OUTER HOUSE, COURT OF SESSION

[2023] CSOH 6

CA77/22

OPINION OF LORD BRAID

In the cause

BRIGGS MARINE CONTRACTORS LIMITED

Pursuer

against

BAKKAFROST SCOTLAND LIMITED

Defender

Pursuer: Catto (solicitor advocate); Addleshaw Goddard
Defender: Manson; MacRoberts LLP

2 February 2023

The issue

[1] The parties entered into a written contract – the Wreck Fixed Contract (WFC) – whereby the pursuer undertook to recover a barge owned by the defender which had sunk, and to provide certain other services, for a fixed fee. In this action the pursuer avers that the WFC was frustrated, that the parties subsequently entered into an oral agreement for the provision of different services for a price of costs plus 15% and that the sum sued for is due to it under that oral agreement. The defender disputes that any sum is due, but before stating any defence on the merits of the action has taken a preliminary plea of no jurisdiction under reference to an arbitration clause in the WFC, which provides that "any dispute

arising out of or in connection with" the WFC shall be referred to arbitration. The case called before me for debate on that preliminary plea. The issue is simply whether the dispute is one which arises out of or is in connection with the WFC. If so, the action must be sisted to allow the arbitration to run its course. It should be noted at this stage that the parties have agreed in a joint minute of admissions that the WFC is governed by and requires to be construed in accordance with English law. They have also agreed the general principles of English law which must be applied. I set these out below at paragraph [9].

Background

[2] The following (although not all formally admitted by the defender) is uncontentious. The defender owns a Gael Force fish feed barge which sank off the coast of Portree, Skye in a storm on or around 26 November 2021. The barge contained 320 tonnes of fish feed. The pursuer, which claims an expertise in coastal, nearshore, offshore and subsea operations (including emergency response, wreck removal and wreck survey and intervention), was instructed to do certain initial work to inspect the barge and to seal the silo hatches. It carried out that work, for which it was paid. Thereafter, following a tender exercise, the parties entered into the WFC on or around 29 April 2022, for the provision of certain services by the pursuer, including the recovery of the barge and disposal of the fish feed, for a fixed price. The WFC provided that "the Services shall be rendered with the principle of no cure, no pay", in other words the pursuer was entitled to payment of the fixed price only in the event that the barge was recovered by it.

[3] Thereafter, the background becomes more contentious. The pursuer avers that it undertook a survey of the barge and commenced the recovery operation. The precise detail is immaterial for present purposes but, in short, the pursuer avers that on 28 July 2022 its

divers assessed that the vessel was emitting dangerously high levels of hydrogen sulphide, such that it became too dangerous for the pursuer to continue to provide the services specified in the WFC, and that the WFC was thereby frustrated.

[4] The pursuer goes on to aver that a series of telephone calls, meetings and email correspondence took place with the defender. Again, the detail is immaterial at this stage. Of note is that the upshot of these communications, according to the pursuer, was that an oral agreement was concluded at a meeting on 15 August 2022 for the venting of the barge and the removal of the fish feed, in return for which the pursuer was to be paid its costs, both those incurred internally and those incurred to external third party suppliers, plus 15%. In contrast to what was previously to be done under the WFC, and in light of the danger posed by the hydrogen sulphide, the venting of the barge and the removal of the fish feed were now to take place sub-sea. The agreement was to cover services already undertaken by the pursuer from 2 August 2022. The pursuer continued to provide services under the oral agreement until 25 August 2022. By then it had become concerned that the defender would not agree a written contract reflecting the agreement already reached orally. The pursuer avers that on that date, the defender's solicitors wrote to the pursuer's solicitors with a draft written agreement which did not reflect the agreed terms; that it had become apparent that the defender did not intend to adhere to the oral agreement; and that the defender's conduct amounted to a repudiation of that agreement. The pursuer therefore left the site, and now seeks to recover payment of £532,919.57 for the work carried out on the basis of the oral agreement which it avers was entered into.

