Case No: HT-12-433

Neutral Citation Number: [2013] EWHC 139 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1st February 2013

Before:

MR JUSTICE AKENHEAD

- -

Between:

ATKINS LIMITED	**Claimant**
- and -	
THE SECRETARY OF STATE FOR TRANSPORT	**Defendant**

- -

Justin Mort (instructed by **Reed Smith LLP**) for the **Claimant**
Daniel Lewis (instructed by **the Treasury Solicitor**) for the **Defendant**

Hearing date: 24 January 2013

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JUDGMENT

Mr Justice Akenhead:

Introduction

1. The Claimant, Atkins Ltd ("Atkins"), seeks to challenge pursuant to Section 68 of the Arbitration Act 1996 an arbitrator's award on the grounds that there was a "serious irregularity", said to be a failure on the part of the arbitrator to determine the or an issue put to him. Alternatively, Atkins seeks permission to appeal from that award.

The Factual Background

2. Much of what follows is taken from the uncontroversial parts of the arbitrator's award. The Secretary of State for Transport ("the Authority") and Atkins entered into what was called the "Area 6 MAC" Contract on 26 February 2008 ("the Contract"), by which Atkins was appointed as managing agent and contractor for Area 6 of the highways network for a contract period of 5 years, subject to extension for a further 2 years. Area 6 comprised trunk roads in East Anglia. Pursuant to the currently continuing Contract, Atkins is obliged to maintain the roads in Area 6. The work consists primarily of two functions, namely routine and cyclic maintenance and winter maintenance including remedying of minor defects in the roads and management of more substantial works, being the replacement or renewal of network assets, referred to as "schemes" or "renewal schemes". Maintenance is carried out by Atkins either through directly employed or sub-contracted labour. Schemes may be carried out by Atkins up to a certain value, over which they are carried out by others under the management of Atkins. For maintenance work, Atkins are to be paid a Lump Sum over the period of the contract, which is payable in tendered monthly tranches with additional payment for mobilisation and demobilisation. Maintenance includes an obligation to remedy defects which appear in the road surface, including potholes. The lump sum payment thus includes work required to remedy any defects, including potholes.

3. The Contract made provision by Clause 90.1 for disputes initially to be referred to adjudication but that, if a party was dissatisfied with the adjudicator's decision, it could refer the dispute to arbitration. The agreed arbitration procedure was the Institution of Civil Engineers ("ICE") Arbitration Procedure (1997).

4. A dispute arose between the parties relating to the circumstances in and the extent to which the costs of and occasioned by repairing potholes on the trunk roads in Area 6 should be paid for. Atkins claimed that the prevalence of potholes on the network was significantly greater than it anticipated and that it was accordingly entitled to additional payment pursuant to the compensation event provisions under clause 60 of the Contract, either under clause 60.1(11) (in relation to defects) or clause 60.1(22) (in relation to a breach of an implied term of the Contract). The Authority disputed Atkins' entitlement to any compensation event. On 3 February 2012, Atkins referred the dispute to an Adjudicator pursuant to Clause 9 of the Conditions; Mr. Andrew Bartlett QC, well known and respected in construction law circles (and elsewhere), was appointed as the Adjudicator. The parties agreed that the Adjudicator should determine the issue of principle as to whether, assuming the material facts were established, there was a compensation event.

5. Atkins put forward essentially three bases of claim, only one of which was pursued to arbitration. That was referred to as the "Secondary Case" which was, broadly, that potholes occurring after the Contract Date are defects within Clause 60.1(11) where they exceed in volume the number of potholes that it would have been reasonable for an experienced contractor or consultant to have allowed for. As the hearing involved effectively preliminary issues, no "number" of reasonably allowable potholes was identified. The Adjudicator in his decision of 9 March 2012 rejected the two other bases of claim but accepted the Secondary Case.

6. By Notice to Refer dated 4 April 2012 the Authority gave notice under clause 93.2 of the Contract disputing the Adjudicator's Decision accepting Akins' Secondary Case and referring the dispute to arbitration. Professor John Uff CBE, QC, also a well known and respected construction law practitioner and arbitrator, was appointed as arbitrator by agreement between the parties.

7. Essentially, Professor Uff reached a decision the other way in finding as he did in Paragraph 8.1 (ii) of his Interim Award issued on 22 November 2012 that "an excess volume of potholes beyond what it was reasonable to allow in the Contract is not capable of constituting "*a defect in the physical condition of the area network*" under Clause 60.1 (11) of the Contract".

8. Atkins is unhappy with the outcome of the arbitration and complains that the arbitrator did not effectively or even at all address a key issue upon which it relied. It argues in any event that the arbitrator either came to an obviously wrong decision or a decision that was in the event wrong and that permission to appeal should be granted and the appeal allowed.

The Contract

9. To understand the contentions of both parties, it will be helpful if I set out what the Contract provided. The Contract contained what are well-known within construction circles as the NEC3 Conditions, albeit somewhat modified. These Conditions are used throughout the construction and engineering industries and are highly regarded in the sense that they are perceived by many as providing material support to assist the parties in avoiding disputes and ultimately in resolving any disputes which do arise. There are some siren or other voices which criticise these Conditions for some loose language, which is mostly in the present tense, which can give rise to confusion as to whether and to what extent actual obligations and liabilities actually arise. Very few cases involving material disputes as to the interpretation of the NEC3 Conditions have made their way through to reported court decisions. The Contract incorporated "Contract Data" as well as various other documents. Atkins is referred to as the "Provider" whilst the "Service Manager" was the Authority's representative.

10. By Clause 20.1, the Provider "provides the Services in accordance with the Service Information". The Service Information sets out general obligations of the Provider including the obligation to:

> "(i) ensure that the area network is operated and maintained to no lesser standards than is appropriate for a highway of the character of the Area Network (budgets permitting) and for use by the traffic which is reasonably to be expected to use the Area Network".

The obligation to provide asset maintenance was set out in Paragraph 3.3.3 (1) of the Service Information:

> "The Provider maintains the area network asset in a condition which meets the requirements of the Routine and Winter Service Code and the Network Management Manual and Annex 13."

