OUTER HOUSE, COURT OF SESSION

[2023] CSOH 31

CA19/23

OPINION OF LORD SANDISON

In the cause

AGB SCOTLAND LIMITED

Pursuer

against

DARREN McDERMOTT

Defender

Pursuer: G Walker, KC; Anderson Strathern
Defender: Hawkes, KC; Brodies LLP

16 May 2023

Introduction

[1] In this action AGB Scotland Ltd sues Darren McDermott for £367,808.84 plus VAT and pactional interest as the sum it claims to be due to it in terms of a building contract between the parties, and for an additional sum of £7,227.50 plus VAT and pactional interest as representing the fees of an adjudicator which were met by it. The action came before the Court for a debate on the parties' preliminary pleas, coupled with a motion by the pursuer for the grant of summary decree.

Background

[2] In November 2016 the parties entered into a construction contract for the carrying out of alterations and an extension to the defender's home. The contract was in the form of the SBCC Standard Building Contract with Quantities for use in Scotland (SBC/Q/Scot [2011] edition) incorporating Amendment 1 dated March 2015, as issued by the Scottish Building Contract Committee Limited, together with various ancillary documents. The contract price was £1,049,631.03 exclusive of VAT. The contract was a construction contract for the purposes of the Housing Grants, Construction and Regeneration Act 1996, as amended. Works under the contract commenced in January 2017 and on 14 October 2022 the pursuer submitted an Interim Payment Notice in the sum of £367,808.84 to the Quantity Surveyor nominated by the defender in terms of the contract. He replied that he was no longer instructed by the defender, and on 18 October the pursuer served the Notice on the Contract Administrator, CRGP, which in turn on 21 October served a Pay Less Notice on the pursuer, bearing to certify that no sums were due to it in terms of the contract.

[3] On 1 December 2022 the pursuer served a Notice of Adjudication on the defender and Mr Alex Warrender was appointed as adjudicator. The Scheme for Construction Contracts (Scotland) applied to the adjudication, subject to immaterial refinements. The pursuer argued that it was entitled to payment of the whole sum stated in the Interim Payment Notice as no timeous Pay Less Notice had been issued. Various defences to that claim were advanced, including that relevant for present purposes, which was to the effect that the Interim Payment Notice was invalid as not having provided a proper basis for calculation of the sums demanded. On 9 January 2023 the adjudicator issued his decision, which determined that the sum sought by the Interim Payment Notice, net of VAT and along with pactional interest, was due. He also determined that the burden of his fee, which was paid by the pursuer, should fall upon the defender. The pursuer seeks by this action to

enforce the adjudicator's decision. The defender claims that that decision is a nullity and should be set aside *ope exceptionis* because the adjudicator failed to exhaust his jurisdiction.

Defender's submissions

[4] On behalf of the defender, senior counsel submitted that the adjudicator's decision did not properly address the defender's line of defence that, as the appendix to the letter of 14 March 2022 had not been sent with the Interim Payment Notice or otherwise previously supplied to the Quantity Surveyor, there had not been proper specification given of the sums claimed in the Notice.

[5] It was acknowledged that the process of adjudication required the courts to respect and enforce the adjudicator's decision unless it was plain that the question which he had decided was not the question referred to him or the manner in which he had gone about the task was unfair. 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. Where, however, the adjudicator had acted in excess of his jurisdiction, had failed to exhaust his jurisdiction or had acted in breach of the rules of natural justice, or where his reasoning was non-existent or unintelligible, the court would not enforce the decision. Put shortly, if an adjudicator had not answered the question put to him, his decision would be unenforceable. Reference was made to *Carillion Construction Limited* v *Devonport Royal Dockyard Limited* [2005] EWCA Civ 1358 at [85], *Gillies Ramsay Diamond* v *PJW Enterprises Limited* 2004 SC 430, 2004 SLT 545 at [25], *Construction Centre Group Limited* v *Highland Council* 2002 SLT 1274 at [19], *Connaught Partnerships Limited (in administration)* v *Perth & Kinross Council* [2013] CSOH 149, 2014 SLT 608 at [18] to [21], *Barhale Limited* v *SP Transmission plc* [2021] CSOH 2, 2021 SLT 852 at [26], [31] - [33], *Hochtief Solutions AG* v

Maspero Elevatori SpA [2021] CSIH 19, 2021 SLT 528 at [22] (Inner House); [2020] CSOH 102, 2021 SLT 430, (Outer House) at [26]. However, an adjudicator could not seek to rely upon general assertions to the effect that he had considered all submissions and documents - for a decision to be valid and enforceable, there must have been some effort made by the adjudicator to address the lines of defence advanced and to explain the basis upon which they had been accepted or rejected - cf *NKT Cables A/S* v *SP Power Systems Ltd* [2017] CSOH 38, 2017 SLT 494 at [113] - [114]; *Amec Group Limited* v *Thames Water Utilities Ltd* [2010] EWHC 419 (TCC) at [83]. If there was a failure to address such a line of defence there would have been a failure by the adjudicator to exhaust his jurisdiction, and his decision would be unenforceable: *Pilon Ltd* v *Breyer Group plc* [2010] EWHC 837 (TCC), [2010] BLR 452 at [22]; *NKT Cables* at [110] to [114].

