OUTER HOUSE, COURT OF SESSION

[2025] CSOH 37

CA53/24

OPINION OF LORD SANDISON

In the cause

DRAGADOS UK LIMITED

Pursuer

against

PORT OF ABERDEEN

Defender

Pursuer: Howie KC; CMS Cameron McKenna Nabarro Olswang LLP
First Defender: Borland KC, Broome; Pinsent Masons LLP

10 April 2025

Introduction

[1] In this commercial action, the pursuer seeks payment from the defender of £1,247,542 plus interest, which sum it claims is due to it in terms of a Settlement Agreement entered into between the parties. The defender argues that all or at least the greater element of the pursuer's claim is irrelevant and falls to be dismissed without enquiry, and the matter came before the court to determine whether that is indeed the case.

Background

[2] The defender owns and operates the Port of Aberdeen. On 20 December 2016 it engaged the pursuer as main contractor to design, manage and construct a project to expand the harbour by way of an extension at Nigg Bay, by way of a customised version of the NEC3 Engineering and Construction Contract (Version A). In order to assist it to carry out its obligations under the contract, the pursuer employed a design sub-consultant, Ove Arup & Partners Limited, to carry out various services for it under an appointment agreement dated 21 December 2016. The project did not run at all smoothly and on 8 June 2020 the pursuer and the defender entered into a Settlement Agreement composing the differences which had by then arisen between them. In broadest outline, the pursuer received a sum in settlement of its claims against the defender and was relieved from its obligations to carry out further management or construction works, but was to remain responsible for such design, management and construction work as had already been carried out. It was also obliged to continue to secure the completion of certain specific design packages up to particular stages as set out the Schedule Part 12 to the Settlement Agreement, known as the Contractor Design to Complete ("the CDTC"). The Agreement envisaged that the pursuer might in certain circumstances continue to instruct Arup in connection with the completion of the overall design of the works over and above the CDTC and set out the basis upon which the defender would reimburse the pursuer for costs it might incur in doing so. In the event, the pursuer did instruct Arup to carry on with some design work beyond the scope of the CDTC and Arup demanded payment from it in that connection.

[3] A further provision of the Settlement Agreement dealt with the fact that part of the design process involved the production of "redline as-built drawings", which had to be reviewed as part of a process of verification of the design. The Schedule Part 12 to the

Agreement also provided that where Arup required additional fees for checking the accuracy of such drawings as part of the verification review, the pursuer should notify the defender and such costs, where reasonable and verified, would be reimbursed by the defender to the pursuer. Arup carried out the verification process and issued a fee therefor to the pursuer. It also submitted a claim for costs which it maintained had been caused by the prolongation of its appointment due to its having had to carry out that process.

[4] Eventually the time came for the pursuer and Arup to settle their own differences. Arup submitted a final account to the pursuer which included claims in respect of the design work it had done beyond the scope of the CDTC and in respect of fees and costs connected with the verification process, together with other matters. The pursuer conceived that it in turn had its own claims against Arup. On 7 June 2022 the pursuer and Arup entered into their own settlement agreement, whereby an undifferentiated sum was paid to the pursuer by Arup as part of a global settlement of those parties' respective claims against each other. The pursuer maintains that, of Arup's total claim against it, it reasonably considers that £1,247,542 is due to be reimbursed to it by the defender in terms of the Settlement Agreement between the pursuer and the defender.

Relevant contractual provisions and events

[5] In terms of the original Construction Contract between the pursuer and the defender, the pursuer was obliged to provide the contract works as therein defined, including doing what was necessary to complete those works in accordance with the contract, and all incidental work, services and actions which the contract required. It was fully responsible and liable to the defender in all respects for the design of the works (Construction Contract, core clause 11.2(13), bespoke clauses 20.1 and 21.1). It was required to achieve completion of

the works by the agreed completion date (core clauses 11.2(2) and 30.1). The contract contemplated the use of subcontractors who might supply services necessary to provide the works (core clause 11.2(17)). Arup was such a subcontractor.

[6] The Settlement Agreement between the pursuer and the defender raised the possibility of a future direct contract between the defender and Arup, and called that possible contract the "Arup/Employer Appointment" as opposed to the "Arup Existing Appointment", which was a term used to describe the original professional services contract between the pursuer and Arup. The Settlement Date assigned by the Agreement was 1 May 2020, notwithstanding the fact that the Agreement itself was only entered into in the following month. The headline sum payable by the defender to the pursuer in terms of the Agreement was £17,348,472.90.

