OUTER HOUSE, COURT OF SESSION

[2012] CSOH 19

P1000/11

OPINION OF LORD GLENNIE

in

Arbitration Application No.3 of 2011

SGL CARBON FIBRES LTD

Petitioners;

against

RBG LTD

Respondents:

A legal error appeal in terms of Rules 69 and 70 of the Scottish Arbitration Rules

---

Petitioners: Howie, Q.C., Richardson; MacRoberts
Respondents: Lake, Q.C.; Maclay Murray & Spens LLP

27 January 2012

Introduction

[1] This is a legal error appeal against the award of an arbitrator in terms of Rules 69 and 70 of the Scottish Arbitration Rules, which are set out in Schedule 1 to the Arbitration (Scotland) Act 2010. Leave to appeal on one point only was granted on 5 October 2011 (see [2011] CSOH 164).

[2] The appeal arises out of a building contract between the petitioners, SGL Carbon Fibres Ltd ("SGL" or "the Employer"), and the respondents, RBG Ltd ("RBG" or "the Contractor"), relating to certain works at SGL's premises at Muir of Ord Industrial Estate in Easter Ross. The works comprised the construction of an additional production line, the construction of civil and structural elements, and the installation of equipment, piping and ducts. The contract was in the form of an amended NEC 3 Engineering Construction Contract, June 2005, with Options C and W2.

[3] This is not the first time that disputes between these parties in relation to this contract have come before the courts (which may explain why they have not insisted on their right to anonymity in this appeal). A series of disputes between the parties led to two separate adjudications, in both of which the decision of the adjudicator was challenged in court. Notwithstanding points that might have been taken as to the satisfaction of certain suspensive conditions, the parties agreed to arbitrate and appointed Mr Derek Pye as arbitrator. Extensive pleadings and written submissions were exchanged, and these were followed by a "Legal Issues Hearing" in June 2011. Towards the end of July 2011 the Arbitrator issued a Part Award, which he corrected on 12 August 2011 following submissions from RBG. The corrections were on points of detail only.

[4] The corrected Part Award, to which I shall refer as simply as "the Award", dealt with a large number of points raised by both parties. The only point that arises for decision on this appeal is as to the onus or burden of proof relating to SGL's claim to recover sums allegedly overpaid to RBG during the course of the contract.

The contract

[5] The payment provisions in the contract are contained in clauses 50-53 of the Core Clauses (as varied in accordance with Option C), and in the definitions in clause 11 of the Core Clauses (also as varied). The payment provisions are, so far as relevant, as follows:

> "**50 Assessing the amount due**
>
> 50.1 The *Project Manager* assesses the amount due at each assessment date. The first assessment date is decided by the *Project Manager* to suit the procedures of the Parties and is not later than the *assessment interval* after the starting date. Later assessment dates occur
>
> - at the end of each *assessment interval* until four weeks after the *Supervisor* issues the Defects Certificate and

- at Completion of the whole of the works.

50.2 The amount due is

- the Price for Work Done to Date,
- plus other amounts to be paid to the *Contractor*,
- less amounts to be paid by or retained from the *Contractor*.

Any tax which the law requires the *Employer* to the *Contractor* is included in the amount due.

50.3 ...

50.4 In assessing the amount due, the *Project Manager* considers any application for payment the *Contractor* has submitted on or before the assessment date. The *Project Manager* gives the *Contractor* details of how the amount due has been assessed.

50.5 The *Project Manager* corrects any wrongly assessed amount due in a later payment certificate.

51 Payment

51.1 The *Project Manager* certifies a payment within one week of each assessment date. The first payment is the amount due. Other payments are the change in the amount due since the last payment certificate. A payment is made by the *Contractor* to the *Employer* if the change reduces the amount due. Other payments are made by the *Employer* to the *Contractor*. Payments are in the *currency of this contract* unless otherwise stated in this contract.

51.2 ...

51.3 If an amount due is corrected in a later certificate either

- by the *Project Manager* in relation to a mistake or a compensation event or
- following a decision of the *Adjudicator* or the *tribunal*,

interest on the correcting amount is paid. Interest is assessed from the date when the incorrect amount was certified until the date when the correcting amount is certified and is included in the assessment which includes the correcting amount.

52 Defined Cost

52.1 All the *Contractor*'s costs which are not included in the Defined Cost are treated as included in the Fee. Defined Cost includes only amounts calculated using rates an percentages stated in the Contract Data and other amounts at open market or competitively tendered prices with deductions for all discounts, rebates and taxes which can be recovered.