[6] Viewed in that light, the decision of the adjudicator was a nullity and unenforceable. It fell to be set aside *ope exceptionis* in its entirety. In paragraph 5.4.3 of his decision, the adjudicator had noted that the defender argued that the Interim Payment Notice had not been given in accordance with the terms of the contract as, *inter alia*, "it did not provide a basis of calculation". The adjudicator had not noted at that point, however, that the particular ground of complaint was that the appendix to the letter of 14 March 2022, which contained the actual calculations underlying the loss and expense claim, had not been produced with the Interim Payment Notice and had not previously been sent to the Quantity Surveyor. That the Notice required to be sent to the Quantity Surveyor and contain the basis on which the sum therein set out had been calculated were clear requirements in terms of clause 4.11.2.2 of the contract for the validity of the Notice. That was the issue which had been raised by the defender with the adjudicator in section 5 of his Rejoinder, and was what the adjudicator required to address if he was to exhaust his jurisdiction. The only questions which the adjudicator had addressed, however, were

(a) whether an earlier document could be included by reference in an Interim Payment Notice and (b) whether the letter of 14 March and its appendix provided sufficient detail to meet the contractual requirement. He had omitted to answer, expressly or implicitly (*SW Global Resourcing Ltd* v *Morris & Spottiswood Ltd* [2012] CSOH 200 at [17]), the fundamental question of the significance of the fact that the Quantity Surveyor had not received or otherwise been made aware of the appendix. The criticism was not about the quality of the answer given by the adjudicator; rather, it was that he had failed to answer the question asked of him in its totality, or at least that his conclusions on the issue were not set out in a way which made sense to a reasonable reader: *Gillies Ramsay Diamond* at [31].

[7] That failure to exhaust his jurisdiction was not cured by the adjudicator's generic claim at paragraph 4.2 of his decision that he had considered all the submissions made by the parties. Accordingly, the decision should be reduced *ope exceptionis* and the action should be dismissed.

Pursuer's submissions

[8] On behalf of the pursuer, senior counsel submitted that it was plain from the terms of the adjudicator's decision that he had adequately considered and dealt with the argument advanced by the defender in the adjudication, and that there were no factual disputes between the parties requiring decision by the Court after proof.

[9] On 14 March 2022 the pursuer had issued a letter to the Contract Administrator/Architect with an appendix entitled "Extension of Time and Loss and Expense", setting out the detail of its claim for loss and expense. Before the adjudicator, the pursuer had argued that the Interim Payment Notice upon which it founded referred to, and thereby incorporated, the letter of 14 March 2022, although it had accepted that the appendix had not been sent with the Interim Payment Notice itself. The pursuer founded on the letter

and its appendix as validly providing the basis for the calculation of the loss and expense element of the claim. The defender had argued that the appendix had not been sent with the Interim Payment Notice and had not previously been sent to the Quantity Surveyor, and thus could not be relied upon to provide the required specification for the sums claimed by way of the Interim Payment Notice. The adjudicator's decision had summarised the lines of argument advanced by the defender, including that the Interim Payment Notice had not provided a basis for calculation of the sums said to be due, and had addressed it at paragraphs 5.13 to 5.18. He had rejected the defender's argument and accepted the pursuer's argument, setting out brief reasons (which were all that was required of him) for doing so at paragraph 5.18. He considered that the letter of 14 March 2022 was incorporated by reference into the Interim Payment Notice, and that on that view the Notice met the applicable legal standard of specification. Whether the adjudicator had reached the correct conclusion in law about that or any other matter was of no moment for present purposes.

[10] The general approach to the enforcement of decisions made by adjudicators proceeded on the basis that such decisions should be enforced unless there was a good reason to refuse enforcement: *Atholl Developments (Slackbuie) Ltd, Petitioners* [2010] CSOH 94, 2011 SCLR 637 at [17]; *Hochtief* (Inner House) at [21] - [22]; *Carillion* at [53] and [84] - [87]; *Miller Construction (UK) Limited* v *Building Design Partnership Ltd* [2014] CSOH 80; and *Morgan Sindall Construction & Infrastructure Ltd* v *Westcrowns Contracting Services Ltd* [2017] CSOH 145, 2018 SCLR 471 at [83].

