OUTER HOUSE, COURT OF SESSION

[2019] CSOH 110

CA116/19

OPINION OF LORD DOHERTY

in the cause

BABCOCK MARINE (CLYDE) LIMITED

Pursuer

against

HS BARRIER COATINGS LIMITED

Defender

Pursuer: Richardson QC; Morton Fraser LLP
Defender: Walker QC, Steel; Balfour + Manson LLP (for Hill Dickinson LLP)

27 December 2019

Introduction

[1] In this commercial action the pursuer seeks payment of sums which an adjudicator has ordered the defender to pay to it. The defender resists payment on four grounds. Each party has a preliminary plea to the relevancy of the other party's averments. The matter came before me for a debate which was conducted having regard to the pleadings, the adjudicator's decision, and the other documents forming part of the adjudication process.

The contract

[2] In December 2014 the pursuer contracted with the defender for the defender to carry out re-preservation of shiplift docking cradles at HM Naval Base Clyde. The work was to involve dismantling cradle components, removing legacy coating, preparing the metal surface for painting, and painting and reassembling the components. The total contract price was £800,000. The contract incorporated the NEC3 Engineering and Construction Short Contract (June 2005) with bespoke Z clause amendments. It made provision (clauses 60 to 63) for the price to be increased on the occurrence of specified compensation events. It is a "construction contract" as defined by Section 104 of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"). Clause Z17 provided for any dispute to be referred to adjudication in accordance with clauses 93.2, 93.3 and 93.4 of the contract conditions.

[3] Clauses 90 and 92 of the contract conditions provide:

> "**90 Termination and reasons for termination**
>
> ...
>
> 90.2 Either Party may terminate if the other Party has become insolvent or its equivalent (Reason 1).
>
> 90.3 The *Employer* may terminate if the *Employer* has notified the *Contractor* that the *Contractor* has defaulted in one of the following ways and the *Contractor* has not stopped defaulting within two weeks of the notification.
>
> - Substantially failed to comply with this contract (Reason 2).
> - Substantially hindered the *Employer* (Reason 3).
> - Substantially broken a health or safety regulation (Reason 4).
>
> The *Employer* may terminate for any other reason (Reason 5).
>
> ...

92 Payment on termination

92.1 The amount due on termination includes

- an amount due assessed as for normal payments
- the cost of Plant and Materials provided by the *Contractor* which are on the *site* or of which the *Contractor* has to accept delivery and
- any amounts retained by the *Employer.*

...

92.3 If ... the *Employer* terminates for Reason 5, the amount due on termination also includes 5% of any excess of a forecast of the amount due at Completion had there been no termination over the amount due on termination assessed as for normal payments.
..."

Clause 93.1 (as replaced by clause Z 17) provides for a tiered dispute resolution process:

"A dispute arising under or in connection with this contract is notified to the *Employer's* and *Contractor's* commercial management organisations who shall use all reasonable endeavours to resolve through negotiation. If the dispute is not resolved within three days the matter shall be escalated to commercial senior management who shall have 3 days to resolve. If the dispute is not resolved the matter shall be escalated to commercial directors, who shall have 3 days to resolve. If resolution fails, the dispute shall be decided by the *Adjudicator* in accordance with clauses 93.2, 93.3, 93.4 (and 94.1 if specified in the Contract Data)."

Clause 93.2 provides:

"(1) The parties appoint the *Adjudicator* under the NEC Adjudicator's Contract current at the *starting date...*
..."

Clause 94.1 provides for the parties to refer a dispute to adjudication at any time where the 1996 Act applies. It is common ground that the NEC Adjudicator's Contract which was current at the starting date was the April 2013 edition.

The NEC Adjudicator's Contract

[4] Clause 2.3 of the NEC Adjudicator's Contract (April 2013 edition) provided:

"After notifying the parties of his intention, the Adjudicator may obtain from others help that he considers necessary in reaching his decision. Before making his

> decision, the Adjudicator provides the parties with a copy of any information or advice from others and invites their comments on it."

The adjudicator's letter of 11 February 2019

[5] On being appointed the adjudicator wrote to the parties by letter dated 11 February 2019 confirming acceptance of the appointment. He enclosed with the letter a document headed "Terms and Conditions of Appointment" ("the Terms"). Paragraph 14 of the Terms stated:

> "14. If I require quantity surveying input during the Adjudication I will utilise the resources of Bunton Consulting Partnership. This matter is at my absolute discretion and I will not require the consent of the parties. A senior QS will be charged at £85 per hour plus expenses and a junior QS at £55 per hour plus expenses."

