OUTER HOUSE, COURT OF SESSION

[2021] CSOH 118

CA93/21

OPINION OF LORD BRAID

In the cause

(FIRST) PETER JOHN MORTON

(SECOND) GARETH ROBERTSON

(THIRD) STEWART MCLAUGHLIN DAVIS

Pursuers

against

BRITISH POLAR ENGINES LIMITED

Defender

Pursuer: Manson; Aberdein Considine & Co
Defender: Young; Jones Whyte Law

23 November 2021

Introduction

[1] The pursuers are the trustees of the ABE Pension Fund, which is an Occupational Pension Scheme within the meaning of section 318 of the Pensions Act 2004. The defender is the sole employer liable to pay contributions to the Fund. In this commercial action the pursuers sue for payment of unpaid contributions. The case called before me for debate on the defender's preliminary plea that the matters in dispute fall to be determined by arbitration by virtue of an arbitration clause in the trust deed which governs the Fund, and

that the action should be sisted. (Originally, the defender sought dismissal but it is now accepted in light of the Inner House decision in *Fraserburgh Harbour Commissioners* v *McLaughlin & Harvey Ltd* [2021] CSIH 58 – which was issued on the day of the debate – that if the arbitration plea is upheld, the appropriate course will be to sist the action.) It is a matter of agreement that two questions require to be answered at this stage: (1) does the arbitration clause apply to the claim brought in this action; and (2) if it does, has the defender done anything to lose the right to rely on it, having regard to section 10 of the Arbitration (Scotland) Act 2010?

[2] Both parties lodged written notes of argument prior to the debate, augmented in oral submissions. The defender's position is that the arbitration clause, properly construed, does apply and that the action should be sisted to allow arbitration to take place. The pursuers argue that the arbitration clause has no application but that even if it did, the defender has lost the right to rely on it by lodging defences and agreeing a joint statement of issues in the commercial action, neither of which made any mention of arbitration.

Background

The Fund

[3] The Fund, established in 1974, is now governed by a Trust Deed and Rules dated 15 January 1982. In 1987 the defender, which was a subsidiary of the then principal employer, Associated Engineering PLC, acceded to the scheme, by covenanting to comply and observe the provisions of the Trust Deed and Rules so far as applicable to them as associated employers, all in terms of a Deed of Amendment and Succession dated 30 November 1987.

[4] The purpose of the trust was recorded in Recital (a) of the Trust Deed and Rules as being to provide benefits to employees of the principal employer and any associated company or firm.

[5] The defender is the sole remaining employer within the meaning of the Trust Deed and Rules, and the 2004 Act, and, as such, requires to pay contributions to the trustees in "such amounts as may from time to time be required to enable the trustees to maintain the benefits of this Part" (clause 3(c) of Part 1 of the Deed, relating to pension). This payment obligation is repeated for each substantive part of the Fund, viz., also in those parts of the Deed relating to life insurance and widow's pension.

[6] One of the trustees' functions, by virtue of the requirement to maintain the benefits, and by virtue of section 227 of the 2004 Act, is to prepare (and, where necessary, revise) a schedule of contributions, showing the contributions payable by the defender, as employer, and the date by which each contribution requires to be paid.

[7] A funding shortfall in the Fund having arisen, the pursuers duly prepared such a schedule (No 6/1 of process), setting out the contributions payable by the defender from 31 March 2018 to 31 March 2031 inclusive. The schedule states that "This Schedule of Contributions has been agreed by the [defender]" and was signed by both parties on 21 June 2017. After recording the amount to be paid in respect of future accrual of benefits, the schedule states:

> "In respect of the funding shortfall in accordance with the Recovery Plan dated 21/6/2017 the [defender] will pay the following:
>
> > Contributions of £117,120 p.a. payable in total each Scheme year (1 April to 31 March), the first such contributions of £97,600…due no later than 31 March 2018 and the last such contributions due no later than 31 March 2031."

