OUTER HOUSE, COURT OF SESSION

[2021] CSOH 41

P156/21

OPINION OF LORD CLARK

In the cause

ARBITRATION APPEAL NO 1 OF 2021

23 April 2021

Introduction

[1] The petitioner seeks leave to appeal against an arbitrator's Second Part Award issued on 18 February 2021 ("the Award") on the grounds of alleged legal errors. The petition sets out the grounds of appeal and the reasons behind them in some detail. The respondent contends that leave to appeal should not be granted, for the reasons set out in its grounds of opposition. In terms of Rule of Court 100.8(4) an application for leave to appeal on the ground of legal error shall be dealt with without a hearing unless the court considers that a hearing is required. In light of the points raised and the detailed contents of the petition and the grounds of opposition, and in accordance with the terms of the petitioner's motion for further procedure, I decided that a hearing was not required.

Rules 69 and 70 of the Scottish Arbitration Rules

[2] Rule 69(1) states:

"69(1) A party may appeal to the Outer House against the tribunal's award on the ground that the tribunal erred on a point of Scots law (a 'legal error appeal').

[3] Rule 70 includes the following provisions:

"70 (1) This rule applies only where rule 69 applies.

(2) A legal error appeal may be made only—

(a) with the agreement of the parties, or

(b) with the leave of the Outer House.

(3) Leave to make a legal error appeal may be given only if the Outer House is satisfied—

(a) that deciding the point will substantially affect a party's rights,

(b) that the tribunal was asked to decide the point, and

(c) that, on the basis of the findings of fact in the award (including any facts which the tribunal treated as established for the purpose of deciding the point), the tribunal's decision on the point—

(i) was obviously wrong, or

(ii) where the court considers the point to be of general importance, is open to serious doubt ..."

The grounds advanced by the petitioner proceed on the basis of rule 70(3)(c)(i): that the arbitrator's decision on each of the matters challenged was obviously wrong.

Background

[4] The respondent's claim in the arbitration arose from a project to rehabilitate a water mains system. Under a contract with the employer, the respondent was the design and build main contractor for the works. The arbitrator referred to this as a "Call Off Contract". In turn, under a sub-contract, referred to by the arbitrator as the "Design Contract", the respondent appointed the petitioner as a design consultant. The works included the use of a

polyurethane lining material to coat the inside of ageing pipes in water mains. The respondent's claim was based on allegations that the petitioner breached its contractual duties of care to the respondent with respect to the selection and use of the lining material. The petitioner contended that under the Design Contract it was not responsible for the selection and use of the lining material and in any event that the principles of personal bar prevented the respondent from making its claim.

[5] The Design Contract was entered into in terms of the NEC Professional Services Contract June 2005, Option A, as amended. In the Award, the arbitrator set out the key terms of the Call Off Contract and the Design Contract. There was no suggestion that he erred in any way in that regard and it is convenient to use his summary, which is as follows:

> "The Design Contract and its context
>
> …
>
> 62. In the Call off contracts, [the respondent] is referred to as the 'Construction and Design Partner' abbreviated as the CDP, which took 'full ownership' of the design and works information 'as though the CDP was responsible for the design and Works Information from Capex 1 stage'. The Claimant thus undertook to carry out the design and construction of the project 'incorporating both pipe rehabilitation and renewal'. The CDP was responsible for providing 'design deliverables' and for 'verifying' that the proposed scheme met the Project's objectives. The Design Brief, para 4.1.1, provided that 'The full responsibility for the design of all aspects of the Works and the provision of guarantees as to the performance of the works lies with the CDP … The CDP shall take full responsibility for the design of any modification to existing pipework and equipment under the contract".
>
> 63. Para 4.1.2 of the Design Brief further provided that 'The CDP shall be responsible for the detailed pipe condition assessment and refurbishment design where the existing pipe is an unlined and non preferred material. The scope of the design shall include but not be limited to the calculations, drawings and specifications required to describe the works. The CDP shall carry out any testing and survey work required to prove the design' and that 'The responsibility for the design lies with the CDP.'
>
> …

65. The Design Contract between [the respondent] and [the petitioner] incorporated (i) the Contract Data Parts One and Two; (ii) the Contract Information document contained in the Call-Off Contract; (iii) the TQ Register and (iv) NEC core clauses. The Contract Data Part One, section 1, defined [the petitioner's] services as: '… the design of the … main rehabilitation works … in accordance with the Scope'.