The Pricing Schedule makes it clear in Section A of the Preamble that the lump sums entered in the Pricing Schedule "include full or Routine and Winter Services, and for the general management of the contract". Annex 13 provides performance requirements for routine and winter service. The Routine and Winter Service Code incorporated into the Contract states, materially:

> "(i) [Introduction] Routine and winter service is the name for work traditionally carried out under the name of routine and winter maintenance.
>
> 3.1.1 Routine and winter service operations include both cyclic and unplanned activities that may be used to keep the highway safe and serviceable, and are needed to preserve the asset value. These activities include reactive repairs and winter, flood and emergency responses but exclude preventative and programmed renewals maintenance …
>
> Routine and winter service activities that are required for the operation of the Network are considered in 17 Technical Areas that make up 4 technical groups.
>
> 2.1.1 Defects occur in the condition of all aspects of the Network. The general definition of a defect to an asset is that it:
>
> - Represents a deterioration from the normal condition,
> - Prevents an item from acting in the intended manner,
> - Is damaged,
> - Is likely to increase the rate of deterioration of another item, or
> - Causes an unintended as it or nuisance…
>
> Category 1 defects are those that require prompt attention because there is an immediate or imminent risk of either one or more of the following:
>
> - Injury to any party using or repairing the Network
> - Significant disruption to the normal flow of traffic through the Network
> - Structural deterioration of part of the Work…
>
> Annex 2.1.1… contains examples of aspects of condition that may be considered as Category 1 defects"

Annex 2.1.1 specifically includes in a non-exhaustive list:

> "Potholes and other local defect in the carriageway/footway/cycle track…"

11. Clause 11 contains definitions including the following:

(38) Lump Sum Duties are those of the Services which the Pricing Schedule states will be paid for on a lump sum basis

(58) The Price for Services Provided to Date is the total of

- for Lump Sum Duties

- the total of the monthly lump sum prices stated in section A of the Pricing Schedule for the period since the access date, including any notified extension to the contract period

- a proportion of the Lump Sum Price for mobilisation stated in Section A of the Pricing Schedule which is the proportion of the Mobilisation Period which has elapsed

- The Lump Sum Price for demobilisation stated in Section A of the Pricing Schedule on completion of the demobilisation duties stated in the Service Information

- for the remainder of the Services, the total Defined Cost of the Services which have been carried out by the Provider, plus the resulting Fee.'

(67) To Provide the Services means to do the work necessary to perform the Services in accordance with this contract and all incidental work, services and actions which this contract requires'

(74) Routine Maintenance Works are works necessary to maintain the assets forming part of the Area Network in a good state of repair, excluding any works carried out to replace such assets that have reached the end of their economically viable life

(78) Services are the duties to be performed by the Provider under this contract

(87) Winter Maintenance Works are works carried out in severe weather to allow traffic to use the Area Network safely."

12. Clauses 60 to 65, about which much of the argument revolves, legislate for what are called "compensation events", which, unsurprisingly, are events which entitle the Provider to compensation over and above what the Contract otherwise allows for:

"60.1 (10) A defect in work carried out by Others live in or affecting the operation of the Area Network or any other default by Others in carrying out such work, unless the repair or rectification of the defect forms part of the Lump Sum Duties.

(11) The Provider encounters a defect in the physical condition of the Area Network which

- is not revealed by the Network Information or by any other publicly available information referred to in the Network Information,
- was not evident from a visual inspection or routine survey of the Area Network at the Contract Date,
- an experienced contractor or consultant acting with reasonable diligence could not reasonably have discovered prior to the Contract Date and
- an experienced contractor or consultant would have judged at the Contract Date to have such a small chance of being present that it would have been unreasonable for him to have allowed for it.

Only the difference between the physical conditions encountered and those for which it would have been reasonable to have allowed is taken into account in assessing a compensation event.

60.1(13) The Schemes Budget in any Financial Year is greater or less than that specified in the Network Information by a factor of more than 20%. Only the effect on the Defined Cost of the Lump Sum Duties due to the Schemes Budget in any Financial Year being greater or less than that specified in the Network Information by a factor of more than 20% is taken into account in assessing a compensation event. The first 20% of the deviation is ignored when making the assessment (but not when determining whether a compensation event has occurred).

61.3 The Provider notifies the Service Manager of an event which has happened or which he expects to happen as a compensation event if:

- the Provider believes that the event is a compensation event and
- the Service Manager has not notified the event to the Provider.

If the Provider does not notify a compensation event within eight weeks of becoming aware of the event he is not entitled to a change in the prices unless the Service Manager should have notified the event to the Provider but did not.

61.4 If the Service Manager decides that an event notified by the Provider

- arises from the fault of the Provider.
- has not happened and is not expected to happen.
- was something of which the Provider was or ought to have been aware at the time when the original prices for the work affected by the compensation event were assessed.
- has no effect upon defined cost or
- is not one of the compensation events stated in this contract.

he notifies the Provider of his decision that the prices are not to be changed.

If the Service Provider does not notify the Provider of his decision within two weeks of the Provider's notification, the Provider submits quotations for the event.

62.1 After discussing with the Provider different ways of dealing with a compensation event which are practicable, the Service Manager may instruct the Provider to submit alternative quotations…

62.3 The Provider submits quotations within three weeks of the event being notified as a compensation event or within such other period as the Service Manager may agree".

The Adjudication

13. The adjudication process proceeded promptly with Mr Bartlett producing his decision on 9 March 2012 having received written submissions and after an oral hearing. In his decision he records materially in Paragraph 5 that the relief claimed by Atkins was,:

> "(2) further or alternatively that a "defect in the physical condition of the area network" for the purposes of clause 60.1(11) includes a defect arising after the contract date that could not have been anticipated from (a) the Network Information, (b) visual inspection, (c) discovery with reasonable diligence, and that an experienced contractor would have judged to have such a small chance of arising after the contract date that it would have been unreasonable for it to have allowed for it in its tender…"

This was a shorthand paraphrase of Clause 60.1(11) and in itself would have probably been unexceptionable.