[7] The Settlement Agreement made (by clause 2 thereof) certain amendments to the Construction Contract, but otherwise confirmed its continuance in full effect and provided that there was no release from or waiver of the obligations arising under that contract or in respect of any outstanding breach thereof, save as the Agreement provided. Each of the parties to the Agreement (the pursuer being therein referred to as the "Contractor" and the defender as the "Employer") did, however (by clause 3.1), unconditionally and irrevocably waive, discharge and release any and all "Settlement Claims" against the other, and defined that term very widely indeed as including *inter alia* any actual or potential claim or cause of action.

[8] Clauses 3.4 and 3.5 of the Agreement were in the following terms:

> "3.4 The Contractor shall be liable for and shall indemnify the Employer against any claims arising from any third party in respect of or arising from any breach of contract, negligence or other legal liability of the Contractor to such third party in respect of the carrying out of the works up to the Settlement Date and/or otherwise arising from carrying out of the works pursuant to the Construction Contract,

including but not limited to any liability the Contractor may have for any costs for carrying out the works including but not limited to any rates, rents and utilities.

3.5 The Contractor shall be liable for and shall indemnify the Employer against any claims from Subcontractors in respect of the carrying out of the works up to the Settlement Date and/or otherwise arising from the carrying out of the works pursuant to the Construction Contract, subject always to clause 7.8.4 in respect of claims from Arup (if applicable)."

Clause 5.1 of the Settlement Agreement, under the heading "Completion", was in the following terms:

"5.1 Completion shall be deemed to have occurred on the Settlement Date, and the Employer shall procure that the Project Manager shall certify Completion has taken place on the Settlement Date and shall instruct that no further works, other than the Contractor Design to Complete, are required to be performed by the Contractor."

On 22 June 2020 the Project Manager duly issued the following instruction:

"Completion of the works is deemed to have occurred on 01 May 2020. The works for these purposes are the Design Provided to Date and the management and construction of the Works Provided To Date relative to the new harbour facilities more particularly described in the Works Information (all other works having been omitted). The Project Manager instructs that no further Works, other than the Contractor Design to Complete, are required to be performed by the Contractor."

Consequential changes were made to the Construction Contract, so that the pursuer was not required in terms thereof to provide any further work other than the "Works Provided To Date" (ie the works undertaken by the pursuer prior to 1 May 2020) and the "Design Provided to Date" (ie the design undertaken by the pursuer prior to that date) in order to achieve completion. It was, in particular, not required in order to achieve completion to provide the "Contractor Design to Complete", defined as the items of incomplete design matters that remained to be carried out by the pursuer after completion, as specified in the Schedule Part 12 to the Settlement Agreement. New wording was introduced into clause 21.1 of the Construction Contract, to the following effect:

"The Contractor is fully responsible and liable to the Employer in all respects for the design of the Contractor's Design including any design contained in the Works

Information (whether or not prepared by or on behalf of the Employer) and all other design work forming part of the Contractor's Design prepared before or after the Contract Date.

The Contractor shall carry out and complete the Contractor Design to Complete in accordance with the Contract after Completion but otherwise and notwithstanding any clause in this Contract to the contrary, is not responsible for carrying out any other design after the Settlement Date".

The Settlement Agreement then made the following provisions, in a section headed

"Design":

"7.1 The Contractor shall procure that the Design Provided to Date is completed prior to the Settlement Date.
7.2 The Contractor shall carry out and complete the Contractor Design to Complete in accordance with the Construction Contract.
7.3 The Contractor shall continue to employ Arup to complete the Contractor Design to Complete pursuant to the Arup Existing Appointment
7.4 The Settlement Sum includes sums the Employer is paying to the Contractor for the cost of having completed the Design Provided to Date and for carrying out and completing the Contractor Design to Complete.
…
7.7 The Contractor and the Employer shall use all reasonable endeavours to procure that Arup accept a direct appointment from the Employer for completion of the Complete Works Design other than the Contractor Design to Complete in accordance with the Construction Contract.
7.8 Following completion of the Contractor Design to Complete and until such time as the Contractor and Employer are able to procure that the Arup/Employer Appointment is entered into, or in the event that the Employer concludes that it not possible to so procure, the Contractor shall continue to operate the Arup Existing Appointment to complete the Complete Works Design other than the Contractor Design to Complete in accordance with the instructions of the Employer and on the following basis:
7.8.1 the Contractor shall continue to employ Arup to complete the Complete Works Design pursuant to the Arup Existing Appointment;
7.8.2 the Contractor shall administer the Arup Existing Appointment on an open book basis (as between the Contractor and the Employer) and in accordance with the instructions of the Employer or the Project Manager only;
7.8.3 the Contractor shall have no liability whatsoever to the Employer in respect of any design or other services carried out by Arup in completing the Complete Works Design other than the Contractor's Design to Complete;
7.8.4 the Employer shall be liable for and shall indemnify the Contractor in respect of any sums which the Contractor becomes liable to pay to Arup under or pursuant to the Arup Existing Appointment in respect of any design or services carried out by Arup in completing the Complete Works Design other than the Contractor's Design to Complete, and

> 7.8.5 The Parties shall use all reasonable endeavours to agree any supplemental provisions to give effect to the intent of clause 7.8."