66. NEC core clauses included the following:

(1) Clause 21.1. The Consultant Provides the Services in accordance with the Scope.

(2) Clause 21.2. The Consultant's obligation is to use the skill and care normally used by professionals providing services similar to the services'

(3) Clause 11.2 (9). To Provide the Services means to do the work necessary to complete the services in accordance with this contract and all incidental work, services and actions which this contract requires.'

(4) Clause 11.2(11). The Scope is information which either:

(a) specifies and describes the services or

(b) states any constraints on how the Consultant Provides the Services.

and is either:

- in the documents which the Contract Data states it is in or
- in an instruction given in accordance with this contract.

(5) Clause 82.2. The Consultant's liability to the Employer is limited to that proportion of the Employer's losses for which the Consultant is responsible under this contract.'

67. In the Contract Data Part One, section 1, it was stated that the 'Scope' was contained in Appendix A to the Design Contract. Within Appendix A:

(1) Section 4.1 stated that [the petitioner] contracted to 'undertake design works to achieve' the rehabilitation of the problem assets. [The petitioner] also contracted on the basis that it 'is deemed to have provided for any other design works necessary to provide a complete design for the purposes of the construction works and in accordance with the Scope'.

(2) Section 4.1 stated 'for the avoidance of doubt, any design responsibility noted as 'CDP' within the documents provided for within

> section 2 of the Scope, will be deemed to be the Consultant's [the petitioner's] responsibility'.
>
> 68. The Letter of Intent dated 19 May 2010 stated:
>
> 'If the subcontract is concluded between us, the terms of the subcontract will supercede [sic] this letter which will thereupon cease to have further effect. In that event, any work carried out by you pursuant to the instruction contained in this letter will be deemed to have been carried out under the subcontract…'
>
> 69. The Design Sub-Contract was entered into in 2011 but provided that the start date was 9 April 2010 …"

[6] In summary, in the arbitration it was the respondent's claim that, firstly, the lining material was defective and failed, and secondly, the petitioner was responsible for this failure. This was said to be because, even though the petitioner did not select or install this product, it was nonetheless responsible for its use pursuant to the above terms of the Design Contract between the parties. The arbitrator accepted that position and decided in the respondent's favour. He also rejected the petitioner's alternative plea of personal bar.

The petitioner's position on leave to appeal

[7] The arbitrator had erred in law in two ways. Firstly, he failed properly to apply the principles of contractual interpretation to the terms of the contract between the parties and thereby misinterpreted the meaning of those terms. Secondly, he failed properly to identify and apply the principles of personal bar. On the basis of the detailed background and reasons set out in the petition, the arbitrator's decisions on the points of law were obviously wrong.

Ground 1: failure properly to apply the principles of contractual interpretation

[8] On this first ground, there had been an incorrect interpretation of the Design Contract between the respondent and the petitioner. The obvious error was essentially to find that the terms of the Design Contract meant that the petitioner was liable to the respondent for the selection of the lining material by the respondent. The arbitrator's conclusion was that the meaning of the terms in the Design Contract meant that the petitioner had essentially warranted the work of others. This was wrong for three reasons: first, his decision was inconsistent with the express words used; second, it was inconsistent with the factual matrix when the contract was agreed; and third, it led to the absurd result that the petitioner was liable to the respondent for the respondent's own error.

[9] On the first of these reasons, the arbitrator's interpretation was obviously wrong and at odds with *HOE International Ltd* v *Andersen* 2017 SC 313, *Rainy Sky SA* v *Kookmin Bank* [2011] 1 WLR 2900 and *Arnold* v *Britton* [2015] AC 1619. In essence, where there were two possible constructions the court is entitled to prefer the construction which is consistent with business common sense and a contextual and purposive approach to construction should be used, having due regard to commercial common sense. The fundamental error in the arbitrator's approach was that the obligations of the petitioner in the Design Contract were solely premised on the provision of services by the petitioner alone and did not extend beyond those services, such as warranting the work of others. The effect of the combination of Parts 4.1 and 4.2 of Appendix A was that the parties clearly intended that the petitioner's services would be carefully defined and provided by it. The features of the services, and indeed thirty three particular services, were identified as were a number of specific tasks. In these listed services and tasks there was no reference to the selection of lining material. However, the arbitrator rested his decision upon what were general "catch-all" clauses.