14. The Adjudicator dealt with those parts of Atkins' case which are no longer pursued. Material parts of the Adjudicator's decision on the Secondary Case are as follows:

> "42. The Employer [Authority] next argues that the term 'defect' in clauses 60.1(11) is used in a generic sense, such that it refers to a type of defect. In this sense potholes as a category are a defect. The intention of clause 60.1 (11) is to compensate only for latent defects in the limited sense of unknown types of defect.
>
> 43. The consequences of this interpretation would be to make clause 60.1(11) very limited indeed. A reasonable contractor knows that potholes occur in roads from time to time, and indeed potholes are expressly referred to in the Network Information, but no pothole could ever fall within clause 60.1(11) so as to give rise to a compensation event. The same would be true of every type of defect mentioned in the Network Information and related documents.
>
> 45. I am unable to accept this part of the Employer's argument. There is no warrant in the words of clause 60.1(11), or anywhere else in the contract, for reading the word "defect" in that clause as referring to a type of rather than an individual defect. And in my view this interpretation is as uncommercial as Atkins' primary case, for it would turn clause 60.1(11) effectively into a dead letter. I note that the Employer did not put forward any practical example of a defect which would qualify under subclause (11)…
>
> 46. Having rejected the more extreme interpretations put forward by each party, I returned to consideration of Atkins' Secondary Case. In my judgment the phrase

"being present" in the fourth bullet point of clause 60.1(11) is a reference to being present at any time up to the end of the contract period. This follows not only (negatively) from my rejection of Atkins' primary case but also (positively) from consideration of how the contract is constructed and phrase and how it works. In particular…

> (c) Application of subclause (11) requires consideration of what it would have been reasonable or unreasonable for the Provider to allow for in its pricing. When tendering armed with the Network Information, it would have been reasonable for the Provider to have made allowances, in its figures for the lump sums, to cover dealing with potholes and other defects reasonably expected to occur month by month or year by year during the life of the contract. The nature of the Network Information was such as to permit such allowances to be made, based on past experience, the Provider's expertise, judgement of commercial risks, and other relevant factors…

47. Relying on the Secondary Case, Mr Mort [for Atkins] contended for the conclusion that Atkins was entitled to claim the additional potholes over and above the number of potholes that it would have been reasonable for an experienced contractor or consultant to have allowed for. Mr Nicholls [for the Authority] argued, in opposition to this, that there was nothing about volume (ie excessive numbers) in the wording of subclause (11). As a matter of express language this is correct, but it is not a valid objection to Mr Mort's contention. The relevant principle is consideration of whether it would have been unreasonable to allow for the defects which the Provider contends constitute a compensation event. Defects encountered might be outside the hypothetical reasonable allowance for a variety of practical reasons, which on particular facts might have to do with severity, number, distribution, or some other feature. Excess volume happens to be the feature which Atkins relies upon in this instance…

56…my decision is as follows:

> a. As regards the meaning of clause 60.1(11)…
>
> > iii. The phrase "defect in the physical condition of the Area Network" includes one or more potholes; and the word "defect" in that phrase does not mean 'generic category of defect' or similar…"

15. Essentially, the remaining area of argument referred to arbitration by the Authority related to the Secondary Case. That boiled down in reality to arguments as to whether Atkins was entitled in principle to recover for each and every pothole which it had to deal with over and above the number which an experienced contractor or consultant should reasonably have allowed for. Atkins pursued that argument and it was challenged in effect on the basis that the number of potholes which could reasonably have been foreseen or allowed for was immaterial and an excess over that number did not in itself give rise to a compensation event.

16. In the context, I turned to what the experienced arbitrator said in his interim award:

"3.1 Given that there has not been a full exchange of pleadings in either the Adjudication or the Arbitration and that the parties have, in effect, decided upon a "preliminary issue" without the underlying issue being fully defined, I considered it important at the outset to define the dispute upon which a decision was required.

3.2 The Notice to Refer served by the Secretary of State recites that the Adjudicator had decided that a compensation event had arisen by reason of clause 60.1(11) of the Contract and that *"potholes or other defects occurring after the Contract Date are defects within clause 60.1(11) where they are over and above the number of potholes that it would have been reasonable for an experienced contractor or consultant to have allowed for"*. The Secretary of State, in its reasons for contending that the Adjudicator was wrong contends that:

(i) The reference to "*being present*" in the fourth bullet point of clause 60.1(11) is a reference to a defect being present at the Contract Date.

(ii) The reference to "*a defect in the physical condition of the area network*" in clause 60.1(11), is incapable of being a reference to the volume of potholes.

3.3 Reference to the Adjudicator's decision shows that point (i) above was expressly decided by him. Point (ii) is not included in the dispositive part of the Adjudicator's decision but is referred to within the body of the decision (particularly paragraph 47).

3.4 After oral exchanges with the parties at the hearing, it was agreed that the findings set out in para 3.2 (i) and (ii) above were findings of the adjudicator which were challenged by the Secretary of State and accordingly that the dispute to be determined in the arbitration was whether either or both of those findings were correct. They are now referred to as issue (i) and issue (ii)…

5.1 It was agreed at the oral hearing that Atkins' counsel would go first. Atkins' case is therefore summarised first…

5.3 The price to be paid for the repair of defects was the lump sum, as adjusted by the compensation event regime. The parties agreed to reduce price certainty by agreeing to the compensation event regime. Clause 60.1(11) applies where unforeseeable defects are encountered and applies to lump sum work, in contrast to clause 60.1(10) which excludes application to lump sum duties.

5.4 The purpose of clause 60.1(11) is to protect the contractor from hardship in the event that defects are encountered in the network which it could not have foreseen, and therefore could not have allowed for in its tender price. That protection enables the contractor to reduce its lump sum bid and that is to the employer's benefit: the employer gets what it pays for.

5.5 If the Secretary of State's construction were correct the contractor would be taking on the risk that the government might reduce all funding of the network to nothing. That would be an extraordinary risk for the contractor to take on unless there was some mechanism contained in the contract for compensating

the contractor in those circumstances. Clause 60.1 (13) does not provide such protection because it applies only to the "Defined Cost" of the Lump Sum duties and not to the Lump Sum itself.

Summary of the Authority's Case

6.1 Clause 60.1(11) applies solely to defects which appear after the Contract Date due to a cause which existed at the Contract Date (being present) and which were not and could not have been foreseen by the contractor. The clause thus applies to latent defects in the sense of an unknown type of defect.