52.2 The *Contractor* keeps these records

- accounts of payments of Defined Cost

- proof that the payments have been made,
- communication about and assessments of compensation events for Subcontractors and
- other records as stated in the Works Information.

52.3 The *Contractor* allows the *Project Manager* to inspect at any time within working hours the accounts and records which he is required to keep.

53 The Contractor's Share

53.1 The *Project Manager* assessed the *Contractor's* share of the difference between the total of the Prices and the Price for Work Done to Date. The difference is divided into increments falling within each of the *share ranges*. The limits of a *share range* are the Price for Work Done to Date divided by the total of the Prices, expressed as a percentage. The *Contractor's* share equals the sum of the products of the increment within each *share range* and the corresponding Contractor's *share percentage*.

53.2 If the Price for Work Done to Date is less than the total of the Prices, the *Contractor* is paid his share of the saving. If the Price for Work Done to Date is greater than the total of the Prices, the *Contractor* pays his share of the excess.

53.3 ..."

[6] Key to the payment provisions is the Price for Work Done to Date ("PWDD"). This is defined in Clause 11.2(29) as follows:

> "The Price for Work Done to Date is the total Defined Cost which the *Project Manager* forecasts will have been paid by the *Contractor* before the next assessment date plus the Fee."

The PWDD is, as its name suggests, a cumulative figure, representing the accumulated cost or value of the work (I do not use those words in any precise sense) at each assessment date. I need not set out the definition of the Fee. The Defined Cost, together with the associated concept of Disallowed Cost, is defined in Clause 11.2(23) and (25) as follows:

"(23) Defined Cost is

- the amount of payments due to Subcontractors for work which is subcontracted without taking account of amounts deducted for
  - retention,
  - payment to the *Employer* as a result of the Subcontractor failing to meet a Key Date,

- the correction of Defects after Completion,
- payments to Others and
- the supply of equipment, supplies and services included in the charge for overhead cost within the Working Areas in this contract

and

- the cost of components in the Schedule of Cost Components for other work

Less Disallowed Cost

(25) Disallowed Cost is cost which the *Project Manager* decides

- is not justified by the *Contractor's* accounts and records,
- should not have been paid to a Subcontractor or supplier in accordance with his contract,
- was incurred only because the *Contractor* did not
  - follow an acceptance or procurement procedure stated in the Works information or
  - give an early warning which this contract required him to give.

and the cost of

- correcting Defects after Completion ..."

[7] Finally, I should note that Option W2 provides that both the Adjudicator (W2.3(4)) and the arbitrator (W2.4(3)) have the power to "review and revise any action or inaction of the *Project Manager*".

[8] As is noted in the commentary to the decision of Lord Menzies in *RBG* v *SGL Carbon Fibers* [2010] BLR 631 (a decision on one of the two adjudications between the parties under this contract), there have been few reported cases on these provisions. That case appears to be the only decision in which the payment mechanism in this form of contract has been considered, though the duties of the Project Manager in relation to the certification process of a contract in (or in similar terms to) the ECC 2 form (the predecessor of NEC 3) were considered in *Costain Ltd* v *Bechtel Ltd* [2005] EWHC 1018 (TCC) in the context of an application for an interim injunction restraining the Employer from instructing the Project Manager to exercise his functions other than impartially (and see also *Scheldebouw BV* v *St James Homes (Grosvenor Dock) Ltd* [2006] BLR 113 at paras.25-34). The NEC 3 form itself

is examined in The NEC3 Engineering and Construction Contract, A Commentary, by Brian Eggleston.

[9] In *RBG* v *SGL*, Lord Menzies summarised the arguments for SGL as to the effect of the payment mechanism in paras.7 and 8 of his judgment:

> "The contractual mechanism for assessing the amount due at each assessment date, and for payment thereof, is set out in clauses 50 and 51 of the NEC 3 Option C Contract. The amount due is stated to be the Price for Work Done to Date, ("PWDD") plus other amounts to be paid to the Contractor, less amounts to be paid by or retained from the Contractor. Clause 11.2(29) defines the PWDD as "the total Defined Cost which the Project Manager forecasts will have been paid by the Contractor before the next assessment date plus the Fee." Clause 11.2(23) and (25) give the definitions of Defined Cost and Disallowed Cost ... [He then sets out the relevant contractual terms]
> The assessment of what requires to be paid to the contractor at each assessment date therefore involves an exercise in calculating an accumulating total. Assessing the PWDD requires consideration of Defined Cost less Disallowed Cost. The amount is accumulating and the contract provides for correction of mistakes by the project manager. In determining the dispute referred to him, the adjudicator required to consider the accumulating balance, and decide whether the PWDD was correctly stated in the relevant invoices. ..."