The carrying out of the contract works and the agreement to vary the contract

[6] After the works commenced on site there were several disagreements between the parties. The pursuer was dissatisfied with progress. For its part, the defender claimed that it was entitled to additional payment under the contract for compensation events. By 22 December 2016 the defender had intimated claims for seven compensation events (CE1 to CE7). Before that date the parties had agreed that the total contract price be increased by £20,056.11 in respect of CE7. On 22 December 2016 they entered into a Settlement Agreement ("the Agreement") which settled disputed matters up to that date (including the compensation events) apart from the extra over cost of treating six larger strongbacks. In terms of the Agreement the total contract price was revised from £820,056.11 to £1,070.056.11. The revised value included a £20,000 provisional sum in respect of the additional cost of the six larger strongbacks.

Termination

[7] Although progress was slow the sums claimed by the defender escalated. The pursuer terminated the contract on 15 June 2018 on the ground of Reason 5. On 25 June 2018 the defender prepared and submitted a Termination Application (Payment Notice 31) (7/5 of process) which applied for payment of £967,549.42 plus VAT. On 10 September 2019 the pursuer certified £NIL in respect of that application.

The first adjudication

[8] On 10 September 2018 the defender served notice of intention to refer a dispute to adjudication. The principal issues to be adjudicated upon were (i) whether the Termination Application was a valid payment notice in terms of the contract; and (ii) whether notices issued by the pursuer dated 19 July 2018 and 9 August 2018 were valid pay less notices. The wider question of "the veracity of either party's assessments" (see para 11.4 of Mr Donny Mackinnon's decision dated 14 November 2018 (7/8 of process)) had not been referred to adjudication. Mr Mackinnon held that the Termination Application was a valid payment notice and that the notices of 19 July 2018 and 9 August 2018 were not valid pay less notices. The defender was entitled to payment in full of the sum claimed plus interest and fees. On 3 December 2018 Mr Mackinnon amended the decision (reducing the interest payable by the pursuer). On 7 and 13 December 2018 the pursuer paid the defender the sums awarded. Both parties issued notices of dissatisfaction in respect of the decision.

The second adjudication

Introduction

[9] The parties remained in dispute as to the true and proper valuation of the works as at the date of termination. In February 2019 the pursuer referred that dispute to adjudication and requested that the adjudicator give reasons for his decision. Mr Len C H Bunton was appointed as adjudicator.

[10] The three principal elements of the valuation which were in dispute were (i) the value of the base scope works; (ii) what, if any, value should be attributed to compensation events CE8 to CE13; and (iii) the value of termination costs.

Base scope works

[11] The pursuer maintained that the value of the base scope works at the date of termination was £447,263.62. The defender maintained it was £643,101.47. In arriving at its figure the defender relied upon a report (7/7 of process) prepared by Mr Cookson, who is a chartered quantity surveyor and a chartered builder. Mr Cookson's figure was only very slightly higher (0.7%) than the base scope works figure of £638,553.21 which the defender had advanced in the Termination Application.

Compensation events

[12] The pursuer's primary position was that no sum was due in respect of the claimed compensation events CE8-CE13. Its fall-back position was that only a total of £130,384.15 was due (ie £24,713.38 for CE8; £13,083.76 for CE9; £78,021.18 for CE12; and £14,565.43 for CE13 (which, in fact, resulted in a total of £130,383.75)). In the Termination Application the defender had claimed that a total of £690,155.18 was due for compensation events

CE8-CE13, whereas in the second adjudication it relied on Mr Cookson's valuation of CE8-CE13 and it claimed £1,003,498.22 (on the basis of a price list assessment) or £1,032,583.68 (on the basis of a defined cost assessment).

Termination costs

[13] The pursuer's primary position was that the sum for demobilisation costs was £39,064.02, and that £32,807.80 was due for excess of forecast at completion. In the Termination Application the defender had claimed £160,446.75 for demobilisation costs and £75,773.59 for excess of forecast at completion; whereas in the adjudication it advanced Mr Cookson's valuations (which were £87,350.63 for demobilisation costs, and £90,436.26 (on a price list assessment basis) or £100,599.01 (on a defined cost assessment basis) for excess of forecast at completion).

Mr Bunton's decision

[14] Mr Bunton issued his decision on 22 March 2019. The decision incorporated a note of reasons and a Scott Schedule (in the form of an Excel spreadsheet). For present purposes it is sufficient to indicate what Mr Bunton decided in relation to base scope works, compensation events and termination costs. He held that the value of the base scope works was £447,263.62. He decided that the price should be increased by £690,155.18 because of compensation events CE8-CE13. In relation to termination costs, he decided that demobilisation costs were £39,064.02 and that the excess of forecast at completion was £93,867.67.