[9] On 28 January 2021 the Project Manager issued a letter to the pursuer noting *inter alia* that the defender did not anticipate that it would enter into any agreement with Arup for ongoing design or consultancy services, no mutually satisfactory arrangement having been capable of being arrived at in that regard. It was stated that the defender would not be issuing any instructions to the pursuer regarding the operation of the Arup Existing Appointment in respect of completion of the Complete Works Design under clause 7.8 of the Settlement Agreement, and that, beyond completion of the CDTC, it expected no further or additional design services from the pursuer or Arup.

[10] A further letter from the Project Manager to the pursuer dated 5 March 2021 reiterated that the defender would not be progressing with the appointment of Arup and would not be instructing the pursuer to continue to service the project.

[11] The CDTC was completed on or around 14 April 2021.

Submissions for the defender

[12] Senior counsel for the defender submitted that 83% of the total sum sued for in the action depended entirely upon the pursuer's construction of clause 7.8.4 of the Settlement Agreement being correct. It was accepted, subject only to the matter next to be dealt with, that those aspects of the pursuer's claim which depended upon the provisions on design verification in the Schedule Part 12 to the Settlement Agreement were not capable of resolution at debate.

[13] Dealing firstly with the question of the general relevancy of all the pursuer's claim, it was apparent that the pursuer sued on the basis that it had a liability to Arup arising in

relation to the claims for which reimbursement was sought. However, it did not offer to prove at what level it had settled those claims with Arup. The settlement with Arup involved a global settlement sum of circa £4.5 million paid by Arup to the pursuer. The most the pursuer did in its pleadings was to give notice that it had assessed the risk to it in respect of matters that included, but were not restricted to, the claims which were the subject of the present action, at either £1.8 or £1.9 million. As a result, the pursuer's entire claim was irrelevant. The level of settlement with Arup in respect of the heads of claim it advanced against the defender in this action represented an upper limit on the pursuer's claim against the defender: *Biggin & Co Ltd* v *Permanite Ltd* [1951] 2 KB 314, per Somervell LJ at 321. Further, the pursuer required to prove that the settlement of those heads of claim with Arup was, objectively, a reasonable one: *Gray Construction Ltd* v *Harley Haddow LLP* [2012] CSOH 92, 2012 SLT 1035, per Lord Hodge at [3]. Absent averment by the pursuer of the settlement value it had reached with Arup in respect of those heads of claim, its action against the defender was irrelevant and should be dismissed *in toto*.

[14] Turning to the more detailed attack on the relevancy of the case advanced on clause 7.8.4, the main relevant principles of contractual construction were well-established. In *Rainy Sky* v *Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 at [21] Lord Clarke of Stone cum-Ebony observed that:

> "… the exercise of contract construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other".

Reference was also made to *Scanmudring AS* v *James Fisher MFE Ltd* [2019] CSIH 10, 2019 SLT 295, per Lord Menzies at [81], to *Lagan Construction Group Ltd (In Administration)* v *Scot Roads Partnership* [2023] CSIH 28, 2024 SC 12 at [10] and (although no particular point was taken about the status of clause 7.8.4 as an indemnity clause) to the observations about the proper approach to construction of such clauses in *Murray* v *Caledonia Crane & Plant Hire Ltd* 1983 SLT 306, per Lord President Emslie at 308 and in *Caledonia North Sea Ltd* v *London Bridge Engineering Ltd* 2000 SLT 1123 per Lord President Rodger at 1147K to 1148L.

[15] The overall scheme of the Settlement Agreement was clear. It was specifically structured so that payment of the settlement sum was intended to settle all costs of completion of the works and design undertaken prior to the Settlement Date, 1 May 2020, and to ensure that the pursuer would complete the CDTC, but for it to do no further work beyond that unless it was instructed to do so. Consistent with that, the scheme of the Agreement involved a very wide waiver and discharge of claims, including of any potential pursuer claims in connection with the main contract and the works thereunder. In the limited situations where particular work might have been required after the Settlement Date, for which the pursuer might be entitled to reimbursement over and above payment of the settlement sum, restricted bespoke payment provisions were made. The scheme of the Settlement Agreement was one whereby the pursuer was to do no work post-Settlement Date other than the CDTC (unless instructed to do so) and the defender would have no liability to the pursuer for, among other things, claims made by Arup against it in relation to design undertaken prior to the Settlement Date or in respect of completing the CDTC. The defender had no liability to the pursuer for prolongation or termination claims made by Arup against the pursuer. Clause 5.1 made it clear that the pursuer's obligations of performance under the Construction Contract, which – as between the pursuer and the

defender – extended not only to works of construction but also of design, were to cease on the Settlement Date save in relation to the CDTC. That was reinforced by the amendments made to the clause 21.1 of the Construction Contract by the Settlement Agreement, and was consistent with the instructions issued by the Project Manager on 22 June 2020.