It is clear, I think, that he accepted that description of the contract mechanism as accurate. In para.24 of his Opinion, which formed part of his own reasoning, he said this:

> "... The contractual mechanism which regulates the assessment of entitlement to be paid these sums [RBG's claim for payment under five invoices] is based on an accumulating PWDD. It was argued for [RBG] before the adjudicator that once agreed between the parties' quantity surveyors, PWDD assessed at any particular moment was fixed and could not be revisited. The adjudicator rejected this argument, for understandable reasons: given that entitlement to be paid in terms of these invoices is based on an accumulating total, and given the provision in the contractual mechanisms for subsequent correction of errors ... it is difficult to see how he could have reached another conclusion. However, the consequence of that conclusion is that in order to answer the dispute focussed in clause 3.12 of the notice of adjudication [i.e. whether RBG were entitled to be paid under the five invoices] the adjudicator required to revisit PWDD and consider whether it contained any elements of overpayment. That was necessary because [RBG's] entitlement to payment under these invoices depended on the accumulating total which was PWDD being accurately stated. The contractual mechanism provided that this was not to be fixed but was subject to review and correction ..."

That passage emphasises two important features of the contractual payment mechanism: first, that the right of the Contractor to payment depends upon an assessment each month of the accumulating PWDD; and, second, that that assessment is subject to continual review and correction. In other words, any assessment is only for the purpose of determining what sums are payable at any particular instalment date, and is not binding when it comes to consider future instalments or the final sum due.

Conduct of the parties as regards interim payments

[10] It appears from the Award that the payment mechanism was not operated entirely in accordance with the contract. In terms of clause 50.1, the amount due at each assessment date is to be assessed by the Project Manager. In this case it appears that the Project Manager did not play any significant role in the assessment of interim payments. RBG submitted its claim every month on the basis of prior agreement with SGL's quantity surveyor ("QS") as to the amount to be inserted in the claim. SGL would then pay that amount. The arbitrator describes the position in para.128 of his Award, in the context of a different issue (as to whether agreement by SGL as to the amount to be paid each month resulted in a binding agreement as to the amounts to which RBG was entitled):

> "... it was agreed that RBG would make an application 7 days prior to the Application Date (assessment date) which would then be reviewed by SGL and approved by SGL prior to RBG's formal submission by the Application Date in the 'approved' amount."

However, the arbitrator appears to have considered that nothing turned on this. He went on in para.130 to say that, whether or not this interpretation was correct, he was "completely unconvinced" that this arrangement had "any effect on the Core Clause 5 Payment provisions of the Contract". Any agreement was simply as to the amount to be paid by SGL "on an interim basis" (para.131). It did not displace or modify the Project Manager's obligation to assess the amount due or to correct any wrongly assessed amount in a later certificate (para.134). He explained the position clearly in paras.137, 139 and 140:

> "137 I do not necessarily say that the Parties on a monthly basis did not reach some form of agreement which might involve some element of

> compromise on both sides but if any such agreement was reached it can contractually only have been in respect of what was paid in each monthly assessment the same way as would an assessment made by the *Project Manager*.
>
> 139 The situation which prevails is, therefore, that:-
>
> - The amounts paid in each monthly assessment are subject to correction if found to have been wrongly assessed.
> - The amount due in so far as this arbitration is concerned is to be established as set out in Clauses 50, 51 and 52 of the Contract.
>
> 140 In respect of SGL's Issue 1, I find:-
>
> 1. Contrary to RBG's assertions ... there could not be a binding agreement or series of binding agreements between the Parties as to the sums which the Respondent [RBG] is entitled to be paid in respect of work in the valuation periods down to 31 December 2008 in light of the terms of the Contract. ..."

In other words, even though a different mechanism was operated by the parties, and the amounts payable each month had been agreed by SGL's QS in advance of RBG's claim being submitted and paid, any agreement so reached was only an agreement as to the amount of the interim payments to be paid in any particular month, on the basis of an assessment of PWDD, and such interim payments were susceptible to correction subsequently under clause 50.5 if wrong.