[15] Mr Bunton sent the parties his decision under cover of a letter dated 22 March 2019. He also sent each party a Fee Account. One of the entries in the Fee Account was:

"QS assistance – 28 hours @ £95 £2,660"

Proceedings in England and Wales

[16] The pursuer raised proceedings in England and Wales to enforce Mr Bunton's award (on the basis that the defender was domiciled there). The defender resisted enforcement, pleading *inter alia* that the court did not have jurisdiction; and that if it did the action should be stayed on the ground of *forum non conveniens.* On 28 June 2019 Mrs Justice O'Farrell held that while the courts in Scotland and England and Wales both had jurisdiction, Scotland was the more appropriate forum. She granted a stay of the English proceedings (*Babcock Marine (Clyde) Limited* v *HS Barrier Coatings Limited* [2019] BLR 495, [2019] EWHC 1659 (TCC)).

The present action

[17] The present action was raised on 31 July 2019. Defences were lodged on 29 August 2019. At the preliminary hearing on 13 September 2019 I allowed the pursuer seven days to adjust its pleadings, seven days for the defender to adjust in response, and a further seven days mutual adjustment. The debate was fixed for 25 October 2019. On 21 October I granted the pursuer's unopposed motion to extend the period of mutual adjustment until 21 October 2019.

[18] In the defences the defender avers that the adjudicator failed to exhaust his jurisdiction; and that because of the way that the adjudication was conducted there has been a breach of natural justice. Since the alleged failures are all set out in my summary of Mr Walker's submissions I do not repeat them here. The defender maintains that it is not bound by the decision, which should be reduced *ope exceptionis*.

[19] By adjustment intimated on 27 September 2019 the defender made reference for the first time to the adjudicator having engaged the services of a quantity surveyor who "purportedly provided 28 hours assistance to the Adjudicator". By further adjustment intimated on 4 October 2019 the defender averred:

> "To the extent that the defender was not advised of the appointment of the QS and the nature of the assistance provided by him, an opportunity has been afforded for injustice to be done and there is a breach of natural justice. The decision should be held as unenforceable and falls to be reduced *ope exceptionis*."

Recent correspondence with the adjudicator

[20] On 1 October 2019, shortly after the defender intimated its adjustments raising the issue of the quantity surveyor assistance, the pursuer's solicitors sought to obtain clarification from the adjudicator of the nature of that assistance. By email dated 2 October 2019 the adjudicator replied that in terms of paragraph 14 of the Terms the engagement of quantity surveying assistance had been entirely at his discretion and that he had not required to advise the parties of it. He pointed out that the parties had known since 22 March 2019 that he had obtained such assistance and that no issue had been taken with it. While at the time of reply he was out of his office and was not able to review the adjudication papers, he observed:

> "I cannot, at this stage ... recall exactly what assistance was provided. However, based on my past and extensive experience as an Adjudicator, this would probably involve clerical and administrative assistance, checking that the parties (sic) submissions contained the documents set out in any inventory, checking the parties (sic) calculations in relation to variations etc, assisting me in checking if the parties have submitted vouching information in relation to variations etc, double checking figures after my calculations, and populating the Scott Schedule with values I had decided, and assistance in proof reading, (sic) a very lengthy and detailed Decision.
>
> For example, I can see that on 19 and 22 March 2019, the day before my decision was issued, 14 hours were taken up in checking that the figures from my Decision were

> populated into the Scott Schedule, and this would be checked by me, and an assistant to ensure there were no arithmetical slips..."

Counsel for the defender's submissions

[21] Mr Walker recognised that decisions of adjudicators should be enforced unless there is good reason to refuse enforcement (*Atholl Developments (Slackbuie) Ltd, Petitioners* 2011 SCLR 637, per Lord Glennie at para 17). He submitted that there were good reasons here.

[22] First, while it was clear that the adjudicator had preferred the pursuer's base scope works valuation to the valuation put forward by the defender, he had not explained why he had preferred it. The defender was entitled to know why the adjudicator had decided the matter the way that he had. Reference was made to *Atholl Developments (Slackbuie) Ltd, Petitioners*, *supra,* per Lord Glennie at para 17; *Balfour Beatty Engineering Services (HY) Ltd* v *Shepherd Construction Ltd* [2009] EWHC 2218 (TCC) per Akenhead J at para 48; *DC Community Partnerships Limited* v *Renfrewshire Council* [2017] CSOH 143, per Lord Doherty at para 26; *Gillies Ramsay Diamond* v *PJW Enterprises Ltd* 2004 SC 430, per Lord Justice-Clerk Gill at para 31. The failure to give reasons was a material failure. By failing to give adequate reasons the adjudicator had failed to exhaust his jurisdiction.

