IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

MANCHESTER DISTRICT REGISTRY

TECHNOLOGY & CONSTRUCTION COURT

[2016] EWHC 3596 (TCC)

No. C50MA008

Manchester Civil Justice Centre
1 Bridge Street West
Manchester

Tuesday, 1 November 2016

Before:

HIS HONOUR JUDGE RAYNOR QC

(sitting as a Judge of the High Court)

B E T W E E N :

HALCROW GROUP LIMITED — Claimant

- and -

(1) BLACKPOOL BOROUGH COUNCIL
(2) GORDON BATHGATE — Defendants

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MR. D. FEARON (instructed by Weightmans LLP) appeared on behalf of the Claimant.

MR. S. WHITFIELD (instructed by Hill Dickinson LLP) appeared on behalf of the First Defendant.

MR. V. MORAN, QC (instructed by BLM) appears on behalf of the Second Defendant.

J U D G M E N T

(As approved by the Judge)

JUDGE RAYNOR:

[Judge's Note: quotations from documents have not been checked]

1 Halcrow is a global engineering consultancy. By an agreement made with Blackpool Borough Council, Halcrow undertook the design of a culvert extension at Manchester Square in Blackpool, the design being completed in January 2010. Thereafter, in 2010, 2011 and subsequently damage was sustained first, to the roof of the culvert and the promenade above and, second, to a security gate. A claim was intimated by the Council and arbitration proceedings ensued. The arbitration hearing lasted five days in November 2015, the award of the arbitrator, the second defendant, Mr. Gordon Bathgate, being dated 28th January 2016.

2 In these proceedings, Halcrow seek permission to appeal against the award under s.69 of the Arbitration Act, 1996 and/or the setting aside of the award for serious irregularity under s.68.

3 The contract between the parties incorporated the ICE arbitration procedure. Relevant provisions of that procedure are r.7.4(d)(e) and (f), which are in the following terms:

> "7.4) The arbitrator shall have power to decide all procedural and evidential matters, including but not limited to
> (d) whether to apply the strict rules of evidence or any other rules as to the admissibility, relevance or weight of any material, oral, written or other sought to be tendered on any matters of fact or opinion, and the time, manner and form in which material should be exchanged and presented.
> (e) whether and to what extent the arbitrator should himself take the initiative in ascertaining the facts and the law and,
> (f) whether to rely upon his own knowledge and expertise to such extent as he thinks fit."

The other relevant rule is r.13.3, which relates to evidence and provides:

> "The arbitrator may order that experts appear before him separately or concurrently at the hearing so that he may examine them inquisitorially, provided always that at the conclusion of the question and by the arbitrator the parties or their representatives should have the opportunity to put such further questions to any expert as they may reasonably require."

4 The hearing lasted from 16th to 20th November 2015. The arbitrator had before him a very substantial body of evidence and heard evidence from nine witnesses.

5 The Council adduced evidence from two factual witnesses and three expert witnesses. The factual witnesses were Mr. Pomfret, the project manager and Mr. Arnold, the clerk of the works. The expert witnesses were Mr. Cookson, a quantity surveyor, Professor Alsopp, a wave pressure expert and Mr. Wyatt, a structural engineer.

6 Halcrow's witnesses of fact were Mr. Robert Shaw, its principal engineer and project manager, Mr. Glennerster, the director of coastal engineering and Mr. Symes, whom I shall describe in a moment. There was one independent expert witness, Mr. Bell, Halcrow's wave pressure expert. It should be noted that Halcrow, unlike the Council, had no independent expert engineering witness.

7 Mr. Symes is a chartered civil engineer and a specialist in structural design of marine structures. However, as the skeleton argument prepared by Mr. David Fearon, counsel for Halcrow confirms, Mr. Symes was called as a witness of fact, although he had no involvement in the project prior to March 2012 and his witness statement contained extensive opinion evidence as to the causes of the damage. In the end, the arbitrator took no account of his opinion evidence and that is a matter about which substantial complaint is made by Halcrow in the s.68 application.

8 Both sides were represented by experienced counsel, Mr. David Fearon for Halcrow and Mr. Simon Whitfield for the Council. The arbitrator, Mr. Bathgate is a highly experienced chartered civil engineer and chartered arbitrator and his CV is at B5, tab 12.

9 The culvert is in three sections, section 0 being seaward, section 1 in the middle and section 2 landward. As far as the damage is concerned, it is necessary to separate the damage to the culvert roof and promenade above from the damage to the gate.

10 First, the culvert roof and promenade. As will be seen, the statement of claim alleged that the defect concerned the roof of culvert 1, although damage was noted to the promenade above culverts 1 and 2. In photographs 2,3,4,7,8 and 9 on p.493 of B3 damage is shown to the promenade above culvert 2.

11 The essential allegations are in para.2.3 of the statement of claim, as follows:

"2.3.1) Raising the roof at Culvert 1 has created an internal pressure trap in the marine structure (culvert). The respondent has admitted to selecting a methodology (Exposed Jetties —for open water progressive waves) that is not appropriate (for the dissipated/throttled waves): there is also no evidence of the Respondent using the prescribed care when using exposed jetties for structures that are not exposed.
2.3.2) The Respondent also identified the main issue it perceived being entrapped air, but neglected to consider/design adequately for such. The Respondent has also not designed internal structures within the raised roof at Culvert 1 for foreseeable loadings.
2.3.3) Due to the alleged breaches in this Statement of Claim, the design of the Culvert 1 roof/public promenade has not adequately addressed foreseeable loadings/mechanisms.
2.3.4) It is alleged that the culvert roof/public promenade has suffered damage due to the design not being sufficient for foreseeable loadings/mechanisms.
2.3.5) The claimant agrees with the provided statement in figure 24, the lesson learnt being to have a constant cross-section in the culvert to remove the pressure trap. To be in keeping with the rest of the design the internal roof at Culvert 1 would have to be lowered to the same height as the roofs at the adjacent Culvert 0 and Culvert 2.
2.3.6) Pressure relief also needs to be provided in any case. This is on the basis of safety, to ensure the pressure is not transmitted further down the culvert to adjoining employer's and the third party's critical infrastructure.
2.3.7) The construction work to lower the Culvert 1 roof has been estimated at £157,967. Added to this is the following:

- an estimate of £10,000 for adequate pressure relief as a safety measure;
- an estimate of £25,000 for design fees;
- an estimate of £5,000 for site supervision."

12 It will be seen that paras.2.3.3 and 2.3.4 are pleaded in wide terms, as was para.2.2.10 on p.503 which stated that:

"If the consultant did not provide for the marine structure, that is the culvert at Manchester Square, to be designed for loadings induced from the marine environment (e.g. wave/air induce pressures/forces) in the design criteria and methodology report, then it is alleged that this is a clear breach of cl.21.2."

13 It is also important to note that the claim which is pursued is the cost of lowering the culvert 1 roof, not repairing the cracks to the promenade nor, indeed, any work to the culvert 2 roof, and it is that cost minus £10,000 which the arbitrator awarded.

14 As to the gate, paras.3.2.11 and 3.2.13 on p.525 of B3 were in the following terms:

> "3.2.11) Following its repair; for the gate to fail under normal wave action (no significant storm or evidence of being struck by debris) due to one (of four) missing bolts, appears to be a very lean design. Too lean from either not calculating the correct loading and/or not having a sufficient factor of safety.
> 3.2.13) It is demonstrated from the calculations that the gate has not been designed for dynamic load effects as per the static water head calculation."

15 After a second failure, it was discovered that whereas Halcrow's design had called for four bolts, only three bolts had been fixed by the contractor and as will be seen, Halcrow also alleged additional construction defects.

16 In the points of defence, Halcrow's case, first as regards the culvert and promenade damage, was summarised at 3/534

17 In para.54 on p.544, it was alleged that:

> "The failure of the upper promenade can be broken down into two sections,
> 54.1) longitudinal cracking above the culvert section one side walls and
> 54.2) rotational settlement of the upper promenade pavement slabs above culvert section two, leaving 'steps' between adjacent slabs and cracking of slabs."

18 In its closing written statement, its core submissions were stated as follows under the heading, "Causation and construction defects":

> "24. The claimant has not proven that the damage of which it complains was in any way caused by any such alleged failure, nor could it, because it was not.
> 25. The claimant has identified a number of instances of damage to the promenade and storm gates to the culverts. It asserts that the damage in question occurred as a consequence of these aforementioned alleged breaches of the respondent's design obligations.