The defender's position

[5] In light of its plea of no jurisdiction, the defender has reserved its position in relation to the merits of the action. However, it disputes that the sum sued for is due. In its Note of Arguments, it asserts that it will contend, when the merits come to be enquired into, that the pursuer's averments, if true, amount to nothing more than an oral variation of the WFC in relation to price and methodology. Its position is that the WFC remains in existence, and was not frustrated.

The arbitration clause – clause 17 of the WFC

[6] Clause 17 of the WFC insofar as material is in the following terms:

> "**17. Arbitration and Mediation**
>
> This Clause 17 applies to any dispute arising under this Agreement.
>
> (a) This Agreement shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Agreement shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause…
>
> No suit shall be brought before another Tribunal, or in another jurisdiction, except that either party shall have the option to bring proceedings to obtain conservative seizure or other similar remedy against any assets owned by the other party in any state or jurisdiction where such assets may be found."

English law

[7] There are two related branches of English law which are relevant. The first is the proper approach to the construction of commercial contracts, which I note for completeness. It is not contended by either party that there is any difference between Scots law and English law in this regard. The court must adopt a unitary approach which seeks to objectively determine what a reasonable person with all the background knowledge reasonably

available to the parties at the time of contracting would have understood the parties to have meant by the words they used; and should give effect to the natural and ordinary meaning of the words used by the parties. Where there are ambiguities or rival meanings, the court is entitled to test the competing constructions with reference to business common sense. The court should read the contract as a whole in a coherent and consistent way so that terms complement rather than contradict each other. These propositions are vouched by: *Rainy Sky SA* v *Kookmin Bank* [2011] 1 WLR 2900 per Lord Clarke at [21] – [23]; *Arnold* v *Britton* [2015] AC 1619 per Lord Neuberger at [14] – [23]; and Lord Hodge at [76] – [77]; and *Wood* v *Capita Insurance Services Limited* [2017] 2 WLR 1095 per Lord Hodge at [10] – [14].

[8] The second, and in this case the more significant, relevant branch of English law is the approach taken to construction of arbitration clauses in particular. The parties have agreed by joint minute that the general principles of English law which fall to be applied in relation to the proper construction and application of arbitration and jurisdiction clauses such as clause 17 of the WFC are those recorded in the speeches in *Fiona Trust & Holding Corporation* v *Privalov* [2007] Bus LR 1719; and that those principles should be applied by this court when constructing and applying clause 17.

[9] Counsel for the defender helpfully set out in his Note of Arguments five propositions which he submitted could be derived from *Fiona Trust*, and since they are uncontroversial, and were accepted by the solicitor advocate for the pursuer, I adopt them, slightly recast as follows:

i. Arbitration and jurisdiction clauses are to be liberally construed (per Lord Hope at [26], p 1728). In other words, the courts should pay little attention to the linguistic nuance and precise phraseology of arbitration clauses, in contrast to the position before *Fiona Trust:* see also the judgment of Longmore LJ in the Court

of Appeal in that case, reported at [2007] Bus LR 686, at paragraph [17], where he advocated a fresh start to the approach to construction of arbitration clauses, a passage "applauded" by Lord Hoffman at paragraph [11], p 1724.

ii. The exercise of construction starts from the presumption that the parties, as rational business people, are likely to have intended any dispute arising out of the relationship into which they have entered to be decided by the same tribunal (per Lord Hoffman at [13], p 1725) (the so-called one-stop arbitration approach).

iii. If the parties wish to exclude certain matters from the one-stop approach, they must either say so expressly (Lord Hope at [26], p 1728); or at least, say so in language which makes that clear (per Lord Hoffman at [13]).

iv. In the absence of any express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude a claim from arbitration could prevail (per Lord Hope at [31], p 1729).

v. In cases of doubt over the scope of an arbitral clause, the issue should be resolved in favour of arbitration as arbitration clauses should be construed as broadly as possible (per Lord Hope at [30], p 1729).