[23] Second, the adjudicator had failed to consider a material line of defence (*Pilon Limited* v *Breyer Group plc* [2010] BLR 452, per Coulson J at para 22; *Connaught Partnerships Limited* v *Perth and Kinross Council* 2014 SLT 608, per Lord Malcolm at paras 18-21). He had refused to consider the Cookson report's position on base scope works because he thought (erroneously) that it was not competent for the defender to advance a base scope works valuation which was higher than the base scope works valuation in the Termination Application. Accordingly, he had failed to consider a material defence. *Separatim,* he had

failed to give proper reasons for deciding as he did. Those were failures to exhaust his jurisdiction. *Separatim,* in deciding it was incompetent for the defender to rely on the Cookson report the adjudicator acted in breach of natural justice because that possibility had not been put in issue (*Costain Limited* v *Strathclyde Builders Limited* 2004 SLT 102, per Lord Drummond Young at paras 23-24; *Corebuild Ltd* v *Cleaver* [2019] BLR 505; [2019] EWHC 2170 (TCC)).

[24] Third, the adjudicator had not explained the basis upon which he had arrived at his termination costs figure. In relation to demobilisation costs it might be inferred (para 292) that he had rejected the project leader claim because it was not something which had been included in the price list and there was no vouching of the sum claimed. However, there was no further explanation of why he had preferred the pursuer's demobilisation costs figure. The excess of forecast figure at completion of £93,867.67 seemed to have been based on 5% of £1,877,353.40 (para 295), but the adjudicator had not said how that latter figure had been calculated. Once again he had failed to give reasons. That was a material failure. In that regard he had failed to exhaust his jurisdiction.

[25] Fourth, the adjudicator had engaged the services of a quantity surveyor who, it seemed, had provided 28 hours of assistance to him in the adjudication. The parties were not informed during the adjudication of the fact that quantity surveying assistance had been engaged, nor was the nature of the assistance disclosed. An opportunity had been afforded for injustice to be done (*Barrs* v *British Wool Marketing Board* 1957 SC 72, per Lord President Clyde at p 82). The defender would insist on this ground if none of the other grounds of challenge was successful. In that event it would be necessary to inquire into the precise nature of the services provided by the quantity surveyor in order to determine whether the breach of natural justice had in fact been material.

Counsel for the pursuer's submissions

[26] Mr Richardson submitted that the defender's averments were irrelevant and that decree *de plano* should be pronounced.

[27] It was well settled that one of the purposes of the 1996 Act was to enable parties to obtain a speedy decision from an adjudicator. The courts should lend their assistance to the prompt enforcement of decisions made by adjudicators within the scope of their jurisdiction (*The Construction Centre Group Limited* v *Highland Council* 2003 SC 464, per the Opinion of the Court delivered by Lord Hamilton at para 14). Paragraphs 85 to 87 of the judgment of the court in *Carillion Construction Ltd* v *Devonport Royal Dockyard Ltd* [2006] BLR 15 (delivered by Chadwick LJ) set out the correct approach:

> "85. The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case; which ... may, indeed, aptly be described as 'simply scrabbling around to find some argument, however tenuous, to resist payment'.
>
> 86. It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels 'excess of jurisdiction' or 'breach of natural justice'. It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case...
>
> 87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a

> substantial waste of time and expense — as, we suspect, the costs incurred in the present case will demonstrate only too clearly."

[28] The court should allow considerable leeway in relation to an adjudicator's reasons (*Miller Construction (UK) Limited* v *Building Design Partnership Limited* [2014] CSOH 80, per Lord Malcolm at para 17). Brief reasons will suffice. In *Carillion Construction Ltd* v *Devonport Royal Dockyard Ltd, supra,* the Court of Appeal set out (at para 53) Jackson J's observations at first instance ([2005] BLR 310):

> "53. The judge then went on, at paragraph 81 of his judgment, to state five propositions which, as he said, bore upon the issues which he had to decide:
>
> > '1. If an adjudicator declines to consider evidence which, on his analysis of the facts or the law, is irrelevant, that is neither (a) a breach of the rules of natural justice nor (b) a failure to consider relevant material which undermines his decision on *Wednesbury* grounds or for breach of paragraph 17 of the Scheme. If the adjudicator's analysis of the facts or the law was erroneous, it may follow that he ought to have considered the evidence in question. The possibility of such error is inherent in the adjudication system. It is not a ground for refusing to enforce the adjudicator's decision. I reach this conclusion on the basis of the Court of Appeal decisions mentioned earlier. This conclusion is also supported by the reasoning of Mr Justice Steyn in the context of arbitration in *Bill Biakh v Hyundai Corporation [1988] 1 Lloyds Reports 187*.
> >
> > ...
> >
> > 4. During argument, my attention has been drawn to certain decisions on the duty to give reasons in a planning context. See in particular *Save Britain's Heritage v No 1 Poultry Limited, [1991] 1 WLR 153* and *South Bucks DC and another v Porter (No 2) [2004] 1 WLR 1953*. In my view, the principles stated in these cases are only of limited relevance to adjudicators' decisions. I reach this conclusion for three reasons:
> >
> > (a) Adjudicators' decisions do not finally determine the rights of the parties (unless all parties so wish).
> >
> > (b) If reasons are given and they prove to be erroneous, that does not generally enable the adjudicator's decision to be challenged.
> >
> > (c) Adjudicators often are not required to give reasons at all.