While those clauses could expand the scope of the services the petitioner was to provide, they could not support the petitioner being responsible for the work of others. If that was intended it should have been clearly stated. For the arbitrator to have come to the conclusion that he did was obviously wrong as it ran counter to the plain and ordinary meaning of the express words used.

[10] On the second reason in respect of ground 1, inconsistency with the factual matrix, the Design Contract was agreed in March 2011. The works had been ongoing for some time and the lining material had been selected by the respondent and approved by the employer in the summer of 2010. These were uncontested facts that formed part of the factual matrix or surrounding circumstances. The arbitrator failed to consider them either properly or at all. This was an obvious error that was inconsistent with the authorities (see eg *Arnold* v *Britton*, paragraph 21; see also *Portsmouth City Football Club Limited* v *Sellar Properties (Portsmouth) Limited* [2004] EWCA Civ 760, paragraph 47). Had he considered these key facts properly it would have been clear that the parties could not have intended the scope of the petitioner's obligations to include the selection of the lining material. The key point was that the relevant services already performed by the petitioner prior to the contract being entered into in March 2011 formed part of the relevant background against which the contract must be construed. The lining material had already been selected by the respondent and approved by the employer. These were facts accepted by the arbitrator. He accepted that all of this was done without any recourse to the petitioner and the petitioner was never asked, formally or informally, to comment on matters pertaining to the *in-situ* lining process such as material selection and approval, cleaning methodology or lining thickness. The petitioner had produced Construction Packs setting out the design for rehabilitation and when the Design Contract was executed in or around the end of

March 2011 no-one suggested that something was missing, such as the selection of lining material. It was the crux of his findings on breach that the petitioner was not involved but somehow should have been. It was plain that the parties did not intend the petitioner to have the obligations contended for, let alone that the respondent would pay for the same.

[11] The third reason in support of ground 1 was that the arbitrator's reasoning produced an absurd result. As explained in *Arnold* and *Rainy Sky* the arbitrator should have considered the factual matrix and commercial common sense. These cases are consistent and often read together: *Wood* v *Capita Insurance Services Ltd* [2017] AC 1173; [2017] UKSC 24, (paragraph 14). This is part of the unitary exercise described by in *Rainy Sky*. The competing interpretations should have been tested by the outcomes that they lead to. The general position is that absurd meanings should be rejected, especially when there are sensible interpretations available (see: *The Law of Contract in Scotland* (3rd Edition), McBryde, paragraphs 8-13 to 8-16). In this case it was important to consider whether one or other of the competing interpretations are commercially sensible. This included considering the likely results contended for, and also the industry norm and the particular circumstances in play. The arbitrator failed to do this. It was the respondent's decision to select the product and the employer's decision to use it. By definition, selection of the lining material was never the petitioner's decision, given that the allegation made by the respondent and as found by the arbitrator is that the petitioner never got involved in the selection of the lining material when it should have done. This therefore led to the absurd result that the effect of this decision is to leave the petitioner underwriting the errors of the respondent and the employer. This could not have been the intention of the parties when the respondent was the design and build contractor and the petitioner was engaged for only a part of the project. The arbitrator relied on the case of *Trollope & Colls Limited* v *Atomic Power Constructions*

Limited [1963] 1 WLR 333, but missed the point. Effectively, the petitioner was taken to be underwriting the whole project. If that was the intention then the parties would have needed to use very clear words to that effect. They did not. He erred in failing to avoid an absurd result when there was an alternative interpretation of the contract available, as argued for by the petitioner. While, for example, a main contractor may accept contractual responsibility for the work of a sub-contractor down the line, it was an entirely different thing for a contractor to sub-contract design works to a professional and then to find that the professional is responsible for the work it does and also the work the contractor does up the line too, as well as any errors of the ultimate client. That was the absurd result in this case.

Ground 2: failure properly to identify and apply the principles of personal bar

[12] The arbitrator erred in that he failed to properly apply the principles of personal bar to unchallenged evidence relied upon by the petitioner. In short, there was plain evidence of the respondent acquiescing to a state of affairs and the petitioner arranging its affairs in reliance on the same, which rendered it inequitable for the respondent to rely on the contractual arguments it did. The decision on this issue was obviously wrong. Reference was made to the principles as stated in *William Grant & Sons Ltd* v *Glen Catrine Bonded Warehouse* Ltd (No 3) 2001 SC 901. The arbitrator misapplied these principles. Firstly, he applied the law in too narrow a way. Essentially, he wrongly found that the petitioner had to show that the respondent had made a positive representation, rather than conduct being sufficient as the representation. The respondent's conduct had been sufficient. Reference was made to the findings in fact by the arbitrator. The lining material was not selected by the petitioner and at the time of the Design Contract its selection by the respondent and approval by the employer was a "done deal". The respondent and the employer were also