26. They do not, and crucially, and fatally for the claimant's case, nowhere has the claimant proved how any alleged design defect did cause or could have caused the specific damage sustained by the promenade and gates.
27. The claimant also neglects to record the various occasions when it ignored advice from the respondent on design and construction issues.
28. The respondent has provided compelling evidence that the damage was in all likelihood caused by construction defects i.e. due to defective workmanship on the part of one or other or both of the contractors. In its pleadings and witness statements the claimant provided no evidence whatsoever on this issue. Its claim must therefore as a matter of law fail.
29. In any event, in addition to construction defects identified by the respondent, under cross-examination the claimant's own witnesses (Mr. Pomfret and Mr. Arnold) agreed that there were or could have been a number of construction defects with the works. For example, Mr. Pomfret admitted on day two that the reinforced concrete forming the down stand beams to the edge of the Culvert 1 roof slabs had not been properly poured.
30. Mr. Wyatt actually identified some construction defects in his report.
31. Even though directed to do so by its own engineer in October 2011, the claimant undertook no investigation of the promenade to ascertain what actually caused the damage complained of. Again, as a consequence of this its claim must fail. It has not proved its case on what caused the damage at all, never mind on the balance of probabilities.
32. The claimant did not even address causation in its statement of claim or reply, instead repeatedly stating in the latter that causation would be addressed by independent expert reports. In fact, none of the claimant's expert reports actually properly dealt with causation.
33. Professor Allsop was entirely concerned with theoretical analysis of failure mechanisms for the culverts and gates, with the presumed intention that thetribunal would accept that.
33.1. His analysis was correct (which Mr. Bell demonstrated to be clearly not the case), and
33.2. That if his analysis was correct that somehow the damage which actually occurred must have been due to defective design, though he never actually explained how.
34. Mr. Bell demonstrated that Professor Allsop's theories were unsustainable.
35. In any event, Professor Allsop's report did not deal with how any theoretical design defect could have caused the actual damage sustained. Under cross examination he also clearly stated that he had provided no analysis relating to Culvert 2 (above which much of the damage to the

promenade in situ slab complained of was sustained), nor had he done any calculations on Culvert 0.
35. Further key comments and concessions from Professor Allsop's evidence are recorded below.
37. Mr. Wyatt attempted and failed to deal with causation. His report was shown to have failed to deal with major issues such as construction defects and to have been so full of errors as to be evidentially of little if any value. Details of the most obvious of his errors and omissions is provided below.
38. Mr. Cookson was the claimant's quantity surveying expert. His report was, in reality, simply a rubber stamping exercise. In addition to not dealing with causation it provided no analysis of costings for alternative remedial schemes to assist the tribunal.
39. Mr. Pomfret was the instigator and prime mover of the claim. He drafted the statement of claim and reply, bringing a claim against the respondent in which there was no consideration given to causation. As was put to him in cross-examination, if causation was not understood when the claim was brought, then a claim could not legitimately be brought (Day 1).
40. When instigating the claim Mr. Pomfret clearly refused to countenance the possibility that there were construction defects. He stated that there were none, but his grounds for doing so were preposterous.
41. His failure to do so and to explore if there were in fact construction defects means that the claimant's claim must fail. It cannot prove on the balance of probabilities, or indeed at all, that the respondent was wholly, or in part, or at all, responsible for the damage that occurred.
42. To the limited extent that evidence on causation has since been adduced by the claimant it has been adduced in an effort to justify the bringing of the claim, a retrofitting exercise, of no merit whatsoever.
43. The claimant's case has had no basis in fact, and been based on sweeping allegations against the respondent and innuendo.
44. Mr. Pomfret was a very unreliable witness, refusing to answer the most straightforward questions.
45. A significant number of references to his witness evidence are made below."

19 As regards culvert 2, in para.94.2 to 94.6 the following was stated:

"94.3. The claimant has failed to prove its case on the balance of probabilities or at all.
94.3. The claimant has simply put forward hypothetical methods by which
damage may be occurring.

94.4. It has failed to consider or investigate the identified construction issues
94.5. It has failed to prove any causal link to the damage
94.6. This is particularly clear in respect of the damage above culvert two. There is evidence of rotational settlement of the upper promenade pavement slab, and the claimant has provided no mechanism explaining how this is caused by any default on the part of the respondent."

20 As regards the gate, the position was summarised in para.202.2 of the points of defence on p.575, as follows:

> "The contractor securing the upper central gate restraint with three bolts instead of the designed four. Each of these three bolts was not embedded to the required 85 millimetres and no resonant remain, suggesting they had not been installed properly. The contractor has admitted liability for this."

21 There was also mentioned an incident where the gate was left open, but that was not the subject of the arbitration.

22 Approximately £200,000 was claimed in respect of the damage to culvert 1 and about £30,000 in respect of the gate, exclusive of recoverable costs and interest.

23 On 16th November 2015, the arbitrator held a site visit and his note of that is at appendix A of his award. He noted cracking above the roof of culvert 1 at promenade level and on the soffits of the roof slabs of culvert 1. The only mention of cracking in relation to culvert 2 is cracking at the junction of culvert 1 and culvert 2. Evidently, he did not regard the cracking of the promenade above culvert 2 alone of being of such significance as being worthy of note on his visit.

24 In his note, the arbitrator included the following as regards the cracking above the roof of culvert 1 at promenade level:

> "The cracking I saw was of a type that would and could be expected to have occurred were the promenade to have been subjected to physical lifting. In this case, that lifting would occur if upward pressure on the soffit of the roof beams of culvert one had been of sufficient magnitude such as to overcome the pre-cast reinforced concrete slabs' structural ability to resist visible deflection upward by that upward pressure. The cracking I saw was consistent with an upward deflection of the roof's slabs. That consistency was disclosed by the fact that the cracks were, 'opening' cracks…"

25 As regards the cracking inside the culvert of culvert 1, the arbitrator stated this:

> "I saw cracking on the soffits of the roof slabs of culvert 1. The cracking was at the centre-line of the roof's slabs, symptomatic of tension cracking at the point of maximum bending stress of the roof slabs… I had seen and discerned from the documents I had received long before the site visit, that the quantity of steel reinforcement in the soffits of the roof's slabs exceeded the quantity of the steel reinforcement in the tops of the roof's slabs. It had appeared very obvious to me at a very early stage in the arbitration that the positioning of the reinforcement of steels seemed to be incorrect. The greater quantity of steel, by examination, ought to have been located in the top surfaces of the slabs, and not their soffits. The smaller crack widths (as compared to those cracks in the Promenade's surface) which observed on the soffits were consistent with what I perceived to be as the wrong place to have located the greater quantity of steel reinforcement."

26 At section 15 of the award, the arbitrator awarded the sum of £187,967 in respect of the claim for the culvert 1 roof slab and he awarded the sum of £27,424 in respect of the gate claim.

27 In his reasons, the arbitrator summarised the respective cases of the parties as follows. First, in para.16.1.3, as regards the damage to the culvert roof and promenade he stated thus:

> "6.1.3. The claimants position was that the respondent, who owed a duty of care to it, had breached that duty of care, and that the said breach caused the damage suffered. The claimant alleged that the culvert roof/public promenade had suffered damage due to the design not being sufficient for foreseeable loading/mechanisms. The respondent's position was that the damage was caused by construction defects for which it had no liability, as its contract with the claimant excluded the provision of supervisory duties during construction of the culvert."

28 Second, as regards the gate in para.16.2.2 he stated:

> "16.2.2. In the giving of his evidence, Mr. Glennerster could not understand how Halcrow could be liable for the claim in respect of the gate when it had not been constructed by the contractor in accordance with Halcrow's drawings. I understood Mr. Glennerster's position; the fixings of the gate as constructed were not consistent with Halcrow's drawings. However, it was submitted to me in the claimant's evidence, evidence which I accepted, that the fixings of the gates to the culvert as

shown on Halcrow's drawings were inadequate. The corollary of that is that even if the contractor had installed the fixings of the gates in accordance with Halcrow's drawings, the failure of the fixings would nonetheless have ensued. That was my conclusion of what had been submitted to me, both in writing and orally."

29 Halcrow criticised the description of its case as regards the damage to the roof and promenade as incomplete, but I do not accept that this is valid. It seems to me a fair summary, because it is clear from the parties' closing submissions that there were indeed two, and only two, competing causes put forward as regards the damage. As regards the Council, the cause was Halcrow's defective design, and as regards Halcrow the cause was construction defects.

30 The arbitrator's statement of the Council's case in relation to the Culvert roof and promenade, which I have quoted, is a direct quotation from its statement of claim.

31 Before coming to the arbitrator's reasons, it is necessary to refer to two matters which arose during the course of the hearing. The first concerns the arbitrator's failure to have regard to Mr. Symes's opinion evidence and I shall deal with that in more detail later. The second concerns the way in which evidence concerning the design defect which the arbitrator regarded as determinative emerged.

32 On the penultimate day of the hearing, Mr. Fearon, counsel for Halcrow, cross-examined Mr. Wyatt. There was the following exchange noted by the arbitrator at p.458 of B2:

"Mr. Fearon: I cannot find anything to show causation?
Mr. Wyatt: The link is the structure is underdesigned; in the slab under uplift load and failure to make the structure not composite."

