OUTER HOUSE, COURT OF SESSION

[2017] CSOH 145

CA52/17

OPINION OF LORD CLARK

In the cause

MORGAN SINDALL CONSTRUCTION AND INFRASTRUCTURE LIMITED

Pursuer

against

WESTCROWNS CONTRACTING SERVICES LIMITED

Defender

Pursuer: Currie QC; Pinsent Masons LLP
Defender: Higgins QC; DAC Beachcroft Scotland LLP (for Levy & McRae, Glasgow)

30 November 2017

Introduction

[1] In this action, the pursuer seeks enforcement of the decision of an adjudicator, dated 18 May 2017, in terms of which the adjudicator ordered the defender to pay to the pursuer the sum of £430,654.44, plus VAT.

[2] The pursuer was engaged as contractor by North Lanarkshire Council for the construction of a new building, Chryston High School and Cultural Centre. Work on the construction of the building commenced in 2010. By a sub-contract, entered into on 26 and 31 October 2011, the pursuer engaged the defender (trading as Harndec Flooring Company),

to carry out works involving the installation of soft flooring to classrooms, corridors and ancillary spaces within the building. The defender carried out the sub-contract works during the period from February 2012 to July 2012.

[3] The soft flooring was principally in the form of vinyl floorcovering, although in some areas carpet tiles were used. The floor had a concrete slab as its base, on which was placed a layer of rigid insulating material and a damp proof cover. On top of this, an anhydrite screed was laid. A primer was applied on top of the screed. Next, a latex levelling compound was applied. Finally, the floorcovering was laid. The anhydrite screed was composed of calcium sulphate and was poured over the existing surface, to which had been attached underfloor heating pipes. The screed was then left to set. The type of primer was specified in the sub-contract. The primer was to be applied to the anhydrite screed, when it was sufficiently dry, before the latex levelling compound was laid, in order to promote adhesion of the compound to the screed.

[4] After installation, areas of the vinyl floorcovering began to exhibit what the parties described as "bubbling and blistering". By email dated 12 July 2013, the pursuer informed the defender of a number of locations at which bubbling and blistering were present, these being set out in a Schedule of Defects dated 7 July 2013. Further locations were identified in later correspondence. In that correspondence, the pursuer came to contend, based on expert advice, that the problem was caused by three failures on the part of the defender: (i) that the defender had used an incorrect primer, (ii) that in any event the primer had been inadequately applied, and (iii) that the defender had failed properly to test for the presence of moisture in the anhydrite screed prior to laying the flooring.

[5] The parties disagreed about the cause of the problem, resulting in the service of a Notice of Adjudication by the pursuer on 6 April 2017. The pursuer sought payment from

the defender of the cost of having another firm carry out the work of replacing the whole of the flooring. The adjudicator found in favour of the pursuer. The defender has not made payment.

[6] In brief, the reasons given by the adjudicator for reaching his decision were as follows. The primer used by the defender was clearly not recommended by the manufacturer of the primer as suitable for an anhydrite screed and was substituted by the defender for the specified primer without approval or instruction by the pursuer. Liability for the selection of this incorrect primer lay with the defender. In relation to workmanship, on the basis that the experts agreed that little or no primer was evident, the primer used was insufficiently applied to the surface of the screed. Liability for this sub-standard workmanship also rested with the defender. So far as the presence of moisture in the screed during construction was concerned, the adjudicator noted the defender's argument that construction moisture was always present in the sub-floor. As to the reasons for the post-construction presence of moisture, the adjudicator referred to the various contentions put forward by the defender's expert and did not find any of these to be well-founded. He referred to the contractual specification, including that the defender had to ensure, before laying the flooring, that the surface was dry and had to test for moisture and retain test results. He noted the absence of test results. He decided that the extent of the testing carried out by the defender was inadequate and that the results provided by the defender were not an accurate depiction of the sub-floor conditions at the time of testing. He went on to consider other possible causes of the bubbling and blistering put forward by the defender and did not find these contentions to be well-founded. In terms of clause 11.2(5) of the sub-contract "a part of the subcontract works which is not in accordance with the Subcontract Works Information" constitutes a "defect". The adjudicator concluded that the

failures by the defender meant that in those respects the works had not been carried out in accordance with the Subcontract Works Information and thus constituted defects for the purposes of clause 11.2(5) of the sub-contract.