> 5. If an adjudicator is requested to give reasons pursuant to paragraph 22 of the Scheme, in my view a brief statement of those reasons will suffice. The reasons should be sufficient to show that the adjudicator has dealt with the issues remitted to him and what his conclusions are on those issues. It will only be in extreme circumstances, such as those described by [the] Lord Justice Clerk in *Gillies Ramsay* [*Diamond*], that the court will decline to enforce an otherwise valid adjudicator's decision because of the inadequacy of the reasons given. The complainant would need to show that the reasons were absent or unintelligible and that, as a result, he had suffered substantial prejudice.'"

The Court of Appeal went on (at para 84) to approve Jackson J's observations:

> "84. It will be apparent, from what we have said in giving our reasons for refusing permission to appeal, that we are in broad agreement with the propositions which the judge set out at paragraph 81 of his judgment and which we have ourselves set out at paragraph 53 in this judgment. Those propositions are indicative of the approach which courts should adopt when required to address a challenge to the decision of an adjudicator appointed under the 1996 Act..."

Reasons will be sufficient if they show that the adjudicator has dealt with the issues. Unless reasons are absent or unintelligible and that causes substantial prejudice the court should not interfere. In some cases the acceptance by an adjudicator of one position will be sufficient to indicate the reasons for rejecting the other position (*DC Community Partnerships Limited* v *Renfrewshire Council, supra,* per Lord Doherty at para 26; *SW Global Resourcing Ltd* v *Morris & Spottiswood Limited* [2012] CSOH 200, per Lord Hodge at para 17).

[29] The difference between the parties in relation to the valuation of the base scope works had not been to the fore at the adjudication. The defender's figures had been set out in appendices 55 and 56 to Mr Cookson's report. There had been no discussion of them in the body of the report. However, the difference had been focussed for the adjudicator (eg in the pursuer's Reply (7/14 of process) at paragraphs 5.4 to 5.7 and in the defender's rejoinder (7/15 of process)). The pursuer's position had been that the difference arose because before termination the defender had been overpaid for preliminaries. The defender denied that there had been overpayment, or (if there had been) that the pursuer was entitled to take

account of it when valuing the base scope works. The adjudicator accepted the pursuer's figures. It was implicit that he had accepted that there had been overpayment before termination. In the circumstances acceptance by the adjudicator of the pursuer's position had sufficiently disclosed his reasoning for rejecting the defender's alternative position.

[30] It was erroneous to suggest that the adjudicator had failed to consider the position advanced in the Cookson report and appendices when he was valuing the base scope works. It was clear from his decision and reasons that he had fully considered the Cookson report and appendices in relation to all of the disputed matters. The foundation for this aspect of the defender's argument was paragraph 183 of the adjudicator's note of reasons. That paragraph occurred during the adjudicator's consideration of the parties' opposing positions on quantification of the CE8 claim. The adjudicator had been critical of the absence of records and vouching supporting Mr Cookson's assessments. Those were the circumstances in which he had decided not to go beyond what the defender had claimed for the compensation events in the Termination Application. He had not failed to consider Mr Cookson's report in the context of compensation events, and there was no basis whatsoever for concluding that he had failed to consider the report and appendices in relation to the base scope works. He had not considered himself capped by each of the elements in the Termination Application. His base scope excess of forecast at completion figure (£93,867.67) was higher than the corresponding figure in the Termination Application (£75,773.59). In any case, even if on a fair reading of paragraph 183 the adjudicator was saying that he considered claims were capped at the claims which had been made in the Termination Application, the cap for the base scope works (£638,553.21) would have been very far in excess of the adjudicator's view of the value of those works (£447,263.62).

[31] The criticism of the adjudicator's reasons relating to termination costs was unwarranted. The dispute in relation to demobilisation costs had been clearly focussed in the adjudication. The pursuer had itemised the build-up of its valuation. It had proposed a total value of £39,064.02. Mr Cookson had not supported parts of the claim for £160,446.75 which the defender had submitted in the Termination Application (paragraphs 16.35 to 16.47 of his report). He had maintained that this aspect of the claim should be £87,350.63 (being £27,443.50 for redundancy notice and £59,907.13 for other demobilisation costs). While the contract programme had allowed for about one week demobilisation, Mr Cookson had considered it appropriate to allow five weeks. He allowed £25,250 for project leader costs. The pursuer's criticisms of the defender's claim had been set out in, eg, the Reply at paragraph 2.7; paragraph 5.1(f), (j), (k) and (l); and paragraphs 5.10 to 5.15. It was clear that the adjudicator had taken the criticisms on board because he had found in favour of the pursuer's demobilisation figure. It was reasonably clear from paragraph 295 that he had not accepted that any sum ought to be due for project leader costs, and that he thought demobilisation claims ought to have been vouched to show actual costs incurred. In the whole circumstances it had not been necessary for him to say more than he did in relation to demobilisation costs.