The Award

[11] SGL were claimants in the arbitration and RBG were the respondents. SGL claimed *inter alia* that they had paid more than was due to RBG under the contract, and sought to recover the amount overpaid. RBG, for its part, claimed that further sums were due. These cross-claims gave rise to Issues considered by the arbitrator in his award. The question of where the onus of proof lay was asked in SGL Issue 5: was it for SGL to show that a given sum of money claimed by RBG at some point during the course of the contract for a given piece of work and paid by SGL was too much, or did RBG have to show that the sum was well-merited? RBG Issue 1 asked effectively the same question: where did the onus of proof lie where SGL considered that sums paid by them to RBG included an element of overpayment?

[12] The arbitrator dealt with these issues in paras.210-280 of his Award. After considering the various arguments advanced by the parties, he found, in para.278, that

the onus of proof (a) lay on SGL to prove its case that any sums paid to RBG on the basis of payment certificates issued by the Project Manager (or comparable agreement between quantity surveyors) amounted to overpayment; but (b) lay on RBG to prove its entitlement to the further sums which it counterclaimed. There was, in fact, no dispute about the second of these findings; RBG do not challenge his decision on this point. The first point was, however, hotly disputed.

[13] The arbitrator's reasoning on this first point was, in summary, as follows. The general principle was that "he who asserts must prove" (para.219). On this basis, it would be for SBG to prove its claim to be entitled to be reimbursed monies it had already paid to RBG (para.220). Although payments made during the course of the contract were only interim payments, susceptible to correction if wrong, that was not sufficient to displace the conventional legal burden of proof which lay on SGL (para.227). He rejected SGL's argument that, even if the initial burden lay on them, that burden was displaced by the terms of the contract in terms of which it was for RBG to justify its entitlement to payment. He went on to say this (at paras.239-243):

> "239 It would be a strange situation if a process which SGL had agreed to and in which it participated and resolved on a monthly basis to the extent that it made payments it had agreed with RBG, that RBG would now have to prove again the amounts which SGL had agreed to each month in a situation where SGL is the Claimant in the arbitration.
>
> 240 This does not mean that these amounts cannot be corrected by me as the *tribunal* if they are later proved to be wrong, but it is SGL's burden to prove this in respect of assessments previously agreed by the Parties' respective quantity surveyors and paid by SGL.
>
> 241 Once the two quantity surveyors had reached their agreement as to the amount of each interim application it appears, but I make no finding on it, that this agreed figure was then formally applied for by RBG and was paid by SGL. I cannot see there was anything in the Contract to prevent [the] *Project Manager* from making his own assessment following the QS's agreement and in fact the Core Clauses and Main Option Clauses at section 5 of the Contract remained in place to permit such action.
>
> 242 Even though I have decided that the quantity surveyors' arrangements did not constitute a binding agreement I do consider that the process was sufficient to discharge RBG's obligation to justify its claim as might be said to be its burden in order for the matter not to qualify as a Disallowed Cost under clause 11.2(25).

243 That does not mean that SGL cannot now seek to prove the contrary, but it has the burden of doing so at least in so far as its claim is concerned."

[14] The arbitrator went on to consider the burden of proof in the counterclaim for additional sums (which, as I have said, he held to lie on RBG) and then returned to consider the burden of proof in relation to SGL's claim. So far as concerned interim payments, he took the view that a party who wished to challenge the amount certified by the Project Manager (had the contractual mechanism been followed) would have had to do so by adjudication, and the burden on proof in that adjudication would have been on the party seeking to establish that the certification was wrong. In paras.266-278 he went on to say this:

"266 The situation which prevails in this arbitration is that RBG has already 'proved' its claim at each assessment date to the extent that SGL through its quantity surveyor, rather than the *Project Manager*, has accepted and paid the PWDD.

267 The apparent lack of involvement of the *Project Manager* in the payment process is perhaps explicable by the fact that the *Project Manager* is an employee of the *Employer* but this is possibly a matter for later in this arbitration process.

268 Nevertheless, SGL's agreement of the PWDD, although non-binding, at each assessment date, should not put RBG in a worse position than it would have been in had the *Project Manager* actually carried out the assessment process. In other words, SGL would bear the burden of proving over-certification.

269 It seems only right, therefore, that the Party wishing to challenge the non-binding agreements of the amount due should bear the burden of proving that the amount or amounts are incorrect. In this case that Party is SGL.