[16] Looking specifically at clause 7.8, it was plain that the clause 7.8.4 indemnity could only become operative in the event (a) that completion of the CDTC by the pursuer had occurred; (b) that there had been an instruction by the defender to the pursuer to operate its Existing Appointment of Arup; and (c) that that appointment been administered by the pursuer on an open book basis. Completion of the CDTC was agreed to have taken place on or about 14 April 2021. The defender had by that stage already made it clear in correspondence that it would not be engaging Arup itself and that it would not instruct the pursuer to operate the Arup Existing Appointment to complete any further design works after completion of the CDTC. The pursuer accepted that there had been no such instruction by the defender. It did not offer to prove that any work done by Arup under its Existing Appointment by the pursuer other than completion of the CDTC had been administered on an open book basis. Thus, the pursuer had not fulfilled the conditions necessary for the operation of the clause 7.8.4 indemnity. Another way of looking at that was to categorise the pursuer's failure to administer the existing Arup appointment on an open book basis as a material breach of contract rendering it unable to enforce the indemnity against the defender. The open book obligation in clause 7.8.2 was obviously a counterpart of the clause 7.8.4 obligation to indemnify.

[17] The pursuer's suggestions that it was obliged to continue to operate the Arup Existing Appointment after completion by the pursuer of the CDTC even without any instructions from the defender to do so, and that any sums which it became liable to pay

Arup under that appointment except insofar as incurred relative to any design or services carried out by Arup in completing the CDTC were to be the liability of the defender, were misconceived. That position was entirely inconsistent with the overall scheme of the Settlement Agreement, in particular clause 5.1 thereof. It was clear that the parties intended that the pursuer would not be obliged to do any further work other than the CDTC. Moreover, the pursuer granted an extremely wide waiver and discharge in return for an agreed settlement sum. Clause 7.8 sat in that context and only came into operation, if at all, following completion of the CDTC – ie, following completion of the only further work which the pursuer was obliged to do pursuant to clause 5.1. The pursuer was not to operate the Arup Existing Appointment for anything other than completion of the CDTC between the settlement date and that completion. Upon such completion, there was no further work for the pursuer to do. There was accordingly no proper basis for construing clause 7.8 as requiring the pursuer, on completion of the CDTC, unilaterally to instruct Arup to carry on with any work beyond such completion, absent instruction from the defender (and, indeed, even more so in the face of prior express statements from the defender that no further services from Arup beyond completion of the CDTC were required or desired).

[18] Further, the only sensible and proper construction of clause 7.8 was that any operation of Arup's Existing Appointment beyond the CDTC required an instruction issued to the pursuer to do so. It was not in dispute that no such instructions were ever issued to the pursuer; on the contrary, the defender had made it clear that it would not so instruct the pursuer.

[19] As to the quantum of the pursuer's claim, sums totalling £377,307.98 were made up by reference to design package references that were located in the elements of the design provided prior to the settlement date and in the CDTC. Those were not design elements that

could engage the indemnity in clause 7.8.4. They had already been paid for in the settlement sum. The pursuer's claim in the sum of £377,307.98 was thus irrelevant in any event.

[20] In summary, absent averment by the pursuer of the settlement value it reached with Arup in respect of its present heads of claim, the action as a whole was irrelevant and should be dismissed. Failing that, clause 7.8 properly construed did not give rise to any entitlement to the sums claimed by the pursuer based upon clause 7.8.4 (totalling £1,035,292.11) and the defender should be absolved from any liability to pay those sums, or at least the action should be dismissed insofar as based upon the relative claims. In any event, decree of dismissal should be pronounced in respect of the claims totalling £377,307.98 which related to design elements already covered by the settlement sum. An appropriate course might be for the court to fix a by order hearing following the issue of its opinion, so as to allow discussion of the terms of an appropriate interlocutor.

Submissions for the pursuer

[21] On behalf of the pursuer, senior counsel submitted that the court should allow a proof before answer with all pleas standing.