6.2 The Contract requires Atkins to repair defects, which expressly includes potholes. The Contract provides no threshold or limit on the number of potholes Atkins might be required to repair. A construction of clause 60.1(11) which treats "defect" as meaning "volume of defects" removes the point of a lump sum contract and makes no commercial sense. On its true construction, clause 60.1(11) does not provide for a compensation event if the contractor encounters an unforeseen "volume of defects" after the Contract Date. Atkins' construction of Clause 60.1(11) as providing for compensation where an unforeseen *volume* of defects is encountered ignores the clear words used, both as to "defect" and "being present".

6.3 Atkins' case is not that any individual pothole is said to be unforeseen, but that the volume of potholes is unforeseen. This is not addressed by clause 60.1(11) nor can such a claim be brought within its terms.

6.4 The Authority accepts that a failure to implement Schemes (no such failure being accepted) might lead to a higher incidence of potholes. While other factors also affect the incidence of potholes, particularly weather, this situation is addressed by clause 60.1(13) which protects both parties, unlike clause 60.1(11), and does allow adjustment of the Lump Sum price, contrary to Atkin's submission.

6.5 On the case advanced by Atkins, there is no clear basis upon which it can be known when the compensation event has arisen. The contractor is required to give notice under clause 61 of the "event" within eight weeks. That event must be the first pothole to occur after the notional number or volume of potholes to be anticipated by the experienced contractor had been exceeded: every pothole thereafter would require notice and would require the compensation event procedure, including provision of a quotation, to be operated. This would be unworkable and cannot have been intended…

Consideration of Issues

7.9 Turning to issue (ii), the question is whether a "*volume of defects"* or "*a number of defects"* can, purely by virtue of its volume or number, constitute a "*defect*" within the meaning of sub-clause (11). In this case Atkins necessarily accept that a number or volume of defects up to the limit contended for (which has not otherwise been defined or described in any version of Atkins' case) does not comprise a defect within the clause. Furthermore, while the "*excess*" volume or number is said to constitute the "*defect*" within sub-clause (11), it is

clear that this volume or number will or may consist of an indeterminate number of individual potholes (the separate causes of which are immaterial) distributed anywhere across the network and being encountered over an indeterminate period of time.

7.10 Plainly the foregoing description creates a host of practical problems as compared to the well understood process of notifying and pursuing a claim in respect of one discrete defect occurring at a particular place and a particular time. It was pointed out in argument that the parties had considered ways in which these procedural difficulties could be regulated and brought under control. I have no doubt that engineers on both sides would readily contrive some system to bring order and might well agree on a numerical basis from which to assess the "*excess*" number or volume of potholes being present over a given period or area. Such rationalisation, however, is not in point as regards the essential question whether an excess number or volume can constitute a defect falling within the wording of sub-clause (11) as properly interpreted…

7.12 In the Arbitration the Authority, through Mr Lewis, has restated its opposition to this part of the Adjudicator's decision. The Authority relies in part on its interpretation of the words "*being present*", which I have not construed in the manner contended for by the Authority. However reliance is also placed on the proper meaning of the word "*defect*" (singular) and on the practical difficulties involved in determining whether and when the "*event*" relied on under sub-clause (11) can be said to occur. Mr Lewis placed particular emphasis, rightly in my view, on the extensive notice provisions under the Contract requiring not only notice of the occurrence of the event to which the Service Manager is required to respond, but discussions between the Provider and the Service Manager which may involve submitting quotations in order to determine how the notified defect is to be dealt with.

7.13 Mr. Mort submitted that difficulties of giving notice and of complying with other related provisions under the Terms of Contract could not affect the construction of sub-clause (11) itself. While this submission has some force, it cannot be accepted as rendering these associated provisions irrelevant. They are, of course, part of the same contract and each of the terms is to be construed having regard to the whole. The immediate point, however, is that, in practical terms, the "*defect*" being contended for by Atkins is bound to lead to a dispute as to whether the notice provision has been complied with. It also gives rise to the question whether these provisions are capable of being complied with. The notice provision is not a mere formality since Clause 61.3 expressly provides that:

> *If the Provider does not notify a compensation event within 8 weeks of becoming aware of the event, he is not entitled to a change in the prices unless the service manager should have notified the event to the Provider but did not.*

7.14 There are other requirements for the Provider to submit his quotation for dealing with a compensation event within 3 weeks of the event being notified or such other period as the Service Manager may agree. Given the circumstances outlined above, of the relevant events occurring at widely spaced locations and

at different times, it is inevitable that the parties would be forced into a rationalisation amounting virtually to re-writing of the Contract to accommodate such a compensation event, particularly bearing in mind the inevitability of a major argument as to what constitutes a "*reasonable allowance*", whether for volume or numbers of defects. It is in this sense that the provisions as to notice and requirements for quotations are, in my view, relevant to the question whether the claim as asserted by Atkins falls within the wording of sub-clause (11)…

7.17 Returning to the main issue of construction, the question is whether the claim that Atkins wish to pursue can properly fall within sub-clause (11). This is ultimately a matter of construction of the words of the sub-clause. Starting with the last three lines of the printed clause, it can certainly be said that an excess number of potholes over and above that "*for which it would have been reasonable to have allowed*" may fall within these words which are, however, intended to limit the claim which can be made. In other words the Contractor cannot claim in respect of physical conditions which it would have been reasonable to allow for. Only the difference can form the basis of the claim. However, the claim must comply with the whole clause and with what is to be taken as the intention to be derived from the words used.

7.18 Before turning to this, it may be noted that the last three printed lines do not use the word "*defect*" and refer only to "*physical conditions*". It is the opening words of sub-clause (11) that refer to "*a defect in the physical condition of the area network ...*". As noted, "*defect*" is in the singular, suggestive of an occurrence of isolated or limited extent. In response to this argument, Mr. Mort contended that the occurrence of "*rock*", being a typical ground of a claim for unforeseen conditions, was likely to occur in different locations. While that may be so, it does not follow that each occurrence or group of occurrences of rock are not to be treated as an individual "*defect*" to which notice provisions and other requirements of the Contract would apply individually. It can readily be accepted that the use of "*defect*" in the singular is not conclusive, but it is at least a pointer to the intention of the clause.