[10] As regards the wording of the present clause, two further points fall to be made. First, there is a "dispute" even if the claim made by one party is indisputable, that is, one to which there is no defence: *Chitty on Contracts*, (34th edition) Vol II, 34-30 and the cases there cited. Second, the words "in connection with" and "arising out of" are to be given a wide meaning: *Chitty*, 34-30.

Cases subsequent to *Fiona Trust*

[11] Counsel for the defender cited a line of English cases in which the principles in *Fiona Trust* had been applied. I need not refer to them, given that the parties agree what the principles are and that they fall to be applied by this court. That said, it is worth mentioning the four cases upon which counsel placed particular reliance. The first is *Uttam Galva Steels Ltd* v *Gunvor Singapore Pte Ltd* [2018] EWHC 1098 (Comm), where the argument was whether claims arising out of bills of exchange fell within the scope of an arbitration clause in the original sales contract. Picken J held that they did, expressing the view that it was difficult to see how the parties as rational business people could ever be taken to have intended that disputes arising of activities and documents contemplated by the master contract should be decided by a different tribunal from the one identified in the master contract. The second case is *Mobile Telecommunications Company Ltd* v *HRH Prince Hussam Bin Saudi Bin Abdulaziz al Saud (t/a Saudi Arabia Plastic Factory)* [2018] EWHC 1469 (Comm), in which there was a written loan agreement containing an arbitration clause and, allegedly, two subsequent oral agreements which were said to have altered some of the arrangements struck in the loan agreement. Andrew Baker J held that the question of whether there was any such oral agreement having any and, if so, what impact upon the parties' rights and obligations under the loan agreement was a matter arising out of or in connection with the loan agreement in accordance with the *Fiona Trust* principles (paragraph [11]). The third case is *Sonact Group Ltd* v *Premuda SPA "Four Island"* [2018] EWHC 3820 Comm, where the issue was whether an arbitration agreement recorded in a charter party was wide enough to catch a subsequent settlement agreement. Males J held, at paragraphs 16-20, that it was inconceivable that the parties could have intended that disputes arising out of the settlement agreement were to be adjudicated by the courts when they had already agreed an arbitration

clause and taken no steps to disapply the same: there was no bright line rule that once the parties enter into a new legal relationship, in that case a settlement agreement, an arbitration clause in the underlying contract necessarily can no longer apply (paragraph 20).

[12] The final case to mention is *Sea Master Special Maritime Enterprise* v *Arab Bank (Switzerland) Ltd* [2022] EWHC 1953 (Comm), in which a ship owner sought to challenge an arbitration tribunal's decision that the ship owner's counterclaims against a bank were within the scope of an arbitration agreement which, as here, referred to arbitration as "any dispute arising out of or in connection with" the agreement. The owner argued that its claims did not arise out of the agreement. Picken J applied the *Fiona Trust* one-stop presumption (at [109]), but the case is of particular interest for its discussion of when a dispute might be held to arise out of or be connected with an agreement. Various possible tests were identified in argument under reference to authority (see [110] – [111]), *viz*: whether the claim is "causatively connected" with the relationship created by agreement and the rights and obligations arising therefrom ([110]); whether the dispute is "closely knitted together on the facts" with a contractual dispute ([110]); or whether there is a "factual overlap" between the claims of the parties under separate instruments/ contracts ([111]). In the event, Picken J held (at [113]) that (i) the owner's claims arose out of the same relationship between the parties (the owners of the vessel and carrier of the cargo on the one side and a party having an interest in the cargo on the other); (ii) the general body of facts was the same in the claims on both sides; (iii) the period of time was the same in the claims on both sides; and (iv) there were features of the owner's claims which founded upon aspects of the contract relied upon by the bank.