[32] Nor had the adjudicator needed to say more than he did about excess of forecast to completion. There was no dispute as to the methodology to be used - that was clearly set out in clause 92.3. This was not a case of a method being used which was a surprise for the parties. Rather, the formula had been applied in light of the other findings which the adjudicator had made. The sum awarded under this head had been higher than the sum for which the pursuer had contended because the adjudicator had awarded considerably more for compensation events than the pursuer had suggested. There was no mystery about the

calculation of the excess of forecast sum. The multiplicand was £1,877,353.40 (paragraph 295). How that figure had been arrived at was apparent from the Scott Schedule. The forecast of the amount due at completion had there been no termination was £3,053,836.21. The amount due on termination which was to be deducted was the sum of three figures - £447,263.62 (base scope works), £690,155.18 (compensation events) and £39,064.02 (demobilisation costs). Five per cent of £1,877,353.40 was £93,867.67.

[33] The defender's averments about the assistance which the adjudicator obtained from a quantity surveyor were irrelevant. The presumption of propriety ought to be applied (*Atholl Developments (Slackbuie) Limited, Petitioner, supra,* at para 17, and *SW Global Resourcing Ltd* v *Morris & Spottiswood Limited, supra,* at para 13). Where an adjudicator obtained assistance of a clerical or administrative nature without telling the parties that did not result in a breach of natural justice (*Dickie & Moore Limited* v *Trustees of The Lauren McLeish Discretionary Trust* [2019] CSOH 71 and *John Sisk & Son Limited* v *Duro Felguera UK Limited* [2016] BLR 147, 165 Con LR 33, [2016] EWHC 81 (TCC)). In terms of clause 2.3 of the NEC Adjudicator's Contract the adjudicator was entitled to obtain such help as he considered necessary provided that he notified the parties. Here, the adjudicator had notified the parties by sending them the Terms. Paragraph 14 of the Terms had alerted them to the fact that the adjudicator could obtain quantity surveying input without further notice. Neither party had queried the Terms. Accordingly, contrary to the defender's averments, the defender had been advised of the adjudicator's intentions. It may reasonably be inferred from the fact that the adjudicator did not provide any information or advice to the parties that the quantity surveyor assistance was merely clerical and/or administrative.

Counsel for the defender's response

[34] Mr Walker responded to Mr Richardson's submissions on Ground 4. The defender's averments were not irrelevant. On the face of things matters had not been done properly. The adjudicator had not complied with either of the requirements of clause 2.3 of the NEC Adjudicator's Agreement. There had not been notification of his intention to obtain the assistance which he obtained from the quantity surveyor. Paragraph 14 of the Terms had not been notification of his intention to obtain that assistance. In any case, he had not provided the parties with a copy of any information or advice from the quantity surveyor and invited their comments on it. Inquiry was necessary to ascertain the nature of the assistance which had been given in order to determine the materiality or otherwise of the breach of natural justice which had occurred.

Decision and reasons

Base scope works: Ground 1

[35] There was no real dispute as to the relevant law. Where, as here, an adjudicator was required to give reasons they could be brief, and they need not deal with every point. Adjudicators' reasons are not to be judged by the standards applied to judges or arbiters. A reasonable person informed as to the context of the dispute who reads the decision ought to be able to discern from it what the adjudicator has decided, and why he has decided it. Here, there is no doubt that the reasonable reader would be clear that the adjudicator had decided that the value of the base scope works was £447,263.62. Would he be able to discern why the adjudicator had decided that? In my opinion he would.

[36] The reasonable reader would know that the difference between the parties' valuations for base scope works had been focussed in the material before the adjudicator

(eg in the Referral at paragraph 10.7(a)(iii) (7/12 of process), in the pursuer's Reply (7/14 of process) at paragraphs 5.4 to 5.7, and in the defender's Rejoinder (7/15 of process)). The pursuer's position had been that the difference arose because before termination the defender had been overpaid for preliminaries. The defender denied that there had been overpayment or, if there had been, that the pursuer was entitled to take account of it when valuing the base scope works. The adjudicator accepted the pursuer's figures. In my opinion this is an instance of an issue where the acceptance by an adjudicator of one position is sufficient to indicate the reasons for rejecting the other position (*SW Global Resourcing Ltd* v *Morris & Spottiswood Limited, supra*, per Lord Hodge at para 17; *DC Community Partnerships Limited* v *Renfrewshire Council, supra,* per Lord Doherty at para 26). I think it is implicit that the adjudicator accepted that there had been overpayment before termination and that account ought to be taken of that. In my view, acceptance by the adjudicator of the pursuer's position sufficiently disclosed his reasoning for rejecting the defender's alternative position.