[22] The pursuer sued on the basis that it incurred liabilities to Arup in respect of matters that were covered by the indemnity in clause 7.8.4 of the Settlement Agreement or by the provisions in Schedule Part 12 thereto. It was accepted by the pursuer that it was unable to state with any certainty precisely how much it had actually settled with Arup for in relation to those liabilities. It had reached a settlement with Arup which included all of Arup's claims against the pursuer and all of the pursuer's claims against Arup. The settlement did not break down the amount paid (by Arup to the pursuer) into its constituent parts. However, that did not prevent the pursuer from claiming for such liability that it was able to

establish it had to Arup in respect of the matters covered by the provisions of the Settlement Agreement. The present claim was not one based on damages for breach of contract or delict. Instead, it was a claim for a contractual indemnity (insofar as founded on clause 7.8.4) or for payment due under the contract (insofar as founded on the Schedule Part 12). Thus, it was distinguishable from cases such as *Biggin & Co* and *Gray Construction*. No part of the claim depended on the pursuer being able to prove that it had settled a claim by Arup or that its settlement was reasonable. Rather, it was based on the pursuer having had a liability to Arup. The pursuer offered to prove that it did indeed have such a liability and that the liability for which it sued was less than the sum that it attributed to the elements to which the claim related when negotiating with Arup. That made the claim relevant despite it being unable to say exactly how much of the overall settlement related to the liability it had accrued relative to the matters covered by clause 7.8.4 and the Schedule Part 12. The defender had had fair notice of the basis upon which it had assessed its liability to Arup and of the fact that in the negotiation it had secured a deal which was lower than it had actually attributed to these matters. It was a matter for proof whether or not the pursuer did, in fact, have a liability to Arup which was covered by the Settlement Agreement. That could be established independently of the events leading up to, and the terms of, the Settlement Agreement between the pursuer and Arup.

[23] The general principles of contractual interpretation were well known and not in dispute. No special rules applied to the interpretation of indemnity clauses: *Photo Production Ltd* v *Securicor Transport Ltd* [1980] AC 827 at 851, [1980] 2 WLR 283 at 296; *Wood* v *Capita Insurance Services Limited* [2017] UKSC 24, [2017] AC 1173, [2017] 2 WLR 1095. The old intellectual baggage surrounding such artificial rules had generally been discarded

by the courts in favour of the approach exemplified in the modern cases such as *Wood*, *Rainy Sky* and *Lagan Construction*.

[24] The interaction between clauses 5.1 and 7 of the Settlement Agreement was important to arriving at a proper understanding of the true meaning of that contract. In clause 5.1, the declaration that no further works were required to be "performed" by the pursuer did not indicate that it was to have no further role in merely administering the contract between itself and Arup. Clause 7.3 in terms required the pursuer to continue to employ Arup to complete the CDTC pursuant to the Arup Existing Appointment, which appointment dealt not only with those aspects of the project design which fell under the definition of CDTC, but with the required design as a whole – the "Complete Works Design". Unless and until the entire appointment was terminated by the pursuer, Arup was obliged to, and had a right to, perform all of the design services falling within the scope of the Arup Existing Appointment.

[25] The scheme of the Settlement Agreement, and in particular clause 7 thereof, was to secure, directly or indirectly, the automatic, continuous and uninterrupted progress of the design process required for completion of the harbour project. That made eminent commercial sense. The introductory wording to clause 7.8 made it clear that the priority was the completion of the CDTC, but that beyond that point in time, either until a direct contract was entered into between the defender and Arup, or if such a contract did not prove to be possible, the pursuer was to continue automatically to operate the Arup Existing Appointment in order to complete the Complete Works Design overall. It was hardly likely that the pursuer would have agreed to do that for the benefit of the defender and at its own risk as to cost and potential liability. As and when it transitioned into merely administering the Arup Existing Appointment for the benefit of the defender, it would have no liability for

design work beyond the scope of the CDTC (clause 7.8.3) and had the benefit of the indemnity for any cost liability it incurred to Arup given to it by clause 7.8.4. It would be obliged, in accordance with the requirement in the introductory section of clause 7.8. to act "in accordance with the instructions" of the defender, to administer the Arup Existing Appointment in conformity with any instructions in fact given by the defender, but it was a matter of agreement that no such instructions had been given, leaving the pursuer free to administer the appointment according to its own lights for so long as that proved possible, seeking instructions from the defender only as and when the need might arise.

[26] One could see the same theme carried through into clause 21.1 of the Construction Contract as amended by the Settlement Agreement, which stipulated that the pursuer would not be "responsible" for carrying out any design other than the CDTC after the Settlement Date. That did not, and in the context of the Settlement Agreement as a whole could not, mean that it would not in fact be requiring Arup to continue with such further design work; what it meant was precisely that it would not be liable to the defender for the quality of any such further work and would have the benefit of the cost indemnity provided for by clause 7.8.4.