Submissions

Defender

[13] Counsel for the defender submitted that construing clause 17 of the WFC liberally in accordance with the *Fiona Trust* principles, and applying the "one-stop" approach, the parties had intended all disputes arising out of their relationship constituted by the WFC to be decided by arbitration. The subject matter of the action plainly arose out of and was connected with the relationship created by the original contract. The arbitration clause represented a separate and separable agreement from the agreement in which it was first recorded. The whole subject matter of the dispute related to only one thing: the salvage operation in relation to the defender's barge. If the pursuer's position were correct, there was a potential for related disputes to fall to be determined by different tribunals: for example, the defender's (likely eventual) argument that the WFC had not been frustrated but, at most, had been varied would fall to be decided at arbitration while the pursuer's claim was being resolved by this court – the very situation which the one-stop principle was designed to avoid. Even if a new oral agreement had been struck at the meeting on 15 August 2022 as the pursuer averred, that agreement merely varied, and thus was related to, the WFC. For aught yet seen, the pursuer might in the future introduce an *esto* case based on the hypothesis that the WFC had been varied. No attempt was made to disapply or modify the arbitration agreement at the meeting on 15 August, as the pursuer's own averments made clear. Finally and in any event, on a plain reading of clause 17, even apart from the principles in *Fiona Trust*, the subject matter of this action plainly arose out of and was connected with the WFC. Without the WFC there would be no relationship between the pursuer and the defender.

Pursuer

[14] The solicitor advocate for the pursuer submitted that although the parties were the same, the WFC and the oral agreement applied to wholly different subject matters. The WFC had provided for the barge to be recovered for a fixed fee on a no cure, no fee basis, whereas the oral agreement was for the provision of different services, which had to be rendered sub-sea due to the dangerous nature of the gas. It was pure coincidence that the pursuer had the necessary skills to carry out the work agreed in the oral agreement. Not all salvage companies possessed those skills. The defender had not been obliged to instruct the pursuer to undertake the works which were the subject of the oral agreement but could have instructed a third party. That it chose to instruct the pursuer did not bind either party to the terms of the WFC. The one-stop approach did not apply, since the first contract between the parties, for emergency work, did not include an arbitration clause and any dispute under it would have been litigated in the courts. Following *Alexander Tugushev* v *Vitaly Orlov and others* [2021] EWHC 926, a two stage approach had to be applied: (i) identify the matters at issue in these proceedings; and (ii) decide which of those matters, if any, the parties had agreed to refer to arbitration. The only matter in issue in the present proceedings was the oral agreement, which contained no arbitration agreement. Although the pursuer had averred that the WFC had been frustrated, that was by way of background only: the pursuer's right to payment under the oral agreement was not contingent upon its being able to show that the WFC had been frustrated. Further, the pursuer would not be able to mount an *esto* case that it was entitled to payment under the WFC as varied, because the WFC itself prohibited any oral variation. The problem of different tribunals deciding different matters arising out of the same agreement would simply not arise.

Decision

[15] I will deal first with the four cases relied upon by the defender. I recognise, as the solicitor advocate for the pursuer submitted, that these can all be distinguished from the present case. In *Uttam Galva Steels*, the bills of exchange were contemplated by the original contract, but the alleged oral agreement here could not be said to have been in contemplation of the parties when the WFC was entered into. In *Mobile Telecommunication Company*, oral agreements were claimed to have varied the agreement which contained the arbitration clause, whereas that is not the pursuer's position here (albeit, it might be the defender's). In *Sonact Group*, the second agreement was one which settled a dispute which had arisen under the first, again not the situation here. And in *Sea Master*, there was no second agreement at all, but the issue was whether counterclaims by the ship owners could properly be regarded as arising out of the contract.

[16] Further, while I accept the point made by counsel for the defender that an arbitration clause in an agreement stands separate from the agreement itself, it is going too far to say that the one-stop approach presumably intended by rational business people has the consequence that every subsequent agreement between the same parties is subject to that arbitration agreement. Putting that slightly differently in the context of this action, however liberal an approach is taken to construction of clause 17 of the WFC, there must be *some* connection between the dispute to be litigated and the WFC if that clause is to be held to apply. As was argued in *Sea Master*, *Fiona Trust* itself is of little assistance in deciding whether or not a dispute is connected with the agreement in which the arbitration clause appears (the issue in *Fiona Trust* was whether the arbitration clause was intended by parties to apply to a claim that the contract had been procured by bribery).