33 At 9.15 on the final day of the hearing, according to the arbitrator's note, which is at p.462 of the bundle:

"I met in private with Mr. Whitfield and Mr. Fearon. I explained that by inspection the 450mm slabs on their own do not appear to work. That was based on my own knowledge which I could not rely on without canvassing it before parties. I appear to have no calculations from Halcrow which showed the 450mm slabs will work on their own.
Mr. Fearon noted there will be some composite action, a fact which I acknowledged but noting, just how much is some?"

34 Mr. Whitfield, counsel for the Council, then in the course of re-examination of Mr Wyatt asked the following questions:

> "Mr. Whitfield: Look at document 2098, this is p.463, running the revised numbers for the ultimate moment, 575.12kN/m^2 goes to 625.1kN.m. Either 575.12kN.m or 625.1kN.m, what does that mean?
> Mr. Wyatt: There is insufficient strength in the beam to resist wave pressure forces.
> Mr. Whitfield: So against the criticism yesterday, do you wish to change anything in your overall conclusion?
> Mr. Wyatt: No."

35 After Mr. Fearon asked further questions, there was the following exchange with the arbitrator:

> "101. I then took Mr. Wyatt to document 1100 (Drg No 7709). I stated that the top face steel shown there was H2O bars @ 125mm c/c; and the bottom face steel was s25 bars @ 125mrn c/c. Mr. Wyatt's wave pressure was 56kN/m2, and his HA loading was 28.83kN/m2, including the knife edge load; that would suggest the greater quantity of reinforcement would be on the top surface, but the greater quantity of steel was on the bottom face. Mr. Wyatt stated that the greater quantity of steel is in the bottom face. I asked what that meant? He replied that there was insufficient steel on the top and bottom faces. He also stated: if air is acting over only a part of the beams it will not alter his conclusion to a great degree. He had assumed that water pressure was acting on the bearing shelf. He had taken the worst credible loading condition. Wave loading had been taken as live loading similar to HA loading therefore his factors of safety were OK. He had taken a factor of safety of 1.4 as for buildings. I asked if he had adopted load factors from British Standards. He replied yes, and he had not increased them."

36 Mr. Fearon then asked a further supplementary question.

37 Originally, Halcrow pursued, as part of its s.68 application, an allegation of breach of agreed procedures and of natural justice arising out of this exchange. However, in paras.109 to 112 of Halcrow's skeleton argument these matters were not pursued, although it is submitted, as will appear, that the arbitrator, as regards this exchange, failed to act fairly.

38 As to the reasons that the arbitrator gave for his award in relation to the roof and the promenade, he stated as follows:

"16.1.4. The dispute was referred to me on 27 January 2015. Resolution of the dispute has taken one year or thereby. During that year, the question which awaited my answer was this; which was the more likely cause of the damage to the culvert and its overlying promenade -was it (a) that of the design's not being sufficient for foreseeable loading/mechanisms; or was it (b) the alleged construction defects? I now answer that it was the former.
16.1.5. There were construction defects. Mr. Pomfret eventually had to concede that there was at least one. Crucially, the types of defect relied upon by the respondent were not the cause of the damage to the culvert and promenade. I asked myself, if the design was consistent with the parties' contracts requirements, would the construction defects alone have caused the damage which had occurred and which damage I saw both in photographs and on site? No, they would not. I also asked myself, if there had been no construction defects, would the damage still have occurred? The answer is yes.
16.1.6. The principal cause of the damage is to be found in the inadequate structural design of the pre-cast reinforced concrete slabs which form the roof of the culvert 1. The design of the pre-cast reinforced concrete roof slabs of culvert 1 has been shown to exhibit fundamental errors which negate its essential structural adequacy:

- there is insufficient steel reinforcement in the bottoms of the roof
- there is insufficient steel reinforcement in the tops of the roof slabs there is an absence of steel links between the bottom and top steel reinforcement layers, which absence denies a facility for the slabs to be analysed structurally as beams.
- there is no adequate restraint to resist uplift forces generated by contractually derived wave pressures which act upon the internal roof of culvert 1."

I also refer to the following paragraphs of the award: 16.1.17,16.1.18, the final paragraph of 16.1.19, 16.1.20 and 16.1.21.

39 In 16.1.22 the arbitrator commented, as was the fact given the exclusion of Mr. Symes's opinion evidence, that there was no expert evidence from Halcrow to support its denial of defective design. As will be seen, I do not accept that that amounts to a reversal of the onus of proof.

40 I note that there was no criticism of the slabs forming the roof of culvert 2, but there is, as I have already noted, no claim in respect of remedial work to the culvert 2 roof.

41 As to the gate, the arbitrator's reasons are stated in 16.2.5 and 16.2.6 in the following terms:

> "16.2.5. Mr. Wyatt adopted forces acting upon the gate which had been derived by Professor Allsop. I preferred Professor Allsop's derivation of forces on the gate to those derived by Mr. Bell.
> 16.2.6. Mr. Wyatt reported that the bolts anchoring the gates to the base concrete had pulled out. He stated in his report that the loads applied to the gate by the respondent had been calculated incorrectly. He concluded that the gate's anchors had pulled free because of *inter alia*, errors in determining the loads acting on the gate."

42 Following the publication of the award, Halcrow's solicitors wrote to the arbitrator on 16th February 2016, asserting that there were numerous serious irregularities and errors within the award and complaining of the conduct of the proceedings. It was stated that Halcrow had no option but to make the present applications. In addition, pursuant to s.57(3) of the Act, additional awards and reasons were requested. The arbitrator declined to furnish the same.

43 I now deal with the s.68 application.

44 I have before me and have considered witness statements from Mr. Michael Bennett, Halcrow's solicitor, Mr. Pomfret and the arbitrator. I have also received very helpful skeleton and oral arguments on both applications from counsel for the parties, Mr. Fearon for Halcrow, Mr. Whitfield for the Council, and Mr. Vincent Moran QC for the arbitrator.

45 Section 68(1) of the Act provides:

> "(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
> A party may lose the right to object (see s.73) and the right to apply is subject to the restrictions in s.70(2) and (3).
> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant --
> (a) failure by the tribunal to comply with s.33 (general duty of tribunal);
> (d) failure by the tribunal to deal with all the issues that were put to it."

There are other sub-paragraphs but as the argument and case progressed, it is clear that the only allegations of serious irregularity are within categories (a) and (d).

Subs. (3) provides:

> "(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may;
> (a)remit the award to the tribunal, in whole or in part, for reconsideration,
> (b)set the award aside in whole or in part, or
> (c)declare the award to be of no effect, in whole or in part.
> The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

46 Thus, not only must Halcrow establish that the case comes within one of the two categories that are relied on, but also that it has caused or will cause it substantial injustice.

47 Section 33(1) of the Act provides, under the rubric, "General duty of the tribunal":

> The tribunal shall -
> (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

48 There was extensive citation of authorities, but no disagreement about the law to be applied, and I start with the general principles enunciated by Akenhead J in the case of **The Secretary of State for the Home Department v Raytheon Systems Ltd** [2014] EWHC 4375 TCC. At para.33(a) down to (f) inclusive, the judge stated as follows:

> "(a) Section 68 reflects 'the internationally accepted view that the court should be able to correct serious failures to comply with the 'due process' of arbitral proceedings: cf Art.34 of the Model Law.' (see **Lesotho Highlands Development Authority v Impregilo SpA** [2005] UKHL 43, para.27); relief under s.68 will be appropriate only where the tribunal has gone so wrong in the conduct of the arbitration that 'justice calls out for it to be corrected.' (ibid).
> (b) The test will not be applied by reference to what would have happened if the matter had been litigated (see **ABB v Hochtief Airport** [2006] 2 Lloyd's Rep 1, para.18).

(c) The serious irregularity requirement sets a 'high threshold' and the requirement that the serious irregularity has caused or will cause substantial injustice to the applicant is designed to eliminate technical and unmeritorious challenges (Lesotho, para.28).
(d) The focus of the enquiry under s.68 is due process and not the correctness of the Tribunal's decision (**Sonatrach v Statoil Natural Gas** [2014] 2 Lloyd's Rep 252 para.11).
(e) Section 68 should not be used to circumvent the prohibition or limitations on appeals on law or of appeals on points of fact (see, for example, **Magdalena Oldendorff** [2008] 1LR 7, para.38, and Sonatrach para.45).
(f) Whilst arbitrators should deal at least concisely with all essential issues (**Ascot Commodies NV v Olam International Ltd** [2002] CLC 277 Toulson J at 284D), courts should strive to uphold arbitration awards (**Zermalt Holdings SA v and Nu Life Upholstery Repairs Ltd** [1985] 2 EGLR 14 at p.15, Bingham J quoted with approval in 2005 in the **Fidelity case** [2005] 2 LR 508 para.2) and should not approach awards 'with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults on awards with the objective of upsetting or frustrating the process of arbitration."