7.19 While the argument is centred on the fourth bullet point for the purpose of the "*unforeseen defects*" claim, it is relevant to consider all the bullet points. With regards the first it can be said that defect is assumed to be of such a nature as to be capable of being revealed by the Network Information or other publicly available information. Likewise as regards the second bullet point, a defect is something which may or may not be evidenced from visual inspection or routine survey of the contract date. Thirdly, a defect is something which may or may not be capable of discovery acting with reasonable diligence prior to the date of the Contract. Putting those three bullet points together, it can be said they contemplate something with a physical existence which may or may not be capable of being foreseen from the material available at the Contract date.

7.20 Finally, the fourth bullet point requires the defect, in the judgment of a hypothetical experienced contractor or consultant at the Contract date "*to have such a small chance of being present that it would have been unreasonable for him to have allowed for it*". It is necessary here to note that the test is not, as the Adjudicator appears to have read the clause "*whether it would have been*

unreasonable to allow for the defects", but whether the relevant judgment was such that it would have been unreasonable to have allowed for the defect at all because there was "*such a small chance of* [its] *being present*".

7.21 Correctly read, the fourth bullet point alone, in my view, makes it extremely difficult to bring Atkins' claim within the words. For there to be any such claim, Atkins accept that they must be deemed to have allowed for a volume or number of defects which are within the hypothetical limit. To describe the excess volume or number as an occurrence with "*such a small chance of being present that it would have been unreasonable ... to have allowed for it*" would surely be a misuse of words. What Atkins are saying, as apparently reflected in the Adjudicator's decision, is that it was reasonable to allow for a certain volume of potholes within their price. That may well be so, but it does not follow that any additional volume or number of potholes can fall within sub-clause (11).

7.22 The effect of Atkins' contention is not only, as the Authority contends, to breach the lump sum provision, but to turn the Contract into a re-measure provision by which, after some notional but unstated limit, the Contractor would be entitled to claim payment progressively as further potholes were encountered. Whether this would operate during the whole period of the Contract, so that the hypothetical allowance would have to be wholly expended before any payment became due, or whether it would operate on an annual basis, or whether it would operate on an area basis, are questions which have not been addressed. In my view they add further layers of complexity which have no place within the terms of sub-clause (11) and further militate against the interpretation contended for by Atkins.

7.23 The difficulties of bringing the claim within the words of sub-clause (11) as discussion above, are sufficient to reject Atkins' claim on balance. However, when coupled with the difficulties involved in complying with the notice provisions and other measures aimed at dealing with compensation events, the case against Atkins' contentions becomes overwhelming. In my view, the claim to be brought by Atkins cannot, on a fair and objective reading of the words, be brought within sub-clause (11). Issue (ii) is therefore to be resolved in favour of the Authority.

8. Disposition

8.1 For the reasons set forth above I find and declare that:

(i) The reference to "*being present"* in the fourth bullet point of clause 60.1(11) is a reference to a defect being present at any time during the contract period.

(ii) An excess volume of potholes beyond what it was reasonable to allow in the Contract is not capable of constituting "*a defect in the physical condition of the area network*" under Clause 60.1(11) of the Contract…"

<u>These Proceedings</u>

17. On 19 December 2012, Atkins' solicitors wrote to the arbitrator that there had or may have been a "serious irregularity" within the meaning of Section 68 of the Arbitration Act 1996 and asked him to accept the letter as Atkins' "objection for the purposes of section 73(1)" of that Act. The complaint was that the arbitrator had not decided the issue of whether each pothole over and above the number which should have been allowed for by Atkins was a compensation event. The arbitrator apparently did not respond to this letter but did acknowledge receipt of the Claim.

18. The Claim was issued on the same day, 19 December 2012, the essential complaint being that the arbitrator had failed to determine the claim as formulated by Atkins, alternatively seeking permission to appeal. The Claim was supported by a witness statement of Mr Speed, Atkins' solicitor, which explained the background to the claim but also provided information suggesting that the case was one of general public importance, based as it was upon the NEC conditions and because the particular form of contract was used by the Highways Agencies for other road maintenance contract.

19. The Court issued an order on the 21 December 2012 giving directions for the hearing, it being understood that the hearing would deal not only with the serious irregularity issue but also with permission to appeal. It was understood by both parties that, if permission to appeal was to be given, the hearing would also encompass the substantive arguments.

20. The Authority submitted two witness statements from Mr Stocker of the Highways Agency and Ms Da Costa of the Treasury Solicitor. These provided some evidence of what Counsel had identified as the "kernel" of the dispute being the "volume point". Ms Da Costa accepted that some of the other maintenance contracts were on the same contract terms but said that currently the Highway Agency "is not in a formal dispute with any other contractor in the remaining 11 areas on this particular issue".

21. I was assisted by lucid and helpful written and oral presentations by both Counsel in the case.

The Law

22. Relevant parts of the Arbitration Act 1996 are:

> "57 (1) The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.
>
> (2) If or to the extent there is no such agreement, the following provisions apply.
>
> (3) The tribunal may on its own initiative or on the application of a party—
>
> (a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or
>
> (b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.
>
> These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal.

(4) Any application for the exercise of those powers must be made within 28 days of the date of the award or such longer period as the parties may agree…

68. A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant…

(d) failure by the tribunal to deal with all the issues that were put to it…

69 (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An appeal shall not be brought under this section except—

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

(3) Leave to appeal shall be given only if the court is satisfied—

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award—

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

70 (1) The following provisions apply to an application or appeal under section 67, 68 or 69.

(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted—

(a) any available arbitral process of appeal or review, and

(b) any available recourse under section 57 (correction of award or additional award).

(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

(4) If on an application or appeal it appears to the court that the award—

(a) does not contain the tribunal's reasons, or

(b) does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal,

the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose."

23. For the purposes of Sections 57 and 70, one needs to assess whether the arbitration regime, including any agreed rules or procedures, actually incorporates any arbitral process of appeal or review. Section 57 of the Act, which will or may be part of the arbitral process, allows for correcting an award for "any clerical mistake or error arising from an accidental slip or omission" or clarifying or removing any "ambiguity in the award". An additional award may be made in respect of any claim presented to the tribunal but not dealt with in the award. The use of the word "claim" in this context is to be compared with the word "issue" in Section 68(2)(d). "Issue" is or at least may be a narrower word than "claim": a claim may give rise to a number of issues albeit that a whole claim may be an issue. This was a distinction highlighted by Mr Justice Cooke in **Torch Offshore LLC v Cable Shipping Inc** [2004] 2 LL Rep 446.