[27] The defender's expressed concerns about the current claim extending to liabilities not covered by either clause 7.8.4 or the Schedule Part 12 to the Settlement Agreement were misplaced; the pursuer had no intention of making any claim beyond the scope of those provisions. It offered to prove that all of the liability it incurred to Arup and claimed from the defender arose after the Settlement Agreement had been entered into and after the CDTC had been completed. It offered to prove that all of that liability related to the Complete Works Design and not to the CDTC, or else to the process of verification of the redline "as-built" drawings. It had an expert report advancing the proposition that the claims it was

making were as a matter of fact within that scope; the defender had an apparently contradictory such report, but that situation simply disclosed a factual dispute which could not be resolved by legal debate alone.

Decision

[28] Two of the three principal issues in contention at the debate may be resolved without much difficulty. Dealing firstly with the defender's submission that the case as a whole is irrelevant because of the pursuer's inability to demonstrate the level at which it settled the claims here advanced in its negotiations with Arup leading up to the settlement agreement between those parties, it is necessary to consider the particular contractual context against which the case is stated. The pursuer's contentions in that regard are to be preferred. Although the word "indemnify" is used in clause 7.8.4 of the Settlement Agreement between the parties, in reality the clause is a promise on the part of the defender to reimburse the pursuer in respect of any sums which the latter became liable to pay Arup under or pursuant to the Arup Existing Appointment in respect of any design or services carried out by Arup in completing the Complete Works Design other than the CDTC, subject always to the conditions of clause 7.8 as a whole being satisfied. Likewise, Schedule Part 12 to the Settlement Agreement speaks of the reimbursement of reasonable and verified fees "required" by Arup for reviewing the accuracy of the redline as-built drawings.

[29] Against that background, all that the pursuer has to aver in order to make out a relevant case of the kind which it advances is that a liability was incurred by it to Arup which was covered by the terms of clause 7.8, or that Arup required from it the payment of reasonable and verified fees for reviewing the accuracy of those drawings. That that liability and that requirement were subsumed into a greater settlement between the pursuer and

Arup which did not attribute particular values to them is of no consequence, so long as the court can determine their value (by reference to the terms of the Arup Existing Appointment in respect of the claim advanced under clause 7.8.4, and by application of the contractual criteria of verification and reasonableness in respect of that advanced under the Schedule Part 12). The value which the pursuer ascribed to them as part of its approach to the settlement of its disputes with Arup is not relevant.

[30] The second principal issue in contention is, in essence, whether the pursuer's claims, to the extent of a maximum of £377,307.98, are truly advanced in respect of services by Arup for the Design Provided to Date and for carrying out and completing the CDTC. Counsel for the pursuer confirmed in the course of the hearing that, as a matter of principle (and leaving aside the claims made under the Schedule Part 12 in respect of the verification of the redline "as-built" drawings), no such claim was being advanced. Whether the relevant claims are indeed entirely in respect of work done after the completion of the CDTC and only for services not falling within that category is in dispute between the parties, and each prays in aid the support of a suitable expert for the position it takes. It was not suggested by either party that the court could determine the merits of that factual dispute without the opportunity to hear and evaluate such expert evidence, and so it is not possible at this stage of proceedings to treat any element of the pursuer's claims as irrelevant as being advanced in respect of ineligible services performed by Arup.

[31] The remaining issue is the more complex one of the proper construction of clause 7.8.4 of the Settlement Agreement. An extensive analysis of that Agreement and the changes which it effected to the Construction Contract was undertaken in the course of the debate, but ultimately the resolution of the issue which divides the parties in this connection

turns on the wording of section 7 of the Agreement alone, with its other parts providing little or no assistance in the question of its proper construction.

[32] There is, for example, no doubt that, in terms of the Construction Contract between the parties as originally entered into, the pursuer was required to design as well as to construct the relevant harbour works. However, at least by the time the Settlement Agreement was entered into, the defender was well aware that Arup was as a matter of fact carrying out the design element of those works, and given the reference to the Arup Existing Appointment in the Agreement, it is a reasonable inference that it was also aware, in general terms at least, of the nature of the arrangement which had been entered into between the pursuer and Arup in that regard. That design was seen by the parties at the time of the Settlement Agreement as a specific subject distinct from the others which then had to be dealt with is apparent, too, from the way in which it is singled out in clause 3.5 for treatment separately from the potential claims of other subcontractors.

[33] Clause 5.1 of the Settlement Agreement, strongly founded upon by the defender, does provide that the Project Manager is to instruct that no further works, other than the CDTC, are required to be performed by the pursuer. However, section 7 of the Agreement makes it clear that there might well come to pass circumstances in which the pursuer would be required to procure further design work from Arup, and the general stipulation in clause 5.1 that it would not require itself to perform further work does not appear to me, in the context of the shared knowledge of the parties that Arup was doing the project design work, and the presence of section 7 in the Agreement, to move matters forward materially one way or another. The relevant terms of the instruction actually given by the Project Manager on 22 June 2020 simply echo the terms of clause 5.1 and, in any event, are incapable of affecting the true construction of the Agreement.