49 In **Sonatrach v Statoil Natural Gas LLC** [2014] EWHC 875 (Comm), Flaux J stated in paras.11, 12 and 18:

"11) In order to succeed under section 68 an applicant needs to show three things. First of all, a serious irregularity. Secondly, a serious irregularity which falls within the closed list of categories in s.68(2). Thirdly, that one or more of the irregularities identified caused or will cause the party substantial injustice. The focus of the enquiry under section 68 is due process, not the correctness of the tribunal's decision: see per Hamblen J in **Abuja International Hotels v Meridian SAS** [2012] EWHC 87 (Comm) at [48] to [49]. As the DAC Report states, and numerous cases since have reiterated, the section is designed as a long-stop available only in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected. This point, that s.68 is about whether there has been due process, not whether the tribunal "got it right", is of particular importance in the present case, where, upon close analysis, the claimants' real complaint is that they consider that the tribunal reached the wrong result, which is not a matter in relation to which an arbitration award is susceptible to challenge under s.68.
(12) It has been emphasised in a number of cases that the evaluation of the evidence is entirely a matter for the tribunal. A clear statement of the applicable principle can be found in the judgment of Colman J in

World Trade Corporation v C Czarnikow Sugar Ltd [2005] 1 Lloyd's Rep 422 at [45], albeit in the context of s.68(2)(d), alleged failure to deal with an issue:

"On analysis, these criticisms are all directed to asserting that the arbitrators misdirected themselves on the facts or drew from the primary facts unjustified inferences. Those facts are said to be material to an "issue", namely what were the terms of the oral agreement. However, each stage of the evidential analysis directed to the resolution of that issue was not an "issue" within s.68(2)(d). It was merely a step in the evaluation of the evidence. That the arbitrators failed to take into account evidence or a document said to be relevant to that issue is not properly to be regarded as a failure to deal with an issue. It is, in truth, a criticism which goes no further than asserting that the arbitrators made mistakes in their findings of primary fact or drew from the primary facts unsustainable inferences'.

(18) I have to say that I am not sure I should feel similarly constrained. The passage in the judgment of Toulson J is clearly obiter since his conclusion (and thus the ratio of the decision) was that the applicant was engaged in an impermissible attack on the tribunal's findings of fact, so that the application under s.68 failed. Toulson J does not specify what sort of exceptional case he had in mind. I can quite see that in a case, for example, of an agreed or admitted piece of evidence which was ignored or overlooked, it might be possible to say that the tribunal was in breach of its duty under s.33, so that s.68(2)(a) was engaged. However, beyond that, it seems to me that, as the present case demonstrates, the contention that the tribunal has overlooked or misunderstood particular evidence necessarily involves interference with the evaluation of the evidence by the tribunal. Whilst the applicant may contend, as in the present case, that the tribunal has overlooked a critical piece of evidence, the tribunal may not have regarded it as critical and thus may have decided that it was not worth referring to in an Award which necessarily cannot set out every piece of evidence in the case. I do not see how the court can determine whether the tribunal has overlooked evidence without an analysis of the tribunal's evaluation of the evidence, which is not a permissible exercise under s.68: see the passage in the judgment of Colman J cited above and [49]-[50] in my own recent judgment in **Primera Maritime (Hellas) Limited v Jiangsu Eastern Heavy Industry Co Ltd** [2013] EWHC 3066 (Comm); [2014] 1 Lloyd's Rep 255 at 264-5, both cases under s.68(2)(d), but where the prohibition against attacking the findings of fact of the tribunal must apply whichever head of s.68(2) is relied upon."

50 I will deal with caselaw on subs.(d) of s.68(2) later.

51 The allegations under s.68(2)(a) and s.33 are six in number: (1) finding in favour of the Council when there was no evidence on causation adduced by it. That is para.3.1.3 of the claim form. (2) failing to consider Halcrow's case on causation properly or at all (para.3.1.1). (3) excluding the opinion evidence of Mr. Symes, in spite of prior rulings that his evidence was admissible, and to the substantial prejudice of Halcrow who were thus denied expert engineering evidence. There was complaint, I note, also of a hearsay ruling, but that has been abandoned. (4) making findings based on the arbitrator's own knowledge, rather than evidence adduced before him. (5) allied to that, asking questions of the Council's engineering expert, Mr. Wyatt, supporting a conclusion regarding structural strength of the slabs he had reached and directed to an issue that was not open to the Council on the pleadings (para.7) and (6) refusing one month prior to the hearing to admit a further statement of Mr. Symes containing calculations.

52 Other allegations in the claim form under ss.68(2)(a) (b) and (c) are not pursued and as I have said, I will deal with the allegations under subs.(2)(d) later.

53 I now deal with the six allegations I have mentioned.

54 The first, as I say, asserted that there was no evidence as to causation. That allegation is plainly incorrect. Mr. Wyatt's report was produced to expressly deal with this issue: at para.1.2(b) on p.832 of B3 it is stated that he was to "produce an expert's report, providing expert evidence as to the cause and the failures/damage at the culvert roof and culvert gate". His conclusions were clearly stated in para.3.1 on p.834 of B3.

55 I refer also to paras.9.1.7 on p.882 where it is said, “cover slab is not strong enough to safely resist the upward loads from … pressure" and at 10.1.2 where it is said under "Conclusions":

> "The cover slab has not been designed or detailed to adequately resist the internal pressure conditions and the actions caused on the structure. As a result, structural damage has been caused to the upper promenade slab and the outer floor cover slab. This damage is evidenced by visible movements or cracking or spawning to a promenade slab, elements of the cover slab and the walls supporting the cover slab."
>
> I refer also to paragraphs 10.1.4 and 10.1.5 on p.888.

56 As regards the gate, Mr. Wyatt's opinion was stated in para 10.1.7.

57 There was also evidence given by Mr. Wyatt at the hearing, as noted by the arbitrator. I have already referred to answers that he made to the question in para.88, p.458 by Mr. Fearon, to the evidence which he gave in answer to Mr. Whitfield's questions on p.463, and at p.465 to the exchanges of the arbitrator and Mr. Wyatt which I have quoted.

58 As I have noted, in my judgment it is hardly surprising that the Council's expert evidence on causation was accepted when there was no expert engineering evidence for Halcrow taken into account by the arbitrator.

59 The second allegation, as I have said, is failing to consider the case of Halcrow on causation properly or at all. I shall consider the individual allegations made by Mr. Bennett in para.85 of his first witness statement, but it seems to me from the detailed criticisms in paras.88 to 101, that what Halcrow seeks to do is to have me evaluate the evidence which was before the arbitrator in an endeavour to persuade me that the arbitrator misunderstood or overlooked evidence before him, and so reached an indefensible or perverse or simply wrong conclusion. That is precisely what the court is not permitted to do in an application under s.68 of the Act.

60 The points which are made in para.85 are three in number.

61 As to (a), my finding on this is that the arbitrator obviously disagreed. He was satisfied that construction defects were not the cause of damage and that Halcrow's design was in the respects he stated. He plainly did not consider that it was necessary to have any invasive investigation and that was a matter for him.

62 In paragraph 85(b) it was asserted that the Council "have provided no evidence of the causal link between the damage and any supposed breach". However, the arbitrator was satisfied on the evidence before him that there was a causal link as specified by him in para.16.1.6 of the award, and it is not for the court to re-evaluate the evidence he relied on in reaching that conclusion.

63 Paragraph 85(c) asserts that, "the promenade slab and the *in situ* precast slabs acted compositely whether designed to or not". In fact, the arbitrator expressly considered the question of composite action in his reasons. In para.16.1.18 he evidently took the view that composite action was not significant (and I refer to para.96 on p.462) and was not a fundamental part of Halcrow's design (para.16.1.18). He may have been wrong, but that was a matter for him.

64 A fourth matter which is relied upon by Mr. Bennett later in his witness statement relates to beach levels. That is a matter dealt with by him in paras.91 to 97 of his witness statement. However, once again evidently, the arbitrator did not attach significance to these differential levels and that, in my view, was a matter solely for him.

65 In connection with all these allegations, Halcrow makes submissions to the effect that the arbitrator misdirected himself as to the burden of proof. I deal with those matters in connection with the s.69 application and, as will be seen, I have rejected the criticisms.

66 I now deal with the allegations which I have mentioned in paras 51(3) and (6) above relating to Mr. Symes's evidence.

67 I have summarised Halcrow's submissions in those paragraphs. In order to deal with the same it is necessary for me to summarise the events which occurred in relation to Mr. Symes's evidence.

