OUTER HOUSE, COURT OF SESSION

[2021] CSOH 117

CA42/21

OPINION OF LORD BRAID

In the cause

DRAGADOS (UK) LIMITED

Pursuer

against

DC EIKEFET AGGREGATES AS

Defender

Pursuer: MacColl QC; CMS Cameron McKenna Nabarro and Olswang LLP
Defender: Brown; DAC Beachcroft Scotland LLP

16 November 2021

Introduction

[1] On 5 May 2017, following a tender process, the parties entered into a Supply Contract Agreement for the supply and delivery of armourstone by the defender to the pursuer. The pursuer required the use of that stone for construction work it had contracted to carry out for the Aberdeen Harbour Expansion Project.

[2] Armourstone is graded as category A or category B depending on its characteristics, category A being of a higher quality than category B.

[3] A dispute has arisen as to the quality of the stone supplied by the defender. In brief, the pursuer contends that the contract entitled it to category A, but that the defender

supplied category B, stone. The pursuer sues for the loss it says it has incurred as a result. The defender's position is that it believed that it was required by the contract only to supply category B stone. At the heart of that dispute is a dispute as to what the parties' contract, properly construed, means; and, in ascertaining that meaning, whether it is legitimate, as the defender seeks to do in its pleadings, to have regard to pre-contractual discussions and communications between the parties. The defender also argues that even if the contract has the meaning contended for by the pursuer, the pursuer is personally barred from now asserting that it was entitled to category A stone.

[4] The case called before me for debate on the relevancy of the defender's averments about those matters. The pursuer also attacked the relevancy of certain averments about contractual duties said by the defender to be incumbent upon the pursuer.

The parties' contract

[5] Clause 2 of the Supply Contract Agreement provided that:

> "The [defender] will Provide the Goods and Services in accordance with the Goods Information and the conditions of contract."

The parties further agreed (clause 4) that the documents forming the contract were: the Supply Contract Agreement itself, the conditions of contract, the completed Contract Data part one, the completed Contract Data part two, the Goods Information, and the Price Schedule. Condition 12.4 of the conditions of contract is to the following effect:

> "This contract is the entire agreement between the Parties. Neither Party has relied upon any prior representation by the other in entering into this contract."

The contract therefore not only contained an express term about the documents to which reference might be made in ascertaining the terms of the contract, it also expressly provided

that those documents comprised the entire agreement, and that neither party had relied upon any prior representation by the other.

[6] The following additional provisions of the conditions of contract are relevant for present purposes:

Condition 14.1:

> "The [pursuer's] acceptance of a communication from the [defender] or of his work does not change the [defender's] responsibility to Provide the Goods and Services..."

Condition 14.7 (which is relevant to the personal bar argument):

> "…the [pursuer's] issue of (or failure to issue) submissions, proposals, records, notifications, replies, comments, advice, acceptances, decisions, approvals, certificates, instructions, enquiries, directions or other communications or the carrying out of (or the failure to carry out) any inspection, test or other enquiry does not affect the [defender's] obligation to comply with this contract."

Condition 17.2:

> "The [defender] warrants that [it] has reviewed and scrutinised the Goods Information prior to the Contract Date exercising Good Industry Practice with a view to identifying:
>
> - any mistake, ambiguity, inconsistency, inaccuracy, discrepancy or omission that is contained in the Goods Information…
>
> and the [defender] has notified the [pursuer] of the same prior to the Contract Date."

Finally, condition 20.1:

> "The [defender] complies with and Provides the Goods and Services in accordance with:
> - The Goods information".

[7] Turning to the Contract Data part one, clause 1 describes the goods to be supplied as:

> "The supply and delivery of armour stone to the Aberdeen Harbour Expansion Project as detailed in the Works Information".

That document also defines "Goods Information" as:

> "the document(s) and any other information included on Technical Documents appended to this order".

[8] Those documents included a document described as HR Wallingford Materials and Workmanship Specification – Breakwaters – Rock and Concrete. The specification of the rock to be supplied is set out at section 3. Section 3.1.2 sets out the parameters to be used for grading rock in accordance with BS EN 12282-1 and includes the statement:

> "In addition the upper limit and lower limit of the effective mean mass M_{em} shall be defined for all Category A gradings to be used as primary armour".

Under the heading "Armour and filter layers" the following appears:

> "Standard gradings shall be within categories LMA (Light grading category A) or HMA (Heavy grading category A) for armour layers and LMB (Light grading category B) or HMB (Heavy grading category B) for filter layers."

