OUTER HOUSE, COURT OF SESSION

[2020] CSOH 109

CA45/20

OPINION OF LORD CLARK

In the cause

D McLAUGHLIN & SONS LIMITED

Pursuer

against

EAST AYRSHIRE COUNCIL

Defender

Pursuer: Howie QC; DAC Beachcroft Scotland LLP
Defender: Thomson QC; Shepherd and Wedderburn LLP

30 December 2020

Introduction

[1] Under a building contract the pursuer was the contractor, employed by the defender. The works involved the construction of a new single storey extension at Hurlford Primary School, East Ayrshire. A dispute was referred to adjudication. The pursuer seeks to enforce the award of the adjudicator. The defender challenges the adjudicator's decision.

Background

[2] The terms of the contract included the Standard Building Contract with Quantities for use in Scotland (SBC/Q/Scot) 2011 edition, as amended by the Preliminaries ("the

Standard Conditions"). The works commenced in 2016. A dispute arose between the parties regarding sums claimed by the pursuer to be due from the defender under the construction contract. The pursuer raised an action in the sheriff court on 12 September 2019 seeking payment of the balance said to be due. On about 17 March 2020, the pursuer issued a Notice of Adjudication. The adjudicator found in favour of the pursuer. The defender refused to make payment and the pursuer raised the present action for enforcement of the adjudicator's decision. In its defences, the defender challenges the adjudicator's decision, not on any grounds regarding jurisdiction or breach of natural justice, but concerning alleged errors by the adjudicator. The defender also enrolled a motion to lodge a counterclaim in this action. The motion was unopposed by the pursuer. The counterclaim seeks declarators which would have the effect that the award by the adjudicator is not enforced and also seeks payment by the pursuer of the adjudicator's fees paid by the defender. In August 2020, the action which had been raised in the sheriff court was remitted to the Court of Session. In order to distinguish those proceedings from the current enforcement action I shall continue to refer to them as the sheriff court action. At a preliminary hearing, it was agreed that this case and the remitted sheriff court action should call for debate, with 1 day allocated for each case. At the debate hearing I was informed that the parties had agreed that the remitted sheriff court action should not be the subject of debate and should be sisted. I shall shortly explain, in brief terms, the dispute, the adjudication process and the points raised in the court actions, but it is important to note at the outset that this case involves not only an action for enforcement of an adjudicator's decision but also a counterclaim by the defender, and that there is a previously raised sheriff court action by the pursuer seeking what could be described as final determination of the parties' dispute by the court.

The sheriff court action

[3] The defender's Final Certificate valued the works in the sum of £3,343,223.82. In the sheriff court action, the pursuer seeks declarator that the true value of the Final Certificate contract sum should have been £3,711,242.80 and seeks decree for the balance said to be due, that is, £441,622.78. The pursuer avers *inter alia* that the Final Certificate failed to acknowledge the pursuer's full and proper entitlement in respect of the valuation of variations and the measured works. The figures relied upon by the pursuer are based upon worksheets submitted by it to the defender on 21 May 2019. The differences in the parties' respective valuations of the adjusted contract sum, relating to the valuation of the variations and measured works, were stated in the worksheets. The pursuer accepts that all sums certified by the contract administrator have been paid by the defender, but the pursuer denies that the Final Certificate incorporated all 27 interim certificates issued under the contract by the contract administrator. The pursuer's clamed gross value of the contract sum that should have been stated in the Final Certificate is not advanced on the basis of the Interim Payment Certificate relied upon in the adjudication, discussed below. However, the sheriff court action concerns the overarching issue of the amount claimed to be due to the pursuer as the adjusted contract sum.

The dispute referred to adjudication

[4] One of the due dates for an interim payment under the contract was 27 July 2017. The defender's architect did not issue an Interim Certificate stating the sums he considered to be, or have been, due within 5 days after 27 July 2017 in accordance with clause 4.10.1 of the Standard Conditions. On 10 August 2017, the pursuer issued an Interim Payment Notice

to the defender's quantity surveyor in terms of clause 4.11.2.2 of the Standard Conditions in the contract. The Interim Payment Notice stated that the pursuer considered the sum of £949,556.50 was due to it as at 27 July 2017. Following service of the Interim Payment Notice, the defender's architect did not issue a Pay Less Notice in terms of clause 4.12.5 and 4.13 of the Standard Conditions. Accordingly, in terms of clause 4.12.3 of the Standard Conditions, the pursuer contended that the defender was obliged to make payment of the whole sum in the Interim Payment Notice. The defender refused to do so. Between August 2017 and July 2019 interim certificates were issued and the defender made various payments to the pursuer under the contract. Between November 2019 and January 2020, the parties corresponded about the pursuer's entitlement to be paid the balance said to be due. The defender refused to make payment of the sums claimed by the pursuer.

The adjudication

[5] As noted, on or around 17 March 2020, the pursuer issued a Notice of Adjudication in terms of clause 9.2 of the Standard Conditions and Rule 1 of Part 1 of the Schedule to the Scheme for Construction Contracts (Scotland) Regulations 1998 (SI 1998/657) (as amended) ("the Scheme") in respect of this dispute. On 20 March 2020, Mr Donny MacKinnon, Chartered Surveyor, was appointed as the adjudicator. On 23 March 2020, the pursuer served a Notice of Referral, to which, on 1 April 2020, the defender produced a Response. On 6 April 2020, the pursuer served a Reply and on 10 April 2020 the defender produced a Rejoinder. On 14 April 2020, the pursuer served a Surrejoinder and on 17 April 2020, the defender produced a Response to the Surrejoinder.

[6] In the adjudication, the pursuer valued its entitlement to payment based on a gross valuation of £3,802,614.87, some £91,372.07 more than the sum of £3,711,242.80 relied upon

in the sheriff court action. In summary, the defender sought to resist payment on the basis that: (a) the Interim Payment Notice was invalid because: (i) the sum due had been calculated to the wrong due date (27 July 2018 as opposed to 28 July 2018); (ii) it had failed to stipulate the relevant clause in the contract under which the notice was being issued, leading to ambiguity; and (iii) it had been defectively served because it was not copied to the architect/contract administrator and the defender; (b) in any event, the Final Certificate issued by the defender on 17 July 2019 was conclusive evidence of sums due to the pursuer under the contract and, on that basis, the adjudicator was obliged to make a nil award; and (c) in any event, there had been an oral settlement agreement reached in respect of the Interim Payment Notice between the defender's quantity surveyor and the pursuer's Mr Hill. In summary, the pursuer's position on these issues was: (a) the Interim Payment Notice was valid because: (i) it had been calculated to the correct due date of 27 July 2017; (ii) there was no requirement to stipulate the relevant clause under which the Interim Payment Notice was being issued and its terms were sufficient to meet the reasonable recipient test for such notices; (iii) it had been correctly served as clause 4.11.2.2 only required notice to be given to the quantity surveyor and the agreed method of service of electronic communication had been used; (b) on a proper construction of the contract, the Final Certificate did not preclude enforcement of the pursuer's pre-existing right to payment in respect of the Interim Payment Application; and (c) there had been no oral settlement agreement reached.