24. "Serious irregularity" within the meaning of Section 68 does not mean in itself an error of fact or law on the part of the arbitrator, perhaps on the basis that "to err is human". It is important that the parties do not consciously or sub-consciously dress up challenges to the factual findings or legal reasoning or conclusions of an arbitrator as "serious irregularity". Whilst such errors may well be present when there are other genuine serious irregularities subject to the Court's intervention under Section 68, that is or may be coincidental. In the **Petro Ranger** [2001] 2 LL Rep 348, Mr Justice Cresswell highlighted parts of the Report on the Arbitration Bill by the Departmental Advisory Committee on Arbitration chaired by Lord Saville which highlighted various relevant points:

"4. The test of "substantial injustice" is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process, that the court will take action…

7. Section 68 is designed as a longstop, only available in extreme cases, where the tribunal has gone so wrong in its conduct of the arbitration in one of the respects listed in s.68, that justice calls out for it to be corrected.

8. Section 68 must not be used as a means of circumventing the restrictions upon the court's power to intervene in arbitral proceedings. Further, the distinction between s.68 and s.69 must be maintained. In addition, the court's powers under s.70(4) should be borne in mind (see below).

> 9. Section 68(2)(d) ("failure by the tribunal to deal with all the issues which were put to it") does not require a tribunal to set out each step by which they reached their conclusion or to deal with each point made by a party. There is a distinction between criticism of the reasoning and a failure to deal with an issue (Thomas J. in Hussmann v. Al Ameen [2000] 2 L.L.R. 83, at 97, column 1)." (page 350)

25. It is unnecessary to consider the meaning and impact of Section 69 which has been addressed by previous court decisions, such as **Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd** [2008] EWHC 426 (TCC) and **HMV UK v Propinvest Friar Limited Partnership** [2011] EWCA Civ 1708.

Discussion

26. As Atkins' case is intimately tied up with what the Contract actually means in the context of the number of potholes exceeding what might reasonably have been allowed for by Atkins, it will be more helpful if I analyse what the Contract does mean. Both parties before me rightly accepted that Clause 60.1(11) in referring to "a defect in the physical condition of the Area Network" is referring amongst other things to a pothole, however caused. This is obviously right because elsewhere in the contract documentation (and in particular in the Routine and Winter Service Code quoted above) potholes are referred to as defects. It therefore follows that potholes which are encountered can be (or give rise to) a compensation event. The term "defect" is defined very broadly and, whilst the list in Annex 2.1.1 is non-exhaustive, the 20 examples would seem to cover almost every conceivable defect which one might think about.

27. In Clause 60.1(11), one needs to have regard to the language which the parties have used or adopted. The first element is the encountering of "a defect in the physical condition of the Area Network". There is a non-exhaustive list of defects and so it must be the case that any defect in the physical condition, whether spelt out as a type of defect in the Contract or not, is the subject matter of the sub-clause. There may well be importance in the use of the singular words "a defect"; the parties could have used the plural "defects" which might have assisted Atkins in its arguments. The singular noun is comprehensible in the light of the four bullet point requirements which must be fulfilled before the defect in question becomes or can be classified as a compensation event; in particular the fourth requirement talks about the contractor/consultant not allowing "for it", the "it" being the defect being considered.

28. In logic and as a matter of experience, potholes or potholing in roads may be caused by any number of causes from wear and tear, fundamental design, material and construction deficiencies, abuse by road users or others, calamitous events and possibly many more. I gave to Counsel several examples in the course of argument. The first was an accident involving army ordnance exploding, causing damage to the road which leads to potholing. The second was an inherent deficiency in the materials used as base or sub-base course material which over the years deteriorates leading to uneven settlement and potholing. Whatever the cause, the potholes need to be repaired because they are defects within the defect definition in the Routine and Winter Service Code which need to be addressed, often because they would otherwise cause a hazard or nuisance to road users. Given the wide if not infinite nature and causes of

potholing, one can then consider the application of the four requirements in Clause 60.1(11). Thus, there might have been comment in the Network Information that a particular trunk road within the area had been designed and built to standards, no longer considered acceptable, using materials which were known to deteriorate over a given period of years; a pothole which is attributable to such deterioration may well therefore fail to satisfy the first bullet point requirement. Similarly, a visual inspection or routine survey at the Contract Date might have revealed a major concentration of potholes in a particularly low-lying area of East Anglia criss-crossed by rivers, streams and drainage ditches; such potholing, whatever the causes, would fail to satisfy the second requirement. Even if not obvious from the Network Information or from a visual inspection or routine survey, an inherent design or construction defect in roads of the type covered within the Contract area which has received substantial publicity, for instance in papers in the New Civil Engineer magazine, might not overcome the third requirement. However, potholing after the Contract Date caused by an unknown and unpublicised type of design or construction defect might well satisfy the third requirement.

29. It is in the fourth requirement in Clause 60.1(11) that Atkins, to a substantial extent, attaches importance in its contentions about numbers of potholes:

> "The Provider encounters a defect in the physical condition of the Area Network which…
>
> • an experienced contractor or consultant would have judged at the Contract Date to have such a small chance of being present that it would have been unreasonable for him to have allowed for it."

There is nothing in the language which expressly suggests that the number of defects is a key or important element in the compensation event equation. Verbally, this requirement makes it extremely difficult to conclude that an excess number of potholes over and above a reasonable maximum number which could be considered to have been allowed for can form the basis for establishing the encountering of one or more potholes above that number as one or more compensation events. I agree with the arbitrator's observation that to "describe the excess volume or number as an occurrence with 'such a small chance of being present that it would have been unreasonable...to have allowed for it'" is "a misuse of words".

30. One therefore needs to ask whether as a matter of an overall businesslike or commercial interpretation this bullet point requirement must be read as meaning in effect that, where the number of potholes (in this instance) has exceeded the number which might be determined as being a maximum that an experienced contractor/consultant might reasonably have allowed for in its pricing, each and every pothole encountered above that number is a defect which such a contractor/consultant would not reasonably have allowed for.