given the Construction Packs produced by the petitioner, with no suggestion that there was anything missing from the information contained in them. This conduct was sufficient to constitute the representation and the respondent's acquiescence. It was inconsistent with an expectation that the petitioner had responsibility for the selection of the lining material, much less any errors that the respondent and/or the employer had committed. Secondly, there was unchallenged evidence about the petitioner having altered its position on the basis of the representations and acquiescence of the respondent and the arbitrator was obviously wrong to hold otherwise. The petitioner did alter its position on the basis of the representation and acquiescence in that (i) it altered its contractual position and accepted liabilities it would not otherwise have accepted and (ii) it lost the opportunity to protect itself, whether by protesting as to this responsibility or taking steps to deal with it.

The respondent's position on leave to appeal

[13] The extensive design obligations incumbent on the respondent in terms of the Call-Off Contract were made part of the Design Contract and thus became the petitioner's contractual responsibility. It was obvious, under section 4.1 of Appendix A, that a complete design relative to the construction works would include the choice of the lining product to be used where lining was the relevant rehabilitation technique on the project. The petitioner assumed the design responsibilities undertaken by the respondent under the Call-Off-Contract, that is, "full responsibility" for all aspects of the design. Design responsibility was thereby stepped down to the petitioner. Further, there was no proper basis for the petitioner's plea of personal bar in the arbitration. On each of the grounds, there was nothing in the arbitrator's decision or reasoning that was obviously wrong.

Ground 1: failure properly to apply the principles of contractual interpretation

[14] The petitioner's argument that the "design service" in relation to the selection of lining material was supposedly performed by the respondent and/or the employer, such that the arbitrator concluded that the petitioner essentially warranted the work of others, was wrong. The arbitrator noted that the Design Contract included an obligation on the petitioner to provide any design works necessary to provide a "complete design for the purposes of the construction works". That was correct. The reference to the employer having approved the lining material did not indicate anything about the fitness for purpose of the relevant product in terms of physical performance. In his Award, the arbitrator considered whether the petitioner was liable, even on the assumption that what had been done by the respondent in proposing the lining product, and what the employer had done in "approving" it, could be regarded as in some way as "design" activity. He did not, however, make any findings to that effect. Thus, the factual basis for the petitioner's application for leave was lacking. But in any event, even if it was the case that what others had done amounted in some way to "design" (the hypothesis which the arbitrator was considering), his conclusion was that this would not matter as far as the petitioner's design responsibilities were concerned. The buck ultimately stopped with the petitioner. The arbitrator was correct in his analysis. Hence there was no error on his part at all. Even if there could be any doubt about that, it was nonetheless a conclusion which a reasonable decision-maker could have arrived at in the circumstances and was not obviously wrong.

[15] The petitioner's suggestion that the arbitrator concluded that the petitioner had essentially warranted the work of others was groundless. His conclusion was that the petitioner had assumed a contractual responsibility for the "complete design process". This did not involve any decision by the arbitrator that the petitioner was thereby required to

warrant the work of others or warrant a particular outcome. The petitioner's further argument that the arbitrator's decision on interpretation did not take proper account of the evidence, and was in fact contradicted by it, was wrong. It essentially amounted to a suggestion that he should have made additional findings of fact, rather than being a true legal error appeal falling with rule 69. Reference was made to *Arbitration Application No 2 of 2016*, [2017] CSOH 23 (*per* Lord Doherty at paras 22-25). In any event, the extent to which it was appropriate to take account of the factual matrix was a fact-sensitive matter and a matter of judgment for the arbitrator (as to the relevance, or otherwise, of the background facts). The petitioner's arguments about the factual background to the Design Contract were flawed at both a legal and factual level. The letter of intent was clear in its terms that once a formal design contract was entered into between the respondent and the petitioner it would supersede the letter and that all work done previously by the petitioner would be deemed to have been carried out under the formal Design Contract. There was no indication that the production of the Construction Packs by the petitioner from August 2010 onwards meant that there was any reduction in the width of the obligation which the petitioner was subject to under the Design Contract, namely to produce a "complete design".