The adjudicator's decision

[7] On 6 May 2020, the adjudicator issued his decision and then on 11 May 2020 issued a corrected version. In summary, the adjudicator decided that: (a) the Interim Payment

Notice was valid because: (i) the relevant due date was 27 July 2017; (ii) it gave reasonable notice to the defender's quantity surveyor of what it was; and (iii) it was served in compliance with the contract; (b) the Final Certificate did not did not affect the dispute as regards the Interim Payment Application and he was not obliged to issue a nil award; and (c) the defender had not satisfied the burden of proof in respect of any settlement agreement; any agreement reached was only in respect of delaying commencement of adjudication.

[8] In consequence, the adjudicator found the defender was liable to make payment to the pursuer of £427,578.75, plus VAT, giving a total sum of £513,094.50. The adjudicator also found the defender was liable to make payment of interest in the amount of £78,361.18 up to the date of his decision, increasing in the daily amount of £61.46 until payment is made. The adjudicator also found that the defender, as the unsuccessful party, was liable for his fees in the amount of £14,373.60 inclusive of VAT.

The present action

[9] In this action, the pursuer seeks enforcement of the adjudicator's decision. In its defences and counterclaim the defender identifies two grounds for contesting enforcement. The first relates to the Final Certificate being conclusive evidence in the adjudication and the adjudicator having erred in not treating it as such. The second relates to the validity of the Interim Payment Notice dated 10 August 2017. At the hearing, senior counsel for the defender accepted that the second issue would require some evidence to be led and that it could not be dealt with at this stage. On the Final Certificate matter, the key points made by the defender in its pleadings are:

> "The Final Certificate was conclusive evidence in the Adjudication, as provided in Standard Condition 1.9, because the Adjudication was not commenced within 60 days of the Final Certificate. Reference is made to Answer 13. The defender has

> paid all sums due to the pursuer in terms of the Final Certificate. As a result no sum is due to the pursuer in respect of the 10 August 2017 Notice (described by the pursuer as an Interim Payment Notice and which was essentially provisional in nature), which formed the sole basis of the pursuer's claim to payment in the Adjudication. The adjudicator should have awarded a nil amount. This issue of the conclusive evidential nature of the Final Certificate, and its consequences, is a short and self-contained point. It was raised in the Adjudication. Reference is made in particular to Paragraphs 1.iii, 61 to 68, 70 and 74 of the Response. The point requires no oral evidence or other elaboration beyond that which is capable of being provided during a relatively short hearing, devoid of oral evidence, taking place no later than any hearing to be held in respect of the pursuer's pleas-in-law and conclusions. Without prejudice to that generality, the point does not engage any consideration or determination of the issue of when the works commenced. In the circumstances it would be unconscionable for the Court to ignore the point, and the defender is entitled to have the point decided by way of the decrees of declarator first and third concluded for in the defender's Counterclaim, arising as the point does in connection with the enforcement of the decision of the Adjudicator in terms of Article 8 of the Standard Conditions…"

These points are reflected in the counterclaim. The pursuer's position in response is pled as follows:

> "…Explained and averred that the final certificate was not accorded the status of conclusive evidence in the adjudication by virtue of clause 1.9 of the Standard form of building contract. The final certificate had been challenged by the pursuer timeously (i.e., within sixty days from the date of issue thereof) in the said action in Kilmarnock sheriff court. Accordingly, in respect of any matter which came to be challenged in that action - such as the sums truly payable to the pursuer by the defender under certificates issued pursuant to the Contract - the final certificate never achieved the status of conclusive evidence, whether in the proceedings in Kilmarnock or anywhere else. Irrespective of the procedure required to decide the point about the status of the final certificate in the adjudication, it is not unconscionable for the Court to decline so to do. That status is a matter of law arising in the adjudication upon which the adjudicator has arrived at a decision. Whether his decision on the point of law be right or wrong, it is not a basis in law for refusing to comply with the contractual obligation to give effect to the decision of the adjudicator or for the court to refuse an order - such as is here concluded for - to enforce the prompt implement by the defender of its said contractual obligation. To do otherwise would be to undermine the policy of the adjudication system…"

In the counterclaim, the defender also seeks recovery of the adjudicator's fees paid by the defender.

The issues

[10] It is well-established in the authorities (discussed shortly) that in an action for enforcement of an adjudicator's decision the grounds upon which enforcement can be challenged are limited, in effect to matters of jurisdiction and natural justice, and that errors of law or fact by the adjudicator do not permit a challenge to enforcement. However, as is explained below, senior counsel for the defender sought to argue that there was authority in England to the effect that there was an exception to these general principles, allowing in certain limited circumstances an error by the adjudicator to be founded upon in the challenge to enforcement. He argued that this exception should be recognised and followed by the courts in Scotland and that the defender's position fell within that exception. The pursuer resisted that argument. That is the major issue in this case.

[11] The subsidiary issue, which arises only if the defender succeeds, is whether the defender can recover the fees paid to the adjudicator.

Submissions

Submissions for the pursuer

[12] The defences were unusual in an action for enforcement of an adjudicator's decision. There was no question of any jurisdictional error or natural justice or any other matter falling within the grounds of challenge in an enforcement action. The adjudicator's decision was being attacked because it is wrong. That did not warrant a defence to enforcement of the adjudicator's decision. It was simply a complaint about an error of fact or law within his jurisdiction. The Final Certificate point argued by the defender was in fact also about evidence and the weight the adjudicator thought should be given to the evidence and was therefore even less available for complaint. It was plainly within the bounds of what the

adjudicator was entitled to do. Reference was made to *Carillion Construction Ltd* v *Devonport Royal Dockyard Ltd* [2006] BLR 15 (at para [84]). If the adjudicator put the wrong level of weight to particular evidence, that was the misfortune of the losing party. So, whether or not senior counsel for the defender was correct about the conclusive evidence point it did not get the defender anywhere. Reference was also made to *Amey Wye Valley Ltd* v *County of Herefordshire District Council* [2016] BLR 698 (at para [30]) and *Gillies Ramsay Diamond* v *PJW Enterprises Limited* 2004 SC 430 (at paras [35] and [36]), and [40]-[43]). In the latter case, Lord Gill had been fairly forthright about the nature of the errors of law made by the adjudicator. The view taken by the court was that it was not appropriate to seek to overturn the decision because it was disfigured by errors of fact or law. Judicial review of the adjudicator's decision was not available for *intra vires* errors of law. That case made it clear that there is no possible defence based on the decision being wrong.