The pursuers aver that each of those contributions which has fallen due remains unpaid in whole or in part, and that the total sum owed by the defender to the scheme is £348,733. While not formally admitted, the defender does not take issue with that figure as being the sum arrived at if one deducts the sums averred to have been paid from the sums stated in the schedule as falling due. The pursuers' primary ground of action is that the sum sued for is contractually due by virtue of the Schedule of Contributions, but in the alternative the pursuers rely on the creation of a statutory debt under section 228(3) of the 2004 Act.

[8] While not taking issue with the arithmetic, the defender disputes its liability to pay the sum sued for. It is unnecessary in this opinion to recite in detail its reasons for adopting this stance. In brief, its position is that a revised schedule has been agreed "in principle" and that the pursuers are personally barred from demanding payment of the sum sued for, and have waived any obligation on the part of the defender to make payment. This is said to be by reason of certain informal representations and understandings reached in or about 2020 and recorded in a Memorandum of Understanding dated 7 February 2020 upon which the defender has relied.

The arbitration clause

[9] The arbitration clause founded on by the defender is clause 11 of Part V of the trust deed, in the following terms:

> "All questions, disputes or differences as to the true intent and meaning of these Rules or as to the execution of the trusts of the Scheme shall be submitted to a sole arbitrator to be mutually agreed upon, or, failing agreement, to be nominated by the Court, and the decision of such arbitrator shall be final and conclusive."

Construction of the arbitration clause

Parties' positions

[10] The question of whether or not the arbitration clause applies to the claim being pursued in this action turns on the proper construction of that clause, and in particular whether the parties intended that it should apply to a claim for unpaid contributions due under the 2017 Schedule. Before turning to consider how the arbitration clause should be construed, it is helpful to set out the points of agreement and divergence between the parties. They agree on the proper approach to the construction of contractual instruments, set out by Lord President Carloway in *Midlothian Council* v *Bracewell Stirling Architects* 2018 SCLR 606 at para. [19]. The court should ask what a reasonable person having all the background knowledge available to the parties would have understood them to have meant from the language adopted. The meaning of the words used must be assessed having regard to the other relevant parts of the contract. In circumstances where there are two possible constructions the court is entitled to prefer the one which is more consistent with business common sense.

[11] Where the parties first diverge is in how that ostensibly straightforward approach should be applied to the arbitration clause. Counsel for the defender advocated a liberal approach. There were several strands to his submission. It made no sense for the resolution of disputes to be fragmented in the way suggested by the pursuer. A reasonable person having the knowledge of the parties would have understood the parties not to have wished some disputes to be resolved by arbitration and others by the court: *Fiona Trust & Holding Corpn* v *Privalov* [2007] Bus LR 1719. Likewise, where there were two or more linked agreements, rational business people would not intend an arbitration clause to apply to only some of those agreements: *Trust Risk Group SpA* v *AmTrust Europe Limited* [2017] 1 CLC 456.

[12] Counsel for the pursuer submitted that the English authorities cited by the defender should not be followed. The Scottish courts had eschewed a liberal approach to the construction of arbitration clauses: *ERDC Construction Ltd* v *HM Love & Co* 1994 SC 620. The arbitration clause should be interpreted having regard to the context in which it appeared, namely in a trust deed governing a pension scheme. Additional considerations applied in construing such a deed: the court should avoid an overly technical approach, and should give reasonable and practicable effect to the provisions: *British Airways Pension Trustees Ltd* v *British Airways Plc (Stevens* v *Bell*) [2002] PLR 247 at [24] to [26], per Arden LJ.

