OUTER HOUSE, COURT OF SESSION

2020 CSOH 102

CA75/20

OPINION OF LORD CLARK

In the cause

(FIRST) HOCHTIEF SOLUTIONS A.G.; (SECOND) DRAGADOS, S.A.; (THIRD) AMERICAN BRIDGE INTERNATIONAL CORPORATION; and (FOURTH) GALLIFORD TRY INFRASTRUCTURE LIMITED

Pursuers

against

MASPERO ELEVATORI S.p.A

Defender

Pursuers: Manson; Pinsent Masons
Defender: MacColl QC; Addleshaw Goddard

17 December 2020

Introduction

[1] The pursuers seek an order to enforce the award of an adjudicator. The defender contends that the award should be reduced *ope exceptionis* on the grounds that the adjudicator acted in excess of his jurisdiction and, on another matter, failed to exhaust his jurisdiction.

Background

[2] The pursuers formed an unincorporated joint venture known as the Forth Crossing Bridge Constructors ("FCBC"). The Scottish Ministers engaged the pursuers as the contractor for the design and construction of the Forth Replacement Crossing (subsequently named the Queensferry Crossing), on the Firth of Forth to the west of the existing road and rail bridges. The Forth Replacement Crossing is a cable-stayed bridge deck supported by three towers, each 200m in height, with approach viaducts to the north and south of the bridge deck. The three towers were constructed by the pursuers. The pursuers entered into a sub-contract with the defender on 26 July 2012 and 20 August 2012. The sub-contract related to the design, manufacture, installation and commissioning of three rack and pinion lifts, one for each of the bridge towers. After a delay, certain work to install the tower lifts was carried out by the defender. It designed the lifts and manufactured and delivered some materials. The parties fell into dispute regarding the defender's approach and progress in relation to the sub-contract works. At a meeting on 24 July 2018, the parties agreed on certain matters in relation to further progressing the works. However, the dispute continued. On 15 November 2018, the pursuers issued a notice of termination of the sub-contract. The pursuers sought payment from the defender of sums which the pursuers regarded as falling due as a result of the termination. The principal claim, made under clause 12.3.1(c) of the sub-contract, was for the costs resulting from having another sub-contractor effectively start afresh and re-do the works done by the defender. The defender contended that the pursuers' termination of the sub-contract had been invalid. Accordingly, it refused to meet the claims.

[3] As the parties could not resolve their dispute, it went to adjudication. The adjudicator accepted nomination on 11 June 2020 and the formal Referral notice was sent on

12 June 2020. The issues of whether the sub-contract had been validly terminated and, if so, whether the sums claimed by the pursuers were required to be paid by the defender, were referred to adjudication. The defender issued its Response on 5 July 2020. The pursuers produced a Reply on 14 July 2020, to which the defender issued a Rejoinder on 24 July 2020. The parties then made various subsequent submissions to the adjudicator. Thereafter, the adjudication proceeded and the adjudicator issued his decision on 12 August 2020.

[4] The adjudicator decided that the pursuers' termination of the sub-contract had been valid. As a result, he found that the pursuers were entitled to payment from the defender of (i) the sum of £1,106,031.53 pursuant to clause 12.3.1(c) of the sub-contract; (ii) the sum of £30,790.30 pursuant to clause 12.3.1(f) of the sub-contract; (iii) interest from the defender in the sum of £117,808.99 under the Late Payment of Commercial Debts (Interest) Act 1998 (the sum which had accrued up until the notice of adjudication on 9 June 2020); (iv) interest from the defender at the daily rate of £272.53 under the 1998 Act, from 9 June 2020 until payment; and (v) compensation from the defenders in the sum of £100 under the 1998 Act. The defender has not paid these sums. The adjudicator also found that the defender was liable to make payment of the adjudicator's fees and expenses in the sum of £42,332.40 inclusive of VAT. The pursuers have paid this sum and now seek recovery of it from the defender in accordance with the terms of the award.

The issues

[5] The defender opposes the enforcement of the adjudicator's decision on two grounds. The first contention is that the adjudicator exceeded his jurisdiction by proceeding to make his award under the sub-contract when the dispute actually fell under a separate and distinct "new agreement" reached at the meeting on 24 July 2018. The second is that the

adjudicator failed to exhaust his jurisdiction by failing to address substantive lines of defence offered up by the defender, relating to whether the claim properly fell within clause 12.3.1(c) of the sub-contract. The pursuers' motion was for summary decree (under Rule of Court 21.2) for the sums claimed, failing which for decree *de plano* on the basis that the defender's averments were irrelevant. The defender sought dismissal of the action and reduction of the adjudicator's decision *ope exceptionis*.