[11] Where an adjudicator had failed to exhaust his jurisdiction in a material respect, the Court could intervene, but only in the plainest of cases: *Hochtief* (Inner House) at [22], *Carillion* at [85], *Atholl* at [17] and *Gillies Ramsay Diamond* at [25] and [31], and not where the arguments against enforcement were technical and without substantial merit: *Charles Henshaw and Sons Ltd* v *Stewart & Shields Ltd* [2014] CSIH 55 at [17]. In considering whether

an adjudicator had exhausted his jurisdiction, the scope of an adjudication was properly to 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* at [19] and [20]. Where a responding party in adjudication proceedings raised a material line of defence to a claim made against it, the adjudicator required to deal with it and could not ignore it: *Connaught Partnerships* at [18] to [21]. If there was a true failure to address a material line of defence, there would have been a failure by the adjudicator to exhaust his jurisdiction, and his decision would in consequence be unenforceable: *Pilon* at [22]; *NKT Cables*; *DC Community Partnerships Ltd* v *Renfrewshire Council* [2017] CSOH 143. However, failure by an adjudicator to refer to a specific point in his decision or any reasons for it would not in itself suffice as an adequate reason not to enforce the decision; rather, it had to be plainly apparent from the adjudicator's decision or reasoning that a material issue had not been addressed: *Hochtief* (Outer House) at [26], and the cases there cited.

[12] An adjudicator enjoyed a presumption of regularity and propriety. It was presumed that he had looked at the relevant documents and given them appropriate consideration within the applicable time constraints: *SW Global* at [15] - [17]. Acceptance by an adjudicator of one position might be sufficient to indicate the reasons for rejecting the other position: *SW Global* at [17]; *DC Community Partnerships* at [26].

[13] The defender's averments were irrelevant. He was bound to fail in his attack on the adjudicator's decision. If one had to have regard to the principles governing the grant of summary decree, they were to be found in *Henderson* v *3052775 Nova Scotia Ltd* [2006] UKHL 21, 2006 SC (HL) 85 at [14] - [16] and [18] - [19], discussed in *Grier* v *Chief Constable, Police Scotland* [2020] CSOH 33, 2020 SCLR 619 at [246] and *Promontoria (Chestnut) Ltd* v *Ballantyne Property Services* [2020] CSOH 56 at [32]; [2022] CSIH 17, 2022 SLT 708 and applied clearly to the present case.

[14] Decree *de plano*, which failing summary decree, should be granted.

Decision

[15] There is no material difference between the parties as to the law applicable to the dispute. Put short, the Court will for the policy reasons canvassed in the authorities be slow to refuse to enforce an adjudicator's decision. However, if the adjudicator's decision plainly indicates that he failed in arriving at his conclusions to take into account and deal with a line of defence advanced before him, then that may (not necessarily will) lead to the conclusion that he failed to exhaust his jurisdiction and that his decision should be set aside. The facts of the present case call for no more detailed examination of the state of the authorities than that, for the following reasons.

[16] In section 5 of his decision, the adjudicator set out the issues in the adjudication as he conceived them to be. He noted at 5.2 that the case for the Referring Party (ie the pursuer) was "of course predicated on it having issued a valid Interim Payment Notice dated 14 October 2022". In that connection, he noted that the Respondent (ie the defender) claimed that one of the reasons why the Interim Payment Notice was invalid was that it did not provide an adequate basis of calculation. The adjudicator dealt with that contention in the following passages of the decision:

> "5.13 In the Response, the Respondent contends that nowhere in the Interim Payment Notice or the supporting documents does it show how the Referring Party's claim for loss and expense totalling £196,435.50 excluding VAT was calculated. The Respondent says that this is the largest element of the sum of £367,808.84 excluding VAT sought by the Referring Party. It accepts that reference is made in the Interim Payment Notice to a letter of 14 March 2022 from the Referring Party but that this letter does not contain a breakdown of time or rates.
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> 5.14 In support of its position, the Respondent relies upon the judgements in Muir Construction Limited v Kapital Residential Limited as well as Tierney v GF Bisset (Inverbervie) Limited. [The cases referred to are respectively to be found at [2017] CSOH 132, 2017 SLT 1294 and [2022] SAC (Civ) 3, 2022 SLT (Sh Ct) 113.]

5.15 In the Reply, the Referring Party argues that at Appendix 2 to its Interim Payment Notice, it had provided a copy of its letter of 14 March 2022 (comprising of 9 pages) which in turn refers to a previous submission on loss and expense (totalling 76 pages).

5.16 The Referring Party relies upon the judgement in the case of Grove Development Limited v S&T (UK) Ltd as a basis for its contention that a previous document can be incorporated by reference into the Interim Payment Notice. [The case referred to is to be found at [2018] EWHC 123 (TCC) | [2018] Bus LR 954, on appeal at [2018] EWCA Civ 2448, [2019] Bus LR 1847.} [sic?]