270 If such a challenge had been made during the course of the works by SGL to the *Project Manager*, it seems logical that even on the submission of prima facie evidence that something was wrong the *Project Manager* would have requested sight of the Contractor's accounts and records to verify his previous assessment.

271 This perhaps logical and unsurprising given that SGL is not actually in possession of any of the necessary accounts and records which might support its assertion of an incorrect measurement.

272 Following the same logic, therefore, for RBG to claim further payment in respect of its counterclaim it will bear the burden of proving the new higher PWDD.

273 Of course, because the new higher PWDD is a cumulative amount, it naturally includes all elements of Defined Cost from the beginning of the Contract.

274 Thus, it appears at first sight that despite my decision in respect of the SGL Claim, that SGL bears the burden of proving any overpayment of the PWDD previously paid, it now appears that RBG will in any event effectively bear the burden of proving that there has been no overpayment.

275 Nevertheless, as a matter of practicality, it appears to me that RBG may already have justified its claim to SGL up to the level of the PWDD already paid in its interim agreements with SGL's quantity surveyor.

276 As to whether RBG wishes to rely simply on that level of substantiation in this arbitration as evidence to substantiate the PWDD it now seeks is a matter solely for RBG itself.

277 This does not mean that these amounts cannot be adjusted by me as the *tribunal* should I find grounds which justified items being considered as Disallowed Cost.

278 I find that the onus of proof in this arbitration:-

1. lies on SGL to prove that any money previously paid to RBG is too much;

2. lies on RBG to prove its entitlement to the cumulative amount of the PWDD which provides the basis for its counterclaim."

The arbitrator went on to emphasise that this dispute related only to SGL's claim to recover sums allegedly overpaid. SGL did not dispute that the burden was on them to prove (if it wanted to) that extensions of time granted during the contract were excessive.

[15] I have set out these passages from the Award at some length because they appear to me to show plainly the arbitrator's reasoning as regards the onus or burden of proof. That reasoning can, I think, be summarised in this way:

(a) the informal arrangements in terms of which SGL's QS approved the amounts to be paid by way of interim payments did not alter the legal position from that which would have obtained had the Project Manager assessed the amount due at each assessment date in accordance with the contract;

(b) any agreement reached (or assessment made) as to the amounts to be paid on each assessment date was agreement or assessment "on an interim basis only" (para.237), i.e. was an agreement or assessment for the purpose of deciding the amount to be paid then and was not a final and binding determination of the PWDD as at that assessment date;

(c) in terms of clause 50.5, the Project Manager may correct in a later assessment any amount wrongly assessed in an earlier one, but the burden of proof at that stage lies on the party arguing for such correction;

(d) accordingly, if the Employer (SGL) seeks to contend that at any stage the PWDD has been assessed in an amount higher than that at which it should have been assessed, it bears the burden of persuading the Project Manager that this is the case;

(e) similarly, the burden lies on the Contractor (RBG) if it wishes to persuade the Project Manager that the PWDD at any time has been assessed in an amount lower than that at which it should have been assessed;

(f) that same burden of proof carries through to the final accounting and to any claims made in adjudication or arbitration, where the adjudicator and arbitrator respectively have power to review and revise the actings of the Project Manager.

In effect, the non-binding agreements or assessments as to PWDD for the purpose of assessing interim payments gave rise to a rebuttable presumption that the sum so agreed or assessed at each time was correct. The burden lay on the party seeking to assert otherwise.

Submissions

[16] In developing his arguments on behalf of SGL, Mr Howie QC pointed to the role played by "Disallowed Cost" in the definition of PWDD. PWDD was "the total Defined Cost which the Project Manager forecasts will have been paid by or retained from the Contractor". "Defined Cost" excluded "Disallowed Cost". "Disallowed Cost" included (and therefore "Defined Cost" excluded) cost which the Project Manager decides "is not justified by the Contractor's accounts and records". The Contractor's records are those which it required to keep in terms of clause 52.2 of the Contract. Accordingly, any assessment of PWDD (on which the Contractor's right to payment

was founded) required the Contractor to show that the sums claimed by it were justified by its accounts and records. The burden lay on the Contractor throughout.

[17] Building on this, Mr Howie argued that the arbitrator made, in effect, two separate but overlapping errors of law in reaching his conclusion that the burden was on SGL to establish that it had overpaid.

