OUTER HOUSE, COURT OF SESSION

[2021] CSOH 7

CA78/20

OPINION OF LORD CLARK

In the cause

GABRIEL POLITAKIS

Pursuer

against

JOHN WOOD GROUP PLC

Defender

Pursuer: Party
Defender: Ellis QC; MacRoberts LLP

26 January 2021

Introduction

[1] In this action, the pursuer seeks: (i) declarator that a Part Award dated 11 December 2014, made in an arbitration, is null and void; (ii) an order for accounting, and (iii) damages under various heads. The parties to the arbitration were Apollo Engineering Limited ("Apollo") and James Scott Limited ("Scott"). The pursuer, who largely owned and ran Apollo, claims that the defender is responsible for the liabilities alleged against Scott. The defender contends *inter alia* that the declarator sought is not competent, that the defender is not liable for the alleged liabilities of Scott, that the pursuer's averments are irrelevant and

lacking in specification and that the obligations upon which the monetary claims are based have been extinguished by prescription. The case called before me for a debate.

Background

[2] In giving this summary of the background, I have drawn from the pleadings and also from the narrative in a previous decision of the Inner House (*Apollo Engineering Limited* v *James Scott Limited* 2009 SC 525). The pursuer, Gabriel Politakis, holds 90% of the shares in Apollo. His wife holds the remaining 10%. The pursuer was the managing director of Apollo. The company's business included the design and construction of specialist equipment for the petrochemical, pharmaceutical and processing industries. In 1990, Apollo entered into a sub-contract with Scott. Scott was itself a sub-contractor to the main contractor, Costain Taylor Woodrow Joint Venture ("CTW"). The principal employer was the Property Services Agency ("PSA") on behalf of the Secretary of State for the Environment. Scott was to provide mechanical and electrical services in respect of Facility 210 at RNAD, Coulport, which involved the construction of a floating jetty to be used for explosives handling for nuclear submarines. The jetty was to be U-shaped, constructed out of concrete, with an internal steel structure. In terms of its sub-contract with Scott, Apollo was to supply specialist fabrication and installation services in relation to pipe-work required in the construction of the jetty. Some of the pipe-work was to convey toxic waste from the submarines. The value of the work was almost £4m. It was initially estimated that it would take 18 months to complete the work, later estimated at 2 years.

[3] Disputes arose between Apollo and Scott and, by the end of September 1991, their sub-contract was at an end. Work had commenced on site in spring 1990 and Apollo had fabricated much of the required pipe-work over the succeeding months into the summer

of 1991. Apollo had encountered substantial cash flow problems as a result of alleged delays and disruptions to the works caused by Scott. In August 1991, Scott purported to vary the sub-contract by removing the installation element. In the following month, Apollo went into liquidation and that, in turn, led to the termination of their involvement in the sub-contract on 11 September 1991. Scott then raised proceedings in the Court of Session for recovery of cupro-nickel materials, which Scott maintained belonged to it but which were in Apollo's possession. Apollo lodged a counterclaim for £2.3m, claiming that Scott had failed to pay Apollo for work completed and was liable in damages for failing to provide the necessary drawings to enable Apollo to carry out the contract works in time. Apollo maintained that Scott had repudiated the contract. The main feature of Apollo's claims seems to have been that it had incurred substantial expense in sourcing the necessary raw materials, notably specialist metals, with which to build the pipe-work.

[4] On 24 June 1993, the court sisted the action pending the outcome of an arbitration in terms of the sub-contract. In early 1996, an arbiter (using the term from that time) was appointed. In July 1998, the arbitration was sisted. The liquidation of Apollo was then sisted in about 2002, confirmed by the Inner House in December 2003. The application to sist the liquidation followed the agreement of a Creditors Voluntary Arrangement ("CVA"). As a result of sisting the liquidation, directors of Apollo were able to continue the company's dispute with Scott. In July 2005, the parties executed a joint deed of appointment of a new arbiter, John Spencely. The pursuer refers to this as "the Spencely Arbitration". In that arbitration, Apollo sought a declarator that Scott had repudiated the contract in terms of a letter dated 30 August 1991. Apollo then made a series of craves for damages under various heads including £881,827 (delay and disruption); £715,954 (fabricated material on site); £691,748 (unfabricated material on site); £273,639 (fabricated but undelivered

material); £510,917 (preliminaries); £552,567 (loss of profit - measured works completed by others); £748,949 (loss of profit - increased scope of subcontract works); £693,070 (loss of profit - acceleration); and £30,644 (site accommodation).

[5] After sundry procedure in the arbitration, a 5-day debate was allowed. Both parties had legal representation. The arbiter produced a draft opinion on 28 March 2007. Following upon further written observations from the parties, on 18 May 2007 this was issued as a "Final Draft Opinion". The arbiter decided to sustain the motion on behalf of Scott for dismissal of all of Apollo's craves for damages (apart from the claim for £30,644 regarding retained site accommodation). The claims which were dismissed included the sums sought by the pursuer in Craves 4, 5, 6 and 7 in the present action. The arbiter did not dismiss the claim for declarator in relation to repudiation. He set out detailed reasons for his decision. His Final Draft Opinion became the subject of a stated case for the opinion of the Court of Session under section 3 of the Administration of Justice (Scotland) Act 1972. Apollo also brought a judicial review petition challenging the actings of the arbiter and seeking reduction of his decision. The application for judicial review was refused on 7 March 2008 (*Apollo Engineering Limited* v *James Scott Limited* [2008] CSOH 39) and a reclaiming motion by Apollo was refused on 21 May 2009 (reported at 2009 SC 525). Following objections that the pursuer had no right to represent Apollo, the stated case was dismissed by the Inner House on 27 November 2012 on that ground (A*pollo Engineering Limited* v *James Scott Limited* [2012] CSIH 4). The merits of the stated case were not addressed by the court. The Inner House refused leave to appeal to the UK Supreme Court. Apollo sought leave from the UKSC, which held that Apollo could competently appeal without leave from the Inner House (A*pollo Engineering Limited* v *James Scott Limited* [2013] UKSC 37). However, in November 2014, having considered whether the case raised a point of general public

importance, the UKSC refused permission for the pursuer to represent Apollo and dismissed the appeal. Thereafter, the arbiter issued a Part Award, in terms of his Final Draft Opinion, on 11 December 2014.

[6] The sist of the liquidation was recalled by the Court of Session on 14 May 2015. As the directors were no longer in control of Apollo they lost the ability to pursue claims on behalf of the company. The pursuer as an individual attempted to reclaim the recall of the sist but his reclaiming motion was refused. The pursuer also brought an action before Edinburgh Sheriff Court against Mr Spencely seeking *inter alia* a declarator that the arbiter had acted dishonestly and in bad faith. Scott was allowed to enter that process as a party minuter. The action was dismissed *inter alia* on the basis that the action was incompetent and the averments of dishonesty or bad faith were irrelevant and lacking in specification, and the pursuer's appeal against that decision failed (*Politakis* v *Spencely* [2017] SAC (Civ) 19). Leave to appeal further was refused. The pursuer also brought proceedings against the Royal Bank of Scotland plc and again Scott became a party minuter. In that case, the Sheriff Appeal Court did not consider it necessary to consider the issue of the relevancy of averments of alleged fraudulent conduct because the case was irrelevant on other grounds (*Politakis* v *Royal Bank of Scotland,* Sheriff Appeal Court, 3 August 2018).

[7] Scott was a company within the AMEC Group of companies. In October 2017, the present defender purchased the entire share capital of AMEC Foster Wheeler plc which was the ultimate holding company of Scott.

Procedural history of the present action

[8] The Initial Writ was lodged at Ayr Sheriff Court in December 2019. On 7 August 2020, the case called for a debate. The sheriff granted a motion by the pursuer, made at the

outset of the diet of debate, to remit the case to the Court of Session. Thereafter, the pursuer enrolled a motion on 24 August 2020 for the court to allow a proof before answer and allow an amendment to the pleadings, the primary purposes of the amendment being to incorporate Apollo as an additional pursuer and to incorporate two additional defenders, namely AMEC Foster Wheeler Ltd, formerly AMEC Foster Wheeler plc, and Scott. The defender lodged opposition to that motion and enrolled a motion to remit the cause to the commercial roll. The pursuer did not lodge any Minute of Amendment and no motion to amend was moved. On 24 September 2020, on the opposed motion of defender, the commercial judge remitted the cause to the commercial roll, allowed a debate and identified the issues for debate.