Thus, the contract documents contain an express provision that the stone used for armour layers, which was to be supplied by the defender, was to be graded as category A.

The defender's disputed averments

[9] The passages in the defences which were the primary focus of discussion at the debate appear in answers 3.1 and 3.2. The scene for what follows is set out in answer 3.1 where, after a reference to prior discussions over many months, the following is averred:

> "From those communings, and from their actings over many months following execution of the Supply Contract Agreement it is apparent that the parties had a shared understanding of the intended specification of the stone to be supplied which did not conform precisely with the specification derived from the Goods Information. The proper construction of the Supply Contract Agreement and the mutual intention of the parties to it falls to be determined in light of that shared understanding. Reference is made to answer 3.2."

[10] Turning to answer 3.2, in the interests of brevity I will not set it out in full but the essence of the averments there is that throughout the negotiation of the Supply Contract

Agreement and for a substantial period thereafter both parties proceeded on the basis that what the contract was to provide for was the supply of category B stone. In support of this position, the defender refers to the fact that the invitation to tender made no reference to category A stone, and to three versions of a document entitled "General Information and Conditions of Offer" issued to the pursuer, each of which specified that the stone to be supplied would be "in strict accordance with EN 13383-1/2 Category B". The defender also refers to further pre-contract negotiations all conducted expressly on the basis that the stone to be supplied was category B stone. The averments then turn to post-contractual events: that the first 13 invoices submitted by it to the pursuer, and paid without comment, referred to EN 13383-1/2 Category B stone; and that the pursuer at no time queried any of the references to category B stone. Answer 3.2 then contains this averment:

> "Regardless of the terms of the Goods Information as incorporated in the Supply Contract Agreement the pursuer could not reasonably have believed that the defender had agreed to supply anything other than category B stone. It is probable that the pursuer did not appreciate the reference to category A stone in the Goods Information. Had it done so it would have queried the defender's proposed specification and would have rejected or at least queried the shipments it accepted or the invoices issued in respect of those shipments. On a proper construction of the Supply Contract Agreement and having regard to the communings described and the order of precedence outlined in cl 4 of the Supply Contract Agreement the mutual intention of the parties was to purchase and sell respectively stone which conformed to BS EN13383-1/2 Category B…On its proper construction the Supply Contract Agreement does not specify Category A stone for the 1-3T stone."

[11] The defender also pleads a case of personal bar, in answer 4.8. Again, that passage is too long to set out in full. The defender avers that the pursuer "could not reasonably have supposed" that the defender's tender was for category A stone, and that "it seems likely" that the pursuer also proceeded in ignorance of the requirement for category A stone. The pursuer took no steps to correct the defender or to challenge any of the multiple documents submitted by the defender referring to category B stone. By paying the first thirteen invoices

each referring to category B stone, it could reasonably be taken to have agreed to accept such stone. The defender reasonably relied on the position adopted by the pursuer and continued to deliver category B stone. The defender avers that by acting in the way it did, the pursuer is personally barred from contending that the defender was obliged to supply category A stone.

[12] The final substantive passage in the defences with which issue was taken was the following, which appears in answer 3.7:

> "On a proper construction of the Supply Contract Agreement the defender's obligation to supply stone in accordance with the Dredging and Earthworks Specification could only be to supply stone such as would comply with that specification on the assumption of compliance by the pursuer with its obligation in respect of handling, inspection and incorporation of the stone in the works. The obligations incumbent on the defender could only be rendered workable on the basis of the pursuer inspecting and checking stone prior to it being incorporated into the works, and either discarding stone that did not meet the required specification, or using it in other parts of the works where it would comply with the specification required. The defender complied with its obligations."

The debate

[13] Both parties lodged written Notes of Argument, which they adopted, and elaborated upon in submissions. Senior counsel for the pursuer submitted that the contract unambiguously provided for the supply of category A stone. Pre-contract negotiations of the sort averred by the defender in answers 3.1 and 3.2 were not admissible in construing the contract. It was notable that the defender was not seeking rectification, nor did it contend that there had been no consensus. The pursuer's position was bolstered by the express terms of the contract itself, particularly condition 12.4 of the conditions of contract. The averments were no more relevant to any question of personal bar. No relevant case of personal bar had been pled. Not only was such a case precluded by the express terms of the contract, including condition 14.7 of the conditions of contract (above), the defender's case of

reliance on any representation made by the pursuer was undermined by the theme underpinning its case that it believed throughout that the contract was for the supply of category B stone. Nor could the averments be relevant to any case of causation as currently pled on record. Finally, the passage in answer 3.7 quoted above was entirely irrelevant. There was no foundation for the assertion that the pursuer had the obligations ascribed to it in that passage.