Submissions for the pursuers

Relevant legal principles

[6] Both grounds of challenge by the defender were lacking in substance and entirely without merit. Moreover, the defender was barred from asserting a jurisdictional challenge at this stage as it had not done so, or reserved its position in that regard, during the adjudication. The principles governing the question of the enforcement of an adjudicator's decision were well-established. Reference was made to: *Carillion Construction Limited* v *Devonport Royal Dockyard Limited* [2006] BLR 15; *Amec Group Limited* v *Thames Water Utilities Limited*, [2010] EWHC 419 (TCC): *Ground Developments Limited* v *FCC Construction and others* [2016] EWHC 1946 (TCC); *Bouygues (UK) Limited* v *Dahl-Jensen* (UK) Limited, [2000] BLR 49; *NKT Cables A/S* v *SP Power Systems Ltd*, 2017 SLT 494; and *Transform Schools (North Lanarkshire) Ltd* v *Balfour Beatty Construction Ltd & another* 2020 SCLR 707. Both grounds of challenge presented by the defenders were of a kind recognised by the courts as relevant. However, it was important to emphasise that it is only in rare circumstances where there have been obvious and egregious failures in relation to jurisdiction that the court should refuse to enforce. Properly analysed, the defences offered here were of the highly technical nature about which the courts are encouraged to be sceptical and astute to reject.

Issue 1: did the adjudicator exceed his jurisdiction?

[7] The adjudicator had jurisdiction and in any event the objection in this connection came too late. The pursuers' position (which the adjudicator sustained) was that the claims proceeded under the sub-contract; and that the so called "new agreement" of 24 July 2018 was simply a variation of the sub-contract. The defender was barred from tabling this point at all standing its failure to object or reserve its position in relation to the adjudicator's jurisdiction sufficiently clearly and in good time. A party who wishes to object to the jurisdiction of an adjudicator must make that plain, in either general terms or by making a reservation on a specific matter: *GPS Marine Contractors Ltd* v *Ringway Infrastructure Services Ltd*, [2010] Bus LR Digest 129 (*per* Ramsey J at para [36]). In either case, the reservation must be definite and meaningful in order to be rendered effective: *GPS Marine* (at [34]) quoting from *Allied P & L Ltd* v *Paradigm Housing Group Ltd*, [2010] BLR 59 (at para [33]). If a party does not raise a specific objection or reserve its position in a definite and meaningful way before continuing to participate in the adjudication, he will create an *ad hoc* jurisdiction for the adjudicator and lose the right to object to any decision on jurisdictional grounds: *GPS Marine* (at para [37]). This is because the ongoing participation amounts to a waiver: *GPS Marine* (*ibid.*). All of this was recognised and approved by this court in *Morgan Sindall Construction & Infrastructure Ltd* v *Westcrowns Contracting Services Ltd*, 2018 SCLR 471 (paras [20]-[22]). The defender did not object timeously or with sufficient clarity and had therefore acted to confer jurisdiction and must be taken to have waived its right to object at this stage.

[8] It was made perfectly clear in the notice of adjudication that the pursuers were founding upon the sub-contract as varied by the agreement on 24 July 2018. Despite that,

the defender did not state a jurisdictional objection or do anything to reserve its position in this connection in the Response. While it was true that the defender argued that the variation was in fact a new agreement, it did not frame the matter in any intelligible way as a jurisdictional objection. Nor did the defender state any general or specific reservation in this connection. There was an averment in the Response that the agreement of 24 July 2018 was outwith the scope of the adjudication, but the pursuers expressly sought, in their Reply, to formally ascertain whether it was the defender's intention to take a jurisdictional challenge and/or to reserve its position in this connection. The defender continued to demur from tabling or reserving a jurisdictional objection and continued to participate in the adjudication in the absence of both of these things. Indeed, it confirmed that "the Adjudicator has jurisdiction to determine the contract put before him in the Notice of Adjudication, and Referral Notice. That contract is the Sub-Contract." As the adjudicator concluded that the agreement in July 2018 did form part of the sub-contract then it followed that he had jurisdiction in accordance with the submission made by the defender. The adjudicator was not given any proper opportunity to address himself to any clearly articulated jurisdictional challenge and indeed he recorded in his decision that the defender had not challenged his jurisdiction at the appropriate time or on a sufficiently clear basis. Moreover, the defender, despite having failed to reserve its position, called upon the adjudicator to consider, rule and rely upon the terms of the new agreement/variation as part of the defender's substantive defence to the merits of the pursuers' claims under the sub-contract. There were numerous completely unqualified references to the new agreement/variation throughout the defender's pleadings in the adjudication.

[9] The defender's reliance upon *Gatty* v *Maclaine* 1921 SC (HL) 1 was misconceived. The concept in the present case is the conferral of an *ad hoc* jurisdiction upon an adjudicator;

and not a bar *per se* as between the pursuers and the defender. The relevant authorities cited above were clear in stating that a party will confer jurisdiction unless it states an objection which is definite and meaningful. No such objection was taken here. As a matter of law, the adjudicator had jurisdiction for two reasons. Firstly, because it was conferred upon him by the defender's circumferential approach to the question in the course of the adjudication. It followed that the defender must be taken to have conferred an *ad hoc* jurisdiction upon the adjudicator. As a result, the defender was barred from tabling its defence based upon the adjudicator allegedly acting in excess of his jurisdiction. Secondly, because the adjudicator's conclusion on the merits of the dispute saw him conclude that there was only one contract, any challenge on jurisdictional grounds would dissolve. The adjudicator determined that there was no new agreement here and that which the defender labelled as such was, properly construed, simply a variation of the sub-contract. It would have been an abrogation of the adjudicator's duties not to have determined the new agreement/variation question. The defender plainly put the question in issue as part of its defence on the merits such that the adjudicator was obliged to deal with it. The adjudicator answered the right question as part of his determination of the dispute in the light of the positions taken by the parties. Even if the court could conclude at this stage that he had answered that question incorrectly (and no such conclusion should be reached) the court is still obliged to enforce the award: *Bouygues (UK) Limited, supra*.