[13] When an adjudicator's decision is issued that *ipso facto* creates liability. There is a way of recovery: the losing party pays and can then raise an action under section 108 of the Housing Grants, Construction and Regeneration Act 1996, which might be called an unwinding action. That is the sole method of dealing with an error of law. The reference to recovery in *Gillies Ramsay Diamond* (at para [43]) must mean that the loser has to pay in the meantime. As the sole method of sorting an adjudicator's decision that is erroneous is to sue to get your money back there is a duty to pay and the person found liable can not create a defence by saying the decision is erroneous. Whatever may be the position in England, one could not square that with the decision in *Gillies Ramsay Diamond,* which disallows a defence based on actual legal error. The defence was one that is not open because it is fundamentally inconsistent with the statute, the Scheme and the policy of parliament. That was all to the effect that the adjudicator's decision shall be binding until subsequent

litigation declares otherwise. The reason why there are adjudicator's decisions which cannot be enforced because of such things as jurisdictional or natural justice errors is that in these cases there is no proper decision and there is an *ultra vires* nullity.

[14] In relation to *Hutton Construction Ltd* v *Wilson Properties (London) Ltd* [2017] BLR 344, the case heavily relied upon by the defender, it refers to a claim for declaration, which is about the need to sue separately for money to be repaid. It is not a defence to an adjudication enforcement case to say the adjudicator has made even a farcically obvious error, such as the very blatant error as in *Gillies Ramsay Diamond*. If what had been issued in the present case was not an Interim Payment Notice but was a copy of a Shakespeare sonnet, that would not have been challengeable. The legal ground under section 108 is the implied term referred to therein. *Castle Inns (Stirling) Ltd* v *Clark Contracts Ltd* [2005] CSOH 178 was an example of how errors are resolved. An unwinding litigation could not be raised until the losing party complied with the obligation to pay out. Doing it as a counterclaim involves erecting a defence by another name. The defender could not create a defence in practice by the kind of procedural arrangement being sought to be followed here.

[15] In *Hutton Construction Ltd*, it was not all clear where the exceptions identified by Coulson J came from. In the present case, there was no common ground that the defender's position should be dealt with at this hearing. However, in *Hutton Construction Ltd* (from para [14]) Coulson J deals with circumstances in which the court will hear the points even where there is no agreement. Anything said there that is inconsistent with the decision in *Gillies Ramsay Diamond* should be rejected. It was unclear from *Hutton Construction Ltd* whether or not payment under the adjudicator's award had been made. Reference was made to *Fenice Investments Ltd* v *Jerram Falkus Construction Ltd* [2009] EWHC 3272 (TCC) (at para [48]). The idea of sorting cash flow problems by quick decisions would be subverted if

Hutton Construction Ltd were to be followed by this court. The approach in *Hutton Construction Ltd* failed badly as an attempt to protect the statutory scheme. If speedy enforcement can be stopped by means of a counterclaim then we would be heading back to the old days of various assorted manoeuvres to avoid payment. The reference in *Hutton Construction Ltd* to unconscionability was inadequate. For these reasons the points raised by the defender should not be entertained.

[16] If that was wrong then turning to the Final Certificate point, a provision about conclusive evidence falls to be construed strictly as in *Autoridad del Canal de Panama* v *Sacyr SA* [2017] 1 AER (Comm) 916 (at para [81], sub-paragraph 6). Clause 1.9.1 refers to conclusive evidence about the contract sum. The claim here was not about that; rather, it was about work on account. It was not about a matter on which the Final Certificate is given any standing by clause 1.9.1. The claim was about how much the pursuer should get paid for each particular month. So on that short basis the whole argument for conclusive evidence fell down. The Final Certificate had nothing to do with interim payment.

[17] If that was incorrect, one needed to pay attention to the exceptions stated in clause 1.9.3. The sheriff court action canvassed the issue of how much the pursuer was to be paid. On a proper construction of the provisions, that would knock out the things on which the Final Certificate would be conclusive. The removal of the conclusive evidence rule operated for all purposes, not just for the sheriff court action but also to the adjudication proceedings. The barrier having been broken by the court, the subsequent adjudication was not affected by the conclusive effect of the certificate just because no adjudication was raised within 60 days. *Trustees of the Marc Gilbard 2009 Settlement Trust* v *OD Developments and Projects Ltd* [2015] BLR 213, relied upon by the defender, was incorrectly decided on the matter of interpretation of the clause. The commentary about that case disagreed with the

decision. The judge had not given appropriate weight to the fact that these clauses have to be construed strictly. But in any event the case was distinguishable on its facts. The literal language of the provision says it is not conclusive regarding the matters raised in the litigation. If Coulson J was correct in *Trustees of the Marc Gilbard 2009 Settlement Trust*, then how could one sensibly choose to raise proceedings and later go to adjudication? Similarly, on Coulson J's approach, if adjudication happened within 60 days then in subsequent proceedings about the same issue it must be the case that the Final Certificate would be conclusive. The adjudication would be bound to be self-defeating, which is absurd. That result was avoided if the conclusive evidence rule remains broken for subsequent proceedings. It has to be the case that after 60 days the certificate is no more conclusive than it was within the 60 days.

[18] As to the defender's final point raised in the counterclaim, seeking repayment of the adjudicator's fees, it was not open to the court in an action on the merits of the dispute to order payment to the ultimately successful losing party in the adjudication. Authority for that could be found in *Castle Inns (Stirling) Ltd* v *Clark Contracts Ltd*, referred to in *Halsbury Homes Ltd* v *Adam Architecture Ltd* [2016] BLR 419 (at paras [50]-[59] and [63]-[64]). Lord Drummond Young made clear that the allocation of the adjudicator's fees is incidental and not something one is entitled to get back at all.

Submissions for the defender

[19] In summary, notwithstanding the basic nature of the adjudication enforcement policy captured by the concept of "pay now and argue later" there was an exception to those principles. That exception was founded upon the two authorities of *Caledonian Modular Ltd* v *Mar City Developments Ltd* [2015] EWHC 1855 (TCC) and *Hutton Construction Ltd* v

Wilson Properties (London) Ltd and there was no authority to say these were wrongly decided. Both cases readily acknowledged the "pay now argue later" proposition and case law such as *Carillion Construction Ltd* v *Devonport Royal Dockyard Ltd* (and by implication *Gillies Ramsay Diamond* v *PJW Enterprises Limited*), but indicate that there is an exception. The submission in the note of argument for the pursuer that in fact one still had to make payment of the sum awarded by the adjudicator to come within the exception was obviously wrong. There could not be an exception any more if one has paid. It was not correct that in either of the two cases quoted payment was required. *Hutton Construction Ltd* was an enforcement case. Reference was made to *Fenice Investments Ltd* v *Jerram Falkus Construction Ltd* (at paras [48] and [49]). The present case fell within the exception.