31. This of course all presupposes that a dispute resolution tribunal can actually determine the number of potholes either on all roads within the Contract area or on individual roads all parts of roads or possibly seasonally which an experienced contractor/consultant would have judged in February 2008 to have had such a small chance of being present that it would have been unreasonable to have allowed for any number of potholes in excess of that number. There are some very real practical

difficulties. An experienced contractor/consultant might have reasonably allowed for there being 1000 potholes on the Colchester to Harwich section of the A12 and 500 on the Great Yarmouth to Lowestoft section of the A47. There could then be permutations on what actually happens with 1200 potholes on the A12 and 700 on the A47 having to be remedied over the life of the Contract: on Atkins' case the extra over of 200 and 200 would be payable. But what happens if 500 potholes only are encountered on the A47? Does one aggregate all the totals on the scores of different sections of road and compare the aggregate total with what is actually encountered or does one look at only those sections of road where the local total is more than what should reasonably have been allowed for? The adjudicator talked of looking at this on a month by month or year by year basis but that again that can produce immensely complex issues. Does one take each of thousands of chainages of roads and analyse for each chainage on a month by month or year by year basis what could reasonably have been allowed for? Although the arbitrator at Paragraph 7.10 suggested that "engineers on both sides would readily contrive some system to bring order and might well agree on a numerical basis from which to assess the "excess" number…of potholes over a given period or area", there is at least potentially an extremely difficult and probably artificial exercise to determine issues such as this.

32. I do not consider that there is any commercial logic or common sense in defining Clause 60.1(11) as enabling the volume of individual defects to be part of the equation. The concentration in the sub-clause is on "a defect in the physical condition" (a pothole in this instance) which would objectively be judged initially as having had such a small chance of being present that it would not reasonably have been allowed for within the pricing. There is of course something on which this fourth requirement can bite which is the cause and origin of the pothole in question. If for example the potholing is caused by exploding army ordnance, by a wholly unforeseeable deterioration of the carriageway attributable to design, materials selection or construction defects in the original road construction taken over by Atkins, by deterioration in the carriageway caused by unforeseeably bad or unseasonable weather which the carriageway was never designed or expected to cope with or by the failure of statutory undertakers' piping under or near the roads, it may well be that, subject to the other three requirements being met and to the evidence, the fourth requirement may also be met. It would then follow that the foreseeable number of potholes overall or on different sections of the roads in question is immaterial and the fact that substantially less potholes are encountered than reasonably envisaged at February 2008 would not prevent recovery for dealing with potholes caused by factors which are not excluded by the four bullet point requirements. It is noteworthy that the Adjudicator noted that no practical example of defects qualifying under Clause 60.1(11) was given to him by the Authority in argument; that is unfortunate because there are ready examples such as thoseset out above.

33. Commercially, one needs to remember that the Contract was, broadly, a lump sum as opposed to a re-measurement contract. The parties collectively take a risk that the defects to be addressed will be more or less in number and in terms of expense than the contract lump sums may allow for. Thus, the Authority may end up paying much more than it might have done through the lump sum if the defects turn out to be a lot less than the lump sum may have allowed for; conversely, Atkins would then make correspondingly additional and non-anticipated extra profit. The Authority may end up paying less if the defects to be addressed turn out to be more in number with

Atkins making less profit or incurring more cost than it had anticipated. There is nothing commercially unfair or indeed unusual in the parties taking these sorts of risk. Mr Mort says that this point is effectively circular because the parties agreed lump sums, subject to the compensation event provisions. With respect to him however, one can not seek to interpret the contract on a commercial basis without looking at the commercial reality overall; put another way in the context of this case, one can not support a broad inferential interpretation of Clause 60.1(11) by generally praying in aid commercial reality when the commercial commonsense supports or at least does not undermine each party taking commercial risks. On Atkins' side, there is no commercial risk and indeed there is only what some will call a "win/win" situation for Atkins in which it keeps the whole of the lump sum if the number of potholes is less than reasonably anticipated but it almost automatically gets additional payments if that number exceeds what is reasonably anticipated.

34. Mr Lewis for the Authority prayed in aid of the Authority's interpretation, more as a pointer than anything else, the notice provisions for compensation events, arguing that, if every pothole above an identifiable number is a compensation event, hundreds or possibly thousands of notices may well have to be given. Added to this are the requirements for quotations for each compensation event to be provided by Atkins when instructed and the need for each compensation event to be assessed by the Service Manager. In my judgment, this is a fair point but it is no more than a pointer and is certainly not determinative of the issue.

Serious Irregularity

35. Atkins through its Counsel argues (respectfully) that the arbitrator not only got the wrong answer but did not "have a keen grasp of what was being asked of him". It is said that he misunderstood and therefore did not deal with the nub of Atkins' Secondary Case which was and is that "a defect" can mean a pothole and, subject to satisfying the first three bullet point conditions in Clause 60.1(11) the fourth condition is satisfied if the pothole which is the subject matter of the actual or potential compensation event is one which exceeds the number of potholes which an experience contractor/consultant would have judged at the Contract Date to have such a small chance of being present that it would have been unreasonable for it to have allowed for that latest defect (exceeding that number).

36. I consider that it is very important that, where the Court is asked to conduct an exercise to determine whether or not in reality and substance an arbitrator has failed to deal with all the issues put to it within the meaning of Section 68(2) (d), the Court is not required to carry out a hypercritical or excessively syntactical analysis of what the arbitrator has written. This is particularly so where the arbitrator in question is not only eminent and highly respected in his field but also has immense legal experience in the relevant field of law concerned. In a clear and obvious case, of course the Court will find that the ground exists and can then move on to consider whether or not the circumstances merit interfering with the award.

37. It may be helpful if I approach the serious irregularity point from the reverse. The Court can only intervene under Section 68 in respect of any established irregularity "as has caused or will cause substantial injustice". For the reasons given above, I do not consider that in the result the arbitrator was wrong in his overall reasoning and

conclusion or that Atkins is right in its assertion as to what the Contract means. It follows that there is no substantial injustice even if an irregularity was established.