Issue 2: did the adjudicator fail to exhaust his jurisdiction?

[10] The adjudicator acted properly and exhausted his jurisdiction. Reference was made to *Pilon Ltd* v *Breyer Group plc* [2011] Bus LR. No fundamental aspect of the defence was missed. The position taken by the pursuers in the adjudication was that, upon termination

of the sub-contract, they were entitled to payment from the defender in respect of certain losses by virtue of clause 12.3.1(c). This provision created a contractual entitlement to payment in circumstances where the sub-contract had been terminated and the pursuers required to have the sub-contract works corrected and/or completed. The defender averred in this action that part of its defence in the adjudication was the contention that the pursuers were using the wrong provisions of the sub-contract to obtain their remedy in circumstances where those provisions did not apply. Not only was that argument completely misconceived (a question for another day), but it was a quite inaccurate characterisation of the terms of the defence as it appeared in the adjudication. The defence was an attack based upon a supposed failure of proof and a lack of specification on the part of the pursuers in relation to the *quantum* of the items claimed under the clause. The defender did not argue that the clause itself did not apply. If that was the intention, then it was not one which was clearly articulated. What the defender actually did in the adjudication was to contend that because the defender's design was suitable and had been accepted by the pursuers, the pursuers were not entitled to recover under clause 12.3.1(c) the cost of re-designing the works post termination. As such, the defender argued that it was therefore unreasonable for the pursuers to go to the expense of going back to the drawing-board in respect of the sub-contract works post-termination. The adjudicator clearly addressed himself to the defender's lines of defence in connection with clause 12.3.1(c) as they were stated in the adjudication. The pursuers' claim could not be held to be one for "design breaches". Instead, it was one based upon costs incurred as a result of termination. The design only came in to the equation because the pursuers argued, and the adjudicator accepted, that it was reasonable to start again when striving to complete the works in the state in which they had been left. This was a matter of *quantum*. The adjudicator held that the items claimed

could reasonably fall to be claimed under the relevant clause. He also considered the "proof and specification" points taken by the defender. Having weighed the competing positions and bodies of evidence laid out by the parties on the merits of the design he concluded that it was necessary and, therefore, not unreasonable for the pursuers to have proceeded with a re-design and that the cost of doing so could be recovered by the pursuers. He considered and rejected the defender's argument. He obviously asked himself the right question in connection with clause 12.3.1(c) and he clearly answered it. This case was very far removed indeed from those cases where there were material omissions on the part of an adjudicator such that there was a failure to exhaust jurisdiction, for example: *NKT Cables; Buxton Building Contractors Ltd* v *Governors of Durand Primary School* [2004] EWHC 733 (TCC). Like the situation in *Morgan Sindall*, there had been no material omission on the part of the adjudicator here which had any significant effect on the overall result of the adjudication.

Submissions for the defender

Relevant legal principles

[11] The correct conventional approach for the court to adopt in an adjudication enforcement action was to consider whether the adjudicator was validly appointed and whether he acted within his jurisdiction and in accordance with the rules of natural justice: *Ground Developments Limited* v *FCC Construction and others* [2016] EWHC 1946 (TCC) (at para [60]). Where, however, the adjudication is incompetent, or the adjudicator has acted in excess of his jurisdiction (or never had any proper jurisdiction), or has failed to exhaust his jurisdiction or has acted in breach of the rules of natural justice, or where his reasoning is non-existent or unintelligible, the court will not enforce the decision: *Carillion Construction Limited* v *Devonport Royal Dockyard Limited* (at para [85]) and *Gillies Ramsay Diamond* v *PJW*

Enterprises Limited 2004 SC 430 (*per* LJC Gill at paras [25] and [31]). An adjudicator has jurisdiction only to determine matters which have been referred for his determination and which have not already been the subject of a determination which is binding at the time of the reference to adjudication: *Carillion Construction Limited; R Durtnell & Sons Limited* v *Kaduna Limited* [2003] BLR 225. In considering whether an adjudicator has exhausted his jurisdiction, the scope of an adjudication will properly be defined by the relevant notice of adjudication, together with any ground founded upon by the responding party to justify its position in defence of the claim made: *Construction Centre Group Limited* v *Highland Council* 2002 SLT 1274 (*per* Lord Macfadyen at paras [19] and [20]). Accordingly, where a party in adjudication proceedings raises a line of defence to a claim made against it, the adjudicator requires to deal with it and cannot ignore it: *Connaught Partnerships Limited (in administration)* v *Perth & Kinross Council* 2014 SLT 608 (*per* Lord Malcolm at para [18] to [21]). If there is a failure to address such a line of defence there will have been a failure by the adjudicator to exhaust his jurisdiction, and his decision will be unenforceable: *Pilon Limited* v *Breyer Group plc* (at para [22]); *NKT Cables A/S* v *SP Power Systems Limited*; *DC Community Partnerships Limited* v *Renfrewshire Council* [2017] CSOH 143).