[14] Counsel for the defender argued that the contract was not unambiguous, and in particular that section 3.1.2 of the Breakwater Specification did not clearly specify that stone which might be used as filler stone must be category A. Different considerations might arise in relation to the 1-3 ton stone, which might not be used as armour layers, and the 3-6 ton stone, which could only be used in that way. The fact that parties had negotiated on the basis that category B stone was to be supplied might be relevant in determining what the contract meant. The averments might in any event be relevant to the questions of personal bar and causation. Since a proof was inevitable whatever the outcome of the debate, a pragmatic approach should be adopted by simply admitting all the averments in question to probation. Much of counsel's submission was based on assertions of fact or law which had no foundation in the defences, but since the relevancy of the defender's case must be tested by reference to what it states in its written pleadings, not on what it might say, I do not propose to dwell on that aspect of the submission.

Pre-contractual negotiations

[15] There is no fundamental disagreement between parties as to the law, which was most recently re-stated by the Inner House in *Luminar Lava Ignite* Ltd v *MAMA Group Plc* 2010 SC 310. The general rule is that the court will not have regard to statements of parties

or their agents in the course of the negotiation of a contract as an aid to the construction of the words which the parties use in the final version of the contract which alone expresses their consensus (Lord Hodge, para [39]). Another way in which the rule has been expressed is that such evidence is not admissible if its purpose is to put a gloss on the contract: *Bank of Scotland* v *Dunedin Property Investment Company Limited* 1998 SC 657, per Lord President Rodger at 665 G. The rule is not absolute: evidence of the factual background is relevant where the facts are known to both parties and those facts can cast light on either (i) the commercial purpose of the transaction objectively considered or (ii) the meaning of the words used in the contract (*Luminar Lava*, para [42]).

[16] When the defender's averments in answers 3.1 and 3.2 are tested against the rule, they can clearly be seen to be irrelevant in that the evidence which would be led by reference to them would be inadmissible. It is plain from answer 3.1 that the defender seeks to ascertain the proper construction of the contract by reference to what the parties thought it meant, to be gleaned by examining communications between them both before and after the contract was entered into. However, evidence of subjective intention is not relevant to the objective meaning of the words of the contract. Thus, the averment about what the pursuer would reasonably have believed, apart from being speculative, is irrelevant, as is the following averment that it is probable that the pursuer did not appreciate the reference to category A stone in the Goods Information. The defender does not offer to prove background circumstances or facts known to the parties as an aid to construction of the contract. While things said in relation to such circumstances may sometimes be relevant, that is not what the defender offers to prove. Rather, the averments are no more and no less than an attempt to have regard to statements made in the course of the negotiations as an

aid to the construction of the contract, or to put a gloss on its terms, which is precisely what the rule excludes.

[17] Counsel for the pursuer submitted that the contract was entirely unambiguous, but it is not necessary to reach a concluded view on whether that is correct. Evidence of prior communings (as distinct from background circumstances) is excluded even if the contract may admit of more than one meaning. Insofar as counsel for the defender submitted that section 3.1.2 of the Breakwater Specification gives rise to difficulties in interpretation at least as regards the 1-3 ton stone, that may be so, but the contract must nonetheless be construed by reference to its terms. Any such difficulties would in no way be eased by inquiry into whether, prior to the conclusion of the contract, the parties were discussing category B stone. That is not a background fact or circumstance known to the parties. How would the court's task in construing a contract which expressly incorporates a requirement to supply category A stone be assisted by knowing that in pre-contract negotiations, the parties had referred only to category B stone? It would not. Such inquiry would simply add time, expense and confusion. As senior counsel for the pursuer submitted, the defender's pleadings are a paradigm example of why the exclusionary rule exists. Had the defender's position been that the contract did not reflect the mutual intention of the parties, then the disputed averments might have been relevant in relation to a conclusion for rectification but no such case is pled.

[18] Even apart from the exclusionary rule, the express terms of the contract preclude reference to any other document or representation in ascertaining its meaning: condition 12.4. Condition 17.2 likewise precludes the defender from taking any point, as it now seeks to do, that the Goods Information contained an ambiguity or inconsistency.