[20] On the question of the conclusive nature of the Final Certificate the adjudicator was manifestly wrong. This was supported by *Trustees of the Marc Gilbard 2009 Settlement Trust* v *OD Developments and Projects Ltd*. The sum finally certified here had been paid by the defender what the pursuer was seeking to do was go back to years before and say the balance due at that stage was not paid and the pursuer is entitled to it. The suggestion of a disconnect between interim and final payments was unsound and ignored the contractual relationship. Each interim certificate superseded the previous one: *Scottish Equitable Plc* v *Miller Construction Ltd* 2002 SCLR 10 (at 20B). One then comes to the Final Certificate which states the amount the contractor is to be paid. While in *Hutton Construction Ltd* the judge had explained the scope of the second exception, that related to the factual circumstances of the previous case, *Caledonian Modular Ltd* v *Mar City Developments Ltd,* and when one read the rest of his judgement the exception was not limited to those issues. The judge referred to a matter of construction being beyond rational justification. The test was whether there is a short and self-contained issue which can be dealt with in a short hearing and it would be

unconscionable (that is, unreasonable) to ignore it. It would be enough if the adjudicator's decision is demonstrably wrong and manifestly wrong. The principles put forward in these cases should be accommodated within the strictures of cases such as *Carillion Construction Ltd* and *Gillies Ramsay Diamond* v *PJW Enterprises Limited*. The law had moved on and exceptions to the general principles have been identified. If one proceeds on the basis of the exception as explained in *Hutton Construction Ltd* none of that cuts across the essential "pay now and argue later" principles of adjudication. Indeed, to the contrary, the policy one would expect would be support the existence of such a narrow or limited exception, not least to avoid unnecessary proliferation of litigation. Accordingly, in light of that exception, the court could entertain the point.

[21] The proper interpretation of clause 1.9 of the contract was as decided by Coulson J in *Trustees of the Marc Gilbard 2009 Settlement Trust* v *OD Developments and Projects Ltd*. The reasoning in that case was manifestly correct. It recognised and gave effect to the purpose of the conclusivity clause. The judge correctly decided that the extent to which the conclusive status is lost is in the action timeously raised. This adjudication was a "smash and grab one" saying that because no Pay Less notice was issued the interim certificate requires payment. That was not a matter raised in the sheriff court action and therefore the conclusive evidence point raised there was different in substance. When the adjudication raised something not raised before, it was caught by the conclusive evidence point. Accordingly, Coulson J was manifestly correct (at para [22]) regarding the point that the proper interpretation of the clause does not allow proceedings to be issued later, relying on the Final Certificate not being conclusive evidence. So, the position was that the issue before the adjudicator was one on which he reached the manifestly wrong decision which can be demonstrated wholly in accord with the conditions identified in *Hutton Construction Ltd* (para [17]), which

represents an exception that the court should recognise and give effect to. One would need a brief evidential hearing on the Interim Payment Notice argument but that still fell within the exception, which allows oral evidence if necessary.

[22] The defender was also entitled to recover the fees it had paid to the adjudicator. The defender avers, by reference to email correspondence involving its solicitors, that payment was made by the defender and that the adjudicator has confirmed full payment having been made by the defender. It was a necessary legal consequence of adjudication provisions, which are consistent with the provisions of the 1996 Act, that parties must have a directly enforceable right to recover any overpayment to which an adjudicator's decision can be shown to have led. The right arises by way of an implied term to that effect in the construction contract: *Aspect Contracts Ltd* v *Higgins Construction plc* [2015] 1 WLR 2961; [2015] UKSC 38 (para [23]). Such a right arises out of restitutionary considerations (para [24]). On the same underlying principles and analysis the same right arises in respect of any payment of adjudicator's fees which would not have been due or paid had it not been for an error by the adjudicator which is capable of being addressed by way of a defence to, and a counterclaim in response to, an enforcement action. The defender ought to have a directly enforceable right to recover the fees which were essentially overpaid on that premise.

Reply for the pursuer

[23] *Aspect Contracts Ltd* v *Higgins Construction plc* concerned payment made under the dispute and did not address incidental questions regarding fees and interest as in *Castle Inns (Stirling) Ltd* v *Clark Contracts Ltd* and *Halsbury Homes Ltd* v *Adam Architecture Ltd*. These first instance cases were more in point. In relation to *Trustees of the Marc Gilbard 2009*

Settlement Trust v *OD Developments and Projects Ltd* the criticisms made by the commentators, narrated at the beginning of the case report, were adopted, although the pursuer had its own criticisms. Clause 1.9.3 states that the conclusive effect is lost save in respect of the matters to which those proceedings relate. It was the subject matter that was important. So, as the sheriff court action discussed what was to be paid in the contract sum, if that was a question at issue and included the Interim Payment Notice from 2017 and the adjudication, then the conclusive evidence rule had been removed by the sheriff court litigation for the adjudication as well. The *Scottish Equitable Plc* case, referred to by senior counsel for the pursuer, was beside the point. The issue here was what should have been paid in 2017. The decision in *Hutton Construction Ltd* v *Wilson Properties (London) Ltd* had not been the subject of any subsequent English authority. The exceptions it referred to were an invention and not justified by appellate decisions or what the statutory regime states. To that extent, it was contrary to appellate authority, particularly in *Gillies Ramsay Diamond* v *PJW Enterprises Limited*. The decision in *S & T (UK) Ltd* v *Grove Developments Ltd* [2019] BLR 1 was in some respects inconsistent with *Hutton Construction Ltd* v *Wilson Properties (London) Ltd*. The court held that it was a precondition of raising a true value adjudication that the sum in the "smash and grab" adjudication was paid in advance. In England the courts have been troubled by a number of cases despite it being said that the exception only applies in very rare circumstances. Many parties have tried to fit their cases into that category. This served to reflect that the purpose of the statute was that such exceptions do not exist. Even if they do exist, the guidelines in *Hutton Construction Ltd* v *Wilson Properties (London) Ltd* did not include scope for an argument such as that of the defender in this case about the conclusive evidence clause. The class of case covered by the exception would, for example, be one which is self-evidently time-barred.

Decision and reasons

Relevant legal principles

[24] Paragraph 23(2) of the schedule to the Scheme for Construction Contracts (Scotland) Regulations 1998 (as amended), which reflects the terms of section 108(3) of the Housing Grants, Construction and Regeneration Act 1996, and applies here, states:

> "(2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it, until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties."