Issue 1: did the adjudicator exceed his jurisdiction?

[12] The dispute referred to the adjudicator was whether the sub-contract had been validly terminated, together with the issue of the sums of money properly due to be paid further to that termination. The Referral proceeded on the basis that the sub-contract was subject to a variation which took place on 24 July 2018, such that there was a "new agreement" on price, programme and resource supply. In contrast, the position of the defender was that the agreement of 24 July 2018 was a new and distinct agreement that was

not a variation of the sub-contract and was outwith the scope of the adjudication. The agreement made no reference to the sub-contract and was not in the established form for variations thereto. On that basis, the 24 July 2018 agreement did not form a part of the sub-contract terms and was a matter beyond the scope of the adjudicator's jurisdiction.

[13] The adjudicator's analysis and determination erroneously proceeded on the basis that the analysis of the pursuers was correct. In adopting this approach, the adjudicator had gone beyond the scope of the dispute properly referred to him and he had exceeded his jurisdiction. Such an approach was illegitimate. The agreement of 24 July 2018 did not meet the contractual requirements for a variation. There was no signed written amendment to the sub-contract, compliant with the provisions of clause 9. No other variations of the sub-contract were done by way of a signed minute of a meeting (which is the document upon which the adjudicator founds his position). The defender was not barred from raising this issue now. The defender had made it plain throughout the adjudication process that the pursuers were seeking a remedy under a "new agreement" rather than under the sub-contract (which the pursuers sought to adjudicate under). In its response, the defender stated in terms that the "24 July 2018 agreement is…outwith the scope of this adjudication" There had been no representation made by the defender that it accepted that the "new agreement" fell within the scope of the adjudication; indeed, its position was expressly to the contrary. Furthermore, there was nothing pled by the pursuers to indicate that there was any reliance by them on any contrary representation purportedly made by the defender. There was, therefore, no bar to the defender advancing this point in the present action. Reference was made to *Gatty* v *Maclaine.*

Issue 2: did the adjudicator fail to exhaust his jurisdiction?

[14] The adjudicator had failed to address substantive lines of the defender's argument in the adjudication process. In so doing, he had failed to exhaust his jurisdiction. The defender sought to defend the adjudication on the basis that the pursuers sought payment under and in terms of clause 12.3.1(c) of the sub-contract in circumstances in which that provision of the sub-contract did not apply. Rather the pursuers were seeking, in truth, reparation for fundamentally negligent design (rather than mere costs of "corrections" to work performed). That was clear, for example, from the defender's argument that this was properly a claim for flawed design, which had itself prescribed. In particular, the defender argued that the pursuers failed to explain why the sums sought by it fell within the scope of clause 12.3.1(c) and that the cost of a complete redesign and replacement of the installation (as sought by the pursuers) went far beyond the scope of the costs recoverable under clause 12.3.1(c) and were, instead, properly referable to alleged design failings on the part of the defender (which design failings did not form a part of the dispute referred to the adjudicator). The adjudicator failed to address this line of defence (or, at least, failed to do so in any intelligible or reasoned manner). He did not address the question of what falls within the scope of clause 12.3.1(c) and whether the design issue went beyond that scope. He needed to do so, particularly when the sums claimed were very significantly in excess of the contract sum. This was a material part of the defence to the claim advanced in the adjudication process. The adjudicator's failure to address this defence meant that he had failed to exhaust his jurisdiction and that his decision falls to be reduced *ope exceptionis*.

Decision and reasons

Issue 1: did the adjudicator exceed his jurisdiction?

Relevant legal principles

[15] It is of assistance to consider how the authorities have approached the issue of what is required in order to constitute a challenge in an adjudication to the jurisdiction of the adjudicator and a reservation of a party's position in respect of jurisdiction. In *GPS Marine Contractors Ltd* v *Ringway Infrastructure Services Ltd*, the principal decision relied upon by the pursuers, Ramsay J made a number of observations about the form of a challenge, during an adjudication, to the adjudicator's jurisdiction. He did so in the context of a generally worded challenge, rather than a specific challenge of the kind said by the defender to have been made here. Ramsay J cited with approval certain *dicta* in *Cia Maritima Zorroza SA* v *Sesostris SAE (The Marques de Bolarque)* [1984] 1 Lloyd's Rep 652, applied in *Allied Vision Ltd* v *VPS Film Entertainment Gmbh* [1991] 1 Lloyd's Rep 392. There are, however, other authorities of relevance.

[16] In *Allied P & L Ltd* v *Paradigm Housing Group Ltd,* Akenhead J said*:*

> "[32] It has long been established in the relatively short period of time in which the Housing Grants Construction and Regeneration Act 1996 ("HGCRA") has been in force that it is necessary for a party challenging the jurisdiction of the adjudicator to reserve its position in relation to its challenge; for instance, although not cited in argument, this issue was raised and commented upon by Mr Justice Dyson as he then was in *The Project Consultancy Group v The Trustees of the Gray Trust* [1999] BLR 377 at Paragraphs 14 and 15. Having reserved its position appropriately and clearly, that party can safely continue to participate in the adjudication and then, if the decision goes against it, to challenge its enforceability on jurisdictional grounds in the court. If it does not reserve its position effectively, generally it cannot avoid enforcement on jurisdictional grounds …"

In The Project Consultancy Group Dyson J (as he then was) referred (at 78-9) to Devlin J's judgment in *Westminster Chemicals & Produce Ltd* v *Eichholz & Loeser* [1954] 1 L.L.R. 99, 105-106 and said:

> "Although that case concerned an arbitration, I agree that what Devlin J. said was equally applicable to an adjudication. He said that if two people agree to submit a dispute to a third person, then the parties agree to accept the award of that person, or, putting it another way, they confer jurisdiction on that person to determine the dispute. If one of the parties thinks that the dispute is outside the agreement that they have made, then he can protest against the jurisdiction of the arbitrator."