The pleadings

[9] As the case was remitted from the Sheriff Court, the pleadings (and the parties' notes of argument and submissions) refer to the craves sought by the pursuer, rather than conclusions. The Closed Record is 113 pages in length. I have taken its contents into account and there is no need to rehearse the averments in detail, although I shall refer to certain passages where appropriate. In brief summary, the pursuer avers that Scott had transferred its "trade and undertaking" to "AMEC", resulting in the legal obligations of Scott being transferred. The defender is said to have taken on that liability when the defender took over AMEC Foster Wheeler plc in 2017. In any event, the defender was said to be jointly and severally liable for "AMEC/Scott's" delictual liability to the pursuer. The defender is said, as a consequence of the takeover, to now be liable for AMEC and Scott having defrauded Apollo, and as such the pursuer. The mere fact that the defender is now refuting AMEC/Scott's delictual liability, which the defender allegedly acquired through

acquisition of AMEC's shares, was said to amount to the defender committing a delict through continuation of the wrong committed by AMEC and obtaining unjustified enrichment at the expense of the pursuer. The defender admits that it became the ultimate holding company of Scott in about October 2017, but that it did so by purchasing the entire share capital of AMEC Foster Wheeler plc. The defender states that the purchase was in exchange for shares in the defender following an offer, shareholder approval and a Scheme of Arrangement under Part 26 of the Companies Act 2006, approved by the High Court in England on 5 October 2017. The pursuer's pleadings set out in detail the history of the sub-contract between Apollo and Scott and the terms and conditions (including the form of the agreement, the priced bill of quantities, the sub-contract tender enquiry document, the main contract and appendices, incorporated correspondence, bill rates and delivery dates). Images of a number of documents are contained in the pleadings.

[10] The pursuer seeks a number of remedies in the present action, on various bases. He seeks *inter alia* a declarator that the arbiter's decision is null and void. He seeks an accounting of sums said to have been ascribed to Apollo by the PSA and embezzled by Scott. He also seeks payment from the defender for alleged debts of Scott on the basis that the defender is liable for AMEC/Scott's debt and alleged fraudulent actions. The pursuer avers that his claims here are almost identical to Apollo's claims totalling £5.1m in the Spencely Arbitration. The pursuer's contentions are summarised in what he has expressed as his pleas-in-law, in the following terms:

> "1. The Arbiter, Mr John Despenser Spencely CBE, having abused his position of trust when by his Part Award he colluded with AMEC/Scott's (succeeded by the Defender) fraudulent misrepresentations of Apollo's case where in bad faith dismissed all of the Arbitration financial craves totalling £5.1m as irrelevant, not on any issues of substantive law, but on the basis of contrived and non-existent methodology issues which he then declared flawed so that he could then proceed to falsely pretend each and every crave was irrelevant as condescended upon, and as a

consequence having caused substantial injustice and substantial financial loss to the Pursuer, the Court is respectfully invited to declare said Part Award as null and void or at the very least be reduced in its entirety and decree should be granted in terms of Crave 1.

2. The Defender being liable for AMEC/Scott's delictual liability and as such being bound to account to the Pursuer for the payments ascribed to the Pursuer by the Principal Employer in compensation for part of the Pursuer's loss and damage caused by delays to design by the Principal Employer which the Defender has taken over from AMEC/Scott but by which the Defender has unjustifiably enriched itself by not passing on to the Pursuer as condescended upon in this action, decree should be granted in terms of Crave 2.

3. *Separatim,* the material delay and disruption of the contract works having been caused by AMEC/Scott's breach of contract, all as condescended upon, in consequence of which the claimants have suffered loss and damage as a result, they are entitled to reparation therefor and the sum claimed of £881,827 (less any sums recovered from those ascribed to Apollo) from the Defender, being liable for AMEC/Scott's delictual liability as the successor of AMEC/Scott, being reasonable decree should be granted in terms of Crave 3.

4. The Defenders, having taken over AMEC/Scott delictual liability, being due to make payment to the Pursuer in respect of sums due by AMEC/Scott in respect of contract works executed for Scott by Apollo as at 30th August 1991 and valued in accordance with the contract, as condescended upon here and in the Arbitration Closed Record, and having through dishonest obfuscations and fraudulent misrepresentations of Apollo's Arbitration Pleadings and supporting documents AMEC/Scott aided and abetted the Arbiter to sustain their calls to dismiss Arbitration Craves 2(ii)(a), 2(ii)(b), 2(ii)(c), 2(ii)(d) on the false pretences these craves were irrelevant, decree should be granted in terms of Crave 4.

5. The Defenders, having taken over AMEC/Scott delictual liability, being due to make payment to the Pursuer in respect of Loss of Profit resulting from repudiation on 30th August 1991 of the Sub-Contract works measured and valued in accordance with the parties' contract as at 30th August 1991, where, as condescended upon here and in the Arbitration Closed Record, AMEC/Scott through dishonest obfuscations and fraudulent misrepresentations of Apollo's Arbitration Pleadings and supporting documents, aided and abetted the Arbiter to sustain the Defenders calls to dismiss Arbitration Crave 2(iii)(a) on the false pretences it was irrelevant, decree should be granted in terms of Crave 5.

6. The Defenders, having taken over AMEC/Scott delictual liability, being due to make payment to the Pursuer in respect of Loss of Profit due to Apollo by AMEC/Scott resulting from repudiation on 30th August 1991, where, as condescended upon herein and in the Arbitration Closed Record, AMEC/Scott having acknowledged that Apollo would have performed additional works, decree should be granted in terms of Crave 6.

> 7. The Defenders, having taken over AMEC/Scott delictual liability, being due to make payment to the Pursuer in respect of Loss of Profit due to Apollo by AMEC/Scott resulting from repudiation on 30th August 1991, where, as condescended upon herein and in the Arbitration Closed Record, AMEC/Scott entered into an acceleration agreement with the principal employer in relation to Apollo's Installation Scott had removed from Apollo to perform themselves but which Apollo would have otherwise performed under said acceleration agreement resulting in substantial profits to Apollo, decree should be granted in terms of Crave 7.
>
> 9. [*sic*] The Defenders, having taken over AMEC/Scott's delictual liability where AMEC/Scott having retained property belonging to Apollo, as condescended upon herein and in the Arbitration Closed Record under Crave 2(iv), and having failed to make payment therefor, decree should be granted in favour of the Pursuer for the sum claimed in terms of Crave 8 against the Defenders who took over AMEC/Scott."

[11] The following extracts from the pleadings identify the nature of the main allegations made in relation to the arbiter and his findings:

> "The Defender's predecessor have had 30 years to arbitrate its debt to Apollo in an honest fashion but chose instead to egregiously frustrate the two Arbitrations, and in particular the Spencely Arbitration, through fraudulent actions. It is submitted that that the issue of said fraud can only be addressed by the Court and no further Arbitration is possible.
>
> …the Spencely Part Award is awash with conscious and malicious fraudulent decisions. As such the said Part Award did not decide the 'legal obligations between Apollo and Scott'.
>
> …Being fully aware that said calls were founded upon dishonest and false representations, by Sections 3, 4, 5 and 6 of his Arbiter's Part Award (APA dated 11 December 2014), Mr Spencely sustained said calls and in bad faith dismissed said Craves on the false pretences they were irrelevant. By that APA, which is incorporated herein brevitatis causa, Mr Spencely dismissed said Arbitration Craves as irrelevant not on any issues attributed to any substantive law but on contrived and dishonest non-existent 'methodology issues' so that he could then say these 'methodologies' were 'flawed' and as such proceed to dismiss the various craves by pretending they were 'irrelevant'. Mr Spencely abused his power and trust placed upon him where he intentionally, irrationally and with impunity misrepresented Apollo's averments by predicating his APA on the fraudulent misrepresentations contained in AMEC/Scott's Arbitration Note of Arguments which is incorporated herein *brevitatis causa*.
>
> … The Pursuer respectfully submits that that the so called 'Arbiter Part Award' is nothing short of an insidious, immoral and illegal document the likes of which has

> no place in Scots Law and as such the Court is invited to declared it null and void or at least reduce it…"

[12] Various allegations of fraud are also made in respect of the conduct of Scott and its legal representatives, including:

> "…AMEC/Scott's 168 page Note of Argument was riddled with false and dishonest representations of Apollo's position…Following the conclusion of the Debate, Spencely, siding with AMEC/Scott's fraudulent misrepresentations, issued a Draft Opinion dated March 2007 by which he dismissed the whole of Apollo's £5.1m claim on the false pretences it was irrelevant. Having ignored Apollo's Observations he then renamed his Draft Opinion as his Final Draft Opinion dated May 2007 which was thereafter subjected to a Stated Case. Although the law has now changed (in November 28 2016) and the Scottish Courts now allow lay representation of non-legal persons, in 2012 the Court decided to go along with AMEC/Scott objections to Mr Politakis representing Apollo in the Stated Case; suffice to say the intent of said objections was to prevent Scott's and AMEC's false representations surfacing before the Courts.
>
> …instead of…ordaining Proof Before Answer, like any other honest, rational and reasonable Arbiter would have done, he converted his FDO into his Arbiter's Part Award (APA) dated 11 December 2014. In bad faith and in absolute collusion with the fraudulent misrepresentations of AMEC/Scott, by his APA the Arbiter abused his power and intentionally, irrationally and with impunity misrepresented Apollo's averments by contriving non-existent 'methodology issues' so that he could then say these 'methodologies' were 'flawed' and as such proceed to dismiss the various craves by pretending they were 'irrelevant'…
>
> …The Pursuer will provide cogent documentary evidence that the Arbiter issued his ARBITER'S PART AWARD (APA) dated 11 December 2014, by which he dismissed Apollo's £5.1m claim as irrelevant, in bad faith and from malice. By said APA the Arbiter consciously reflected the dishonest and false representations in AMEC/Scott's Note of Arguments…
>
> …The Arbiter's dismissals as irrelevant of Apollo's Arbitration Craves were by reference to specific fraudulent misrepresentations stated in AMEC/Scott's Arbitration Note of Arguments; in other words the Arbiter colluded in fraud with AMEC/Scott's law agents."