[19] In support of his submission, counsel for the defender referred to a recent decision of Lady Wolffe, *Paterson* v *Angelline (Scotland) Ltd* [2021] CSOH 101, in which she allowed a proof before answer in an action which also concerned the construction of an agreement, in that case a share purchase agreement, where the pursuer had averments about background circumstances which might be relevant to construction. However, as senior counsel for the pursuer submitted, each case must turn on its own facts and circumstances. *Paterson* is simply an example of a case which was held to fall outwith the exclusionary rule and does not advance matters one way or the other.

[20] Before leaving *Paterson*, counsel for the defender also relied upon it in support of a submission that there was an overlap between interpretation and rectification, in that on the same facts, as I understood the submission, the court could either accept a party's interpretation of the contract or rectify the contract in favour of that party. Consequently, the defender's failure to plead a rectification case did not necessarily matter. I disagree – both with the submission, and that *Paterson* supports it. Rectification is a remedy which may be available when a contract does not reflect the parties' intention. As Lady Wolffe put it in *Paterson* at paragraph [59], a mistake in the expression of the parties' agreement necessarily precludes an argument that the contract correctly expresses the parties' agreement. There may of course be cases where it is unclear whether evidence is admissible evidence to which regard may be had in interpreting the contract, or is evidence in support of a rectification case; and in that sense evidence which is led might be relevant to both cases where both are pled; but this is not such a case, since no rectification case is pled.

[21] It follows that the averments under consideration, in answers 3.1 and 3.2, are not relevant to the question of how the contract falls to be construed, but are excluded from consideration both by the exclusionary rule and by the express terms of the contract. The

question remains as to whether the averments or some of them might be relevant to the defender's personal bar case. I consider that case more fully below but as a preliminary observation, I accept that it may be possible in certain circumstances for a party to pray in aid things said or done prior to a contract being entered into in support of a relevant case of personal bar. Although personal bar was not mentioned as a possible exception to the exclusionary rule in *Luminar Lava*, it was not an issue which arose in that case and Lord Hodge, in stating the circumstances where evidence might be led, was clearly doing so in the context of what might be relevant in construing a contract; he was not considering other situations where evidence of pre-contractual negotiations might be relevant (most obviously, in an action for rectification). I see no reason why in an appropriate case, the approach taken in England – where estoppel has been said to be an exception: *Chartbrook Limited* v *Persimmon Homes Limited* [2009] 1 AC 1101 per Lord Hoffman at para 42 – should not also be followed in Scotland.

[22] That all said, such a case would require to be properly pled. While answer 3.2 is something of a mish-mash of averments of pre-contractual negotiations and post-contractual events, when it is read as a whole, and in the context of answer 3.1 which refers to it, its purpose is clearly directed at how the contract should be construed. There is no hint in those answers of any question of representation by the pursuer on the one hand or reliance on such representation by the defender on the other (which as discussed below are two requirements of personal bar). I do not consider that it is open to the defender to pluck an averment out of context and to say that it might be relevant to a personal bar case contained elsewhere in the pleadings (although in fairness that is not the defender's approach: it argues that the whole of the passage should be admitted to probation since it might be relevant to personal bar).

[23] This leads to the question of whether the defender has pled a relevant personal bar case elsewhere in its pleadings, to which I will now turn before expressing a final view on the relevancy of the averments in answers 3.1 and 3.2.

Personal bar

[24] The scope of the doctrine of personal bar was set out by the Extra Division in *Ben Cleuch Estates Ltd* v *Scottish Enterprise* 2008 SC 252 per Lord Macfadyen at paras [85] to [94]. The basis of the plea is that there must be a representation made by A as to the existence of a certain state of fact; B must believe the representation and act in reliance on it to his prejudice; and the belief in the state of fact must be justified by the representation: see para [85]. Where a representation has produced a justified belief in a state of facts, the representor is personally barred from maintaining that the facts are other than as represented: para [87].

[25] One species of personal bar is acquiescence. The defender founds upon the leading modern case of acquiescence, *William Grant & Sons Ltd* v *Glen Catrine Bonded Warehouse Ltd* 2001 SC 901 in which Lord President Rodger cites (at paragraph [35]) the example given in Bells Principles of expensive building works being carried out with the knowledge of the landowner who takes no steps to intervene. The law presumes that there is an agreement for the work to be done, which is rendered binding by costly operations or work in reliance on it.