He then quoted Devlin J's comment:

> "If he protests against the jurisdiction of the arbitrator, which is merely an elaborate way of saying: 'I have not agreed to abide by your award,' if he protests in that form it is held that he can take part in the arbitration without losing his rights, and what he is doing, in effect, is that he is merely saying: 'I will come before you, but I am not by my conduct in coming before you and arguing the case, to be taken as agreeing to accept your award, because I am not going to do so'. "

[17] In Aedifice Partnership Ltd v *Shah [2010] EWHC 2106 TCC,* (2010) 132 Con L R 100, Akenhead J said:

> "[21] I can draw these various strands together …
>
> (c) One principal way of determining that there was no such implied agreement [to give the adjudicator jurisdiction] is if at any material stage shortly before or, mainly, during the adjudication a clear reservation was made by the party objecting to the jurisdiction of the adjudicator.
>
> (d) A clear reservation can, and usually will, be made by words expressed by or on behalf of the objecting party. Words such as "I fully reserve my position about your jurisdiction" or "I am only participating in the adjudication under protest" will usually suffice to make an effective reservation; these forms of words whilst desirable are not absolutely essential. One can however look at every relevant thing said and done during the course of the adjudication to see whether by words and conduct what was clearly intended was a reservation as to the jurisdiction of the adjudicator. It will be a matter of interpretation of what was said and done to determine whether an effective reservation was made. A legitimate question to ask is: was it or should it have been clear to all concerned that a reservation on jurisdiction was being made?
>
> (e) A waiver can be said to arise where a party, who knows or should have known of grounds for a jurisdictional objection, participates in the adjudication without any reservation of any sort; its conduct will be such as to demonstrate that its non-objection on jurisdictional grounds and its active participation was intended to be and was relied upon by the other party (and

> indeed the adjudicator) in proceeding with the adjudication. It would be difficult to say that there was a waiver if the grounds for objection on a jurisdictional basis were not known of or capable of being discovered by that party."

In his subsequent decision in *CN Associates (a firm)* v *Holbeton Ltd* [2011] BLR 261, Akenhead J said:

> "[33] …If a party does not effectively reserve its position on a given jurisdiction issue, of which it had actual or constructive knowledge, it cannot raise it as an effective objection to a claim for the enforcement of the relevant adjudication decision …"

[18] In *Bresco Electrical Services Ltd (in liquidation)* v *Michael J Lonsdale (Electrical) Ltd; Cannon Corporate Ltd* v *Primus Build Ltd* [2019] 3 All ER 337 [2019] EWCA Civ 27, Coulson LJ considered most of these cases, again in the context of a general reservation, and concluded (at para [91]) that unlike Ramsey J, he was not persuaded that the reasoning in *The Marquess de Bolarque* and *Allied Vision* is of direct application to the general reservation of a responding party's position as to an adjudicator's jurisdiction. He added:

> "[92] In my view, informed by that starting-point, the applicable principles on waiver and general reservations in the adjudication context are as follows:
>
> (i) If the responding party wishes to challenge the jurisdiction of the adjudicator then it must do so 'appropriately and clearly'. If it does not reserve its position effectively and participates in the adjudication, it will be taken to have waived any jurisdictional objection and will be unable to avoid enforcement on jurisdictional grounds (*Allied P&L*)…"

The decision of the Court of Appeal in *Bresco* was overturned by the Supreme Court ([2020] UKSC 25), but not in respect of the point quoted above (rather, the Supreme Court dealt with compatibility of two statutory regimes, adjudication of construction disputes and the operation of insolvency set-off). Accordingly, the English authorities, in the Court of Appeal and at first instance, support the proposition that a challenge to jurisdiction, in effect a protest against one or more of the matters being dealt with, must be made

appropriately and clearly and must amount to an effective reservation of the party's position. I see particular force in Akenhead J's articulation of the test: was it or should it have been clear to all concerned that a reservation on jurisdiction was being made?

The alleged challenge to jurisdiction

[19] If in this adjudication the defender had made an appropriate and clear objection, reserving its position on jurisdiction, that would be an extremely important matter from the perspective of the pursuers and the adjudicator. The defender would, in effect, be saying that if the adjudicator decided that the meeting on 24 July 2018 resulted in a variation to the sub-contract, then his decision would be open to challenge as being unenforceable in its entirety. Severability could not arise in such circumstances. The potentially critical consequences of such a challenge to jurisdiction reinforce the need for it to be appropriate and clear. If such a challenge had been made, I accept that the defender would not be committing to being bound by the adjudicator's decision. In such circumstances the defender would have had to accept that its point about two separate contracts fell to be determined by the adjudicator, but subject to the reservation of its challenge. Of course, if the adjudicator had decided that there was no variation and the 24 July 2018 agreement could not be taken into account, a later challenge by the defender would not arise. So, this situation is not about the adjudicator answering the right question in the wrong way (an *intra vires* error); that would imply that he was able to decide on the scope of his own jurisdiction, which can happen if the terms of the adjudication so provide, but is not the case here. A proper jurisdictional reservation, of the kind referred to in the authorities, would have allowed this challenge.