68 At a preliminary meeting on 12th February 2015, the arbitrator decided that the strict rules of evidence should apply. He also decided under r.7.4(e) and (f) that he was entitled to take the initiative in ascertaining facts and law and was also entitled to rely on his own knowledge and expertise, but permitting the parties to comment on any such reliance. The relevant ruling is at p.19 of B2.

69 In emails of 14th and 15th April 2015, the arbitrator made clear that he was expecting Mr. Symes to provide input on technical matters. On the same day, Halcrow made it clear that Mr. Symes would be giving evidence as a witness of fact. However, the arbitrator in an email on 21st April stated that he envisaged putting matters of a technical nature to Mr. Symes if disagreement remained.

70 On 25th April, Mr. Bennett wrote to the arbitrator and to Mr. Pomfret with a mass of technical details which had been provided by Mr. Symes. On 28th April and on 3rd May, the arbitrator wrote to the parties raising a large number of technical queries and in a later email he stated that he needed Mr. Symes to confirm certain details. On 14th May, the answers to his queries in the email of 28th April were provided by Mr. Symes and in an email of 17th May, the arbitrator stated that he would ask questions about these of Mr. Symes at the hearing.

71 On 22nd May, Mr. Symes' witness statement was served and as I have said, it included substantial opinion evidence regarding the cause of the damage. On 22nd May, the arbitrator stated that in principle he accepted, without agreeing to

the same, that Mr. Symes' answers to his queries represented a valid method of seeking to show that no damage flowed from any breach.

72 On 26th May, the Council's solicitor, Mr. Banks, objected to Mr. Symes' witness statement on the basis that whilst he was called as a witness of fact, his statement consisted wholly or in part of expert evidence. However, on 27th May 2015, the arbitrator ruled that Mr. Symes' statement should stand.

73 In later emails dated 24th June and 25th June, the arbitrator confirmed that he had made a procedural decision on this matter and in an email of 3rd July, he stated that he, "perceived Mr. Symes and Mr. Wyatt as 'equals' albeit Mr. Symes is not giving evidence as an expert". Thereafter, he stated that he would accept a supplemental statement from Mr. Symes dealing with certain queries that he, the arbitrator had raised.

74 Further correspondence ensued between the Arbitrator and Mr Banks, culminating in Mr Banks making clear that the claimant wished to voice challenges to Mr Symes' statement at the hearing notwithstanding the Arbitrator's prior rulings.

75 On 6th November 2015, prior to the hearing the arbitrator ruled that Mr. Symes' supplemental statement containing technical expert evidence would not be admitted. That is a matter as I have said which is a separate complaint.

76 In the event, no expert evidence of Mr. Symes regarding structural matters, including his opinions as to the causes of the damage, was taken into account by the arbitrator. Halcrow's case, as I have stated, is that that was a serious procedural irregularity for the reasons I have stated above. How this position came about emerges from the transcript which I must quote in full:

> "68. Mr. Symes gave his affirmation. He confirmed to Mr. Fearon that documents 1617-1652 were his statement, its contents were the truth, and that it was his signature at document 1652.
> 69. Mr. Whitfield: Your involvement is given at para.3 (document 1618) from 23 March 2012. Was this shortly after Mr. Pomfret's e-mail?
> Mr. Symes: Yes.
> Mr. Whitfield: You're giving evidence as a witness of fact?
> Mr. Symes: Yes.
> Mr. Whitfield: The chronology is information you've abstracted, but not from your own knowledge. You've done an investigation?
> Mr. Symes: Yes. I have no personal knowledge. My Statement is based on what I've read.
> Mr. Whitfield: Your first knowledge is in May 2014 when you visit the site?
> Mr. Symes: Yes.

Mr. Whitfield: Your purpose is to try to understand and provide explanation for the failures, but as a witness to fact you can't give evidence to the causes?
Mr. Symes: Yes.
Mr. Whitfield: As far as giving evidence, you cannot proffer an opinion on the causes of failure?
Mr. Symes: OK.
Mr. Whitfield: At para.26 and 27 (document 1624), the correct person to address this is Mr. Robertshaw, but this is you trawling through events?
Mr. Symes: Yes.
Mr. Whitfield: At paragraphs 31/33, the same comment comes up again and again?
Mr. Symes: I wanted to be up front.
Mr. Whitfield: At para.56 (document 1633), you give your opinion?
Mr. Symes: Yes, my opinion.
Mr. Whitfield: At para.59 (document 1634), where you say, 'I would have expected....'?
Mr. Symes: It's an opinion.
Mr. Whitfield: The first time you have personal knowledge is 19 May 2014, two years after you became involved. What were you doing?
Mr. Symes: I was discussing issues with Mark Glennerster so that I knew what I was going to see on 19 May 2014.
Mr. Whitfield: At para.81 (document 1638), you refer to photos?
Mr. Symes: Correct.
Mr. Whitfield: What you have seen and recorded is in the Appendices. They are commentaries?
Mr. Symes: It's summary of conclusions from the site visit.
Mr. Whitfield: The point is that you cannot conclude anything.
Mr. Symes: If these are the rules, these are the rules.
Mr. Whitfield: Your notes on document 529 say, 'consequences of missing mortar .....'. These are picked up by Mr. Bell. You are not in a position to list the consequences. You don't know. This is covered by Mr. Bell. Go to document 1040, you draw a conclusion of differential settlement, wash-out; again this is expert witness area, not witness of fact. At document 1063, para.1, you mention poor compaction —this is addressed by Mr. Bell. You prepared this document which is your view of poor construction?
Mr. Symes: It records my view.
Mr. Whitfield: Drawing conclusions is a debate I need to have with Mr. Fearon. At documents 1106 and 2021?
Mr. Symes: These are images abstracted from construction drawings.
Mr. Whitfield: Document 1107?

Mr. Symes: It's an enlarged image of a construction drawing. Some of the photos are from Rob Walker's visit in Spring 2014.
Mr. Whitfield: Fig 10 on document 1115, document 1123?
Mr. Symes: At document 1139 that's Dr Cunningham's photo.
Mr. Whitfield: Paragraphs 90, 96, 99 of document 1639 contain opinion and conclusions. For the purpose of this Arbitration, this evidence is not admissible. Paragraph 121 of document 1647; you've heard the discussions on composite action.
Mr. Symes: I disagree.
explained what Mr. Robertshaw's evidence was -that he was addressing issues of uplift.
Mr. Whitfield: Mr. Symes' statement is either hearsay or opinion evidence. I don't want anything held against me.
Mr. Fearon had no questions for Mr. Symes."

77 How the arbitrator regarded what happened appears at p.262 of B2 where he stated:

> "As it turned out at the hearing, counsel for the respondent, Mr. Whitfield, elicited from Mr. Symes that most of his evidence was hearsay and his evidence was not heard on the structural aspects of the culvert. Counsel for the respondent did not object."

The first reference to "respondent", where it refers to Mr. Whitfield, clearly should be a reference to the Council, the claimant in the arbitration.

78 Thus, as the arbitrator stated, he took it that Halcrow did not object to the exclusion of Mr. Symes' expert opinion evidence.

79 For the arbitrator and the Council it is submitted that the parties and the arbitrator at the hearing proceeded upon the basis that the question of the admissibility of the expert evidence of Mr. Symes, notwithstanding the earlier rulings, was open for redetermination at the hearing, and that this is right derives support, in my judgment, from paras.103 to 106 of Mr. Fearon's closing written submissions, where he addresses the question of whether or not opinion evidence of Mr. Symes should be ignored in the following terms:

> "103. Based on the cross examination of Mr. Symes, it is anticipated that the claimant will try to argue that as Mr. Symes is a witness of fact any opinion evidence he gives must be ignored.
> 104. The respondent does not accept this, nor should the tribunal.
> 105. The ICE Arbitration Procedure Part C "Control of the Proceedings' provides that the arbitrator shall have power to decide all procedural and

evidential matters including but not limited to...'whether to apply the strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented'.
106. Mr. Symes is an experienced engineer and has provided valuable evidence to assist the tribunal, and upon which the tribunal can itself take a view based upon its own experience."

80 No mention is made in those paragraphs by Mr. Fearon of the prior rulings of the arbitrator or reliance on those rulings, nor was it contended that the exclusion of the evidence would be a serious procedural irregularity. What was said was that it was, in effect, a matter for the discretion of the arbitrator.

81 At the hearing before the arbitrator, Mr. Whitfield made clear the Council's case that the opinion evidence of Mr. Symes was inadmissible and for that reason he was not intending to cross-examine but did not want anything held against him in that regard. In my judgment, it was incumbent upon Mr. Fearon, if he contended that the evidence should be admitted, to have made his position plain at the hearing. As stated, the arbitrator certainly understood from what had occurred, there being no objection, that Mr Fearon did not object at the time to the position taken by Mr. Whitfield. Given Mr. Fearon's absence of protest, in my judgment, that is a perfectly understandable view to have taken.