[13] The parties also diverge on the juridical location, as counsel for the pursuers put it, of the obligation which the pursuers are seeking to enforce. Under reference to the provisions of the 2004 Act, and certain *dicta* of Warren J in *The PNPF Trust Company Ltd* v *Taylor & Others* [2010] Pens LR 261, counsel for the defender submitted that the obligation to make payment derived only from the Trust Deed. In simple terms, a statutory debt arose only if the provisions of the Trust Deed and Rules were insufficient to oblige the employers to pay the contributions required in order to fund the scheme. Counsel for the pursuers, by contrast, submitted that the schedule constituted a free standing obligation to make payment of specified amounts on specified dates, which could be enforced without reference to the Trust Deed; and that the debt was also a statutory debt which could be enforced by virtue of the provisions of the 2004 Act.

[14] A further point of divergence concerns the width of the clause, and whether the court can and should take anything from the form of words used. Counsel for the defender submitted that the clause is as wide as can be, referring as it does to "all questions, disputes or differences". Further, the phrase "execution of the trusts" took in all aspects of the administration of the trust including the raising of an action for payment. Counsel referred

to a number of authorities in support of this submission, and gave a wide range of examples where the phrase "the execution of the trust(s)" was found, including in exemption or exoneration clauses; indemnity clauses; section 5 of the Trusts (Scotland) Act 1921. It is unnecessary to go to those cases, none of which is in point, but they all serve to demonstrate that in the context of a trust deed the phrase has a well understood meaning, namely, all aspects of the proper administration and management of the trust by the trustees. Counsel for the defender further submitted that the court should not be concerned with the distinction between different forms of wording used in arbitration clauses: *Fiona Trust*, per Lord Hoffman at paragraphs 11 and 12. Counsel for the pursuer, while not taking issue with the body of case law on the administration of trusts in which the phrase occurred in different contexts, argued that the specific references in the arbitration clause to interpretation, and to the execution of the trusts – a phrase which focussed on the actions of the pursuers rather than on the obligations of the defender – did fall to be contrasted with the wording of the various arbitration clauses in the cases founded on by the defender, and was suggestive of a more restrictive approach.

[15] Finally, the parties diverge on whether arbitration should be seen as an impediment to the speedy recovery by the pursuers of contributions which were required to replenish the deficit in the fund (the pursuer's position); or as the defender sees it, a means by which disputes could be resolved still more expeditiously even than in the commercial court of the Court of Session.

Analysis and decision

[16] The starting point is to ask: what is the obligation which the pursuers are looking to enforce and does it derive from the Trust Deed, the schedule of contributions, the 2004 Act

or some combination of the foregoing? Having regard to the clear wording of the schedule signed by both parties, I accept the pursuers' submission that the schedule gives rise to a stand-alone, enforceable contractual obligation. The language used – "the [defender] will pay"; "This Schedule of Contributions has been agreed by the defender" – signals that the parties intended to enter into a binding agreement. There is no need to make reference to the Trust Deed to understand what the defender obliged itself to do, or when it had to do it. Counsel for the pursuers put it rather neatly: the 1982 deed explains why parties were in the room; but once in the room, they then agreed the 2017 schedule. Having reached that view, I do not consider it necessary or helpful to delve deeply into the question of whether section 228 of the 2004 Act gives rise to a separate and independently enforceable obligation. I incline to the view that it does not, there being no need to resort to that provision when the obligation is set out so clearly in the schedule itself. Section 228(3) states that the amount unpaid *if not a debt due from the employer to the trustees*…shall be treated as such a debt (emphasis added). Having held in this case that the schedule does give rise to a debt, there is no need to have recourse to section 228(3).

[17] One must then turn to the arbitration clause and ask whether the parties intended that it should apply to the agreement constituted by the schedule, and the pursuers' action to enforce it. At the outset, I acknowledge, as counsel for the defender submitted, that the severable nature of an arbitration clause (by virtue of section 5 of the Arbitration (Scotland) Act 2010, which provides that an arbitration agreement which forms part only of an agreement is to be treated as a distinct agreement) means that it does not matter that the debt arises from the schedule rather than from the trust deed: the arbitration clause, also sitting outside the Trust Deed, may nonetheless apply to it.