5.17 Furthermore, in the Rejoinder, the Respondent says that the Quantity Surveyor was not the recipient of the letter of 14 March 2022, nor was he copied into that letter. Therefore, they argue, that the Quantity Surveyor cannot be fixed with knowledge of the basis of the calculation when considering the Interim Payment Notice of 14 October 2022.

5.18 Having considered the exchanges between the parties on this matter, I conclude as follows:

1. Of the sum of £367,808.84 excluding VAT sought by the Referring Party in its Interim Payment Notice (a) a sum of £165,373.34 excluding VAT was in respect of an agreed but unpaid value of work done (b) a sum of £196,435.50 excluding VAT was in respect of loss and/or expense and (c) a sum of £6,000.00 excluding VAT was in respect of damages for deleted works given to others.

2. The make up of the agreed but unpaid value of work done of £165,373.34 excluding VAT was known to Mr Jim Park, CRGP and the Employer.

3. The make up of the sum of £196,435.50 excluding VAT for loss and/or expense was known to the Architect/Contract Administrator (since the Referring Party's letter of 14 March 2022 was addressed to them) as per Clause 4.23 of the parties' contract. According to the terms of that Clause, it is at the discretion of the Architect/Contract Administrator as to whether it instructs the Quantity Surveyor to ascertain the amount of loss and/or expense that has or is being incurred.

4. The Respondent has made no adverse comments or complaints about the absence of a basis of calculation of the sum of £6,000.00 excluding VAT claimed as damages for breach of contract.

5. I find that the judgement of Grove Developments relied on by the Referring Party to be persuasive and is good authority for the fact that an earlier document can be included by reference in an Interim Payment Notice.

6. In my view, the judgement of Muir Construction Limited relates to a bare Pay Less Notice and had no basis whatsoever for the figure arrived at. It is therefore distinguished from the facts of this adjudication. I particularly note the use of the words of the judge in that instance where he said that there should be at least an

> indication of how each of the sums were arrived at. The Interim Payment Notice in this instance goes well beyond that standard.
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> 7. Similarly, I find nothing in the case of Tierney which assists the Respondent in this adjudication. This adjudication does not concern itself with a sum claimed absent any detail.
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> 8. I consider that the Referring Party's letter of 14 March 2022, together with the reference document headed 'Extension of Time and Loss and Expense', is sufficiently detailed to meet the threshold standard required by Clause 4.11.2.2 which refers to 'the basis on which that sum has been calculated'. In my opinion, it is not necessary for the Referring Party to provide full vouching such as a breakdown of time or rates to meet the requirements of Clause 4.11.2.2.
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> 9. The amount of detail provided by the Referring Party in support of its Loss and/or Expense claim is to be compared to the bare unsubstantiated figures contained in CRGP's Pay Less Notice of 19 October 2022, which according to the Respondent in paragraph 4.12 of the Rejoinder, were sufficient to achieve the status of 'a valid Pay Less Notice'.
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> 10. In reaching the conclusion that the Referring Party has provided more than an adequate basis of calculation for the sum of Loss and/or Expense claimed in the Interim Payment Notice, I make it clear that I have not considered the merits of the Referring Party's case on this matter and have made no decision in that regard."

Finally, as part of the summary of his decision, the adjudicator noted that one of his findings was "That the Interim Payment Notice adequately sets out the basis of calculation."

[17] It is not possible to read the decision, particularly sections 5.18.3, 5.18.5 and 5.18.8 other than as the adjudicator deciding that the letter of 14 March 2022 was validly included by reference in the Interim Payment Notice sent to the Quantity Surveyor in October, at least in circumstances where that letter and its appendix had previously been sent to the Contract Administrator as a representative of the defender, and that the letter with its appendix contained sufficient detail to meet the requisite standard. Whether any of that can be criticised as a conclusion ill-founded in fact or law is of no consequence; the objection that the defender made, and which he maintains that the adjudicator failed to address, was plainly fully dealt with by the decision. The question was whether specification to the contractual standard of the composition of the loss and expense claim had been provided to

the Quantity Surveyor. The answer was in the affirmative, and the reasoning was that the Interim Payment Notice contained a reference to a document already in the hands of the defender's agents which contained adequate specification. The question was fully answered and the reasoning exceeds the low bar of intelligibility which is required. The defender's criticism amounts merely to the suggestion that the adjudicator's reasoning was flawed and the resultant decision wrong. That is an irrelevant assertion in this context. It follows that the defence to the action is irrelevant. The pursuer's motion for summary decree is unnecessary.

Conclusion

[18] At the close of the debate I refused the pursuer's motion for summary decree as unnecessary, sustained its first plea-in-law, repelled the defender's pleas, and granted decree *de plano* as first and second concluded for, with expenses.