[34] Likewise, the changes made by the Agreement to clause 21.1 of the Construction Contract, set out above, are couched in terms of the pursuer not being "responsible" for the carrying out of any design other than the CDTC after the Settlement Date, notwithstanding any clause in the Construction Contract to the contrary. That mode of expression is capable of being read as meaning that the pursuer should, after the Settlement Date, not carry out or arrange for the carrying out of any design work beyond the CDTC (the defender's preferred construction) or simply that it would not be liable to the defender for any problems with, or bear the obligation of paying for, any such work that was done (the pursuer's preferred construction). Nothing else in the Construction Contract enables any clear choice to be made between those two viable contentions.

[35] One is thus led closely to consider the terms of section 7 of the Agreement itself. Nothing in clauses 7.1 to 7.6 raises any controversial matter. Clause 7.7 makes it clear that the contemplation of the parties to the Agreement was that the defender and Arup might well make a direct arrangement whereby Arup would complete the design works necessary for the project (the "Arup/Employer Appointment") and sets the background to the clause which has proved problematic.

[36] The introductory words to clause 7.8, "Following completion of the Contractor Design to Complete", require to be given some meaning; they cannot be ignored, and they provide one aspect of the temporal reach of clause 7.8, setting out that what is contemplated by the provisions which follow may only occur after the CDTC has been completed. The words used do not in themselves state that what is contemplated must commence immediately after completion of the CDTC or at any set period thereafter, but it is provided (in the prefatory clause 7.8) that the pursuer is to "continue to operate the Arup Existing Appointment to complete the Complete Works Design" and (in clause 7.8.1) that the pursuer

"shall continue to employ Arup to complete the Complete Works Design pursuant to the Arup Existing Appointment", suggesting that – if the arrangement contemplated by clause 7.8 was to come into operation at all – an uninterrupted workstream may well have been what was anticipated from Arup. In any event, it is clear that what is contemplated is not to start before completion of the CDTC. That makes sense as part of the arrangement between the pursuer and the defender, since the Agreement makes it very clear that finalisation of the CDTC is a necessary part of the pursuer achieving completion of its works under the Construction Contract as amended, and thus it might properly be regarded as the priority for both parties. It makes much less sense as part of the arrangements between the pursuer and Arup, since Arup had been engaged in terms of the Arup Existing Appointment to carry out and complete the Complete Works Design, and the CDTC was not even a concept that existed when that Appointment was entered into. The interaction between whatever the proper construction of clause 7.8 may be and the consequent necessary operation of the Arup Existing Appointment, whichever construction is preferred, in a manner other than that in which the parties to it had originally intended that it should operate, is undoubtedly problematic. The defender's attitude to those problems is that it was for the pursuer to deal with Arup and resolve any such issues, if necessary using some of the settlement sum provided in terms of the Agreement.

[37] After establishing that the temporal aspect of what is contemplated by clause 7.8 may only commence following completion of the CDTC, the clause provides for two potential end dates. Those are "until such time as the Contractor and Employer are able to procure that the Arup/Employer Appointment is entered into" – if such an appointment is in fact entered into, which it never was – or "in the event that the Employer concludes that it is not possible" to procure the entering into of the Arup/Employer Appointment, until the

Complete Works Design is completed. In the present case, the defender had, before the completion of the CDTC, already decided and intimated to the pursuer (by way of the Project Manager's letter of 28 January 2021, the relevant import of which has already been set out) that it had concluded that it was not possible to procure the entering into of the Arup/Employer Appointment. On the face of those elements of the contractual provisions considered so far, then, the period during which the arrangement contemplated by clause 7.8 might operate was from the completion of the CDTC on or around 14 April 2021 until completion of the Complete Works Design.

[38] However, clause 7.8 also clearly stipulates that the obligation of the pursuer to "operate the Arup Existing Appointment" in order to achieve the completion of the Complete Works Design is to be "in accordance with the instructions of the Employer" and clause 7.8.2 provides that the pursuer is to "administer the Arup Existing Appointment … in accordance with the instructions of the Employer or the Project Manager only". The submission advanced for the pursuer, that those provisions required it to act in accordance with any instructions which might be issued, but otherwise left it free to operate or administer the Arup Existing Appointment as it saw fit so long as it proceeded towards the overall aim of achieving the completion of the Complete Works Design, is just about reconcilable with what is said on the subject in the introductory clause, but is – to put it mildly – less easy to fit with the wording of clause 7.8.2, especially given the presence there of the word "only".