[18] As for the approach to construction, I do not attach great weight to authorities such as *British Airways Pension Trustees* to the effect that pension schemes should not be construed in an overly technical manner. It seems to me that such comments have little relevance to the question of how an arbitration clause should be construed. That said, nor am I persuaded that the Scottish courts have adopted a liberal approach to the construction of arbitration clauses in general. Although Lord Ross in *ERDC* ultimately did not require to rely on a liberal approach because of the width of the clause in that case (*ERDC*, above, page 625 E-F) his immediately preceding remarks appear, at the very least, to cast doubt on whether a liberal approach should be adopted. He states under reference to the *Stair Memorial Encyclopaedia* volume 2 that a submission must be interpreted according to the ordinary rules of construction. I also note that in *Fraserburgh Harbour Commissioners*, above, the court at paragraph [14] reaffirmed the principle that a contract will not be interpreted as excluding the Court's jurisdiction unless by clear words or necessary implication, under reference to *Brodie* v *Ker* 1952 SC 216 at 224.

[19] Accordingly I do not proceed on the basis that there is a presumption against fragmentation of dispute resolution or to different agreements between the parties having different mechanisms for the resolution of disputes. The question here is simply whether, viewed objectively, the parties intended that the arbitration clause in the 1982 deed should apply to the agreement reached in the 2017 schedule. Although the 1982 deed provides the framework which led to the agreement in the 2017 schedule – the need to reduce the deficit in the Fund – the two agreements cannot truly be regarded as part of one package particularly having regard to the lapse of time between the two. Or, as Beatson LJ said in *Trust Risk Group*, above at para. 49, there is a distinction between a complex series of agreements about a single transaction or enabling particular type of transactions, and the

situation where there is a single contract creating a relationship which is followed by a later contract embodying a subsequent agreement about the relationship. Where agreements are not part of one package, it may be easier to conclude that the parties chose to have different jurisdictions to deal with different aspects of the relationship. The present case falls into the latter category rather than the former. The length of time between the two agreements – some 35 years – is a further indicator that they are not part of one package (and in *Trust Risk Group* a time difference of just under six months was regarded as significant). Even if one were to have regard to *Trust Risk Group* as an aid to construction, it does not assist the defender.

[20] Turning then to consider the wording of the clause itself, while I accept that the courts have in modern times disavowed an overly linguistic approach of inquiring into the difference if any between such phrases as "arising under" and "arising in relation to" (see *Fiona Trust* per Lord Hoffman at paragraph 11), it does not follow that no significance at all can be attached to the choice of words used. Had the parties intended that the arbitration clause in the trust deed should apply to all disputes which might arise in relation to the trust deed, including the employer's obligation to make payment, then it would have been an easy matter to say so, but the disputes which fall to be referred to arbitration are qualified in two ways: either the dispute must be one as to the intent and meaning of the Rules, or it must be a dispute as to the execution of the trusts. The necessary implication from that wording is that there may be disputes which fall outwith the scope of the arbitration clause because they relate neither to interpretation of the Rules nor to the execution of the trusts. Further, the reference to the execution of the trusts does, as counsel for the pursuers submitted, focus on the behaviour or powers of the trustees rather than on the obligations of the defender. It is difficult to see how, on the ordinary and natural meaning of the words

used, a dispute as to the obligation of the defender to make payment is one which can be viewed as a dispute as to the execution of the trusts, whatever the prevalence of that phrase in different contexts.

[21] Finally, having regard to the commercial background, and to the policy underpinning the schedule of contributions (that pension schemes should be effectively funded), the parties cannot objectively have intended that the jurisdiction of the court was to be ousted where the employer had failed to pay a contribution which was due. Such a result would undermine the underlying policy. While arbitration may be quicker than court action where both parties are willing participants, that is not invariably the case and arbitration offers greater scope for a recalcitrant debtor to delay matters, for example, by dragging its heels in relation to the appointment of an arbiter, to take but one obvious example.