[20] The defender relies principally upon a passage in its Response to the Referral. The Response begins with some introductory comments and, before addressing the individual headings and issues as set out in the Referral, deals with "six key issues". In the Response, key point 3 is headed "24 July 2018 agreement" and in a number of paragraphs the defender sets out what it says was agreed. The defender then states:

> "Maspero submits that the minute of meeting dated 24 July 2018 is a record of a separate agreement reached by Maspero and FCBC. It is separate from the Subcontract. It makes no reference to the Subcontract, nor its terms. This is because the meeting was to discuss how to take forward the installation works, which were to be carried out by FCBC directly, not under the Subcontract. Maspero offered to assist with these separate works; however, it negotiated an additional payment to provide this assistance. This was recorded in the agreement. This is a separate agreement, and is therefore not subject to this adjudication. It is well established that only one dispute, under one contract, can be referred to adjudication, for the Adjudicator to determine. The 24 July 2018 agreement is therefore outwith the scope of this adjudication."

[21] In its Reply, having dealt with key points 1 and 2, the pursuers then set out under the heading "Purported challenge to jurisdiction", the following comments, with references in the footnotes to certain authorities quoted above:

> "6.18 At paragraph 0.35 of the Response, the Responding Party states that the 24 July 2018 agreement is a separate agreement and so is not subject to this adjudication as only one dispute may be referred. It is not clear whether the Responding Party is purporting to make a jurisdictional challenge, as this is not clearly stated in the Response.
>
> 6.19 A challenge to an adjudicator's jurisdiction must be made appropriately and clearly. If a party's position is not reserved effectively and it participates in the adjudication, it waives any jurisdictional objection and confers *ad hoc* jurisdiction upon the adjudicator.
>
> 6.20 The Responding Party does not reference the word "jurisdiction" in paragraph 0.35 of the Response. Therefore, it is unclear whether any challenge to jurisdiction is being made.
>
> 6.21 Furthermore, the Responding Party was aware that the Referrer would be relying upon the agreement on 24 July 2018 as a variation to the Subcontract, as this was clearly stated at paragraph 5.6 of the Notice, dated 9 June 2020. The Responding

> Party had almost 4 weeks to challenge the Adjudicator's jurisdiction but did not do so. The Responding Party's agents attended a video conference with the Adjudicator and the Referrer's agents on 17 June 2020 and no reservation of any jurisdictional challenge was made. Similarly, the Responding Party's agents have engaged in correspondence with the Adjudicator and the Referrer's agents without making any such reservation. Accordingly, if the Responding Party is purporting to challenge the Adjudicator's jurisdiction at paragraph 0.35 of the Response, the challenge comes too late. The Responding Party has participated in the Adjudication and so has conferred *ad hoc* jurisdiction upon the Adjudicator to consider the terms of the 24 July 2018 agreement as part of this Adjudication."

[22] In its Rejoinder, dealing with these points, the defender states:

> "1.71 Maspero confirms that its position is that the Adjudicator has jurisdiction to determine the contract put before him in the Notice of Adjudication, and Referral Notice. That contract is the Subcontract.
>
> 1.72 Given only one dispute, under one contract, can be determined by the Adjudicator, it follows that the terms of the 24 July 2018 agreement, and any associated dispute from that contract, cannot be determined in this adjudication.
>
> 1.73 Maspero requests that the Adjudicator determine the dispute before him, under the Subcontract. Maspero's position is that the Subcontract was not validly terminated. Any disputes under the 24 July 2018 agreement, cannot be determined in this adjudication. Maspero fully reserves its rights and pleas in relation to the 24 July 2018 agreement."

[23] In his decision, the adjudicator said:

> "11.24 The Respondent submits that the minutes of meeting of 24 July 2018, being a separate agreement, is outwith the scope of my jurisdiction and that I determine the dispute of termination by reference to the Subcontract. Having decided that the minutes of meeting 24 July 2018 is not a separate contract but a variation to the Subcontract, then it falls within the scope of my jurisdiction.
> 11.25 If I am wrong in that decision, then I consider that the challenge to my jurisdiction has not been made at the outset of the adjudication procedure when it ought to have been known. The Respondent has not set out any challenges to my jurisdiction appropriately and clearly."