38. I do not however consider that any such irregularity has been established. Although there were references to other clauses, the vast bulk of the argument revolved around what the wording in Clause 61.1(11) meant as a matter of ordinary and/or commercial English. When one reads the Interim Award one can see that the arbitrator in Paragraph 3.1 appreciated the importance of defining the dispute upon which the decision was required; the reason for that was obvious because the Secondary Case as formulated was in relatively anodyne terms (as set out in Paragraph 3.2). I have no doubt from the written submissions to the arbitrator and from the Interim Award itself that Issue (ii) (as the arbitrator called it) was shorthand or a form of words for the issue as to whether the volume (or more accurately the number) of potholes was immaterial in the establishment of any entitlement under the clause. I have no reason to doubt that the arbitrator summarised the agreement that Issue (ii) was to be determined by the arbitrator. That is supported by the evidence which has been submitted. One needs to bear in mind that the clause albeit split into various requirements, is a composite clause. There can be no criticism in broad terms of the summaries of the parties' cases at Paragraphs 5 and 6 of the award. In particular Paragraph 6.2 provides what appears to be a reasonable summary of the Authority's case. The arbitrator seems to have addressed Issue (ii) from Paragraphs 7.9 through to 7.23. What for instance the arbitrator said in Paragraph 7.9 about the "excess" volume or number being "said to constitute the "defect" within sub-clause (11)" could be described, if one was being over-syntactical, as technically a misdescription of the argument. However, taken in the round, it is not necessarily a misdescription if what, as I strongly suspect was the case, the arbitrator was referring to the meaning of a "defect" within the context of all the wording in the sub-clause; put another way, what he probably was doing was summarising the point made by Atkins that the number of potholes comes into the equation in the determination of whether any given pothole is a compensation event. The arbitrator, rightly and properly, looked in some detail at the fourth bullet point requirement and it is clear, particularly from Paragraph 7.21, that he is analysing verbally whether the words ("such a small chance of being present that it would have been unreasonable for him to have allowed for it") can sensibly relate to a foreseeable or allowable number of defects as being something upon which a claim could be based.

39. Whilst some arbitrators might have highlighted some different reasoning and proceeded to analyse the wording in verbally a different way, it is simply impossible to say that that there has been any, let alone a serious, irregularity here in circumstances in which, based on the words which the arbitrator himself uses, he knew what the area of issue was, analysed the wording, reviewed the commercial context and came to the decision which he did.

Sections 57 and 70 of the Arbitration Act 1996

40. Section 70 sets up in effect a procedural bar to claims under Section 68 and 69 if the applicant or appellant has not first exhausted any "available arbitral process of appeal or review", and any "available recourse under section 57". There are therefore two aspects of the matter which need to be considered.

41. The first point is what if any "arbitral process of appeal or review" was available. The parties agreed on the use of the ICE Arbitration Procedure 1997, Part H of which deals with awards. Paragraph 21.3 states:

> "The Arbitrator may, within 28 days of the date of the award, correct an award so as to remove any clerical mistake, error or ambiguity, and may also make an additional award in respect of any matter which was not dealt with in the award."

It is unnecessary to consider the "mistake, error or ambiguity" part of this because it does not arise. There are however two functions of this paragraph and, verbally, the removal of a mistake, error or ambiguity is to be done by the Arbitrator within 28 days whilst there is no time limit for the making of an additional award. The use in the drafting of the word "may" twice underlines this. That is comprehensible because it leaves open to the arbitrator and indeed the parties the need to address later matters not dealt with in the issued award. Put another way, the issue of one award does not result in the resolution of matters in dispute which are not dealt with in that award. It follows therefore that there is no arbitral process of appeal or review in this context in the ICE Arbitration Procedure. There are some arbitration agreements and rules which do call for types of arbitral appeal so that the losing party can go to an arbitral appeal tribunal. That is not this case. There is no specific time limit as such on a party under this Arbitration Procedure to seek an additional award if the matter is not dealt with in an earlier award.

42. One then turns to Section 57 to consider what if anything could or should have been done by Atkins under those provisions. In the light of my findings above, there was nothing of any relevance for Atkins to apply to the arbitrator for, because the award was not deficient either in reasoning or in regularity. Even if I was wrong about that, at best Atkins would have been seeking additional reasoning from the arbitrator to make it clear that the arbitrator had, so to speak, "got the point". It is of interest that Section 57(3)(b) talks about the need for "an additional award in respect of any claim"; the use of the word "claim" is in contrast to the wording in Section 68(2)(d): "failure…to deal with all the issues that were put to it". A failure to deal with an argument supporting a claim does not necessarily mean that the claim was not dealt with in the award, although that may well be a matter of fact and degree if there was for instance only one argument supporting the claim. Furthermore, it could properly be said that Section 57(3) is inapplicable because the parties did have a procedural agreement as set out in Paragraph 21.3 of the Arbitration Procedure. In the light of these matters and of the **Torch** case, I do not consider that there has been any failure under Section 70(2) of the Arbitration Act 1996 which would debar Atkins from pursuing such remedies as it might have under Sections 68 and 69.

Permission to Appeal

43. It should be clear from the earlier parts of this judgment that I do not consider that the arbitrator was wrong. So far as permission to appeal is concerned, even less so do I consider that it could be said that he was "obviously wrong". There was, rightly, no real argument that the determination of the point in issue would substantially affect the rights of the parties and that the question was one which the arbitrator was asked to determine and, therefore, the threshold criteria set out in sub-sections 69(3)(a) and (b) of the Act are satisfied.

44. It becomes in one sense a technicality as to whether I give permission to appeal or not because I have felt it necessary to answer the issue as a matter of construction for the purpose of determining the application under Section 68. But for that application, I would have found that the question of law, that is the construction of Clause 61.1(11), did raise a question of "general public importance" because the Contract is not a one-off contract, it is widely used throughout the country, it incorporates the NEC3 conditions albeit somewhat amended and it raises an issue about potholes which are an increasingly widespread problem in times of economic downturn, government spending reviews and cuts and, not insignificantly, a perhaps seriously changing weather pattern which may impact on the causes of the problem. I felt that the statement by the Authority that there were no "formal claims" on the other contracts to be somewhat elliptical albeit I am certain that it was not intentionally misleading, because it is not clear what a "formal" claim is. I would however have refused permission because I do not consider, on balance, that the arbitrator's decision in the result was "at least open to serious doubt". The arguments suggesting that the decision was open to serious doubt included the very fact that Mr Bartlett QC decided the other way demonstrated that the countervailing arguments by Atkins merited serious consideration. But whilst of course they do merit such consideration, the arguments overall reveal that the issue was not open to serious doubt.

Decision

45. It follows from the above that Atkins' claims under Sections 68 and 69 are dismissed.