[22] For all of these reasons, I conclude that the parties did not intend the arbitration clause was to apply to an action by the pursuers for payment of the contributions which the defender agreed to pay in the 2017 schedule. The defender's first plea in law therefore falls to be repelled.

The Arbitration (Scotland) Act 2010

[23] Lest I am wrong in reaching that conclusion, it is necessary to deal with the second question, namely, whether the defender has lost any right to found upon the arbitration clause by virtue of section 10 of the Arbitration (Scotland) Act 2010.

[24] Section 10 is, insofar as material, in the following terms:

> **10 Suspension of legal proceedings**
>
> (1) The court must, on an application by a party to legal proceedings concerning any matter under dispute, sist those proceedings in so far as they concern that matter if—

> (a) an arbitration agreement provides that a dispute on the matter is to be resolved by arbitration (immediately or after the exhaustion of other dispute resolution procedures),
> …
> (d) the applicant has not—
>
> > (i) taken any step in the legal proceedings to answer any substantive claim against the applicant, or
> >
> > (ii) otherwise acted since bringing the legal proceedings in a manner indicating a desire to have the dispute resolved by the legal proceedings rather than by arbitration, and
>
> …
> (2) Any provision in an arbitration agreement which prevents the bringing of the legal proceedings is void in relation to any proceedings which the court refuses to sist. This subsection does not apply to statutory arbitrations.
>
> (3) This section applies regardless of whether the arbitration concerned is to be seated in Scotland.

The court action and procedure to date

[25] The summons was signetted on 30 July 2021 and was served on 3 August 2021. The schedule of documents annexed to the summons referred only to the schedule of contributions. Defences were first lodged on 7 September 2021, setting out the defender's defence of waiver and personal bar in some detail. Following a discussion between counsel, a joint statement of issues was prepared and lodged on 17 September in advance of the preliminary hearing fixed for 21 September. On the same day, amended defences were tendered, introducing the arbitration plea currently insisted upon for the first time. At the preliminary hearing the defender's motion for those defences to be received was unopposed and I granted it.

[26] The explanation given by counsel for the defender for the late introduction of the arbitration plea was that he personally had not seen the Trust Deed when the defences were drafted and the terms of the joint statement agreed with counsel for the pursuers. That was

why the defences as lodged contained a denial as to jurisdiction, and the note specifically reserved the right to raise further issues. He also pointed out that the schedule attached to the summons did not include the Trust Deed. As soon as he received a copy of the Trust Deed, he drafted the amended defences introducing the arbitration plea.

[27] Counsel for the pursuer did not take issue with the foregoing explanation insofar as it went – and was at pains to stress that no criticism was intended of counsel for the pursuer – but said, without contradiction, that the Trust Deed had been sent to the defender's English solicitors in December 2020, attached to an email which was copied to a director of the defender. The defender therefore had both constructive, and actual, knowledge of the existence of the arbitration clause. It was the defender's knowledge which mattered, not that of its legal advisers in Scotland. By lodging defences which had prayed in aid a defence of waiver the defender had taken steps to answer the pursuers' substantive claims, and it therefore had not met the condition in section 10(1)(d)(i). The Trust Deed was not listed in the schedule to the summons as the pursuers did not found upon it.

Decision

[28] The sharp issue which arises here is whether simply by lodging defences which made no mention of the arbitration plea and by agreeing a joint note of substantive issues, the defender has fallen foul of subsection (1)(d)(i) (and perhaps also (1)(d)(ii)). Since there is no doubt that lodging defences is a step in proceedings, and the defences lodged in this case did include a substantive answer to the pursuers' claim, a literal interpretation of section 10(1)(d)(i) would suggest that the defender has lost the right to insist on arbitration. In *Heart of Midlothian Football Club Plc* v *Scottish Professional Football League Ltd* 2020 SLT 736 Lord Clark, adopting a purposive approach to the interpretation of section 10 and deriving