82 My conclusion is that, given the lack of objection at the time, the exclusion of the evidence was no procedural irregularity or breach of the duty under s.33. Alternatively, by absence of protest at the time in my judgment Halcrow waived any right to complain that the exclusion of the evidence was a serious procedural irregularity.

83 It is convenient to deal here with the sixth complaint as stated by me in para 51 above, which related to the exclusion of the supplemental statement of Mr. Symes. It does not seem to me that that adds anything to Halcrow's case here. Even if the supplemental statement had not been excluded prior to the hearing, as a result of what occurred at the hearing it would inevitably have been excluded or disregarded as being inadmissible evidence on structural matters by a factual witness in the same way that such evidence in the principal witness statement was not had regard to. Thus, it does not seem to me that its exclusion has caused any substantial injustice to Halcrow.

84 As to the fourth and fifth matters relied on as summarised by me in para 51 above, those are the matters which are specified by Mr. Bennett in paragraph.121 of his first witness statement where it is said that the arbitrator

overstepped the boundary in respect of the use of his own expertise, it being said that he, in effect, used that expertise to introduce new arguments on behalf of the Council. The four examples are stated in para.121.

85 First, I say this by way of preliminary observation. As stated previously, by his ruling in accordance with the rules, the arbitrator was entitled to take the initiative in ascertaining the facts and to rely on his own knowledge and expertise to such extent as he thought fit. He was also entitled to examine the experts inquisitorially, provided he gave the parties the opportunity to ask further questions.

86 As to the criticism which is made in para.121(a), I cannot see any legitimate complaint to the use of his expertise to conclude that the types of defects relied on were not the cause of the damage. As stated, the two competing causes were clearly defined and in the end Halcrow had no expert engineering evidence to rely on in support of its case. The arbitrator accepted the evidence of Mr. Wyatt as to the lack of strength of the culvert slab, which accorded with his opinion. Halcrow had the full opportunity to respond to this in the hearing and the arbitrator was not obliged to respond to all points made by Halcrow.

87 As to (b), which is the finding that there was insufficient steel reinforcement in the slabs, I must consider this complaint together with the associated complaint referred to in para 51(5) above.

88 I have quoted the evidence of Mr. Wyatt given at the hearing regarding steel reinforcement. The essential complaints of Halcrow in this regard are in paras.76 and 77 of Mr. Bennett's first witness statement.

89 I do not accept the validity of these complaints which, to my mind, have been effectively answered by the Council. First, the inadequacy of the roof slab to deal with foreseeable loadings and mechanisms was expressly pleaded and the inadequate strength of the cover slab expressly stated in Mr. Wyatt's report. In my view, that implicitly raises questions about the adequacy of the steel reinforcement, which was expressly criticised in para 8.4 of Mr. Wyatt's report.

90 Second, the arbitrator raised his concern about the adequacy of the slab on the morning of the first day. According to his note, Mr. Fearon stated that Halcrow, at that stage, did not want to produce further calculations.

91 Thirdly, the arbitrator's questions were follow-up questions to evidence given by Mr. Wyatt in answer to Counsels' questions regarding the inadequacy of strength of the slab. He was, in my view, entitled to explore that evidence and raise supplemental questions, including questions on the drawings, provided they went to matters in play in the proceedings, as I consider that they did, and provided that the parties were allowed the opportunity to ask questions

afterwards. As to that, not only was Mr. Fearon allowed that opportunity, he indeed asked a question. Moreover, he made no protest, nor did he ask for an adjournment to deal with the matter. I cannot see that what occurred was either unfair or amounted to a serious procedural irregularity.

92 Fourthly, alternatively, if it was, in my view, Halcrow is precluded by virtue of s.73(1) of the Act from complaining of the matter now. That section is in the following terms:

> "If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—
> (a) that the tribunal lacks substantive jurisdiction,
> (b) that the proceedings have been improperly conducted,
> (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
> (d) that there has been any other irregularity affecting the tribunal or the proceedings,
> he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection".

93 All the complaints made in para.76 of Mr. Bennett's first witness statement were known to Halcrow on the final day of the hearing and yet no objection was made at that time as in my judgment there should have been if Halcrow objected to what had occurred. Having made no objection at the time and having continued to take part in the proceedings, Halcrow is in my judgment precluded from raising the objections following the publication of the award.

94 The third complaint as to use of the arbitrator's own knowledge is particularised in para.128 of Mr Bennett's first witness statement, and it relates to what the arbitrator referred to as "humping". What Mr. Bennett said is that:

> "Neither side either one, presented evidence or two, submitted, that the structure would not bend at all under wave pressures. Halcrow's position was that the amount of 'humping' would be within acceptable tolerances had the structure acted compositely."

95 However, it is evident that the arbitrator did not accept Halcrow's position. He regarded the humping as a defect caused by an inadequate design and in my view I cannot see how this was unfair or amounted to a breach of s.33 of the Act.

96 The fourth matter which Mr. Bennett referred to in sub-para.(d) of para.121 was the finding that the precast slabs were the source of problems, not the fact the roof was raised, contradicting the Council's own expert. That expert was Professor Alsopp, the Council's wave expert. The arbitrator, it is correct, rejected the opinion of Professor Alsopp, as is clear from para.16.1.19 of his award, noting correctly that Professor Alsopp was not an expert on structural capability aspects of the roof. The arbitrator was fully entitled to reject the opinion of Professor Alsopp if he considered it right to do so.

97 I now consider **the allegations which were made under s.68(2)(d).** That sub-section as I have quoted already refers to, "failure by the tribunal to deal with all the issues that were put to it". A concise summary of the relevant legal principles appears in the judgment of Akenhead J in the **Raytheon** case which I have referred to already at para.33(g) under the heading, "As to s.68(2)(d)" --

> "(g) As to s.68(2)(d):
> (i) There must be a 'failure by the tribunal to deal' with all of the 'issues' that were 'put' to it.
> (ii) There is a distinction to be drawn between 'issues' on the one hand and 'arguments', 'points', 'lines of reasoning' or 'steps' in an argument, although it can be difficult to decide quite where the line demarking issues from arguments falls. However, the authorities demonstrate a consistent concern that this question is approached so as to maintain a 'high threshold' that has been said to be required for establishing a serious irregularity (**Petrochemical Industries v Dow** [2012] 2 Lloyd''s Rep 691 para.15; **Primera v Jiangsu** [2014] 1 Lloyd''s Rep 255 para.7).
> (iii) While there is no expressed statutory requirement that the s.68(2)(d) issue must be 'essential', 'key' or 'crucial', a matter will constitute an 'issue' where the whole of the applicant's claim could have depended upon how it was resolved, such that 'fairness demanded' that the question be dealt with (Petrochemical Industries at para.21).
> (iv) However, there will be a failure to deal with an 'issue' where the determination of that 'issue' is essential to the decision reached in the award (**World Trade Corporation v C Czarnikow Sugar Ltd** [2005] 1 Lloyd''s Rep 422 at para.16). An essential issue arises in this context where the decision cannot be justified as a particular key issue has not been decided which is critical to the result and there has not been a decision on all the issues necessary to resolve the dispute or disputes (**Weldon Plan Ltd v The Commission for the New Towns** [2000] BLR 496 at para.21).
> (v) The issue must have been put to the tribunal as an issue and in the same terms as is complained about in the s.68(2) application (**Primera** at paragraphs 12 and 17).