(i) First, he failed to give effect to the terms of the contract which required the Contractor, in respect of each interim payment, to show that the sums claimed by it are justified by its "accounts and records" and therefore fall to be included within Defined Cost (and therefore PWDD) rather than Disallowed Cost. The onus lay on the Contractor to justify the accumulated PWDD throughout.

(ii) Secondly, he wrongly attached significance to the actings of the parties in respect of the contractual mechanism for payment, to the extent of considering that the agreement or assessment of interim payments in some way overrode the provisions placing the burden of proof throughout on the Contractor.

The role of the Project Manager was to assess the PWDD at each assessment date and, on the basis of that assessment, to calculate the amount payable as an interim payment at that date. On every subsequent assessment date he was required to undertake the same exercise, and to correct in that subsequent payment certificate any amount which had been assessed previously if he was of the opinion that that earlier assessment was wrong. The word "wrongly" in clause 50.5 assumed that there was a right answer, and it was part of the task of the Project Manager at each assessment date to ascertain the correct figure for PWDD justified by the Contractor's accounts and records. It was for the Contractor to show that the PWDD was justified by those accounts and records - such part of his claim as was not shown to be justified was "Disallowed Cost" and therefore not part of "Defined Cost" or PWDD.

[18] For RBG, Mr Lake QC stressed the distinction between the question of where the onus lay under the contract and the question of who had the burden in the arbitration. There was an important distinction between the two. The issue determined by the arbitrator was where the burden of proof lay in the arbitration. He determined, correctly, that it lay on the party seeking to contend that the Project Manager was wrong. SGL's claim in this arbitration depended on it proving that it had overpaid. That required it to show that the amount assessed by the Project Manager to be the

PWDD was wrong. If no evidence was led, SGL would fail to show that and its claim would fail. That indicated that it bore the burden of proof: see Dickson, The Law of Evidence in Scotland (1887) at para.25. It was clear from clause 50.5 that unless it was found to have been wrong, the previous assessment stood. The arbitrator stepped into the shoes of the Project Manager, with the power to review or revise his actions or inactions. Accordingly, what had been done by the Project Manager was the starting point for the arbitrator's consideration of the matter. It was for the party asserting that an assessment made by the Project Manager was wrong, to persuade the arbitrator of that fact. It would be contrary to business sense for the payment provisions to operate in such a way that when the stage of arbitration was reached, all the previous assessments and certificates flew off and the parties were required to start again from scratch.

[19] Looking at the position under the contract, Mr Lake argued that the obligation on the Project Manager to carry out an assessment was mandatory. It did not depend on the Contractor making an application for payment. In this connection, Mr Lake referred to Mr Eggleston's Commentary on the NEC 3 form at p.190. It was in the interest of the Contractor to keep good records, but there was nothing in the payment provisions to indicate that any onus was placed on him. It was a matter for the Project Manager to decide if the accounts and records did or did not justify the sums claimed. Accordingly the contractual burden lay neither on the Employer nor on the Contractor, but on the Project Manager. But the burden in the arbitration, as in litigation, lay on the party seeking to establish that the Project Manager had got it wrong.

[20] In a brief reply, Mr Howie accepted that the question of onus under the contract was conceptually distinct from that of onus in the arbitration. But he submitted that the former would often dictate the latter. It was for the Contractor to show that the amounts claimed were justified by his accounts and records. Turning to the question of correcting a previous certificate, the power to correct was unqualified; the Project Manager should correct anything that was "not the right number". It was not the function of the Project Manager to prove or accept anything. He acted impartially and independently, holding the balance between the Employer and the Contractor. In that exercise the burden lay on the Contractor to prove what was due, to justify the PWDD from his accounts and records. In an arbitration, it was not necessary to attack pre-

existing certificates; the tribunal started from scratch, and the onus remained on the Contractor from beginning to end.

Discussion

[21] It is trite that, as a general rule, "he who avers must prove". That maxim does not necessarily provide the answer in all cases, but it is a good starting point for any consideration of the issue. In a contract case, the incidence of the burden of proof will often depend upon the terms of the contract. Although Mr Lake was right to emphasise that the question of onus under a contractual payment mechanism is a question which is separate and distinct from that of onus in arbitration or litigation, it seems to me that the one will usually inform the other. This is such a case. Ultimately, however, both in arbitration and litigation, it is necessary always to ask the question: who has to prove what?