[17] To determine whether or not there is a sufficient connection between the dispute and the WFC necessarily involves determining what the dispute is, and then asking whether that can be said to be a dispute which arises out of, or is in connection with, the WFC (which I perceive to have been the approach in *Alexander Tugushev*, expressed in slightly different terms). In deciding whether there is a connection, the various so-called "tests" listed in *Sea Master* may provide some guidance, although I would hesitate myself to lay down any particular test, since whether a dispute arises out of or is connected with an agreement containing an arbitration clause must always be a fact-sensitive question.

[18] Turning then to consider what is the dispute in the present action, it concerns the pursuer's entitlement to be paid under an alleged oral agreement for the venting of the defender's barge and the recovery of fish feed. That contract, if it was entered into at all, was entered into, so says the pursuer, because the WFC had been frustrated, although the pursuer also asserts an entitlement to sue under the oral agreement even if the WFC had not been frustrated. The defender denies that the pursuer is entitled to be paid under the oral contract. It denies, too, that the WFC was frustrated. It will assert, when the time comes for it to do so, that any oral agreement simply had the effect of varying the WFC. In response to that, the purser says that the terms of the WFC prevented it from being varied orally.

[19] On that description of the dispute, and construing clause 17 merely by applying the ordinary rules of construction, let alone by adopting the wider *Fiona Trust* approach, the matters in dispute in this action can be said to arise out of (or to be in connection with) the WFC. The solicitor advocate for the pursuer conceded that were he to seek a declarator that the WFC had been frustrated, that would be a matter covered by the clause, but he sought to elide the difficulty which that posed for his argument by submitting that it was immaterial to the pursuer's case whether the contract had been frustrated or not. Nonetheless, the fact

remains that there is a dispute as to whether the WFC has been frustrated; and I cannot say at this stage that that issue is not a material one. Even if that is wrong, the defender's argument that any oral agreement simply varied the WFC is itself a dispute which arises out of the WFC. The pursuer's rejoinder that it did not intend to, and could not, found an *esto* case on any oral agreement with respect missed the point: if the pursuer's position is that the WFC could not have been varied orally because of the terms of the WFC, and the defender states that it was varied orally, then that is itself a dispute which arises out of or is in connection with the WFC.

[20] Even aside from those considerations, there is a clear overlap between the facts underlying the two contracts. The services under both included the recovery of fish feed from the same barge, located in the same position. It is nothing to the point that the basis for payment was different, or that the task had become more difficult, or that not every salvage company had the necessary skills to undertake the second agreement. To adopt the language of *Sea Master*, there is a close causal connection between the two agreements – one arose out of the other; and there is clearly a factual overlap since both involve the removal of the same fish feed from the same vessel.

[21] Reverting to, and applying, the *Fiona Trust* principles, the parties as rational business people must be taken to have intended that a dispute so closely connected to the WFC as the present one – even if they could not have foreseen the precise nature of the dispute, or the circumstances in which any second agreement might be entered into – would be resolved by arbitration, in order that all disputes be dealt with under the "one-stop" approach. To deal with one of the points made by the solicitor advocate for the pursuer, it is immaterial on what basis the parties had previously contracted. When they entered into the WFC they created a new contractual relationship. The pursuer does not aver that when the parties

entered into the subsequent oral agreement, it was agreed that the arbitration clause would not apply. The fact that the parties had contracted previously is irrelevant when considering the meaning and scope of the arbitration clause.

[22] For all these reasons, I conclude that the matters in dispute in the present action are matters which are governed by clause 17 properly construed under English law.

Disposal

[23] I shall therefore sustain the defender's first plea-in-law and sist the cause for arbitration (initially for a period of three months, with the case calling by-order shortly thereafter to monitor the progress of the arbitration).