(vi) If the tribunal has dealt with the issue in any way, s.68(2)(d) is inapplicable and that is the end of the enquiry (**Primera** at paragraphs 40-1); it does not matter for the purposes of s.68(2)(d) that the tribunal has dealt with it well, badly or indifferently.
(vii) It matters not that the tribunal might have done things differently or expressed its conclusions on the essential issues at greater length (**Latvian Shipping v Russian People's Insurance Co** [2012] 2 Lloyd''s Rep 181, para.30).
(viii) A failure to provide any or any sufficient reasons for the decision is not the same as failing to deal with an issue (**Fidelity Management v Myriad International** [2005] 2 Lloyd''s Rep 508, para.10, World Trade Corporation, para.19). A failure by a tribunal to set out each step by which they reach its conclusion or deal with each point made by a party is not a failure to deal with an issue that was put to it (**Hussman v Al Ameen** [2000] 2 Lloyds Rep 83).
(ix) There is not a failure to deal with an issue where arbitrators have misdirected themselves on the facts or drew from the primary facts unjustified inferences (World Trade Corporation at para.45). The fact that the reasoning is wrong does not as such ground a complaint under s.68(2)(d) (**Petro Ranger** [2001] 2 Lloyd''s Rep 348, **Atkins v Sec of State for Transport** [2013] EWHC 139 (TCC), para.24).
(x) A tribunal does not fail to deal with issues if it does not answer every question that qualifies as an 'issue'. It can 'deal with' an issue where that issue does not arise in view of its decisions on the facts or its legal conclusions. A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise (**Petrochemical Industries** at para.27. If the tribunal decides all those issues put to it that were essential to be dealt with for the tribunal to come fairly to its decision on the dispute or disputes between the parties, it will have dealt with all the issues (**Buyuk Camlica Shipping Trading & Industry Co Inc v Progress Bulk Carriers Ltd** [2010] EWHC 442 (Comm), para.30).
(xi) It is up to the tribunal how to structure an award and how to address the essential issues; if the issue does not arise because of the route the tribunal has followed for the purposes of arriving at its conclusion, s.68(2)(d) will not be engaged. However, if the issue does arise by virtue of the route the Tribunal has followed for the purposes of arriving at its conclusion, s.68(2)(d) will be engaged.
(xii) Whether there has been a failure by the tribunal to deal with an essential issue involves a matter of a fair, commercial and common sense reading (as opposed to a hypercritical or excessively syntactical reading) of the award in question in the factual context of what was argued or put to the tribunal by the parties (and where appropriate the evidence) (**Ascot Commodities v Olam** [2002] CLC 277 and Atkins, para.36).

The Court can consider the pleadings and the written and oral submissions of the parties to the tribunal in this regard.
(h) In relation to the requirement for substantial injustice to have arisen, this is to eliminate technical and unmeritorious challenges (Lesotho, para.28). It is inherently likely that substantial injustice would have occurred if the tribunal has failed to deal with essential issues (Ascot, 284H-285A).
(i) For the purposes of meeting the 'substantial injustice' test, an applicant need not show that it would have succeeded on the issue with which the tribunal failed to deal or that the tribunal would have reached a conclusion favourable to him; it necessary only for him to show that (i) his position was 'reasonably arguable', and (ii) had the tribunal found in his favour, the tribunal might well have reached a different conclusion in its award (**Vee Networks Limited v Econet Wireless International** [2005] 1 Lloyd''s Rep 192, para.40).
(h) The substantial injustice requirement will not be met in the event that, even if the applicant had succeeded on the issue with which the tribunal failed to deal, the Court is satisfied that the result of the arbitration would have been the same by reason of other of the tribunal's findings not the subject of the challenge."

98 As regards the damage to the culvert roof and promenade, the issues with which it is said the arbitrator failed to deal are dealt with in paras.84 to 102 of Mr. Bennett's first witness statement. Those are five in number: (1) according to Halcrow, it was necessary to have an intrusive investigation to ascertain the real cause of damage; (2) it is said that there was no evidence of a causal link between damage and breach; (3) the issue of composite action; (4) failure to deal with Halcrow's argument that the damage to the promenade above culvert 2 was of a different nature, being rotational settlement, to the damage above culvert 1, which it is said negated the Council's case on causation; and (5), the matter of differential beach levels.

99 As regards the damage to the gate, it is said that the arbitrator failed to consider the issues raised by Halcrow of intervening acts. Those matters are dealt with in paras.42 to 50 of Mr. Bennett's first witness statement.

100 I deal first with the points which he makes regarding the damage to the culvert roof and promenade (adopting the numbering in para 98).

101 (1) Obviously the arbitrator disagreed with Halcrow, given his findings, and nothing further needs to be said about that. (2) I have already dealt with the arbitrator's finding of a causal link. The issue was certainly dealt with, albeit that Halcrow does not accept the conclusion. (3) Similarly, the arbitrator specifically dealt with the issue of composite action, albeit again that Halcrow

does not agree with his view. (4) It is true that the award makes no express mention of the promenade above culvert 2, save for the promenade above the junctions of culverts 1 and 2, and there is no finding as to the inadequacy of the culvert 2 roof slab. However, this to my mind was neither an irregularity nor am I satisfied that the failure has caused or will cause any injustice. Firstly, in my view, Halcrow's argument regarding the cause of the damage to the promenade above culvert 2 was just that, an argument, and not an issue which the arbitrator was bound to decide, since the only monetary claim was for the cost of works to culvert 1 roof and the arbitrator has found that the structural design of that roof was inadequate. Secondly, contrary to Mr. Fearon's submission, the arbitrator did find that that inadequacy was the cause of the damage he saw on photographs and on site (paras.16.1.5 of his reasons) and, as I have stated, the photographic damage does include damage to the promenade above culvert 2. He thus found that the breach caused such damage.

102 I am not persuaded that that finding is impugnable on the ground of serious irregularity. In my view, the arbitrator dealt with the issues put to him, that is breach and causation of the damage seen, as to which issues he expressed his conclusions. A deficiency of reasons is not capable of amounting to a serious irregularity within the meaning of s.68 unless it amounts to a failure by the Tribunal to deal with all the issues put to it within subs.(2)(d), the remedy for a deficiency of reasons being an order under s.70(4), which Halcrow does not contend for here. As to these points, I refer to the decision of Colman J in **Margulead Ltd v Exide Technologies** [2004] EWHC 1019. at paras.41 to 44.

103 As to (5), differential beach levels, this agaio was in my view simply one point made by Halcrow which evidently the arbitrator did not find material, and that was a matter for him.

104 As to the gate, Mr. Bennett's witness statement alleges three breaks in the chain of causation, which he says were not considered by the arbitrator. First, changes in Halcrow's design made by a third party, not the contractor. Second, the contractor failing to build the gate as designed by Halcrow and thirdly, the Council failing to consider an offer made in an email from Halcrow dated 21st December 2010 suggesting, "potential upgrades to the gates to enhance the design".

105 As to the first two matters, it seems to me that these points are sufficiently encompassed in the arbitrator's summary in the first sentence in para.16.2.2 of his award. As to the third point, the offer, I cannot see how this, realistically, could be said to amount to a *novus actus interveniens,* and it was not suggested to be such in para.81 of Halcrow's closing submissions. In any event, Mr. Pomfret evidently understood the suggestions as being designed simply to

enhance security: I refer to his response dated 21st January 2011 quoted in para.81 of Halcrow's closing submissions.

106 It follows that I dismiss the application under s.68 of the Act.

107 I now deal with **the application under s.69.**

108 Subsections 69(1) to (3) of the Act are in the following terms:

> "(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.
> An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.
> (2) An appeal shall not be brought under this section except—
> (a) with the agreement of all the other parties to the proceedings, or
> (b) with the leave of the court.
> The right to appeal is also subject to the restrictions in s.70(2) and (3) .
> (3) Leave to appeal shall be given only if the court is satisfied—
> (a) that the determination of the question will substantially affect the rights of one or more of the parties,
> (b) that the question is one which the tribunal was asked to determine,
> (c) that, on the basis of the findings of fact in the award—
> (i) the decision of the tribunal on the question is obviously wrong, or
> (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
> (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question."

109 In **John Sisk & Son v Carmel building Services Limited** [2016] BLR 283, [2016] EWHC 806 TCC, Carr J at paras.28 to 36 provided a very helpful summary of the law as follows:

> "28. Sisk contends that the Court must determine whether the Arbitrator's decision was correct and that there is no margin of appreciation: see **Mustill and Boyd on Commercial Arbitration**, second edition p.594,
>
> *'3. Nature of the review. As to the remaining question, namely the nature of the review undertaken on questions of law, there is no doubt. Once satisfied that the decision is one in respect of which there is*

power to intervene, the Court will simply measure the decision against the facts, and if its own judgment differs from that of the arbitrator, the latter will yield. There is no question of exercising a discretion. The Court decides whether the arbitrator was right or wrong, and gives judgment accordingly, although weight is attached to the findings of arbitrators experienced in the trade in question."

29. Although addressing the law before the Act, this remains an authoritative source.

30. Nevertheless, appeals from arbitrators are not granted lightly: see Russell on Arbitration, (24th Edition, para.8-132, page 531, citing **MRI Trading AG v Erdenet Mining Corp LLC** [2012] EWHC 1988 Comm (upheld in the Court of Appeal at [2013] EWCA Civ 156) ('MRI Trading'):

'7. Appeal on question of law. Introduction
It has been said there are three principles relevant to the overall approach. First, as a matter of general approach, the courts strive to uphold arbitration awards. Secondly, the approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it. Thirdly, not only will the court not be astute to look for defects, but in cases of uncertainty it will so far as possible construe the award in such a way as to make it valid rather than invalid.'