The issues for debate

[13] The following issues were identified by the commercial judge who dealt with further procedure as the matters for debate:

(i) whether the pursuer has averred any proper basis for liability on the part of the defender;

(ii) whether the crave seeking declarator of nullity of the arbiter's Part Award is incompetent;

(iii) whether the pursuer has made relevant averments in relation to Craves 2 and 3, on the alleged liability of the defender to the pursuer for accounting and additional expense;

(iv) whether the pursuer has made relevant averments in relation the allegations of bad faith and dishonesty;

(v) whether the pursuer's claims in Craves 2 to 8 have been extinguished by the operation of prescription.

I now deal with these issues in turn.

Issue 1: Whether the pursuer has averred any proper basis for liability on the part of the defender

Submissions for the defender

[14] The pursuer had made no relevant averments of liability on the part of this defender. The delicts founded upon were all said to have been carried out by AMEC/Scott. No detail was averred as to how the defender took on the liabilities of AMEC. The pursuer appeared to confuse the purchase of shares in a company with purchasing assets from the company or assuming the liabilities of the company. Further, no basis was given for the averment to the effect that there is joint and several liability of the defender with AMEC for AMEC's delictual liability or for a separate ground of delictual liability and unjustified enrichment against the defender. The key point was that the averments did not establish a legal

relationship between Apollo and the defender in order to found the claims. There were no averments to provide a basis for the defender to be liable in respect of the alleged breaches. The alleged liability of the defender rested entirely on an assertion that it has assumed the liabilities of AMEC/Scott.

[15] Even if Scott was a wholly owned subsidiary, it had an independent existence from its shareholder. It had its own rights and liabilities. A holding company was not, by virtue of acquiring the shares of a subsidiary, assuming the liabilities of that subsidiary. It is a member of the subsidiary. The assertion by the pursuer seemed to rely only on the proposition that by purchasing the entire share capital of AMEC, the defender assumed liability for all of AMEC's liabilities. Such an assertion betrayed a significant misunderstanding of the basic law of corporations. Reference was made to *Ocra (Isle of Man) Ltd* v *Anite (Scotland) Ltd* 2003 SLT 123 and *Heather Capital (In Liquidation)* v *Levy & McRae and Others* [2015] CSOH 115. The doctrine of a presumption of transfer of liabilities only applies to gratuitous transfer and in limited circumstances, none of which existed here. The pursuer would need to identify an agreement under which the defender assumed the liabilities of Scott to Apollo. He did not do so.

Submissions for the pursuer

[16] On the pursuer's pleadings, the legal relationship between the pursuer and Scott was said to be that Scott defrauded Apollo of £5.1m, most of which in turn belongs to the pursuer. That delictual liability now belonged to the pursuer because Scott forced Apollo into liquidation and as such that sum belonged to the creditors and shareholders of Apollo. The legal relationship between the pursuer and Scott therefore related to the pursuer's legal right of ownership of almost all of the £5.1m.

[17] The legal relationship between the pursuer and AMEC, Scott's parent company, related to the pursuer's legal right of ownership of said delictual liability but which, in 1995 or thereabouts, AMEC took over from Scott by taking over Scott's trade and undertaking. AMEC also conducted the Spencely Arbitration where, in order to evade payments, it committed further intentional delicts of fraud by inducing the arbiter, not that he needed much inducement, to commit the malicious and bad faith act of dismissing Apollo's claims on the false pretences they were irrelevant. The arbiter did this through his Part Award by adhering to AMEC's false and dishonest representations contained in senior counsel for the present defender's Note of Arguments in the arbitration, when acting on behalf of Scott. Furthermore Scott was probably insolvent in that it recently made a declaration of solvency to Companies House.

[18] The legal relationship between the pursuer and the defender related to the pursuer's legal right of ownership of almost all of the said £5.1m where, having acquired the entire share capital of AMEC, the defender also acquired AMEC's and Scott's delictual liability. The defender was jointly and severally liable with AMEC/Scott for their delictual liability to the pursuer. This legal relationship was reinforced by the fact that by evading its debt to the pursuer the defender aimed to unjustifiably enrich itself by a further intentional delict of fraud. It was further reinforced by the fact that in its 2019 accounts the defender clearly admitted to being liable for all of AMEC's liabilities. From the defender's latest accounts, lodged as productions, it was clear that the defender has made provision for AMEC's various debts. But there was nowhere in its accounts any sign of a provision covering AMEC/Scott's defrauding of Apollo.

[19] The defender had taken over all assets and liabilities of AMEC Foster Wheeler plc and put them into a new company called AMEC Foster Wheeler Ltd. Reference was made

to the defender's group accounts and to the defender acquiring liabilities. This all pointed to the defender taking over the liabilities of AMEC Foster Wheeler plc and, as a consequence, of Scott. If AMEC Foster Wheeler plc no longer existed then Scott did not exist either. It was not the same company that was a subsidiary of AMEC Foster Wheeler plc.

Decision and reasons on Issue 1

[20] The claims made by the pursuer, as reflected in the pleas-in-law quoted above, are primarily based on the defender allegedly having taken over "AMEC/Scott's" delictual liability. In Article 2, the pursuer avers that in late 2017, or thereabouts, the defender took over AMEC Foster Wheeler plc and as such "also took over AMEC's wholly owned subsidiary", Scott. The pursuer goes on to aver that:

> "Under the share purchase of AMEC Foster Wheeler Ltd, the [defender] took over ownership of AMEC Foster Wheeler Ltd together with all of its assets, obligations, liabilities and in particular AMEC's delictual liability to Apollo and Pursuer (whether or not the [defender] was aware of AMEC's delictual liability)".

Accordingly, the pursuer is asserting that one legal entity (the defender) has taken on all of the liabilities of a separate legal entity (AMEC Foster Wheeler Ltd, described earlier as a plc) as a result of a share purchase. The acquisition of shares in company A, by company B, obviously does not of itself result in company B assuming the liabilities of company A. The fundamental principle that the company is a separate legal person from its shareholders applies. In order to make a relevant case that the acquisition of shares results in the assumption of a company's liabilities, the basis in fact for that requires to be averred. No such averments are made by the pursuer. For that reason alone, the main case against the defender is irrelevant. There are also, however, issues about whether the pursuer has made relevant averments that the company whose shares were acquired by the defender had

liabilities to Apollo and/or the pursuer. The pursuer makes averments about the liabilities of "AMEC/Scott" but does not explain the legal persons who are represented by the term "AMEC" in that expression. Also, the pursuer does not aver any involvement of any of the AMEC entities in the actings founded upon (apart from the suggestion that "AMEC" took over the conduct of the arbitration, which I deal with below). There is then a reference in the pleadings to Scott being taken over by AMEC Mechanical and Electrical Services Limited. If the pursuer is trying to allege that there was a transfer of liabilities from Scott to AMEC Mechanical and Electrical Services Limited, there are no relevant averments to that effect. The pursuer makes reference to the accounts of Scott in 1995 which refer to "transfer of trade and undertaking" to AMEC Mechanical and Electrical Services Limited. However, he makes no averments to indicate that a transfer of trade and undertaking resulted in an acceptance of the liabilities of Scott by AMEC Mechanical and Electrical Services Limited. In any event, there are no averments to support the acceptance of any liability of Scott by the different entity AMEC Foster Wheeler plc (the company whose shares were bought by the defender). There is no averment that AMEC Foster Wheeler plc (as opposed to one of its subsidiaries) was even the holder of shares in Scott, although that of itself would not of course have sufficed. It is simply not enough for the pursuer to assert a transfer of liabilities from Scott to "AMEC", or particular entities, and then to the defender without indicating a specific basis for such transfers (for example, contractual provisions which had that effect). There is no arrangement or provision specified in the pursuer's averments which might have that effect. In *Ocra (Isle of Man) Ltd* v *Anite (Scotland) Ltd* the presumption of transfer of liability from one corporate entity to another was not held to arise from the purchase of shares, but rather from the carrying on of the business "without any outward change in the form or way" in which the business was carried on. It was also held that for the

presumption to apply the transfer of business must be gratuitous. There is no suggestion in the pursuer's averments that these tests are met here. In essence, a number of different legal entities are referred to, starting with Scott, then two different AMEC companies, and finally the defender, without any proper basis for saying that the liabilities of Scott were passed on, ultimately to the defender. Accordingly, no relevant basis is averred for the defender having assumed liability for the wrongs said to have been perpetrated by Scott.