[16] The petitioner's submission of an absurd result was unfounded. The clear intention was that the respondent would be able to fulfil its own responsibilities under the Call-Off Contract by means of the petitioner undertaking the relevant design work pursuant to the Design Contract. The suggestion that the petitioner was only engaged for part of the works was obviously ill-founded. The petitioner's argument based on absurdity was wholly without substance.

Ground 2: failure properly to identify and apply the principles of personal bar

[17] The petitioner had no averments that it altered its position in reliance on anything said or done by the respondent. Thus, the petitioner did not offer to prove that anything which the respondent said or did (or omitted to do) caused the petitioner to change its position and think that something which was within its contractual scope actually was not. This was because of the implacable theme of its main factual witnesses was that the key things complained of the respondent were always considered by the petitioner to be outside its contractual scope. That is why the petitioner said it never did them. On this basis, in the arbitration the respondent argued that the petitioner' personal bar case had to fail. The petitioner also had no averments relative to the necessary alteration of position referred to by Lord Clarke in *William Grant & Sons Limited* v *Glen Catrine Bonded Warehouse Limited*. Nor did the petitioner have any evidence of such a change of position. The petitioner did not allege that it would have attended to the things complained of by the respondent in the arbitral proceedings if only the respondent had not supposedly induced the belief that they were outside the petitioner' contractual scope. Indeed, the petitioner's case was the complete opposite: that if it had been asked to take responsibility for the selection and approval of the lining material as part of its contractual obligations it would have refused.

[18] The complaint appeared to be that the arbitrator misapplied the law to the evidence. The petitioner did not identify the error of law which the arbitrator is supposed to have made. The assessment of whether the evidence led before him constituted a valid personal bar case was fundamentally a factual decision for the arbitrator. The arbitrator made specific reference to "words and/or conduct" and identified the conduct relied upon. The petitioner's suggestion that the evidence was not "properly considered" by the arbitrator was erroneous. He scrupulously set out the evidence which the petitioner relied upon. The

petitioner's ground 2 was simply an attempt to re-run its arguments in the arbitration under the false guise of a point of law, when really seeking a fresh assessment of the facts.

Decision and reasons

Relevant legal principles

[19] In *Arbitration Appeal No 1 of 2019* [2019] CSOH 60, 2019 SLT 1309, Lord Bannatyne referred to the reasoning in *Braes of Doune Wind Farm (Scotland) Ltd* v *Alfred McAlpine Business Services Ltd* [2008] EWHC 426 (TCC), [2008] 2 All ER (Comm) 493 (para [29]), where Akenhead J observed that a judge who thinks the arbitrator's decision is wrong:

> "may recognise that his or her view is one reached just on balance and one with which respectable intellects might well disagree; in those circumstances, the decision is wrong but not necessarily 'obviously' so."

Lord Bannatyne noted that this approach to the test of "obviously wrong" was adopted by the Court of Appeal in *HMV UK Ltd* v *Propinvest Friar LP* [2011] EWCA Civ 1708, [2012] 1 Lloyd's Rep 416. He also referred to the earlier observations of Lord Diplock in *Antaios Compania Naviera SA* v *Salen Rederierna AB* [1985] AC 191 (at page 206D-E) stating that the test required a view of the arbitrator's decision which "is so obviously wrong as to preclude even the possibility that he might be right". There required to be "a major intellectual aberration" on the part of the arbitrator: *Braes of Doune Wind Farm (Scotland) Ltd* (at para [31] *per* Aikenhead J. In *HMV UK Ltd* v *Propinvest Friar Ltd Partnership* Lady Justice Arden, citing Lord Diplock in *The Nema* [1982] AC 724 (at 742-3), noted that:

> "Lord Diplock was clearly contemplating that the error is one which can be grasped simply by a perusal, that is, a study, of the award itself. We have been taken to the authority of *Braes of Doune Wind Farm (Scotland) Ltd* v *Alfred McAlpine Business Services Ltd* [2008] 1 Lloyds Rep 608 where there is a helpful analysis by Akenhead J. He uses the memorable phrase 'a major intellectual aberration' in paragraph 31 of his judgment, which I have found a useful way of bringing to mind that the error on which we are concerned, if there be an error, must be an obvious one".

The observations in these cases assist in explaining when an arbitrator's decision can be characterised as obviously wrong.