There are two decisions of the Supreme Court which contain, for present purposes, helpful observations about these terms, although the issues involved do not relate directly to those in this case. In *Aspect Contracts Ltd* v *Higgins Construction plc* [2015] 1 WLR 2961, [2015] UKSC 38, Lord Mance (with whom Lord Wilson, Lord Sumption, Lord Reed and Lord Toulson agreed) said:

> "14. By providing that the decision of an adjudicator is binding and that the parties shall 'comply with it', paragraph 23(2) of the Scheme makes the decision enforceable for the time being. It is enforceable by action founded on the contractual obligation to comply with the decision combined, in a normal case, with an application for summary judgment. The limitation period for enforcement will be six years from the adjudicator's decision. But the decision is only binding and the obligation to comply with it only lasts 'until the dispute is finally determined' in one of the ways identified. By use of the word 'until', paragraph 23(2) appears to contemplate that there will necessarily be such a determination. The short time limits provided by paragraph 19(1) also indicate that adjudication was envisaged as a speedy provisional measure, pending such a determination. But there is nothing to prevent adjudication being requested long after a dispute has arisen and without the commencement of any proceedings. Further, it seems improbable that the Scheme imposes on either party any sort of obligation to start court or arbitration proceedings in order to confirm its entitlement. Either or both of the parties might understandably be content to let matters rest.
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> …

> 17. Without the ability to recover such a payment, the Scheme makes no sense. Adjudication is conceived as a provisional measure. At a cash flow level, Higgins remains entitled to the payment unless and until the outcome of legal proceedings, arbitration or negotiations, leads to a contrary conclusion. But at the deeper level of the substantive dispute between the parties, the parties have rights and liabilities, which may differ from those identified by the adjudication decision, and on which the party making a payment under an adjudication decision must be entitled to rely in legal proceedings, arbitration or negotiations, in order to make good a claim to repayment on some basis…
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> …
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> 19. I have no difficulty in accepting that Aspect could at any time, from at least the development in early 2005 of the original dispute, have asked the court to declare that it had not committed any breach of contract or incurred any tortious liability to Higgins, and that the court would have regarded proceedings of this nature for a declaration as entirely admissible and appropriate
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> …
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> 29. …What the Scheme contemplates is the final determination of the dispute referred to the adjudicator, because it is that which determines whether or not the adjudicator was justified in his or her assessment of what was due under the contract.
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> …
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> 32. …In finally determining the dispute between Aspect and Higgins…the court must be able to look at the whole dispute. Higgins will not be confined to the points which the adjudicator in his or her reasons decided in its favour. It will be able to rely on all aspects of its claim for £822,482 plus interest. That follows from the fact that the adjudicator's actual reasoning has no legal or evidential weight. All that matters is that a payment was ordered and made, the justification for which can and must now be determined finally by the court."

[25] In *Bresco Electrical Services Ltd (in liquidation)* v *Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, Lord Briggs (with whom Lord Reed, Lord Kitchin, Lord Hamblen and Lord Leggatt agreed) said:

> "12. A very important underlying objective, both of adjudication and of other recommendations which were eventually implemented in the 1996 Act, was the improvement of cash flow to fund ongoing works on construction projects. A particular concern was that a dispute between (say) a sub-contractor and a sub-sub-contractor which could only be resolved by litigation or arbitration could

in the meantime disrupt the entire project while a refusal of interim payment led to the cessation of significant works. The motto which has come to summarise the recommended approach is 'pay now, argue later'. Adjudication was one of five reforms introduced by Part II of the 1996 Act designed to facilitate the realisation of the cash flow aspiration behind that motto… It is achieved by rigorous time limits for the conduct of the adjudication, the provisionally binding nature of the adjudicator's decision and the readiness of the courts (and in particular the TCC) to grant speedy summary judgment by way of enforcement, leaving any continuing disagreement about the merits of the underlying dispute to be resolved at a later date, by arbitration, litigation or settlement agreement.

13. But solving the cash flow problem should not be regarded as the sole objective of adjudication. It was designed to be, and more importantly has proved to be, a mainstream dispute resolution mechanism in its own right, producing *de facto* final resolution of most of the disputes which are referred to an adjudicator. Furthermore the availability of adjudication as of right has meant that many disputes are speedily settled between the parties without even the need to invoke the adjudication process. This is in part because Parliament chose to confer the right to adjudicate 'at any time', so that it can be and is used to resolve disputes eg about final accounts between the parties after practical completion, rather than merely at the interim stage: see *Connex South Eastern Ltd* v *MJ Building Services Group plc* [2005] EWCA Civ 193; [2005] 1 WLR 3323, paras 34-38 per Dyson LJ, who concluded that in section 108: 'The phrase 'at any time' means exactly what it says.'

14. There is a chorus of observations, from experienced TCC judges and textbook writers to the effect that adjudication does, in most cases, achieve a resolution of the underlying dispute which becomes final because it is not thereafter challenged.

15.…the overall picture of most adjudication decisions achieving *de facto* final resolution of the underlying dispute appears clear.

…

26. Finally, when compared with arbitration and litigation, speed and economy come at an inevitable price in terms of reliability. There is no formal avenue of appeal against an adjudicator's decision, and the court will in general summarily enforce it, regardless whether it is correct on the merits, provided that the adjudicator acted independently and within their jurisdiction. But a dissatisfied party can insist on having the dispute redetermined *de novo* in court or by arbitration (if available) even though the adjudicator's decision will continue to bind in the meantime."

[26] For present purposes, I can draw certain clear points from these observations.

Firstly, the common practice will be for the dispute to be referred to adjudication. The parties do not normally bring litigation to seek final determination of the dispute. Rather,

much more often they simply adhere to the adjudicator's decision or perhaps use that as a factor in reaching agreement to settle their dispute. However, final determination by the court (or by arbitration, if agreed) remains built-in as an available option. Secondly, if the losing party refuses to comply with the adjudicator's decision, the other party will seek enforcement. This speedy mechanism will commonly make it difficult for litigation (or arbitration) for final determination of the dispute to have reached a stage where it can be dealt with at or around the time of the enforcement proceedings. But, thirdly, while it is very commonly the case that no litigation (or arbitration) is raised in respect of the dispute prior to the adjudication or the enforcement proceedings, that is obviously not ruled out, and parties have their ordinary rights to bring the dispute to the court at any time, whether before, during or after the adjudication. This is consistent with the parties' ability also to refer a dispute to adjudication "at any time". Thus, there may, albeit very rarely, be a route towards final determination of the dispute currently in place at the time of the adjudication or by the time enforcement proceedings come to be dealt with. As a consequence, in such rare circumstances, if the court is able to finally determine the dispute prior to making an enforcement order then there will be no requirement to comply with the adjudicator's decision. Fourthly, in seeking final determination, as Lord Mance made clear, the parties may rely upon rights and obligations not ventilated in the adjudication but nonetheless relevant to the dispute.

Coulson J's "exception"

[27] The decision of Coulson J (as he then was) in *Hutton Construction Ltd* v *Wilson Properties (London) Ltd* is of central significance to the arguments in the present case and it is therefore necessary to set out the key passages in some detail. Coulson J stated:

"3. The starting point, of course, is that, if the adjudicator has decided the issue that was referred to him, and he has broadly acted in accordance with the rules of natural justice, his decision will be enforced: see *Macob Civil Engineering Ltd* v *Morrison Construction Ltd* [1999] CLC 739; [1999] BLR 93. Adjudication decisions have been upheld on that basis, even where the adjudicator has been shown to have made an error: see *Bouygues (UK) Limited* v *Dahl-Jensen (UK) Ltd* [2001] CLC 927; [2000] BLR 522. Chadwick LJ summarised the principal reason for this in *Carillion Construction Limited* v *Devonport Royal Dockyard Limited* [2006] BLR 15: 'the need to have the 'right' answer has been subordinated to the need to have an answer quickly.'