[7] In relation to how the bubbling and blistering was caused, the misapplication of primer had, the adjudicator said, limited any possibility of the necessary hydration or chemical barrier between each of the underlayment products and any inherent moisture. The consequential formation of the mineral ettringite between the anhydrite screed and the latex levelling compound was a cause of the delamination of the latex levelling compound, leading to a manifestation of bubbling and blistering within the vinyl floor. He concluded that the failures of the defender affected all areas of soft flooring situated on the anhydrite screed and as such the flooring should be rectified in full. The bubbling and blistering noted within the Schedule of Defects was a direct manifestation of the defects under clause 11.2(5) of the sub-contract. The defender was liable under clause 45 of the sub-contract to make payment of reasonable costs to the pursuer for having the defect corrected by other people.

[8] The defender contended that the court should refuse to enforce the adjudicator's decision and submitted that the decision should be reduced *ope exceptionis*. The defender put forward five grounds for those contentions:

(i) the adjudicator had acted outwith his jurisdiction by deciding on matters which were outside the scope of the dispute referred to him;

(ii) alternatively, he had dealt with two disputes when he is entitled to deal only with one;

(iii) the adjudicator had left out of account a relevant consideration;

(iv) he had acted in a way which was procedurally unfair;

(v) he had failed to exhaust his jurisdiction in respect of a particular matter and to give reasons, or at least intelligible reasons, for his decision (if he made one) on that matter.

[9] The pursuer argued that each of these grounds was unfounded. The pursuer also submitted that the defender was in any event barred from now relying upon the first ground, for the reason that the defender had failed to raise it as a jurisdictional challenge in the course of the adjudication.

[10] I deal firstly with the pursuer's contention that the defender is barred from relying on the first ground. I then deal with the defender's five grounds of complaint in turn.

The Issues

Issue 1: Is the defender now barred from contending that the adjudicator acted outwith his jurisdiction?

[11] The defender submitted that the scope of the dispute between the parties, as referred to the adjudicator, was delineated by paragraphs 7 and 6.5 of the Notice of Adjudication, read with the Schedule of Defects produced by the pursuer on 12 July 2013. In short, the scope of the dispute was limited to the bubbling and blistering in the individual locations specified by the pursuer in the Schedule of Defects. The defender referred to the defects at these locations as the "notified defects" and to the defects in other locations (identified in later correspondence from the pursuer) as "non-notified defects". The defender submitted that, notwithstanding that limitation on the scope of the dispute, the adjudicator had in fact decided upon the overall cause of the bubbling and blistering, not only at those locations listed in the Schedule of Defects intimated on 12 July 2013 but also at others, and had

awarded the pursuer a sum sought by it in respect of the replacement of the whole of the flooring. He had thereby acted outwith his jurisdiction.

[12] The pursuer submitted that the defender had not taken this point in the course of the adjudication and so was now barred from doing so. The pursuer's position was that the challenge made at the time was conceptually quite different from the point made before the court. Moreover, it was submitted that the challenge raised before the court was based upon the Notice of Adjudication, while the challenge at the time emerged only when the defender submitted its Rejoinder, and was made under reference to what was said by the pursuer in its Reply rather than in the Notice of Adjudication.

[13] The pursuer further submitted that, according to *Keating on Construction Contracts* 10th edition, at 18-039:

> "A party will not be allowed to raise an argument during enforcement proceedings that is in substance a jurisdictional challenge when this argument was not made during the adjudication."

Reference was also made to *A.T. Stannard* v *Tobutt* [2014] EWHC 3491 (TCC), at para 13, quoting *GPS Marine Contractors Ltd* v *Ringway Infrastructure Services Ltd* [2010] EWHC 283 (TCC), and to *CSK Electrical Contractors Ltd* v *Kingwood Electrical Services Ltd* [2015] EWHC 667 (TCC), at para 20 .