[24] The pursuers referred in their Reply to a "purported challenge to jurisdiction", but they also stated that it was unclear whether any challenge to jurisdiction was being made. The defender's response to that, in the Rejoinder, did not in my view provide sufficient clarification. It was never said in express terms that the arbitrator had no jurisdiction in

respect of the 24 July 2018 agreement. While the language used by the defender may be seen as hinting at a challenge, the tenor of it also fits with the defender's basic argument that there was no variation of the sub-contract. Indeed, in its Response and Rejoinder the defender makes a number of references to the meeting on 24 July 2018, including, in the Response:

> "9.29 Following the agreement on 24 July 2018, it was FCBC's duty to provide adequate installation technicians that would have worked under Maspero's supervision and advice. The provision of trained and qualified personnel and the ability to proceed with the work was FCBC's obligation. FCBC was unable to provide adequate manpower, and therefore the installation works had a very slow rate of progress.
> …
> 9.37…The delays and difficulties encountered in the execution of the works agreed upon on 24 July 2018 are due solely to FCBC."

There was therefore a degree of reliance by the defender upon that agreement and no suggestion in these references that it fell outside the adjudicator's jurisdiction. In relation to effective reservation, the closest one gets is the reference to the defender reserving its rights and pleas in relation to the 24 July 2018 agreement, but that does not express reservation of a position on jurisdiction. There was no clear statement that the adjudicator had no jurisdiction to decide on the point and nothing to indicate that the defender's ongoing participation in the adjudication should be seen in that light. In the whole circumstances, in my view, there was no proper protest or objection against jurisdiction, made appropriately or clearly, and no effective reservation of the defender's position. The question of whether it was or should have been clear to all concerned that a reservation on jurisdiction was being made falls to be answered in the negative. In relation to the timing of the submissions relied upon by the defender, by the time we get to the Rejoinder, six weeks have elapsed since the Referral. A challenge to jurisdiction made at that stage would have come far too late, given that the circumstances were known from the outset. However, for the reasons I have given,

no such challenge was properly made and, for what it is worth, it is no surprise that the adjudicator also took that to be the position. The effect of the defender continuing with the adjudication in such circumstances is made clear by the authorities and the principles in *Gatty* v *Maclaine* do not affect this issue. Thus, the defender has acceded to the adjudicator having jurisdiction to determine the issue of whether there was a new agreement or simply a variation of the sub-contract.

[25] Accordingly, I reject the defender's submission that the adjudicator acted outwith his jurisdiction. Having reached that decision, I need not consider the submissions for the defender on the merits of the adjudicator's decision on the issue. As he had jurisdiction to determine the matter, because of the absence of a proper challenge, the alleged legal error in his determination of it is of no moment for the purposes of these enforcement proceedings.

Issue 2: did the adjudicator fail to exhaust his jurisdiction?

Relevant legal principles

[26] Senior counsel for the pursuers relied upon the following comments by Coulson J (as he then was) in *Pilon Ltd* v *Breyer Group plc*, which have been cited with approval in Scottish cases:

> "22.1. The adjudicator must attempt to answer the question referred to him. The question may consist of a number of separate sub-issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question then, whether right or wrong, his decision is enforceable: see *Carillion v Devonport*.
> 22.2 If the adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his jurisdiction (and has, for example, failed even to consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice: see *Ballast*, *Broadwell*, and *Thermal Energy*.

> 22.3 However, for that result to obtain, the adjudicator's failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the decision unenforceable: see *Bouygues* and *Amec v TWUL*.
>
> 22.4 It goes without saying that any such failure must also be material: see *Cantillon v Urvasco* and *CJP Builders Ltd* v *William Verry Ltd* [2008] EWHC 2025 (TCC). In other words, the error must be shown to have had a potentially significant effect on the overall result of the adjudication: see *Keir Regional Ltd (trading as Wallis)* v *City & General (Holborn) Ltd* [2006] EWHC 848 (TCC)…"

Coulson J refers to unenforceability being either on grounds of jurisdiction or natural justice and that an inadvertent failure will not ordinarily render the decision unenforceable. As I noted in *Field Systems Designs Limited* v *MW High Tech Projects UK Limited* [2020] CSOH 17, this has been the subject of discussion in other English cases (see eg *RGB P&C Limited* v *Victory House General Partner Limited* [2019] EWHC 1188 (TCC) and *KNN Coburn LLP* v *GD Holdings Ltd* 2013 EWHC 2879 (TCC). In the latter of these, Stuart-Smith J makes these observations under a sub-heading of whether the adjudicator "did not consider a material line of defence". This is the language used by Lord Doherty in *DC Community Partnerships Ltd* v *Renfrewshire Council* (at para [24]), under reference *inter alia* to *NKT Cables A/S* v *SP Power Systems Ltd per* Lady Wolffe (at paras [113]-[114]) and I use that as the test. The starting point is how the court identifies whether a material issue has not been addressed. A failure to refer to a specific point will not of itself suffice and it must be apparent from the adjudicator's decision or reasoning that a material issue has not been addressed.