Base scope works: Ground 2

[37] I am not persuaded that the adjudicator failed to consider the position advanced in the Cookson report and appendices when he was valuing base scope works. On the contrary, in my view his reasons suggest that he considered the Cookson report and appendices when deciding all of the disputed matters.

[38] I do not think that Mr Walker's suggested reading of paragraph 183 is correct. The context of that paragraph, of course, was not the base scope works. It was part of the adjudicator's discussion of the quantification of the CE8 claim. In the immediately preceding paragraphs the adjudicator had been critical of the absence of records and

vouching supporting Mr Cookson's assessments. Those were the circumstances in which he decided not to go beyond what the defender had assessed for the compensation events in the Termination Application. So in relation to compensation events the adjudicator did not fail to consider Mr Cookson's report. Rather, he did not find it to be of much assistance because Mr Cookson's opinions were not based upon the sort of evidence (site records/actual costs) he would have expected in the circumstances.

[39] It is no part of the defender's case that the adjudicator failed to have regard to the Cookson report in the context of compensation events. The adjudicator is not said to have failed to exhaust his jurisdiction in respect of that part of his decision. Yet, paradoxically, Mr Walker seeks to rely upon something said in relation to that aspect of the case to support the proposition that the adjudicator treated the Cookson report as being forbidden territory (at least in so far as the base scope works sum in the report exceeded the base scope works sum in the Termination Application) when he came to consider the base scope works.

[40] I reject Mr Walker's proposition. First, as already noted, I disagree with his reading of paragraph 183. Second, as a matter of fact, the adjudicator cannot have considered himself capped by each of the elements in the Termination Application because his base scope excess of forecast at completion figure (£93,867.67) is higher than the corresponding figure in the Termination Application (£75,773.59). Third, there was really no material difference (about 0.7%) between the Termination Application base scope works figure (£638,553.21) and the Cookson base scope works figure (£643,101.47). Even if on a fair reading of paragraph 183 the adjudicator was saying that he considered all claims were capped at the claims which had been made in the Termination Application, the cap for the base scope works would have been very far in excess of the adjudicator's view of the value of those works.

[41] It follows from my rejection of Mr Walker's proposition that I reject the contentions which were based upon it *viz* that the adjudicator (i) failed to consider a material defence; and (ii) acted in material breach of natural justice by not raising with the parties that he proposed to cap values to those in the Termination Application.

Termination costs: Ground 3

[42] It seems clear that the dispute in relation to demobilisation costs was well focussed during the adjudication. The pursuer itemised the elements it accepted - its total value for demobilisation costs was £39,064.02. Mr Cookson departed materially from the demobilisation costs claim which the defender had submitted in the Termination Application (paragraphs 16.35 to 16.47 of his report). He maintained that the demobilisation costs element of the termination costs should be £87,350.63 (£27,443.50 for redundancy notice and £59,907.13 for other demobilisation costs). He recognised the contract programme had allowed about one week for demobilisation, but he considered five weeks to be justified. He allowed £25,250 for project leader costs, notwithstanding that no sum for a project leader had been included in the contract price list. The pursuer's criticisms of the defender's demobilisation costs claim were set out in the Reply at paragraphs 2.7, 5.1(f), (j), (k) and (l), and 5.10 to 5.15.

[43] The adjudicator valued demobilisation costs at the figure suggested by the pursuer. Once again, in my opinion it is implicit that the adjudicator agreed with the pursuer's criticisms of the defender's figure. I think it is tolerably clear from paragraph 295 (i) that he did not accept that any sum ought to be due for project leader costs (which were a substantial part of the difference between the figures of £39,064.02 and £87,350.63); and (ii) that he thought demobilisation claims ought to have been vouched and based on actual

costs incurred. In my opinion in the whole circumstances it was not necessary for the adjudicator to say more than he did in relation to demobilisation costs.

[44] I am also satisfied that the adjudicator did not require to say more than he did about excess of forecast to completion. There was no dispute as to the methodology. Clause 92.3 prescribed that. The adjudicator's calculation and the result were no more than the application of that methodology to the relevant findings which he had made. There was no mystery about the calculation. The multiplicand was £1,877,353.40 (paragraph 295). The Scott Schedule showed the constituent elements of that sum. The forecast of the amount due at completion had there been no termination was £3,053,836.21. The payments deducted from that sum were £447,263.62 (base scope works), £690,155.18 (compensation events) and £39,064.02 (demobilisation costs). Five per cent of £1,877,353.40 was £93,867.67.

[45] It follows that I reject ground 3.