4. There are two narrow exceptions to this rule. The first, exemplified by *Geoffrey Osborne* v *Atkins Rail Limited* [2010] BLR 363, involves an admitted error. In that case the calculation error was raised by the defendant in a separate Part 8 claim. Because the error was admitted by everyone, including the adjudicator, and because there was no arbitration clause, which meant that the court had the jurisdiction to make a final decision on the point, there were no reasons why, in that case, the error could not be corrected…

5. The second exception concerns the proper timing, categorisation or description of the relevant application for payment, payment notice or payless notice, and could be said to date from *Caledonian Modular Ltd* v *Mar City Developments Ltd*… In that case, the defendant had raised one simple issue, in a detailed defence and counterclaim served at the outset, to the effect that a small group of documents could not have constituted a claim for or notice of a sum due for payment. If that argument was right, it was agreed that the claimant was not entitled to summary judgment. At paragraph 11 of my judgment in that case, I reiterated the general principle that it was not open to a defendant to seek to avoid payment of a sum found due by an adjudicator by raising the very issue on which the adjudicator ruled against the defendant in the adjudication. I went on:

> '12. That is, of course, the general rule and it will apply in 99 cases out of 100. But there is an exception. If the issue is a short and self-contained point, which requires no oral evidence or any other elaboration than that which is capable of being provided during a relatively short interlocutory hearing, then the defendant may be entitled to have the point decided by way of a claim for a declaration. That is what happened, for example, in *Geoffrey Osborne* v *Atkins Rail Ltd* [2010] BLR 363. It is envisaged at paragraph 9.4.3 of the TCC Guide that separate Part 8 proceedings will not always be required in order for such an issue to be decided at the enforcement hearing.
>
> 13. It needs to be emphasized that this procedure will rarely be used …..'"

Coulson J then focused upon the second exception referred to in para [5] of his judgment and said:

"8. The authorities since *Caledonian Modular* demonstrate that, very often, the point taken by the defendant is a straightforward argument to the effect that the adjudicator was wrong and that, either with regard to its timing, or its content, the relevant payment notice was invalid and/or that the pay less notice was valid and prevented payment. In those circumstances, the defendant has issued Part 8 proceedings seeking a declaration to that effect. The claimant may issue its own enforcement claim or, as the cases show, the parties may agree that, if the defendant loses its Part 8 claim, it will pay the sums awarded by the adjudicator in any event."

He then referred to decisions in five cases after *Caledonian Modular* and went on to say:

"10. These cases all involved a significant degree of agreement between the parties. In particular, they all involved CPR Part 8 claims issued by the defendant challenging the decision of the adjudicator, and seeking a final determination by way of court declarations. They all involved a tacit understanding that the parties' rights and liabilities turned on the decision as to whether or not the particular notice had been served in time and/or was a valid application for payment or payment/pay less notice.

11. Furthermore, the issue of a separate Part 8 claim in those circumstances was not simply a matter of form. It was important in two respects. First, it provided a vehicle whereby the defendant could set out in detail its challenge to the adjudicator's decision. This meant that the claimant could see and understand the precise basis of the challenge and the consequential declarations sought.

12. Secondly, the existence of a separate Part 8 claim meant that the TCC knew from the outset what was going to be involved at any subsequent hearing…

13. In my view, the practice which has grown up around challenges of this sort has worked relatively well, but only where there has been a large measure of consent between the parties from the outset. The problems in the present case, and in many other recent cases, have arisen because there has been no such consent.

14. Many defendants consider that the adjudicator got it wrong. As I said in *Caledonian Modular*, in 99 cases out of 100, that will be irrelevant to any enforcement application. If the decision was within the adjudicator's jurisdiction, and the adjudicator broadly acted in accordance with the rules of natural justice, such defendants must pay now and argue later. If the degree of consent noted in the authorities set out in Section 3 above is not forthcoming, then the following approach must be adopted.

15. The first requirement is that the defendant must issue a CPR Part 8 claim setting out the declarations it seeks or, at the very least, indicate in a detailed defence and counterclaim to the enforcement claim what it seeks by way of final declarations. For the reasons already explained, I believe a prompt Part 8 claim is the best option.

…

17. On this hypothesis, there is a dispute between the parties as to whether or not the defendant is entitled to resist summary judgment on the basis of its Part 8 claim. In those circumstances, the defendant must be able to demonstrate that:

(a) there is a short and self-contained issue which arose in the adjudication and which the defendant continues to contest;

(b) that issue requires no oral evidence, or any other elaboration beyond that which is capable of being provided during the interlocutory hearing set aside for the enforcement;

(c) the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore.

18. What that means in practice is, for example, that the adjudicator's construction of a contract clause is beyond any rational justification, or that the adjudicator's calculation of the relevant time periods is obviously wrong, or that the adjudicator's categorisation of a document as, say, a payment notice when, on any view, it was not capable of being described as such a document. In a disputed case, anything less would be contrary to the principles in *Macob*, *Bouygues* and *Carillion.*

19. It is axiomatic that such an issue could still only be considered by the court on enforcement if the consequences of the issue raised by the defendant were clear-cut. In *Caledonian Modular,* it was agreed that, if the document was not a payment notice - and it plainly was not - then the claimant's case failed. If the effect of the issue that the defendant wishes to raise is disputed, it will be most unlikely for the court to take it into account on enforcement. Any arguable inter-leafing of issues would almost certainly be fatal to a suggestion by the defendant that their challenge falls within this limited exception.

20. The dispute between the parties as to whether or not the issue should be dealt with on enforcement would have to be dealt with shortly at the enforcement hearing itself. The inevitable time constraints of such a hearing will mean that it will be rare for the court to decide that, although the issue and its effect is disputed, it can be raised as a defence to the enforcement application.

21. In my view, many of the applications which are currently being made on this basis by disgruntled defendants (and which are not the subject of the consensual process noted above) are an abuse of the court process. The TCC works hard to ensure that there is an enforcement hearing within about 28 days of commencement of proceedings. The court does not have the resources to allow defendants to re-run large parts of an adjudication at a disputed enforcement hearing particularly in circumstances where the adjudication may have taken 28 days or 42 days, whilst the judge might have available no more than two hours pre-reading and a two-hour hearing in which to dispose of the dispute."