[26] It was not entirely clear from the submissions made by counsel for the defender whether the defender was pinning its personal bar case on acquiescence or whether it maintained that the pursuer was personally barred having regard to the slightly wider scope of that doctrine as described in *Ben Cleuch Estates*. The defences refer only to personal bar,

not to acquiescence. The position is not clarified by the pleas in law, there being none directed to this issue. Ultimately it may make no difference. The theme common to personal bar, and its sub-set of acquiescence, is that there must be a representation of some sort by one party, inducing a belief in the other upon which it justifiably relies to its detriment.

[27] Measured against that test, the defender's averments, whether in answer 3.2 or answer 4.8, do not offer to prove a relevant defence of personal bar. At its highest the defender's position is that, acting on its own belief as to its contractual obligation which on its own averments it held from the time of the pre-contractual negotiations and which it continued to hold throughout its execution of the contract (despite the express terms of the contract which it entered into), it supplied category B stone. Even if the payment by the pursuer of thirteen invoices can be regarded as a representation – which, having regard to condition 14.7 of the conditions of contract is doubtful to say the least – the defender does not aver that it was that which engendered any belief on its part. Further, even if the defender relied upon the payment of the invoices in continuing to supply category B stone, that cannot in law be a justifiable reliance, standing the express terms of the contract of which the defender is deemed to be aware.

[28] Putting this another way, the defender did not supply or continue to supply category B stone because it believed that the pursuer was condoning its breach of contract in so doing; it did so because of its belief that it was complying with the contract. It may well turn out to be the case that by retaining and using stone which it knew (if that is the case) was category B and as such disconform to contract, the pursuer has not mitigated its loss, but that is an entirely separate issue. To adapt the example given by counsel for the defender in argument: if parties contract for the supply of red bricks, and the seller provides

yellow bricks, which the purchaser uses in the construction of a house, the purchaser may be precluded from claiming from the seller the cost of demolishing the house and rebuilding it with yellow bricks; but it by no means follows that he is not entitled to damages at all.

[29] It follows that the defender's averments, wherever they appear in the defences, are irrelevant to establish a case of personal bar. Accordingly, the averments which are expressly directed towards personal bar fall to be excluded from probation, as do the averments of prior communings, which are not saved by the personal bar pleadings.

[30] Finally, although it was not foreshadowed in the pleadings or in his Note of Arguments, counsel for the defender also submitted that the evidence of prior communings might be relevant in support of the defender's case on causation. The defences contain averments about that, for example at answer 5.6. These were not the subject of debate. Essentially, the defender's position is that the pursuer was the author of its own misfortune by using and installing in the breakwater stone which it knew was not category A stone. However, as counsel for the pursuer submitted, it is hard to see how evidence of pre-contractual discussions could have any bearing on whether the chain of causation, which by definition must occur post-contract, was broken. If there are facts upon which the defender wishes to found which are relevant to causation, then averments about those facts should appear in the part of the defences which deal with that issue. The requirement for concise pleadings in the commercial court does not absolve the defender from the need to give fair notice of its case. The court should not allow averments which are clearly irrelevant to the purpose for which they are pled – in this case, construction of the contract – to be admitted to probation simply on the off chance that something might emerge at proof which is relevant to other issues.

Obligations on the pursuer?

[31] I turn briefly to consider the defender's averments in answer 3.7, where the defender asserts that certain obligations of inspection were incumbent upon the pursuer. These obligations are said in the defences to arise from a proper construction of the contract, rather than from any express or implied term of the contract (although the reference to the contract otherwise being rendered unworkable is rather redolent of an implied term argument). No specification is given as to which terms of the contract fall to be construed in the manner contended for. On that basis alone, the passage identified in answer 3.7 is irrelevant and falls to be excluded from probation. In his submission, counsel for the defender sought to explain the averments by saying that they were relevant to the performance by the pursuer of its own contractual obligations as the design and build contractor, but that is not how the averments are couched, even if that were a relevant consideration.

Disposal

[32] I will pronounce an interlocutor sustaining the pursuer's third and fourth pleas in law and excluding from probation the offending averments in answers 3.1, 3.2, 3.7 and 4.8, as well as the other averments in the defences which make reference to those averments, all as identified in the pursuer's Note of Arguments at paragraph 4.1 (as amended in the course of submissions). I will also put the case out By Order to discuss further procedure in light of this opinion and to be addressed on expenses.