[21] There is no relevant case made in support of the suggestion that the defender's conduct results in the commission of a separate delict or a continuation of wrongs alleged to have been committed by "AMEC/Scott". Further, no basis for joint and several liability is presented. In relation to the allegation of unjustified enrichment of the defender, again that assertion is not supported by any relevant averments. As noted above, the conduct from which these claims originate is that alleged against Scott. The pursuer also submitted that the defender's group accounts indicated an assumption of liabilities. However, there are no pleadings on this matter and for that reason alone the submission falls to be rejected. In any event, group accounts must as a matter of law comprise a consolidated balance sheet and profit and loss account. Statements made in them about liabilities of the group provide no basis on their own for an allegation of assumption of liability by the holding company. The pursuer's contention that AMEC conducted the Spencely Arbitration was said to be based upon an individual, who is a director of Scott, having signed the deed of appointment of the arbiter, allegedly on the part of AMEC. However, the document referred to by the pursuer expressly states that it was subscribed by that individual on behalf of Scott, which is named also as the party to the arbitration, and no averment is made to explain how that could have been done on behalf of AMEC. The suggestion that Scott may be insolvent was apparently based upon a declaration of solvency lodged in the context of a reduction of capital, which

provides no support whatsoever for that contention. The pursuer also provided no specification for his suggestion that AMEC Foster Wheeler plc or Scott had ceased to exist. Any relevance of these contentions for present purposes was also not developed.

[22] For these reasons, I am satisfied that the pursuer's claim against the defender is bound to fail. I shall sustain the defender's fifth and sixth pleas-in-law. This results in dismissal of the action, but it is appropriate that I also deal with the other issues.

Issue 2: Whether the crave seeking declarator of nullity of the arbiter's Part Award is incompetent

Submissions for the defender

[23] A review of the arbiter's decision leading to such a remedy on the grounds advanced was not competent, because it fell within the supervisory jurisdiction of the court. Reference was made to: *Brown* v *Hamilton District Council* 1983 SC (HL) 1; *Forbes* v *Underwood* (1886) 13 R 465; *Aitchison* v *Magistrates of Dunbar* (1836) 14 S 421; and *West* v *Secretary of State for Scotland* 1992 SC 385. Accordingly, as Crave 1 involved an application to the supervisory jurisdiction which had not been made in the mandatory form, by way of a petition for judicial review, it must fail. Further and in any event an application to the supervisory jurisdiction required permission to proceed and is subject to a 3-month time limit from the date on which the grounds giving rise to the application first arose. The court has power to extend that period if equitable. This action commenced in January 2020, relating to a Final Draft Opinion in 2007 and a Part Award in 2014. Apollo had already brought judicial review proceedings against the draft opinion (*Apollo Engineering* v *James Scott* 2009 SC 525). The transitional provisions contained in the legislation meant that because the grounds first arose prior to 22 September 2015 the time limit of 3 months began to run on 22 September

2015. These failures to comply with the procedural requirements were not merely technical. Crave 1 was therefore incompetent.

Submissions for the pursuer

[24] Senior counsel for the defender had called for a 5-day debate in the Spencely Arbitration where he aided and abetted the arbiter to collude with his fraudulent misrepresentations, which the arbiter did, and then egregiously prevented the pursuer from appealing the arbiter's Final Draft Opinion through the stated case procedure by egregiously objecting to the pursuer representing his company, Apollo. Based on those egregious objections the Inner House, having first rejected the pursuer's motion to allow him to represent Apollo, then summarily dismissed the stated case. All of these egregious objections constituted abuse of the court process by senior counsel for the defender in that their only objective was to prevent his fraudulent misrepresentations, with which the arbiter colluded and in bad faith and from malice dismissed Apollo's claim on the false pretences it was irrelevant, being heard by the Inner House. Furthermore, preventing the pursuer from exposing said bad faith actings, which directly affected the pursuer in that he owned almost all of the £5.1m claimed in the Spencely Arbitration, by not allowing him to represent his company in the Inner House, abused the pursuer's human rights.

[25] Furthermore, by summarily dismissing the stated case because Apollo had no funds to instruct legal representation to expose said bad faith actings, and at the same time not allowing the pursuer to represent Apollo, the only person available to do so, also constituted abuse of both Apollo's and the pursuer's human rights by the Inner House. Lord Hope in the UKSC rejected senior counsel's further egregious and pointless objections which constituted further abuse of court process. Lord Hodge then reversed Lord Hope's equitable

decision and dismissed the appeal without a hearing. That disingenuous decision also constituted abuse of both Apollo's and the pursuer's human rights. On 11 December 2014, the arbiter had wasted no time and converted his fraudulent Final Draft Opinion into his fraudulent Part Award. That Part Award stank of fraud but the pursuer had nowhere to turn. He had no money to seek legal advice nor was he able to instruct law agents to raise some sort of action by which he would overcome that fraud; senior counsel for the defender had made sure of that. The pursuer, as assignee of the rights under the deed of appointment of Mr Spencely as arbiter, then decided to take action against the arbiter to retrieve approximately £400,000 in expense that the pursuer had incurred under his sham arbitration with the intention of using those sums to instruct law agents on behalf of Apollo. However that was a bad experience for the pursuer in that the decisions of the sheriff and the sheriff principal were utterly biased. It was very apparent that the arbiter was being protected by the courts. That also constituted abuse of the pursuer's human rights. After that bad experience the pursuer decided to raise the action against the Royal Bank of Scotland. That was because RBS, the guarantor in relation to Apollo's claim against Scott, had refused to accept the pursuer's demand on a £2.2m guarantee. The Sheriff Appeal Court decided that an implied term which prevented the guarantee being defeated by fraud could not be implied.

[26] So, the pursuer having suffered for 30 years and having now raised this action which is predicated on various fraudulent actings, including collusion and fraud between senior counsel for the defender and the arbiter, now finds that senior counsel argues that it is incompetent. The court should now put all the self-perpetuated technicalities and abuses of court process and procedures by senior counsel for the defender, by which he has promulgated a miscarriage of justice, to one side and try and inject some justice into this

action. The pursuer also made further criticisms of how the arbiter had dealt with the issues before him.

Decision and reasons on Issue 2

[27] As is clear from the pursuer's submissions, he does not put forward any suggestion that the declarator sought in Crave 1 is not a matter that is subject to the supervisory jurisdiction of the court. It plainly falls within the tripartite test in *West* v *Secretary of State for Scotland.* I therefore accept the submission on behalf of the defender that a petition for judicial review is the correct means of review of the arbiter's decision. The remedy of judicial review proceeds by way of a petition in terms of Chapter 58 of the Rules of the Court of Session. While there is now a specific statutory right of appeal under the Arbitration (Scotland) Act 2010 in respect of any serious irregularity, the Act does not apply to arbitrations commenced before it came into effect. As the Inner House made clear in *Apollo Engineering* v *James Scott* 2009 SC 525 (at para [38]), the remedy of proceeding by way of a stated case would deal with the arbiter's findings on relevancy and judicial review would not be available on that issue, since that statutory remedy applied. However, for other matters, such as the points now alleged, the appropriate course of challenging the award would have been by judicial review. Crave 1 is therefore incompetent. If there had been any petition for judicial review, senior counsel for the defender is correct that in terms of the transitional provisions under the Courts Reform (Scotland) Act 2014 and the secondary legislation it would have required to have been raised within 3 months of 22 September 2015, subject to the discretion of the court as to whether there is any equitable basis for extending that period. However, as no such petition has been raised this point

does not arise. Accordingly, I sustain the defender's third plea-in-law in respect of this issue.