Application of these principles

[20] I have had regard to the full factual background as set out by each of the parties, as well as their respective positions in the petition and the grounds of opposition, summarised above. Before turning to apply the principles, it will assist to note the arbitrator's reasoning on the points now said by the petitioner to have involved legal errors.

The arbitrator's reasoning

[21] When dealing with interpretation of the Design Contract, the arbitrator referred to the large number of important and familiar authorities on that subject area, cited and relied upon by the parties. He said:

> "78 … I am aware of and take into account the extent to which factual evidence may refer to the meaning of a contract; and the extent to which evidence of the background and objective of a contract may be taken in to account to establish its meaning"

The arbitrator then narrated in some detail the contentions made by each of the parties and summarised the evidence upon which they respectively relied.

[22] In giving his decision on the contractual issues, for present purposes the key passages are as follows:

> "125. Considering first the obligation which [the petitioner] undertook in terms of the Design Contract and the preceding Letter of Intent, the first issue is how the contract itself should be interpreted. For [the petitioner] it is contended that the contract is unclear and that regard should be had to the need to consider all the relevant surrounding circumstances; and if there are two possible constructions, to prefer that which was consistent with business common sense.

126. In my view it cannot be concluded that the Design Contract has two possible meanings or is in any way unclear save in the limited respect of what constitutes 'design' within the words requiring that [the petitioner] is 'deemed to have provided for any other design works necessary to provide a complete design for the purposes of the construction works'. Whilst it is accepted that there may be areas in which there is overlap and uncertainty between the concepts of construction and design, I do not find there to be any such overlap or uncertainty in regard to the selection of … the intended lining material for waterpipes within the … project. The selection of an appropriate product and method of application was, in my view, part of the design for the purposes of the construction works.

127. [The petitioner] understandably emphasise[s] that [the lining material], when proposed by [*inter alia* the respondent], was given lengthy and no doubt careful and informed consideration by the civil engineers within [the employer] and was approved by them for use on the … project. Assuming that this process can be regarded as 'design' carried out by [the employer] and before them by [the respondent], it remains the case that what [the petitioner was] required to take on was an obligation to design the works which [the respondent was] about to undertake as an obligation towards [the respondent]. It is immaterial that some other party may have undertaken the same process. [The petitioner] could adopt the work or decisions of that other party, but remained under the design obligation it had undertaken towards [the respondent].

128. As part of its analysis of the contract terms [the petitioner] contends that it would be an absurd conclusion that [the petitioner] had responsibility for the whole design of the rehabilitation process and prays in aid observations in the authorities that absurd meanings should be rejected, especially when there are sensible interpretations available. The absurdity is said to be apparent given that [the petitioner] was engaged for part only of the Project (Capex 2-3) and the PU lining had been selected by [*inter alia*, the respondent] and [the employer]. In my view there is nothing absurd in requiring a design specialist to take on responsibility for the complete design process, which would necessarily include parts of the design which might otherwise be over-looked. [The respondent is] entitled to enforce the obligation in accordance with the words of the Design Contract.

130. [The petitioner] argue[s] that a material part of their work was carried out in 2010, necessarily pursuant to the Letter of Intent (LOI) and not pursuant to the Design Contract which was not then in existence and whose terms including the provisions particularly relied on by [the respondent], were still under negotiation. [The respondent] contend[s] that the Design Contract applied throughout the period [the petitioner was] engaged on the … project pursuant to the terms of the LOI. The LOI itself provided expressly that the terms of the subcontract, if concluded, would supersede the LOI and that work carried out pursuant to the LOI would be deemed to have been carried out under the subcontract; and in any event the Design Contract, although entered into in 2011, provided that the start date was 9 April 2010.

> 131. There is ample judicial authority for construing a contract made after the commencement of work as having retrospective effect, absent such express terms: see *Trollope & Colls Limited* v *Atomic Power Constructions Limited*, [1963]. There is no good reason why the parties should not have intended the Design Contract to have retrospective effect and I am in no doubt that it did so operate during 2010."

[23] The arbitrator then turned to deal with the issue of personal bar and concluded:

> "139. In my view [the petitioner does] not present any evidence upon which it could be concluded that [the respondent] made any representation to [the petitioner] and none upon which [the petitioner] can claim to have altered its position or re-arranged its affairs as a result."

[24] He referred to the factual evidence and reached the view that the personal bar plea must fail. He then said:

> "141. I conclude therefore that [the petitioner] had responsibility for all aspects of the design of the … remediation project including the choice or selection of the product to be used for pipe lining where this was to be adopted."