[22] The contract payment mechanism here was not operated to the letter. The parties reached agreement as to the amount of each interim payment without the Project Manager's involvement. But the arbitrator has found, and this has not been challenged, that the parties are (and should be) in no better or worse a position by reason of their having operated a different mechanism for deciding how much to pay at each assessment date. In those circumstances, the issue in this case can properly be addressed, as the arbitrator addressed it, by considering the position as it would have been had the contract payment mechanism been followed.

[23] Certain features of the contract payment mechanism are clear. The Project Manager is responsible for assessing the amount due at each assessment date (clause 50.1) and issuing a payment certificate (clause 51.1). That exercise involves him assessing the accumulating total of the PWDD, which includes the Defined Cost and excludes the Disallowed Cost. The sum due at the relevant assessment date is the sum which he certifies. Any assessment made by the Project Manager, and any certificate issued by him, is capable of being corrected by a subsequent assessment and certificate (see clause 50.5 and *RBG* v *SGL* per Lord Menzies at para.24, *supra*).

[24] It does not follow from the non-binding nature of the Project Manager's assessment and payment certificate that they are to be ignored when it comes to working out the final account, or when one or other party seeks to recover more or recover back sums already paid. In terms of clauses 50 and 51, the sum assessed and certified by the Project Manager becomes due at the particular assessment date.

Unless corrected by him by a subsequent assessment and certificate (under clause 50.5), or by an adjudicator or arbitrator exercising powers of review and revision (under Option W2), that sum, and only that sum, remains the sum which was due at that date, and the cumulative PWDD on the basis of which that sum was certified remains the cumulative PWDD as at that date. That sum certified to be due at any particular assessment date is, and remains for the purpose of future calculations unless corrected by the Project Manager (or the adjudicator or the arbitrator), the sum which is to be regarded as having been due at that assessment date. Any party wishing to have a prior assessment corrected must at least bear the burden of persuasion.

[25] As a matter of practice, I suspect that it is unlikely that the Project Manager will re-open an earlier assessment and certificate unless asked to do so by one or other party. Unless challenged, his assessment and certificate for one assessment date will normally be the basis for any subsequent assessment. This, I think, is how the arbitrator viewed the matter: see paras.253 and 257. This does not directly affect the question where the legal burden lies, but it reflects the reality of the fact that a payment certificate remains binding as to the amount due at the relevant assessment date unless and until it is corrected.

[26] When it comes to arbitration (and, in terms of Option W2, adjudication is no different), the arbitrator has power to review and revise any actions or inactions by the Project Manager. He can therefore correct mistakes in any assessment and payment certificate. It follows that he can open up the whole question of PWDD, Defined Cost and Disallowed Cost and reach conclusions different (perhaps very different) from those reached by the Project Manager. To do so he will require to see the accounts and records kept by the Contractor under clause 52.2. But unless and until he has corrected the Project Manager's payment certificate, that certificate stands. In those circumstances, it seems to me, in agreement with the findings of the arbitrator and the submissions of Mr Lake, that the onus must be on the party seeking to persuade the arbitrator to depart from the assessment of PWDD made by the Project Manager. In so far as the Contractor (RBG) seeks further payment, the burden is on him. In so far as the Employer (SGL) seeks to argue that the Project Manager's assessment is too high, it must shoulder the burden.

[27] Mr Howie laid great emphasis on "Disallowed Costs" being cost which was not justified by the Contractor's accounts and records. His argument really came to this: that unless the Contractor justified the costs claimed by him, they were Disallowed

Costs and his claim would necessarily fail. This is a powerful argument, but it seems to me that it ignores the process of assessment and certification which has taken place at each assessment date throughout the life of the contract. That process has led to payment certificates which are binding unless corrected. More specifically, the Disallowed Cost is that which the Project Manager decides is not justified by the Contractor's accounts and records. Again, the Project Manager has made a decision at each assessment date, and that decision stands unless corrected. In the arbitration, the focus of any enquiry must focus not on the question of what happens if no records are produced to the Project Manager in support of the claim, but on the question who has the burden on showing that the Project Manager's decision, assessment and payment certificate should be corrected. For the reasons which I have endeavoured to give, which are substantially those given by the arbitrator, I consider that the burden lies on the person seeking to show that the certificate is wrong. In the case of the counterclaim in the arbitration, SGL has the burden of showing that the assessments made by the Project Manager were too high, with the result that it has paid too much.

Disposal

[28] In the result, for the reasons set out above, I shall dismiss the appeal and pronounce an interlocutor confirming the Award.