Breach of natural justice: Ground 4

[46] I did not understand there to be any dispute about the applicable law. In reaching his decision the adjudicator required to comply with the rules of natural justice (*Costain Limited* v *Strathclyde Builders Limited* 2004 SLT 102; *Carillion Utility Services Limited* v *SP Power Systems Limited* [2011] CSOH 139; *Highland and Islands Airports Limited* v *Shetland Islands Council* [2012] CSOH 12). The test is not "Has an unjust result been reached?" but "Was there an opportunity afforded for injustice to be done?" (*Barrs* v *British Wool Marketing Board, supra*, per Lord President Clyde at p 82). However, immaterial breaches of natural justice will not render a decision unenforceable: the provisional nature of an adjudicator's decision justifies ignoring non-material breaches (*Balfour Beatty Construction Ltd* v *The Mayor and Burgesses of the Borough of Lambeth* [2002] EWHC 597 (TCC), [2002] BLR 288, per

HH Judge Lloyd QC at para 27; *Dickie & Moore Limited* v *McLeish & Ors, supra,* per Lord Doherty at para 33).

[47] The defender does not accept that the Terms were incorporated into the parties' contract with the adjudicator. Mr Richardson did not suggest that the court should hold at this stage that the defender's averments to that effect are irrelevant. The defender's case is that it was incumbent upon the adjudicator to inform the parties during the adjudication (i) that he was obtaining quantity surveying assistance; and (ii) of the nature of that assistance. He avers that neither of these things was done, and that as a result there has been a breach of natural justice. The question is, can it be said at this stage, without inquiry, that this defence is bound to fail (*Jamieson* v *Jamieson* 1952 SC (HL) 44, per Lord Normand at p 50, Lord Reid at p 63; *Henderson* v *3052775 Nova Scotia Ltd* 2006 SC (HL) 85, per Lord Rodger of Earlsferry at para 16)?

[48] Mr Richardson maintains that the court should reach that conclusion. He says that paragraph 14 of the Terms informed the parties that the adjudicator intended to obtain quantity surveying assistance (and that communication of that paragraph to the parties was compliance with the first of the adjudicator's obligations under clause 2.3 of the NEC Adjudicator's Contract). Mr Richardson did not suggest that the adjudicator informed the parties of the nature of the assistance; but he contended that the court should infer from the absence of such a communication that the assistance provided was merely administrative or clerical, and not the sort of assistance which called for disclosure and comment by the parties. That, he submitted, would be an appropriate application of the presumption of propriety.

[49] In my opinion neither of these submissions is compelling. Paragraph 14 did not communicate an intention on the part of the adjudicator to employ quantity surveying

assistance. Rather, it purported to make provision for what would happen *if* it subsequently transpired that the adjudicator considered that he needed quantity surveying input during the adjudication. Moreover, in my view it would be going too far too fast to infer at this stage that the assistance provided by the surveyor was of a type which did not require to be disclosed.

[50] If the surveyor's assistance here was indeed merely of a clerical, administrative and checking nature I think it moot whether that would have engaged the obligations in clause 2.3 of the NEC Adjudicator's Contract. It is arguable that clause 2.3 concerns matters which are likely to be material to the decision-making process ("help that he considers necessary in reaching his decision"), such as quantity surveying opinion or advice upon which an adjudicator proposes to rely. It is not hard to see that with material of that sort fairness requires that it be disclosed to enable the parties to comment on it. However, I incline to the view that even if the assistance provided by the surveyor was merely clerical and administrative, natural justice required (i) that the adjudicator ought to have told the parties that the surveyor had been engaged; and (ii) that while detailed disclosure for comment would not have been necessary, the adjudicator ought to have indicated (at least in brief, broad terms) just what it was that the surveyor was doing (*Dickie & Moore Limited* v *McLeish & Ors, supra,* per Lord Doherty at para 33).

[51] Be that as it may, the critical question here is whether there has been a *material* breach of natural justice. In my opinion I am not in a position, without inquiry, to conclude that there has not been a material breach of natural justice. I am not persuaded that I can determine on the pleadings that this defence is bound to fail even if the defender proves all that it avers.

[52] Before passing from this ground I observe that it is highly regrettable that, after it became aware of the fact that a surveyor had been engaged, the defender took six months to raise the present complaint. It is wholly unsurprising that the adjudicator and the pursuer have expressed frustration at that delay. I agree with them that the point ought to have been raised much earlier. Ordinarily, by the stage of an enforcement hearing such as this I would have expected a defender taking such a point to have investigated the matter by precognoscing the adjudicator and the surveyor so that it was in a position to make specific averments as to the nature of the services which the surveyor provided. While I have concluded that it is in the interests of justice that there should be an inquiry here, I think it right to stress that objections to an adjudicator's decision ought to be raised expeditiously. I also caution that defenders should not assume that the court would reach the same conclusion as it has here in similar circumstances in the future if, despite these words of warning, a defence is raised at a very late stage.

Disposal

[53] I shall put the case out by order (i) to discuss an appropriate interlocutor to give effect to my decision; (ii) to discuss further procedure; and (iii) to consider any motion for expenses which may be made.