Ground 1: failure properly to apply the principles of contractual interpretation

[25] As noted, the relevant authorities on contractual interpretation, mentioned above, were relied upon in submissions before the arbitrator. He had regard to the factual background and context and the natural and ordinary meaning of the language used. His conclusion was that there were not two possible constructions, but rather only one. It is clear from his decision that he took into account the full design responsibilities of the respondent under the Call Off Contract. In respect of the Design Contract, he noted the language used to describe the petitioner's responsibilities, including that it

> "is deemed to have provided for any other design works necessary to provide a complete design for the purposes of the construction works and in accordance with the Scope" and

> "for the avoidance of doubt, any design responsibility noted as 'CDP' within the documents provided for within section 2 of the Scope, will be deemed to be the [the petitioner's] responsibility".

He took into account the date of entering into the contract and the fact that it had retrospective effect, as both parties accepted. His conclusion was that the selection of an appropriate product for lining material and the method of application were part of the design for the purposes of the construction works. That was so even upon the assumption, or hypothesis, that the employer and the respondent had carried out the design. In his finding, he was not saying that the petitioner had "warranted" the work of others; rather, he was merely giving effect to the words used in the Design Contract stating the obligations undertaken by the petitioner.

[26] I am not persuaded that the arbitrator erred in any way in reaching that conclusion, let alone that his decision was obviously wrong. Indeed, I have some difficulty in seeing any force in the petitioner's position that the so-called general catch-all words (which of course were words expressly used in the contract) may well have expanded the scope of the petitioner's listed responsibilities, but did not cause them to include those found to apply by the arbitrator. That contention would require a clear explanation of what was the expanded scope and its boundaries, in particular showing why the wording somehow did not cover complete design and full responsibility for design. No convincing explanation to that effect was given. The arbitrator's decision cannot, in my view, be regarded as inconsistent with the express words used. In particular, rather than viewing them as conflating the responsibilities of the petitioner with those of others, he recognised from the contractual terms that the respondent had, in effect, stepped down its design responsibilities to the petitioner. The Contract Information (part of the Call Off Contract) stated that acceptance by the employer's representatives of any design work would not relieve the respondent of its responsibilities. Passing these responsibilities to the petitioner no doubt assisted the respondent but that should have been clear to the petitioner from the contractual terms.

[27] The arbitrator was entitled to draw his own conclusions from the factual and expert evidence. In relation to approval of the lining material by the employer, he found that the approval was an important step in securing the contract with the respondent

> "but no-one should have been misled in supposing that such approval meant that product was accepted in terms of its mechanical or physical properties" (para 114).

So, the approval was for limited purposes. This undermines the petitioner's point about the effect of the factual matrix showing that the lining material had already been approved by the employer. More generally, the arbitrator expressly stated that he had taken the factual background into account in relation to determining the meaning of the words in the Design Contract. There is no basis for the petitioner's contention that he failed to consider the facts properly, or at all.

[28] In addition, I have difficulty in seeing how the factual matrix as put forward by the petitioner could impact upon the meaning of the words used in the Design Contract. For example, I do not understand it to have been suggested that the approval by the employer somehow eliminated responsibility on the part of the respondent under the Call Off Contract in respect of the lining material and hence restricted the petitioner's corresponding design responsibilities under the Design Contract. Having regard to the clear terms of these contracts, noted by the arbitrator, there is in any event no basis for that proposition.

[29] I turn now to the contention that arbitrator reached an absurd result. The selection of material by the respondent and its approval by the employer did not ring-fence those responsibilities as being solely between them. Instead, the Design Contract's terms show that the petitioner contracted to undertake responsibility. It is not an absurd result to have responsibilities passed to others, whether (to use the petitioner's terms) those others are up or down the line. Having regard to the terms of the Design Contract and the Letter of Intent,

the arbitrator was quite correct in reaching the view that the petitioner's responsibilities were in place at the material time. The arbitrator relied on the case of *Trollope & Colls Limited* v *Atomic Power Constructions* in finding that there was ample authority for construing a contract made after the commencement of work as having retrospective effect and I see no difficulty with that view.