[39] It is not obvious what, if any, material difference may have been intended by the use of the word "operate" in the introductory section of clause 7.8 and the word "administer" in clause 7.8.2. The further stipulation in clause 7.8.2 that, in the event that the pursuer does come to administer the Arup Existing Appointment with a view to the completion of the

Complete Works Design, it should be done "on an open book basis" as between the pursuer and the defender, again does not indicate the circumstances in which such administration is to occur, and whether or not any such administration was or was not carried out on that basis – whatever precisely it may require – does not appear to me to be a matter capable of resolution at debate.

[40] Clauses 7.8.3 and 7.8.4 present no particular problems of their own, but furnish no answers either; they provide respectively that the pursuer is to have no liability to the defender in respect of further work done by Arup beyond the scope of the CDTC, and that the defender will reimburse the pursuer for Arup's charges for any such work. They do not provide any further material going towards the question of in precisely what circumstances the relevant work is to be done in the first place. Clause 7.8.5, requiring the parties to use all reasonable endeavours to agree any supplemental provisions to give effect to the intent of clause 7.8, displays a prescient diffidence about just how clear and comprehensive the terms of the clause might prove to be, but otherwise is similarly opaque about the circumstances which will and will not call for its operation.

[41] The 2021 correspondence from the Project Manager canvassed above serves the purpose of indicating that no Arup/Employer Appointment would be entered into, and that no instructions to the pursuer to continue to service the project would be issued, but cannot affect the proper construction of the Settlement Agreement.

[42] Against that background, the exercise to be carried out is, as explained in *Rainy Sky*, the unitary one of considering the language used and ascertaining what in all the relevant circumstances a reasonable person with the background knowledge reasonably available to the parties at the time of contracting would have understood them to have meant by the words selected. Although the court can and should prefer a construction which is consistent

with business common sense to one which is not, in the present case it does not appear to me that either scheme which is contended for is, in the abstract, more obviously so sensible than the other. The pursuer's view that the necessary design process should be automatic and continuous so as to enable the completion of the project with the minimum possible delay is an understandable one; the defender's position, that it, as the employer in a project which was already in serious trouble, should be in a position to control how, when and by whom any further necessary work should be done, is equally comprehensible.

[43] One is, thus, ultimately left simply to ask what meaning the language of the contract would convey to the hypothetical reasonable reader seized of the relevant background circumstances. Such a reader would, in my view, appreciate that the commercial background did not much assist in the determination of the point in dispute, and indeed that little or nothing outside the terms of section 7 itself of the Settlement Agreement was useful in enabling a choice to be made between the competing contentions.

[44] The reader in question would probably be puzzled by the potential practical difficulties in the operation of the Arup Existing Appointment which the arrangement contemplated by clause 7.8 entailed, but would appreciate that the fact that Arup was, come what may, to be directed first to complete the CDTC regardless of what might be said in that Appointment, indicated that some inroads into its terms were inevitably and clearly what the parties to the Settlement Agreement had envisaged, and would conclude that (as the defender contended) that was a matter which those parties intended would be for the pursuer to manage and resolve as best it could.

[45] The decisive factor would, in my view, be the double reference in clause 7.8 to whatever (if anything) was to be done by the pursuer in relation to the procurement of work beyond the CDTC by Arup requiring to be done "in accordance with the instructions of the

Employer" or "in accordance with the instructions of the Employer or the Project Manager only". Those words would have to be accorded some meaning by the reasonable reader of the Settlement Agreement. The pursuer's position, that they simply mean that it would have had to act in accordance with any instructions which were in fact so issued, would be regarded by the reasonable reader of the Agreement as contrary to the ordinary meaning of those words, especially in the latter formulation in clause 7.8.2. One thus eventually and clearly arrives, after an extensive but ultimately otiose tour of much of the content of the Agreement and the background to it, at the simple conclusion that the proper construction of section 7 is that the clause 7.8.4 indemnity upon which the pursuer relies necessarily came into operation if and only if the defender or the Project Manager issued instructions to the pursuer to operate or administer the Arup Existing Appointment so as to procure the performance by Arup of design work beyond completion of the CDTC. Since it is common ground that no such instructions were ever issued – and indeed, it is clear that the Project Manager had indicated on behalf of the defender that no such instructions would be issued even before the completion of the CDTC – the pursuer's case based on clause 7.8.4 falls to be regarded as irrelevant.

Disposal

[46] I shall sustain the defender's second plea-in-law to the extent of refusing probation to those elements of the pursuer's claim based on clause 7.8.4 of the Settlement Agreement. The case will be put out by order to determine the precise averments to be refused probation and to discuss whether any amendment of the pursuer's pleadings is necessary in order to provide appropriate focus to its remaining case based on the Schedule Part 12 to the

Agreement. *Quoad ultra* the action shall proceed to a proof before answer with all pleas standing.