Issue 3: Whether the pursuer has made relevant averments in relation to Craves 2 and 3

Submissions for the defender

[28] These craves were predicated on a liability of the defender and the solicitors who acted for Scott and AMEC to produce an account of payments "ascribed" by the PSA to Apollo. The sum was said to have "otherwise been embezzled by AMEC/Scott". Although the word "embezzled" was used from time to time, no further averment had been provided to support any such characterisation. In particular there were no averments of when and by what means the sums were "embezzled". There were no averments that Scott actually had the relevant sums, or that those sums were actually owned by Apollo as opposed to being a contractual debt owed to Apollo. There were no relevant averments of any liability to account on the part of the defender, who is not alleged to have received funds in relation to both Craves 2 and 3, or of a liability to account on the part of the solicitors who are not averred to have held any of the relevant funds, or of any liability to account on the part of Scott. The circumstances in which, and how, any sums were allegedly "ascribed" to Apollo were not specified at all. The fact that the PSA may have allowed a certain value for loss and expense suffered by a sub-sub-contractor (eg Apollo) in valuing an interim payment to be made to CTW might be termed as "ascribed". But such ascription did not give any property rights to Apollo in respect of any sum assessed by the PSA as payable to CTW. All Apollo had was its contractual right to rely on the personal obligation owed by Scott under and subject to the terms of the sub-contract. Reference was made to *MacPhail, Sheriff Court Practice* 3rd edition (paragraph 21-02) and *Coxall* v *Stewart* 1976 SLT 275.

[29] In so far as Craves 2 and 3 relied upon an accounting, that was in relation only to the sum of £550,000, which formed part of the overall claim of £881,827 for additional expense. The last part of Crave 3 in effect sought payment of the balance over any sum accounted for. The pursuer's averments did not provide any explanation of liability on the part of Scott for that sum (let alone on the part of the defender). There was no relevant claim for the balance. Further, the order sought under the Administration of Justice (Scotland) Act 1972, section 1, in Crave 2 was irrelevant as that provision does not give the court power to order an accounting.

Submissions for pursuer

[30] In relation to Crave 2 the pursuer sought an order under section 1 of the 1972 Act; the pursuer moved the court to ordain the accounting sought, especially from the solicitors who were said to be the holders of all the documentation relating to Apollo's claim. The accounting sought here related to the embezzlement of sums of around £550,000 in mid-1993 as averred at Articles 11, 28, 34, 63, 78, 81 and 84. This order would be to recover the sum ascribed to Apollo by the PSA, and by definition that sum was owned by Apollo. As such, it was now the property of the pursuer in that all sums belonging to Apollo post-liquidation and after the CVA also belong to the pursuer (save for £220,000 due to other non-connected creditors of Apollo).

[31] As was averred, in consequence of the delay to the pipe-work design, Apollo made a claim for delay and disruption up to September 1990. The PSA verbally acknowledged the claim for additional expense caused by that delay and requested Apollo to update it to the end of 1990. Apollo then claimed £460,000 up to December 1990, but before paying any monies to Apollo the PSA commissioned Touche Ross to audit Apollo to determine whether

Apollo could complete the contract after incurring these substantial additional overhead costs. Touche Ross concluded that Apollo would be able to implement the contract and Apollo was then paid £305,000. Later, in an email to Scott it was stated that the PSA had made funds available to Scott to be passed on to Apollo for delays caused by the PSA. This was the money that had been embezzled by Scott in 1993. Crave 2 sought to recover documents to see what was paid.

[32] The arbiter's dismissal, on the false pretence that it was irrelevant in law, of Crave 2(i) in the arbitration (additional expense) was in pure bad faith and from malice. Articles 85-89 in the summons in the present case provided sufficient and adequate averments on that matter. The court was invited to consider the pursuer's submissions relating to him having borrowed £200,000 from RBS, secured against his house, to pay off the Clydesdale Bank when it called in Apollo's overdraft that had been inflated by Scott's delays and underpayments. In any event, senior counsel's submissions relating to the contractual chain constituted pure rhetoric. Relating to the additional expense incurred by Apollo, either Scott received sums from the PSA directly or indirectly though the principal contractor CTW to be handed over to Apollo, or it did not. The mere fact that senior counsel had evaded giving a straight answer implied that Scott did receive these sums. The defender, who was now in possession of these sums, should be ordained by the court to hand them over to the pursuer forthwith.

Decision and reasons on Issue 3

[33] As noted earlier, Apollo and Scott were parties to a sub-contract and Scott itself was a sub-contractor to CTW, with the PSA being the principal employer of CTW. In Article 33, the pursuer avers that, after the Touche Ross report:

> "Apollo was then paid by the PSA (the taxpayer) £200,000 in lieu of delay to design to December 1990 plus a further unsolicited three monthly payments of £35,000 per month for the further anticipated delays for January, February and March 1991".

The precise manner in which Apollo received these payments (ie whether they were directly from the PSA or via CTW and then Scott) is not explained in the pleadings. However, in the action against RBS, the pursuer averred that these payments totalling £305,000 were ascribed to Apollo and "Thereafter, in accordance with its obligations under Clause 16, Scott timeously [*sic*] passed the said £305k on to Apollo in April 1991". The averments in the present action in support of Craves 2 and 3 in relation to accounting appear at Article 34 of Condescendence and include:

> "As at Repudiation on 30 August 1991, as set out in the undernoted tabulation the balance due was £881,827 (see undernoted Tabulation) and is the sum sued for under Crave 3 herein. It is also the sum that was claimed in the Spencely Arbitration under Crave 2(i). In June 1993 or thereabouts and in relation to said £881,827 the PSA ascribed further sums to Apollo, believed to be up to £550,000, but which sum has otherwise been embezzled by AMEC/Scott".

[34] A liability to account requires, at least, that property or assets of one person are held by another person: *MacPhail, Sheriff Court Practice* (3rd edition, paragraph 21-02; *Coxall* v *Stewart* 1976 SLT 275 (*per* Lord Maxwell at 276). Here, the pursuer makes no averments to show that any sum said to have been ascribed by the PSA was the property, or an asset, of Apollo. The circumstances involve, as is common in a construction setting, a chain of personal obligations between the employer (the PSA), the contractor (CTW), the sub-contractor (Scott) and what might be called a sub-sub-contractor (Apollo). The pursuer does not suggest that Apollo's right was anything other than under a personal obligation owed by Scott to pay the money due to Apollo under the sub-contract between them. While of no direct relevance for present purposes, this fits with what he appears to have contended in the action against RBS. If, as is apparently accepted, the money was paid by the PSA to

CTW under the main contract, Apollo did not own it. Indeed, if CTW had become insolvent that money would have formed part of the assets of CTW and Scott would have been a creditor, along with other creditors. Scott had the right to seek enforcement of personal obligations by CTW and Apollo had the same right against Scott. These are the features of the legal relationship averred by the pursuer and he gives no basis for alleging actual ownership by Apollo of the sum said to have been ascribed. I therefore conclude that the pursuer has made no competent or relevant averments in support of the claim for accounting.

[35] In relation to embezzlement, there are no specific averments on that allegation, although I take it that the pursuer is founding upon the contention that as this was Apollo's money, by keeping it Scott carried out an embezzlement. The foundation for that averment is, as I have indicated, not made out. Moreover, there are no relevant averments of a liability to account on the part of the solicitors, who are not averred to have had possession of any of the funds.

[36] The pursuer's second plea-in-law (quoted above) asserts that the defender, being liable for AMEC/Scott's delictual liability, is bound to account to the pursuer for the payments ascribed to the pursuer. The alleged breach of a delictual duty said to have caused this loss to Apollo is not clear, given that it is a claim to account for a sum. There is also what appears to be a claim against the defender for the remaining amount, over and above the allegedly embezzled sum of £550,000, of the gross sum of £881,827. The latter figure is said to be the balance due to Apollo, at repudiation, for additional expense caused by delays to design. The basis for the claim for any such remaining amount is not specified and is not covered by any averments relating to accounting.

[37] Crave 2 makes reference to section 1 of the 1972 Act and seeks a "full account of payments" made by the PSA. This provision gives the court powers to order inspections and recovery of documents and other property under section 1(1). Under section 1(1)A the court has power to order disclosure of information as to potential witnesses. Neither of these subsections give the court power to order an accounting. But it may be that the pursuer's reliance on section 1, although unclearly put, is primarily about recovery of documentation. In order to seek recovery, the pursuer should have enrolled a motion for commission and diligence, based upon a specification of documents. He did not do so. If the wish to enrol such a motion had been raised at the debate, I would have given consideration to it (particularly as the pursuer is a party litigant), but that did not arise.

[38] There is, in any event, no relevant basis for the present defender being under any obligation to account.

[39] For these reasons, I shall sustain the defender's second and sixth pleas-in-law in respect of Craves 2 and 3.