[28] In considering the approach taken in England, I do so with some diffidence because I am not sufficiently *au fait* with the procedure, but on my basic understanding the development of the court's approach can be traced as follows. In *Fenice Investments Inc* v *Jerram Falkus Construction Ltd* Coulson J said (at para [48]):

> "I am in no doubt that an adjudicator's decision is binding on the parties and, save in exceptional circumstances, it must be complied with, no matter how quick or slow the Pt 8 procedure to challenge that decision. A losing party who makes a challenge to the decision by using the CPR Pt 8 procedure can do so, but in the ordinary case he must, in the meantime, pay the sum found to be due."

Thereafter, in *Caledonian Modular Limited* v *Mar City Developments Limited* Coulson J indicated the exceptional circumstances which might allow a challenge in respect of an error, not involving jurisdiction or natural justice. That appears to have led to a number of situations in which parties in English proceedings have sought to challenge the enforcement of an adjudicator's decision on the basis of an error. As quoted above, in *Hutton Construction Ltd* v *Wilson Properties (London) Ltd* Coulson J referred to many such applications by disgruntled defendants being an abuse of the court process. Accordingly, Coulson J then sought to take a more restrictive approach, identifying the limited circumstances in which an application challenging enforcement on the grounds of an error could be entertained. By way of example, that approach was subsequently applied in *ISG Construction Ltd* v *Platform Interior Solutions Ltd* [2020] EWHC 1120 (TCC) in which a few days after having granted summary judgment in favour the defendant in enforcement proceedings, the judge then heard the claimant's case, brought under Part 8 seeking declarations including that the decision of the adjudicator was wrong and beyond rational justification. The judge concluded that the test in *Hutton Construction Ltd* v *Wilson Properties (London) Ltd* was not met, firstly because the point raised by the plaintiff was not raised in the adjudication and

secondly because the issue raised went beyond a short point of construction and required valuation evidence.

[29] In understanding the exception which Coulson J identifies, it is of crucial importance to note that he is referring to situations in which an application for final determination has been made and is capable of being dealt with at or around the same time as the enforcement action (see eg paras [10] and [15] of his judgment). This was encapsulated by Mr Jonathan Davies QC in his judgment in *Bouygues (UK) Limited* v *Febrey Structures Limited* [2016] EWHC 1333 (TCC) (a case referred to by Coulson J *Hutton Construction Ltd*) who noted that there were two sets of proceedings listed for hearing before the court. The first was the defendant's application for summary judgment in respect of the enforcement of an adjudicator's decision and the second was the claimant's proceedings under Part 8 as to the interpretation of the parties' contract. The judge stated (para [2]) that:

> "This case is an illustration of the practice of parties seeking to upset an Adjudicator's Decision *by way of the swift final determination of the dispute.*" [Emphasis added]

He then made reference to *Caledonian Modular Limited* v *Mar City Developments Limited.*

[30] While the approach is described as an exception, I do not view it as an exception in the ordinary sense to the general principles of law as to how enforcement can be challenged. Rather, it is an exception in the sense that an application for final determination is ready to be heard and is sufficiently short and focused to be dealt with at or around the time of the enforcement application. However, it might equally be said that this is not an exception at all, but instead is simply an application of the basic principles of section 108(3) and paragraph 23(2) of the Scheme as to final determination. So, in the vast majority of situations a final determination issue will not be capable of being considered at the same

time as an enforcement application, but the exception allows that to occur in very limited circumstances where final determination can swiftly be dealt with. Put slightly differently, final determination by the court involves consideration of the dispute rather than merely a challenge to the adjudicator's decision, but commonly it will incidentally involve a challenge to the adjudicator's decision in the sense that the contention is that, in reaching the final determination, what the court should decide differs from the adjudicator's decision because the adjudicator erred.

[31] In this jurisdiction, there is of course no Part 8 procedure. However, as I have noted, either party may raise proceedings for final determination of the dispute at any time. One possibility (used in the present case) is to seek to lodge a counterclaim in the commercial action in which enforcement is sought. A counterclaim can of course relate to a matter forming part of, or arising out of the grounds of, the action by the pursuer or it can seek a decision which is necessary for the determination of the question in controversy between the parties. In an ordinary action, a counterclaim can simply be lodged. In a commercial action, a motion to lodge a counterclaim is required and the authority of the commercial judge is required to permit it (Rule of Court 47.7(1)). The approach taken by that rule acknowledges that a counterclaim can delay the resolution of the primary action.

[32] The preliminary question that arises in this case is whether the court should follow the principle behind *Hutton Construction Ltd* v *Wilson Properties (London) Ltd* which, as I have said, I interpret as allowing an application for final determination, if that is suitable for swift disposal, to be dealt with at or around the time of the enforcement hearing. I see no real difficulty with that principle. The law is clear that the decision of the adjudicator is binding (subject to the limited areas of challenge) until final determination and as I have noted there may, at least potentially, be circumstances in which, in the interests of justice, final

determination can properly be made at or around the time of the enforcement proceedings. For practical reasons, however, those cases are likely to be very few and far between. Commonly, no proceedings will have been raised prior to the referral to the adjudicator. Enforcement proceedings will normally be raised shortly after the adjudicator's decision, if payment is not received. There is therefore in most situations a limited time for the losing party to raise final determination proceedings (whether in a separate action or a counterclaim) which can be ready for determination at the enforcement hearing. Any such proceedings will require pleadings, sufficient time for adjustment, and discussion of the appropriate procedural way forward. Whether in any particular case there is a means of achieving final determination at or around the time of the enforcement hearing, and it is appropriate to have that heard, will be a matter for the commercial judge dealing with the case to determine having regard to the relevant circumstances.

[33] That leads on to the question of whether the details of the approach of Coulson J in *Hutton Construction Ltd* v *Wilson Properties (London) Ltd* should be used as identifying when it will be appropriate to allow the final determination matter to be heard in the context of there also being an enforcement action. I broadly accept the approach he takes, but the precise scope of what he describes as the exception may not be entirely clear. As quoted above, at para [5] he describes the second exception as concerning the proper timing, categorisation or description of the relevant application for payment, payment notice or payless notice. However, having described the conditions for allowing the application to be heard he refers, in para [18], again quoted above, to examples including whether that the adjudicator's construction of a contract clause is beyond any rational justification, or that the adjudicator's calculation of the relevant time periods is obviously wrong, or that the adjudicator's categorisation of a document is of that nature. It may be the case that the

descriptions in these two paragraphs are indeed linked and that the reference to construction of a contract clause is in the context of, for example, the categorisation of the relevant document. But in understanding the boundaries of what is described as an exception of this important nature, it would be preferable if a bright line could be drawn.

[34] Nonetheless, in my view, Coulson J's approach should be treated with respect and as a broadly helpful indication of the circumstances in which final determination can be reached in the context of there also being enforcement proceedings. However, I go no further than repeating that in this jurisdiction it will be a matter for the judge dealing with the case to decide if that can occur. It will often be very unusual for the final determination matter to be, as it were, "oven ready" at the time of the enforcement hearing and the use of a counterclaim or action to try to stymie enforcement without the justification that it can suitably be dealt with at the hearing is to be strongly discouraged.