assistance from English case law, held that the lodging of defences containing responses to substantive claims which were subject to the clear qualification that a sist for arbitration was requested did not fall foul of section 10(1)(d)(i). However, the defences in the present case contained no reference to the arbitration clause whatsoever, let alone anything which could be described as a clear qualification. The English authorities on what constitutes a step in proceedings are discussed in *Capital Trust Investments Ltd* v *Radio Design TJ AB* [2002] CLC 787 Paragraphs 20 to 24. The common theme in those cases is that a party will not be held to have been deprived of the right to recourse to arbitration if it takes some other substantive step in the proceedings *at the same time as* applying for a stay; but again that can be distinguished from the position here, where the first reference to arbitration came *after* substantive defences had been lodged. At paragraph 24 of *Capital Trust Investments* the following statement of the law was approved: that an act which would otherwise be regarded as a step in proceedings will not be treated as such if the applicant has specifically stated that he intends to seek a stay.

[29] Accordingly, even applying a purposive approach to the construction of section 10(1)(d)(i) does not avail the defender. There is no qualification in the defences giving any hint that the defender wished to resort to arbitration. While I take the point that the defences did not contain an admission of jurisdiction, and have some sympathy with the position in which counsel for the defender found himself, the defender itself was fixed with actual and constructive knowledge of the arbitration clause. The position might have been different had the defences been purely skeletal in nature, but while no admissions were made as to the amount due, answer 6 in particular gives a detailed account of the substantive defence to be relied upon, without qualification, as referenced by pleas in law 3 and 4. Since the defences were drafted on instruction, the defender unequivocally

represented that it wished the court to resolve the dispute. The defender has not met the condition in section 10(1)(d)(i). I do not regard this as a harsh outcome, when the defender's English solicitors had the Trust Deed and Rules from December 2020 and were aware of the dispute over the contributions (among other disputes which apparently exist) and so had ample opportunity both to suggest arbitration and to brief the defender's Scottish legal advisers of the existence of the arbitration clause.

[30] Having reached that view it is strictly unnecessary to consider whether the agreement of a substantive joint note of issues making no reference to arbitration also constitutes a step in proceedings or whether it is something which might fall within subsection (1)(d)(ii). The interpretation of that provision is not free from difficulty. It appears to have its roots in the second statement of principle which was approved in *Capital Trust Investments*, namely that the right to seek a stay will also be lost if the defendant in the judicial proceedings has expressly or impliedly represented that he does not intend to refer the issues in dispute to arbitration, the questions being whether the defendant has unequivocally represented that there will be no reference to arbitration and whether the plaintiff has conducted his affairs on the basis that the matter will be determined by the court in reliance on that representation. The second of those requirements – acting in reliance on the representation – does not feature in the Scottish provision. Where the problem arises is in relation to the phrase "otherwise acted since bringing the legal proceedings" in reference to the party applying for a sist. Usually, as here, that party will be the defender, who will not have brought the legal proceedings. However, the provision would have little application if "the proceedings" in question comprised the application to sist. On any view the subsection is unhappily drafted but the construction which does least violence to the provision as a whole is to read it as if it said "otherwise acted since the

bringing of the legal proceedings". On this approach, the defender has also fallen foul of (1)(d)(ii) by agreeing the joint note, if that does not of itself fall to be regarded as a step in the proceedings.

[31] Either way, by both lodging defences, and agreeing the joint note, the defender has failed to comply with the provisions of section 10(1)(d) read as a whole. Had I not repelled the defender's first plea in law, I would in any event have refused the motion to sist (in consequence of which the arbitration clause would then have been rendered void in relation to these proceedings, by virtue of section 10(2) of the 2010 Act.

Disposal

[32] I will repel the defender's first plea in law and refuse to admit to probation the averments which relate to it, in answer 1 from "Explained and averred" to the end of that answer. I will then put the case out By Order to discuss further procedure.