31. Sisk suggests that this s.is unreliable, in the sense that it is not clear whether it is directed at applications for leave (where different considerations apply) or at substantive appeals. However, the passage is directed expressly at an 'overall approach', suggesting that it is aimed not only at applications for leave but also substantive appeals. This is reinforced by the reference to MRI Trading, which itself involved a substantive appeal. There, albeit that the principles advanced were broadly not in dispute between the parties, Eder J said that he was prepared to proceed on the basis that the following principles reflected the correct legal test as follows:

'15. … there are four principles which a court needs to keep carefully in mind.
First as a matter of general approach, the courts strive to uphold awards. This means that, when looking at an award, it has to be read in a reasonable and commercial way, rather than with a view to picking holes, or finding inconsistencies or faults, in a tribunal's reasoning…This is particularly so when the tribunal comprises market men, since one is entitled to expect from traded arbitrators the accuracy of wording, of cogency of expression, which is required of a judge…
Secondly, where a tribunal's experience assists it in determining a question of law, such as the interpretation of contractual documents,

the court will accord some defence to the tribunal's decision on that question. It will reverse the decision only if satisfied that, despite the benefit of that experience, the tribunal has still come to the wrong answer…

Thirdly, it is for the tribunal to make the findings of fact in relation to any dispute and any question of law arising from an Award must be decided on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators: see ***The 'Baleares'*** *[1993] 1 Lloyd's Rep 215 at 228 which makes clear that this is so regardless of whether the court thinks a finding of fact was right or wrong.*

Fourthly, when a tribunal has reached a conclusion of mixed fact and law, the court cannot interfere with that conclusion just because it would not have reached the same conclusion itself. It can interfere only when convinced that no reasonable person, applying the correct legal test, could have reached the conclusion which the tribunal did: or, to put it another way, it has to be shown that the tribunal's conclusion was necessarily inconsistent with the application of the right test: ***The 'Sylvia'*** *[2010] 2 Lloyd's Rep 81 at [54]-[55]. The same extremely circumscribed power of intervention applies when it is complained that a tribunal has incorrectly applied the law to the facts. It is only if the correct application of the law leads inevitably to one answer, and the tribunal has given another, that the court can interfere. Once a court has concluded that a tribunal which correctly understood the law could have arrived at the same answer as the one reached by the arbitrator, the fact that the individual judge himself would have come to a different conclusion is no ground for disturbing the Award: The Chrysalis [1983] 1 Lloyd's Rep 503 at 507.'*

32. Certainly, the first of these principles was endorsed expressly by the Court of Appeal (at para.23) (and no disagreement expressed more generally): as a matter of general approach, the courts strive to uphold arbitration awards; the approach is to read an arbitration award in a reasonable and commercial way, expecting as is usually the case, that there will be no substantial fault that can be found with it; not only will the court not be astute to look for defects, but in cases of uncertainty it will so far as possible construe the award in such a way as to make it valid rather than invalid. In **Bunge SA v Nibulon Trading BV** [2013] EWHC 3936 (Comm) Walker J described these guiding principles were being of 'fundamental importance' (albeit, for the purposes of that case, they did not enable the court to give to an award a meaning plainly not intended by its authors).

33. Sisk did not take issue with these four principles in broad terms. It submitted, and I agree, that the second principle is of little assistance on the facts of this case where the Arbitrator did not have any particular expertise to which deference should be paid on the questions of law

before him. And there are limits to the principle of judicial deference to the arbitrator (as exemplified by the first instance and Court of Appeal's judgments in MRI Trading themselves, although that was a case of an arbitrators' decision that was described as 'somewhat surprising if not bizarre').

34. Carmel places significant emphasis on the third and fourth principles. As to the third principle, the arbitrator is master of the facts. As Steyn LJ put it in The 'Baleares' (supra):

'The arbitrators are masters of the facts. On an appeal the court must decide any question of law arising from the award based on a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be or what the scale of the financial consequences of the mistake of fact might be.'

35. And it is important that the Court does not permit an appellant to dress up what are essentially issues of fact as questions of law. The Court must be constantly vigilant in this regard (see **The 'Baleares'** (supra) (at 228) and also **Demco Investments and Commercial SA v S E Banken Forsakring** [2005] 2 Lloyd's Rep 650 (per Cooke J at paragraphs 35 to 48).

36. As to the fourth principle, on appeals by reference to questions of mixed fact and law, reversal of an award can only be justified if it can be shown that the correct legal test must have been misapplied because no arbitrator could have applied that test correctly and reached the conclusion that he or she did. The position is a strong one. By way of example and by reference to Issue 1, only if the Court were to conclude that no arbitrator applying the correct legal burden of proof could possibly have come to the conclusion that the Arbitrator did on the valuation of Carmel's work could the Court interfere.'

110 Four alleged errors are identified in para.4 of the claim form, but para.4.4, which is the error relating to hearsay, has been abandoned. Paragraph 4.2 relates to the gate and I will deal with that later. The remaining allegations relate to the damage to the culvert roof and the promenade above.

111 Firstly, incorrectly applying the test for causation as alleged in para.4.1 of the claim form and elaborated in paragraphs 11 and 12 of Halcrow's skeleton.

112 I am not satisfied that the arbitrator obviously erred as alleged. Paragraph 16.1.4 of his award in my view is not obviously impugnable, given that there were only two competing causes put forward and the arbitrator excluded one of these, namely construction defects. There is a helpful short summary of the

law, which I am satisfied is accurate, in *Clerk & Lindsell on Torts*, 21st ed at para.2-08 where it is stated:

> "But where there are only two competing causes, neither of which is improbable (even if they are uncommon events), then once one cause has been eliminated, the judge is entitled to conclude that the other was the probable cause of the damage."

That is based upon the decision of **Ide v ATB Sales Ltd** [2008] RTR 8 at paras.19 to 20. In any event, the correct question to my mind was evidently addressed by the arbitrator in para.16.1.6, namely what was the cause of the damage.

113 A further allegation under this head is failing to consider the need for a causal link between the breach of contractual design obligations and actual damage. I refer to para 4.1 of the Claim Form and paras 15, 16 and 18 of Mr Fearon's skeleton argument.

114 Again, I am not satisfied that the arbitrator failed to properly consider the need for a causal link. He was obviously aware of the need to prove the link, given what is stated in para.16.1.6 of his award, and found such a link.

115 The second major allegation is that he misdirected himself as to the burden of proof and wrongly allocated that burden. I refer to para 4.3 of the claim form and paras 20 to 23 of the skeleton argument

116 I am not satisfied that there was an obvious error here. From the way that the reasons were formulated, it is clear that the arbitrator was aware that to find liability, he had to be satisfied that it was established that breach caused damage. I cannot see that it was suggested or considered by him that it was for Halcrow to disprove negligence

117 Reference was made by Halcrow in this connection to para.16.1.22 of the award, where it is stated that:

> "Mr. Bell did not provide any evidence in terms of either structural ability of the slabs to resist the wave forces which he had derived or their ability to resist HA loading. There was no expert evidence from the respondent to support its denial of allegation of defective design."

118 It is suggested in para.22 of Halcrow's skeleton that this suggested that it was for Halcrow as respondent in the arbitration to adduce evidence demonstrating that the culvert was sufficiently designed. I do not see that that was suggested

in the paragraph that I have quoted. All the arbitrator was doing was stating the facts in that paragraph about the state of the evidence adduced by Halcrow.

119 I now deal with the gates. It is asserted that the arbitrator ignored a break in causation and made a finding based on speculation. The way the case is put appears in para.19 of Mr. Fearon's skeleton

120 Again, I am not satisfied that the arbitrator obviously erred. First, he plainly did not find that there was an *novus actus*. He merely stated Mr. Glennerster's position and clearly did not accept there was a *novus actus*. That follows from the conclusion in para.16.2.2.

121 Secondly, whether there was a *novus actus* is a conclusion of mixed law and fact, and I refer to the fourth principle annunciate by Eder J in the **MRI Trading** case (quoted by Carr J in the **Sisk** case).

122 I cannot be satisfied that the correct legal test must have been misapplied, that is that no arbitrator could have applied the test correctly and reached the conclusion that there was no *novus actus*. That depends on how it was determined that there was deviation from the drawings, a question of fact. If the only accepted deviation was fixing three bolts, not four, and it is found that the gate would have failed even if four had been properly fixed in accordance with Halcrow's design, the finding that there was no *novus actus* could be justified.

123 Thirdly, in any event I am not satisfied that the arbitrator's finding was speculative. He found as a fact, based on the expert evidence before him, that even if the gates had been fixed in accordance with Halcrow's design, that design was inadequate to withstand pressures and there would have been failure. Furthermore, he concluded that the failure was caused by Halcrow's errors in determining the loads acting on the gate and thus that the construction errors were immaterial. It is not for me in an appeal on a question of law to consider whether that conclusion was one which was open to him on the evidence.

124 I thus refuse permission to appeal.

125 It follows that the orders I make today are that the application for permission to appeal under s.69 is dismissed and secondly, the application under s.68 is also dismissed. Costs to follow the event.