Issue 4: Whether the pursuer has made relevant averments in relation to the allegations of bad faith and dishonesty

Submissions for the defender

[40] There were no averments of fact to show that the arbiter knew that the arguments which he accepted were false or dishonest, as asserted by the pursuer. The pursuer would have to prove such knowledge. The only method adopted by the pursuer was to argue that the arguments accepted by the arbiter were wrong. The mere fact that the arbiter may be wrong did not infer dishonesty: *Politakis* v *Spencely* (at para [14]). That decision also made clear that a case based on dishonest or fraudulent conduct requires, in order to be relevant,

distinct averments of the facts and circumstances from which dishonesty is to be inferred. The pursuer's averments were entirely lacking in specification. The Sheriff Appeal Court in that case had dealt with essentially the same allegations against the arbiter. The court noted that the pursuer had failed to discharge the responsibility to provide clear and concise averments of the basis on which the serious allegations were made. The same had occurred in the present action. The allegation of malice on the part of the arbiter was also not supported by any relevant averments. The averments supporting Crave 1 were therefore irrelevant.

[41] Craves 4 and 5 bore to be claims for delictual liability on the part of "AMEC/Scott", whose liability the defender is alleged to have assumed. The assertion in the pleas-in-law is that "AMEC/Scott, through dishonest obfuscations and fraudulent misrepresentations… aided and abetted the Arbiter to sustain…calls to dismiss" the craves in the arbitration. The criticism of the arbitration did no more than take parts of the Note of Argument put forward by Scott and assert that they are false. There was no attempt to aver circumstances from which it could be inferred that Scott knew the arguments to be false. The only basis for the assertion that the arguments were false was that the pursuer described them as wrong. There were therefore no relevant averments that the defender committed the delict of fraud or any act akin to fraud. The case for delictual liability was unsupported by a relevant or specific averment.

[42] Craves 6, 7 and 8 seek payment of sums claimed by Apollo in the arbitration with Scott. The claims rested on the defender's alleged delictual liability for "AMEC/Scott's" delictual liability. The respective pleas-in-law made the same assertion. However, there was no averment of the alleged basis for any delictual liability. The crave in the arbitration which is reflected in Crave 8 in the present action was not decided against Apollo in the

arbitration. Any representations or decision of the arbiter have not led to Apollo losing this claim. Even if it was to be contended that Craves 6 and 7 are presented on the same basis as Craves 4 and 5 (because they reflect craves dismissed in the arbitration by the arbiter) they would be irrelevant for the same reasons as Craves 4 and 5. They would, if it were possible, be even more irrelevant because no attempt had been made to aver any alleged dishonest conduct relied upon.

Submissions for the pursuer

[43] In relation to the reasons why the decision of the arbiter fell to be reduced or declared null and void, the pursuer makes averments (Articles 85-89) which address the dismissal by the arbiter of the various heads of claim. The arguments presented by the pursuer on each of these points followed a similar structure and it suffices if I quote from part of the pursuer's Note of Argument, without going fully into the detail, to illustrate the approach taken.

> "59. Crave 1 - Article 85: in support of AMEC/Scott's fraud, [senior counsel] induced [the arbiter] to dismiss Arbitration Crave 2(ii)(a) for £715,954 on the false pretences it was irrelevant. [The arbiter] did so in collusion with [senior counsel]. Based on the undernoted arguments and averments under Article 85 the Court is moved to uphold the Pursuer's Crave 1.
>
> 60. In support of the fraud committed by his Client's AMEC and Scott, [senior counsel] deliberately obfuscated and misrepresented in his Note of Arguments the averments and documents relating to Apollo's Claim for Fabricated Material-On-Site for £715,954, i.e. Crave 2(ii)(a).
>
> 61. The object of those deliberate and reckless misrepresentations by [senior counsel] was to induce [the arbiter] to found upon them. Not that [the arbiter] needed any inducement in that he consciously and readily colluded with [senior counsel] where he simply labelled the latter's reckless misrepresentations as 'Flawed Methodology' and dismissed this part of the claim on the false pretences it was irrelevant in law.
>
> 62. For the purposes of dismissing as irrelevant in law a claim for receivables amounting to £715,954 only a kangaroo court could have held that such pathetic and

> reckless misrepresentations on factual matters constituted matters of 'substantive law'.
>
> 63. [Senior counsel] now tells this Court that it has no jurisdiction to 'review the merits of the arbiter's decisions'. But notwithstanding this Court has jurisdiction to deal with the intentional delict of fraud, there are no merits to review in this part of [the arbiter]'s part Award here, only pathetic lies and fraudulent misrepresentations.
>
> 64. [The arbiter] simply correlated his and [senior counsel's] reckless and pathetic misrepresentations to a so called 'flawed methodology' where, as is obvious from the undernoted submissions, neither of them could have cared less whether these were true or false, so long as [the arbiter] dismissed Crave 2(ii)(a) as irrelevant. This scenario accords with the third category of Lord Herschell's dictum in *Derry v Peek*: 'Fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, without caring whether it be true or false'".

[44] The pursuer's Note of Argument goes on, following a similar structure, to deal with Article 86, arguing that:

> "having confiscated Apollo's Cupro-Nickel Material, [senior counsel], in support of AMEC/Scott's fraud, induced [the arbiter] to dismiss Arbitration Crave 2(ii)(b) for £691,748 on the false pretences it was irrelevant. [The arbiter] did so in collusion with [senior counsel]".

The alleged conduct is described thus:

> "72. In support of the fraud committed by his Client's AMEC and Scott, [senior counsel] submitted in his Note of Arguments for the Debate in the [the arbiter] Arbitration a reckless misrepresentation (page 120 of [senior counsel's] Arbitration Note of Arguments copied below) which was that Scott 'bought' Apollo's Cupro-Nickel Material. This issue is extensively covered under paragraphs 184-195 of the Chronology of Events below."

In relation to each of Articles 87 to 89, the pursuer argued that "in support of AMEC/Scott's fraud, [senior counsel] induced [the arbiter] to dismiss" a particular crave, "on the false pretences it was irrelevant. [The arbiter] did so in collusion with [senior counsel]".

[45] The allegation that the intention of senior counsel was to induce the arbiter to found upon his misrepresentations, although the arbiter did not need "any encouragement in that he consciously and readily colluded with senior counsel" is repeated in the submissions on

each article, as is the point that "only a kangaroo court could have held that such pathetic and reckless misrepresentations on factual matters constituted matters of 'substantive law'". *Derry* v *Peek* is referred to in each of the arguments made.

[46] The submissions reflect and develop points made earlier in the pleadings, some of which I have quoted above. In Article 78, the arbitration is described as a "sham arbitration". The pursuer's averments of the arbiter's alleged bad faith are summarised in the heading which precedes Article 80. His decision is alleged to have been "consciously" based on AMEC/Scott's "dishonest and fraudulent Note of Arguments". In Article 81, reference is made to the arbiter "consciously" reflecting the "dishonest and false representations" made on behalf of Scott.

[47] In his oral submissions, the pursuer made detailed comments as to the nature of the claims against Scott under reference to the pleadings and documents incorporated therein. The reason for the repudiation of the sub-contract was to defraud Apollo. Scott had confiscated Apollo's material from the supplier, so it could repudiate the contract after that and defraud Apollo. All of the detail had been explained to the arbiter. The arbiter was a construction expert who knew what he was doing. For example, he must have understood what composite bill rates meant. There had been conscious misrepresentation by both senior counsel and Mr Spencely. The pleadings explained why again he was totally wrong. The ordinary bystander could see that it was not just a mistake but even if it was, why were steps taken to stop the pursuer bringing the stated case? In relation to the claim for preliminaries, what the arbiter had said was completely wrong and bore no resemblance to the actual claim. It was a horrendously conscious misrepresentation for the purposes of causing harm and dismissing the claim. The arbiter had twisted the submission for Apollo. He totally dismissed the claim out of hand without hearing anything from the representative

of Apollo. He made up his mind to dismiss. The arbiter also refused to state certain questions for the purposes of the stated case.

[48] The pursuer gave a detailed analysis of how the arbiter had erred. For example, the pursuer drew attention to the connectivity tables. One could see from these that the value of penetration is by reference to bill rates and is nothing to do with any costs. The arbiter never even looked at the value of penetrations in the connectivity tables. Apollo's final account contained a summary of the valuations from those connectivity tables. The arbiter had access to all of that information, including the bill of quantities. Apollo had valued its claim in accordance with the contract. However, the arbiter chose instead to conclude that it should be dismissed and then refused to include it in the stated case. He had acted with bad faith and malice. It was clear that he had not looked at the documents. He said that Apollo did not value in accordance with the relevant clauses, which was a lie. It was to be done in accordance with Clause 10 of the sub-contract and that was what happened. The pleadings covered the other grounds for challenging his dismissal.