[30] For these reasons, I conclude that in respect of ground 1 the petitioner has not established that the arbitrator's decision is wrong. If, however, the decision is wrong, the petitioner's grounds of challenge do not meet the high test of establishing it to be obviously wrong, as that test is explained in the authorities. The area of contractual interpretation involves use of now well-established principles and it may be that in a particular situation a decision-maker gives more or less weight than is due to say, the factual matrix, or commercial common sense, or the literal meaning of the words. When reaching a view on interpretation based upon the sometimes subtle interaction of such factors, respectable legal minds may well differ. Demonstrating that in doing so an arbitrator has made a major intellectual aberration, or that his decision is so obviously wrong as to preclude the possibility that he may be right, can be difficult. There is no proper basis for any such conclusion based on this ground of appeal.

Ground 2

[31] The arbitrator's findings on personal bar were, as noted above, that the petitioner did not present evidence that the respondent made a representation or that the petitioner changed its position or re-arranged its affairs as a result. He correctly recorded the petitioner's position as being that the respondent caused an understanding "by its words and/or conduct". He set out the evidence and made reference to the conduct relied upon by

the petitioner. He held that there was nothing that passed between the petitioner and the respondent suggestive of a representation that the petitioner should no longer regard the pipe lining process and the selected technique as part of the design of the rehabilitation works (para 139). He viewed the petitioner's position as amounting to a contention that a party seeking to enforce a contractual obligation must notify the other party that it is required to perform or that it is intended to enforce the obligation in question (para 140).

[32] As I see it, he decided that the conduct alleged was not inconsistent with an expectation that the petitioner had responsibility for the lining material: the evidence about the respondent's selection and the employer's approval of the lining material did not suggest that the petitioner was not to be responsible for it. All that the conduct did was to show that the selection and approval (for limited purposes) had occurred but it did not indicate the absence of contractual responsibility on the part of the petitioner.

[33] Another difficulty with this ground is the identification of the alleged legal error. This challenge concerns factual matters said to support a plea of personal bar. In those circumstances, in order to be a legal error, it needs to be shown that a finding was made for which there was no evidence or which is inconsistent with the evidence or contradictory of it (see *Advocate General* v *Murray Group Holdings Ltd* 2016 SC 201 (at paras [42]-[43]). A legal error does not arise merely because on the arbitrator's assessment of the evidence the factual basis for personal bar was not made out. In my opinion, there is nothing to show that the arbitrator's findings were inconsistent with the evidence or contradictory of it; rather the findings flowed from his assessment of the evidence.

[34] Further, the petitioner's first argument was that the selection of the lining material did not fall within its contractual responsibilities but its second argument was that, but for the alleged representation, it would not have entered into the contract or accepted

responsibility for that selection. This secondary line could be taken to suggest that the petitioner would have been aware, or at least concerned, from the terms of the Design Contract that the petitioner's responsibilities did indeed cover the lining material. However, the petitioner does not argue that there was evidence before the arbitrator of such awareness or concern (indeed the evidence led on behalf of the petitioner was to the contrary). It was simply not shown that the respondent did anything to cause the petitioner to conclude that an obligation which fell within its contractual duties in fact would not be relied upon by the respondent. Nor was it shown that petitioner's original position was that it would not enter into the Design Contract, but it then decided to do so as a result of the alleged representation. Accordingly, the arbitrator found there to have been no alteration of the petitioner's position. Instead, the evidence for the petitioner was that it did not believe, when reading the scope in Appendix A in the Design Contract, that it was to advise on selection of the lining material and that if it had been told that it was liable for the selection it would not have entered into the contract or would have taken steps to deal with this responsibility. As put in the petition, if the petitioner had been asked to take responsibility for the selection and approval of the lining material it would have refused to do so. But what the petitioner would have done if told of its obligations does not satisfy the requirements for personal bar; it does not involve an alteration of position based upon a representation by alleged conduct. One can therefore understand the arbitrator's view that the petitioner was suggesting that a party should notify the other party that it is required to perform or that it is intended to enforce the obligation in question. There was, of course, no need to do that and there is no basis for concluding that the conduct of the respondent somehow barred it from relying upon that obligation. In short, the arbitrator was in my view correct to hold that there was nothing to show that the respondent, by its words or

conduct, had represented that the pipe lining process and technique fell outwith the petitioner's design responsibilities, or that the petitioner had altered its position as a result.

[35] Accordingly, in respect of ground 2, I conclude that the arbitrator's decision was correct, but even if for some reason it was wrong, the petitioner's challenge does not meet the test of showing the decision to be obviously wrong.

Disposal

[36] For these reasons, leave to appeal on each of the grounds is refused.