[35] In the present action, however, the procedural circumstances are indeed rather unusual. As I have noted, the sheriff court action was raised by the pursuer in 2019. If, as seems clear, it is to be viewed as seeking resolution of the final sums to be paid to the pursuer by the defender, it is an action for final determination of their dispute. The adjudicator's final decision was issued on 11 May 2020 and proceedings to enforce it were raised on 8 June 2020. A motion was enrolled on 14 July 2020 by the defender to lodge a counterclaim. The motion was not opposed and was granted. The pursuer was given time to respond to the counterclaim. The pleadings in the summons, defence, counterclaim and answers were then adjusted, with adjustments completed on 18 August 2020. A substantive hearing, in the form of a 2 day diet of debate, on both the remitted sheriff court action and the enforcement proceedings was then fixed for 19 and 20 November 2020. The pursuer did not in the ordinary sense, and as described by Coulson J in *Hutton Construction Ltd* in his

reference to a number of other English cases, consent to the issues being dealt with at the same hearing. But, as I have said, the pursuer did not oppose the motion to lodge the counterclaim and in this case adequate time has been available to the parties to refine their pleaded positions on the counterclaim issues.

[36] If I were to apply the approach taken in *Hutton Construction Ltd*, I would conclude that the counterclaim does not fall within the criteria set out therein. Firstly, the issue raised is not (as I understood senior counsel for the defender to accept) about the proper timing, categorisation or description of the relevant application for payment, payment notice or payless notice. Secondly, (taking for the moment para [18] in *Hutton Construction Ltd* as expressing a wider test) it is not possible to conclude that the adjudicator's decision is "beyond rationally justifiable". The relevant contractual provisions state:

> "1.9.1 Except as provided in clauses … 1.9.3 … the Final Certificate shall have effect in any proceedings under or arising out of or in connection with this Contract (whether by adjudication, arbitration or legal proceedings) as: …
>
> > .2 conclusive evidence that any necessary effect has been given to all the terms of the Contract which require that an amount be added to or deducted from the Contract Sum or that an adjustment be made to the Contract Sum… ;
> >
> > .3 conclusive evidence that all and only such extensions of time, if any, as are due under clause 2.28 have been given; and
> >
> > .4 conclusive evidence that the reimbursement of direct loss and/or expense, if any, to the Contractor [i.e. the pursuer] pursuant to clause 4.23 is in final settlement of all and any claims which the Contractor has or may have arising out of the occurrence of any of the Relevant Matters, whether such claim be for breach of contract, duty of care, statutory duty or otherwise.
>
> … [1.9].3 If adjudication, arbitration or other proceedings are commenced by either party within 60 days after the Final Certificate has been issued, the Final Certificate shall have effect as conclusive evidence as provided in clause 1.9.1 save only in respect of the matters to which those proceedings relate."

In *Trustees of the Marc Gilbard 2009 Settlement Trust* v *OD Developments and Projects Ltd*

Coulson J held that the Final Certificate did not have effect as conclusive evidence in the

proceedings actually raised within the specified period but it constituted conclusive evidence in any proceedings not raised within that period. Senior counsel for the pursuer submitted that an alternative interpretation made more commercial sense: as long as at least one set of proceedings was raised timeously, the Final Certificate would not, in terms of clause 1.9.3, as strictly construed, have conclusive effect in any later claims in respect of the matters to which the first set of proceedings relate. The arguments presented by senior counsel for the pursuer in relation to the issue of construction of clause 1.9, read along with the points made by the commentators in the case report, demonstrate that there are legitimate and properly arguable reasons why the interpretation reached in *Trustees of the Marc Gilbard 2009 Settlement Trust* v *OD Developments and Projects Ltd* may not be correct. That plainly suffices to indicate that the test of the adjudicator's interpretation being "beyond any rational justification" is not met. All of that said, in this case the pursuer did not oppose the lodgement of the counterclaim and did not seek immediate enforcement of the adjudicator's decision. As the issue in the present case called for a debate after a reasonable period of adjustment of the pleadings, and by implication the pursuer permitted the defender, no doubt for pragmatic reasons, to develop its challenge in full, it might be open to argument that it is not necessary for this court to take the same restricted approach as in *Hutton Construction Ltd*.

[37] However, there is a much more central point in this case: does the counterclaim seek final determination of the dispute between the parties? In my opinion, it clearly does not. As I have noted, the question of validity of the Interim Payment Notice raised in the counterclaim was reserved for later determination. The Final Certificate point in the counterclaim is presented as a challenge to the adjudicator's decision. It is something that arises from the adjudication and proceeds upon the basis that the adjudication occurred

outwith the 60 day period. If successful, it will show the adjudicator's decision to be incorrect. But it does not give rise to the final determination of the full dispute between the parties. That will be highly likely to involve the earlier payment notices, interim certificates and the Final Certificate. There are extant proceedings raised originally in the sheriff court and now before this court about the overarching issue of the sums said to be due to the pursuer based upon at least some of that documentation. It was not suggested that these extant proceedings can somehow be ignored for the purposes of final determination of the parties' dispute or that the contention in the counterclaim about conclusive evidence would itself allow final determination of the dispute. On the contrary, the extant proceedings plainly cannot be disregarded as they deal with the dispute about what sum, if any, remains due. If I were to decide at this juncture on the conclusive evidence point in the adjudication that decision would not deal with the extant proceedings. Importantly, it is not clear whether, in those proceedings, the conclusive evidence point will require to be considered and decided upon. The defender may, for example, wish to use it to seek to demonstrate that the adjudicator's decision was incorrect and to seek to argue (as was raised here) that as the issues before the adjudicator differed from those in the sheriff court action the conclusive evidence rule applied. Given that the conclusive evidence issue could potentially be a matter raised in that action, it would not be appropriate for me to reach a decision upon it. In short, the matter of final determination is not before the court at this point.

Conclusion

[38] I conclude that while there may be unusual and very limited circumstances in which a judge might allow final determination to be dealt with at or around the time of the enforcement proceedings, this case does not fall into that category because the issue of final

determination remains at large and is not addressed in the counterclaim. The challenge to enforcement, based as it is on an alleged error by the adjudicator, must therefore fail: see eg *Carillion Construction Ltd* v *Devonport Royal Dockyard Ltd*; *Gillies Ramsay Diamond* v *PJW Enterprises Limited*. In these circumstances, the point made by the defender about recovery of the adjudicator's fees does not arise.

Disposal

[39] I shall sustain the pleas-in-law for the pursuer in the principal action, repel the pleas-in-law for the defender in that action, and grant decree as concluded for by the pursuer. In relation to the counterclaim I require to hear from parties as to whether, in light of the decision I have reached, it, or any part of it, should remain in play. In the meantime, I reserve all questions of expenses.