Decision and reasons on Issue 4

[49] The primary theme of the pursuer's case on this issue is fraud. The well-known meaning of fraud is given in *Erskine's Institute of the Law of Scotland* III.i.16: "a machination or contrivance to deceive". As Professor Joe Thomson explained, "the paradigm of relevant fraudulent conduct is a fraudulent misrepresentation" (*Stair Memorial Encyclopaedia,* Volume 11 paragraph 723). This fits with the key ingredient of Erskine's definition being the intention to deceive, misrepresentation being the common form of achieving deceit. In the criminal context, Scots law views fraud as comprising a "false pretence", which succinctly expresses the essence of the concept. In *Marine & Offshore (Scotland) Ltd* v *Hill* [2018] CSIH 9;

2018 SLT 239, giving the Opinion of the court, the Lord President (Carloway) took such factors into account and having referred to *Erskine* said (at para [16]):

> "There requires to be a false pretence and, in the civil context, resultant loss (a practical result). It follows that there must be clear and specific averments of the representation founded upon and how the loss was sustained. General allegations will not suffice (*Shedden* v *Patrick*, Lord Fullerton at (1852) 14D., p.727*; Royal Bank of Scotland* v *Holmes*, Lord Macfadyen at 1999 S.L.T., p.569, following *RH Thomson & Co* v *Pattison, Elder & Co*)."

In order to be relevant, the pursuers' averments, taken *pro veritate,* must be capable of yielding an inference of fraud and the averments of primary fact require to be capable of supporting that inference. A fraudulent misrepresentation has to be material and has to be relied upon.

[50] It is a recurring theme of the pursuer's case that senior counsel for the defender, when acting for Scott in the arbitration, made fraudulent misrepresentations on the false pretence that the claims by Apollo were irrelevant. While it is said that the arbiter relied upon these misrepresentations, the following point (quoted above) is repeatedly stated:

> "Not that [the arbiter] needed any inducement in that he consciously and readily colluded with [senior counsel] where he simply labelled the latter's reckless misrepresentations as 'Flawed Methodology' and dismissed this part of the claim on the false pretences it was irrelevant in law."

The pursuer also argued that "On 11 December 2014, [the arbiter] wasted no time and converted his fraudulent [Final Draft Opinion] into his fraudulent Part Award". The pursuer does not therefore carry through his contention of the arbiter being induced by a misrepresentation and indeed turns it into the arbiter having himself acted fraudulently and consciously colluded in the false pretence. No-one else is identified as having relied upon any misrepresentation. No-one was said to be deceived. Absent this essential element of an allegation of fraudulent misrepresentation, the case based on that ground is irrelevant.

[51] More fundamentally, there is an absence of averments of primary fact which could yield an inference of fraud. The pursuer appears to suggest that the submissions in the arbitration, and the arbiter's findings, were so plainly or starkly incorrect that there can be no explanation other than a deliberate intention to deceive. The fact that a legal representative makes submissions to a decision-maker which are plainly incorrect (taking for this purpose the pursuer's pleadings *pro veritate*) does not yield any inference of fraud; nor does it in any way infer that the submissions were known to be false representations. Legal representatives commonly make submissions which come to be viewed by the decision-maker as erroneous or unfounded. Similarly, a plain error by a decision-maker obviously does not infer fraud. The context here was a 5-day diet of debate before the arbitrator. The question of either party's submissions being plainly wrong was open to scrutiny and argument. The submissions were also part of a legal argument based upon relevancy rather than simply statements of fact. There is nothing which points towards a false pretence. I therefore conclude that in the pursuer's averments no proper basis is given for allowing an inference to be drawn that the submissions or the arbiter's decision were fraudulent.

[52] It is also the case that the pursuer deploys a number of other terms or epithets in describing the behaviour of the arbiter and senior counsel and indeed others. I do not intend to go through each of these because they are part and parcel of the allegations of fraud, but I would observe that no proper basis in fact is presented for the assertions that these persons acted in bad faith or with malice, or dishonestly, or recklessly, not caring whether the points submitted or determined were true or false.

[53] Some reference was made to senior counsel, on behalf of Scott, opposing the pursuer's motion to represent Apollo in the stated case and to the arbiter having refused to

include certain points in the stated case. As a matter of law and practice, Scott was perfectly entitled to oppose that motion and its opposition has no bearing on an allegation on fraud. The fact that the arbiter did not consider certain matters to fall within the ambit of the stated case procedure is also of no bearing in that regard.

[54] I therefore conclude that the pursuer's averments in support of Crave 1, 4 and 5, and, to the extent that they are intended to be founded upon fraud, Craves 6 and 7, are irrelevant and lacking in specification. In relation to Crave 8, no loss was sustained in that regard at the arbitration but in any event no relevant ground of action is made out. I sustain the defender's sixth plea-in-law in relation to these craves.

Issue 5: Prescription

Submissions for the defender

[55] The obligations to give an accounting and to make reparation founded upon for the purposes of Craves 2-8 had been extinguished by the operation of prescription. Reference was made to sections 6 and 11(1) of the Prescription and Limitation (Scotland) Act 1973, in relation to when prescription commences and when an obligation becomes enforceable, and to *Dunlop* v *McGowans* 1980 SC (HL) 73. The onus in establishing the application of any of the qualifications to the normal rule rested on the creditor in the obligation: Johnston, *Prescription and Limitation of Actions* (2nd edition., paragraph 6.88) *Pelagic Freezing (Scotland) Limited* v *(First) Lovie Construction Limited and (Second) Grantmij Group Limited* [2010] CSOH 145; and *Politakis* v *Spencely.* A "relevant claim" may interrupt prescription, meaning a claim made in appropriate proceedings. In Johnston, *Prescription and Limitation of Actions* (paragraph 5.09) the author confirmed that "It is well established that an action is commenced at the date of citation of the defender. This is the date on which prescription is

interrupted" (see *Canada Trust and Others* v *Stolzenberg and Others (No 2)* [2002] 1 AC 1). It is the date of service on the defender at which the court is first seized of the matter.

[56] The date upon which the particular obligations founded upon in this action became enforceable was the date when Apollo first suffered loss as a result of the alleged breach of delictual duty. In relation to all of Craves 2 to 8 that date could not be later than 11 December 2014, the date of the Part Award by the arbiter. The pursuer's own averments confirmed that point. The pursuer avers that he raised the action in Ayr Sheriff Court on 11 December 2019. That may be the date on which the Initial Writ was warranted. However the Initial Writ was not served on the defender until about 4 January 2020. By that time any delictual claims had been extinguished by prescription even on the pursuer's averments of when Apollo first suffered loss.

[57] While it may not matter for present purposes, the defender's contention was that Apollo first suffered loss from the time of the arbiter's Final Draft Opinion in 2007 which was in the same terms as the Part Award. This was apparent from the pursuer's own pleadings. Certainly following that draft opinion Apollo also incurred the expense of pursuing the stated case procedure and the judicial review procedure in which it was unsuccessful. Loss results when any detriment is caused, whether or not the creditor is aware of that detriment being a loss. A detriment may simply be that the creditor has not obtained something which he had sought or has incurred expenditure: *Gordon's Trustee* v *Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287. Apollo clearly had suffered the alleged loss and damage at the time of the draft opinion in 2007 and the actions on which it embarked thereafter.

[58] Crave 8 depended upon an unspecified delictual liability. However in this case the claim in the arbitration which it replicated was not dismissed by the arbiter. Any delictual

liability which caused loss of this claim by Apollo must relate to an earlier unspecified period, presumably to the time of the contract in or about 1991. The other delictual liabilities, in so far as specified, appeared to amount to allegations of alleged misconduct during the arbitration before Mr Spencely in 2006 and 2007. The counterclaim in the Court of Session (and the arbitration before Mr Spencely) were not based on these delictual claims. Any of the current claims which relate to an earlier period are also delictual and no delictual claim has previously been made about these matters. The pursuer's position that it was not competent for Apollo to raise an action for its losses until the issuing of the Part Award in 2014 was incorrect, when one bore in mind the two delictual liabilities asserted against Scott (embezzlement in 1993 and fraudulent misrepresentation in the Note of Argument in 2007). It was quite possible for Apollo to raise proceedings after these events.