The alleged material error

[27] In essence, the defender's contention is that the sums sought by the pursuers went far beyond the scope of the costs recoverable under clause 12.3.1(c) and were, instead, properly referable to alleged design failings on the part of the defender (which design

failings did not form a part of the dispute referred to the adjudicator). The adjudicator is said to have failed to address the question of what falls within the scope of clause 12.3.1(c) and whether the design issue went beyond that scope. That clause states:

> "12.3.1 If the Contractor terminates this Subcontract or the Subcontractor's right to continue with the Subcontract Works as provided in Sub-Clause 12.1.1, Sub-Clause 12.1.2 or Sub-Clause 12.1.5, the Contractor shall be entitled to:
> … (c) charge the Subcontractor the amount by which the full Cost of finishing the Subcontract Works and a reasonable allowance to cover the Cost of corrections to work performed by the Subcontractor that may be required under Clause 8 (Completion and Taking-Over, Outstanding Work, Defects Liability and Final Completion), exceeds the unpaid balance of the Subcontract Price or the unpaid balance of the value of the terminated part of the Subcontract Works, as the case may be; however, if such Cost of finishing the Subcontract Works is less than the unpaid balance of the Subcontract Price or the unpaid balance of the value of the terminated part of the Subcontract Works, as the case may be, the Contractor shall pay the Subcontractor the difference;"

[28] The battle lines between the parties on the design issue were fairly clear. The pursuers argued that it was impossible for an alternative subcontractor to complete the installation of the lifts using the defender's design and materials. Accordingly, the pursuers had to appoint an alternative subcontractor to re-design and build the lifts. Expert advice on what was required was taken and relied upon by the pursuers. The pursuers' position was put, in summary, (at para 10.21 in the Referral) as follows:

> "Therefore, in circumstances where FCBC had to procure the re-design, manufacture and installation of the Lifts and there was only one available subcontractor able to fulfil the order, FCBC is entitled to recover the whole cost of the [new sub-contractor's] works under clause 12.3.1(c) of the Subcontract."

The defender's position was that its design had earlier been accepted and no claim for deficient design could be made under clause 12.3.1(c). In essence then the dispute was whether the works could be completed based on the defender's design, with the pursuers saying they could not and the defender saying they could, with each position based upon expert evidence. The adjudicator set out the competing positions and reached the view that

the need for re-design was something that fell within clause 12.3.1(c) as a step to complete the works.

[29] In relation to the defender's position on design, the adjudicator stated (the reference to "the Respondent" being the present defender) that:

> "11.111 The Respondent has raised the issue of acceptance of the design and prescription of design claim as two key points. This is in respect of the Respondent's submission that the Referrer's quantum arises out of an alleged default in the design. I have considered the Respondent's submission and conclude that the Referrer's claim for damages is as a result of what it considers is breaches in respect of supervision; provision of electrical engineers; delivery of materials and components; poor quality materials; progress on site and withdrawal of resources. The adjudication dispute is not in respect of the design but it is considered in respect of mitigation of loss."

He then said:

> "11.113 In respect of the prescription of design claim, I consider this dispute is not in relation to the design…"

The adjudicator went on to note that the parties' respective experts disagreed as to whether the pursuers could appoint an alternative sub-contractor to complete the defender's sub-contract (as the defender contended) or whether the pursuers required to appoint an alternative sub-contractor to provide a replacement installation. He discussed (at para 12.11) the evidence of the defender's expert on design information, drawings, assembly instructions and documentation, which included that he considered that there were sufficient drawings and sketches to allow an experienced third party to complete the installation. This was also said to apply to the assembly information. The adjudicator concluded that:

> "12.12 The Respondent has failed to evidence that there is sufficient design information, drawings, assembly instructions and documentation to complete the installation either by installers under supervisors or by experienced installers."

He went on:

> "12.18 For the reason given above, in relation to quality and absence of materials and components; design issues; specific issues of OSG, clearances and entanglement of cables; car sling dimensions and headroom; document provision and doubts of ability to obtain certification, I am of the opinion that it would not be possible to appoint an alternative Subcontractor to resolve design issues and complete the Tower Lifts.
> 12.19 I have the parties submissions on costs following termination of the Subcontract. The costs of termination are set out in clause 12.3 of the Subcontract and are a matter of contract. Damages for breach of contract are pursuant to clause 2.4.3 of the Subcontract. Clause 12.3(c) [*sic*] entitles the Contractor to charge the Subcontractor the full amount of finishing the Subcontract Works, subject to the deduction of the unpaid balance of the Subcontract Price.
> …
> 12.29 For the reasons above, I am of the opinion that the Referrer has acted reasonably to mitigate the costs…"

[29] The adjudicator therefore noted the point made by the defender that the principal sum claimed arose as a result of an alleged defect ("default") in design. He rejected that submission, identifying what in his view were the grounds for the claim. He concluded that clause 12.3.1(c) permitted recovery, including the costs of re-design, on the grounds identified. Having reached that view, he also indicated that issues of design would be relevant to the question of mitigation of loss and he then considered them in that context. In reaching these views, the adjudicator was plainly aware of the defender's position on design and took it into account but did not accept it, and by clear implication, considered that the true grounds of loss (as he saw them) fell within the scope of clause 12.3.1(c). He did not therefore leave out of account a material line of defence.

[30] For these reasons, I do not accept the submission for the defender that the adjudicator failed to exhaust his jurisdiction.

Conclusion

[31] I conclude that the defender's averments are irrelevant and the pursuer's motion for decree *de plano* should be granted. In the circumstances of this case, given the legal issues raised and having not been separately addressed in any detail on whether the test for summary decree is met, I grant only that part of the motion.

Disposal

[32] I shall sustain the pleas-in-law of the pursuers, repel the defender's pleas-in-law and grant decree against the defender as concluded for, reserving in the meantime all questions of expenses.