[59] The pursuer's case against RBS, in which Scott was convened as a party minuter, was raised in 2017 and so could only interrupt a claim which arose as late as 2012. The case on embezzlement arose in 1993 and the case in relation to the contents of the Note of Argument arose in 2007. The 2017 action against RBS was of no relevance. However, if the correct starting date was 11 December 2014 (when the Part Award was issued) then it was necessary to consider the pleadings in that case in more detail. Craves 3 to 7 were directed against the party minuter, Scott. Reference was made to embezzlement and the like. It was argued on behalf of Scott that it was not competent to make such craves except by amendment. However, the pursuer produced a closed record which incorporated these new craves and pleas. The matter called before the sheriff at the options hearing when the sheriff did not allow those craves, adjustments and pleas to become part of the pleadings. So, they were not allowed to form part of the process although they did form part of the closed record. Accordingly, even if the prescriptive period commenced in 2014, that action would not save

the pursuer's case. Reference was made to *Ecclesiastical Insurance Office plc* v *Whitehouse-Grant-Christ* 2016 SLT 990 in which adjustments were intimated containing a plea-in-law and that formed a relevant claim. That case could be distinguished from the pursuer's case against RBS where he tried incompetently to introduce a case by adjustment when the only existing claims were against RBS. No step was made bringing the claim before the court. So, the RBS case did not interrupt prescription, but even if it did prescription had already expired some 5 years before that action was raised.

Submissions for the pursuer

[60] The first question was whether this claim would have prescribed had it been raised in Apollo's name, but in delict, as a direct result of the arbiter's Part Award dated 11 December 2014. It would not have prescribed because it would simply have been a continued claim emanating from the original counterclaim in the Court of Session back in October 1991. The second question was whether the pursuer could or should have raised a parallel action for the same damages at the outset, other than the counterclaim which was raised by the liquidator in Apollo's name, where most of the sums claimed were for the benefit of the pursuer and a small amount for the benefit of other creditors of Apollo. On hindsight had the pursuer known then how some lawyers deliberately and dishonestly make perpetual false representations in support of their client's fraudulent evasions of their debts, perhaps the pursuer should have raised a parallel action to avoid any possible future prescription issues. But in any event there were no such issues because the loss and damage suffered by the pursuer then were being catered for by Apollo's liquidator whose counterclaim was primarily for the pursuer's benefit as the principal creditor and shareholder of Apollo.

[61] Here, the pursuer's claim was in his own name which could have been in his company's name, Apollo, had AMEC/Scott not egregiously objected to the pursuer representing Apollo at every turn of proceedings and especially in the stated case. The pursuer was only claiming sums which belong to the pursuer and which emanate from the arbiter's bad faith Part Award by which he dismissed Apollo's £5.1m arbitration claim which in turn had continued from the original counterclaim in 1991 which, after being sisted for arbitration, was expected to settle in a reasonable time. It had not settled because AMEC/Scott used the arbitration as a means of perpetually evading payments due to Apollo and as such the pursuer. Had this action included additional damages other than the said £5.1m claimed by Apollo in the Spencely Arbitration then any additional damages may or may not have been subjected to prescription under the 1973 Act. In the event, the craves in this action were clearly identified with the craves in the Spencely Arbitration. The defender had in effect accepted this claim as a continuation of the Spencely Arbitration claim. It was one and the same claim except it is now a delictual claim in the name of the pursuer who is the rightful owner of almost all of the sums claimed.

[62] There were no prescription issues here. The 2007 Final Draft Opinion was subjected to an appeal but which senior counsel for the defender perpetually blockaded by blocking any attempt by the pursuer to represent Apollo in the stated case. However, unlike his Final Draft Opinion, the Part Award dated 11 December 2014, which was just a copy of the Final Draft Opinion, could not be subjected to an appeal. It was at that point that the pursuer's loss, which was addressed within the Spencely Arbitration claim, became a loss that the pursuer had to address as an individual. The pursuer's case against Mr Spencely was lodged in February 2015 and Scott entered that action as a minuter and lodged defences. As clearly specified at Article 91 the pursuer lodged that action as assignee of Apollo's rights

under the deed of appointment of Mr Spencely as arbiter. The pursuer's claim against Mr Spencely was delictual in nature because it was predicated on his Part Award dated 11 December 2014 and on Mr Spencely's bad faith and fraudulent actings and Scott colluding with him. That claim interrupted any prescription issue relating to this claim.

[63] In any event in the pursuer's case against RBS cited on 23 January 2017, Scott entered that action as a minuter and lodged defences. As clearly specified at Article 92, the pursuer brought that action as assignee of Apollo's rights under the £2.2m guarantee and demanded payment of £2.2m from RBS as the guarantor. The guarantee related to the counterclaim in the initial summons at the instance of Scott. The pursuer's claim against RBS was delictual in nature because it was predicated on the arbiter's Part Award dated 11 December 2014 and on the implied terms that Scott would not defeat Apollo's claim against Scott through fraud. The averments in relation to the fraud committed by Scott in collusion with Mr Spencely were in the pleadings and in exactly the same terms as in Article 85 onwards in this case. That claim interrupted any prescription issue relating to this claim. Until the appeal to the Supreme Court was concluded, the pursuer's loss was still being addressed by Apollo's case, so the pursuer could not raise an action. It would not have been competent to raise an action for the same claim. In any event, the court should exercise its discretion and decide that there are no prescription issues.

Decision and reasons on Issue 5

[64] The obligations upon which the pursuer relies in this action are to account for the sum allegedly ascribed by the PSA and embezzled by Scott and to pay damages arising from delictual acts. The pursuer's position is that he has succeeded to Apollo's rights to recover these sums, but there is no dubiety that the wrongs are said to have been perpetrated upon

Apollo. The alleged ascription of sums by the PSA and the consequent embezzlement claim arose in 1993. There was a concurrence of *damnum* and *injuria* at that point. The pursuer made no suggestion that there had been any relevant claim or other ground for interruption of the prescriptive period in respect of that obligation. It has therefore prescribed.

[65] The delictual obligations are based on alleged wrongs perpetrated by the submissions in the Note of Argument for Scott in the arbitration in 2007. In my view, if for any reason these caused loss or damage, that occurred when the arbiter's Final Draft Opinion was issued in 2007. The use of the expression "Final Draft Opinion" was presumably, in accordance with standard practice, a means of allowing a stated case on points of law to be taken. Nonetheless, the majority of the claims made by Apollo were dismissed in the arbiter's decision and, if that was brought about by the alleged breach of delictual duties, loss thereby occurred. In any event, loss and damage also took place when expenditure was incurred in respect of the stated case procedure. There was therefore a concurrence of *damnum* and *injuria* arising from the Final Draft Opinion, when a right of action arose: *David T Morrison* v *ICL Plastics Ltd* [2014] UKSC 48 (paragraph 11); *Gordon's Trustee* v *Campbell Riddell Breeze Paterson LLP* (paras [21] and [22]. The stated case, and indeed the petition for judicial review that followed, were based on the contractual obligations and cannot give rise to relevant claims in respect of the alleged delictual obligations in the present case and hence did not interrupt the prescriptive period. I sustain the defender's seventh plea-in-law on this issue.

[66] If my reasoning above is incorrect and the 5-year prescriptive period commenced only on the issuing of the Part Award on 11 December 2014 then *prima facie* that period expired prior to service of the Initial Writ. On 20 December 2019, the pursuer emailed the CEO of the defender attaching *inter alia* the warrant of citation dated 16 December 2019 and

the Initial Writ. These were then sent by post, along with a copy of the arbiter's Part Award, by recorded delivery on 3 January 2020. The pursuer avers that he raised the action at Ayr Sheriff Court on 11 December 2019. However, as the warrant of citation shows, it must have been served on or after 16 December 2019, and indeed it appears to have been formally served on about 4 January 2020 and so *prima facie* the obligations have been extinguished by prescription. But that leaves the question of whether any relevant claim was made by the pursuer during the 5-year period. While I was given certain information by senior counsel for the defender about that matter, including in relation to the sheriff refusing to allow adjustments by the pursuer in his claim against RBS in 2017, it would not have been appropriate to decide the issue of whether or not there was a relevant claim without evidence about the events that occurred. If the obligations had not otherwise prescribed (as I have held) the approach taken in *Ecclesiastical Insurance Office plc* v *Whitehouse-Grant-Christ* would have required to be considered in the light of that evidence.

Conclusion

[67] As noted above, debate was allowed on the five issues that I have dealt with. For the reasons explained, I have accepted most of the submissions for the defender on these issues. The pursuer, in his Note of Argument, moved for a diet of proof on the averments in support of Craves 3-8 and argued that Craves 1 and 2 should be granted. If I had not decided to dismiss the action, I would have concluded that there was no basis for either an award of summary decree or the suggestion that the defender's averments were irrelevant in respect of Craves 1 and 2.

Disposal

[68] For the reasons given, I shall sustain the second, third, fifth, sixth and seventh pleas-in-law for the defender and dismiss the action. In the meantime, I reserve all questions of expenses.