[14] The defender accepted that a challenge not raised in the course of the adjudication could not be raised before this court in enforcement proceedings but submitted that it was evident, or at least implicit, from the challenge to jurisdiction made at the time that the same point had been raised. If the court did not consider the issue to have been properly raised before the adjudicator, it should be borne in mind that the full extent to which the adjudicator had erred in dealing with the matters was only apparent from his decision and the challenge could therefore be fully formulated only after the decision had been issued.

The reservation of the defender's position made at the time was sufficient. Reference was made to the Opinion of Lord Malcolm in *Specialist Insulation Ltd* v *Pro-Duct (Fife) Ltd* [2012] CSOH 79, [2012] BLR 342, [2012] SCLR 641, in particular at paras 32-36. It was also argued that, even if the specific issues raised before the court had not been raised before the adjudicator, the fact that another jurisdictional point was taken was sufficient to preserve the position of the defender. Reference was also made to *Keating on Construction Contracts*, 10th edition, para 18-039, where it is said that what amounts to a valid reservation depends upon the circumstances. The cases relied upon by the pursuer in its Note of Argument (*A.T. Stannard Ltd* v *Tobutt* and *GPS Marine Contractors Ltd* v *Ringway Infrastructure Services Ltd)* could be distinguished from the present case. The defender had not waived its right to challenge the jurisdiction exercised by the adjudicator.

ISSUE 1: DECISION AND REASONS

[15] The jurisdictional challenge made by the defender during the adjudication did not arise until the Rejoinder was intimated on 4 May 2017, with a covering email which set out the basis for the challenge. The substance of the defender's challenge was about whether the adjudicator was being asked to determine two disputes. The email stated:

> "Paragraph 7.7.1(c) of the Reply document makes it clear for the first time that there are two disputes that will involve completely different analyses of causation and quantum. Moreover the definition of 'dispute' requires to be augmented to justify the damages claim. Are you as adjudicator being asked to order payment of monies due under one head or the other? Are you as adjudicator going to carry out two sets of calculations arising from two differing approaches to causation?"

[16] The email went on to request that the adjudicator should resign forthwith and stated that the Rejoinder and appendices and any future participation by the defender in the

adjudication were entirely without prejudice to and under reservation of the defender's "rights in respect of this jurisdictional challenge".

[17] In the Rejoinder, also intimated on 4 May 2017, in its response to points 10, 11, 12 of the pursuer's Reply the defender contended:

> "The adjudicator already has the Harndec position. In so far as the redress sought is concerned it is now apparent that Morgan Sindall are attempting to refer two separate and distinct disputes. One dispute relates to monies due under clause 45.1, the other relates to what must by Morgan Sindall's own admission be a different sum in respect of damages due for breach of the parties' subcontract. The adjudicator does not have jurisdiction to decide two disputes."

[18] Paragraph 7.7.1(c) of the Reply by the pursuer, which the defender argued gave rise to the jurisdiction challenge, is in the following terms:

> "(c) Given the terms of clause 45.1 of the Subcontract
>
> *'If the Subcontractor is given access in order to correct a notified Defect but he has not corrected it within the defects correction period, the Contractor assesses the cost to him of having the Defect corrected by other people and the Subcontractor pays this amount.'*
>
> and given the presence of these Defects, Morgan Sindall do not even require to demonstrate that Harndec caused (in the legal sense) the blistering/bubbling. It is sufficient for Morgan Sindall to recover under clause 45.1 where Morgan Sindall have proved that there are Defects. As such, even if the Adjudicator is not satisfied as to the causative effect of the primer and the lack of moisture testing, Morgan Sindall are still entitled to recover under clause 45.1. In any event, it is submitted that the causative effect of Harndec's failures is demonstrated beyond any doubt."

[19] The basis for the challenge to jurisdiction stated in the defences, and argued before the court, was that only a claim in respect of "notified defects" was covered by the terms of the Notice of Adjudication. However, the jurisdictional challenge made at the time of the adjudication was directed at the adjudicator being asked to resolve two disputes. It is evident from the adjudicator's decision that he considered the challenge to concern the suggestion that he was being asked to deal with two disputes: a claim under the contract and a claim at common law (see paras 8.111-8.121). That is an entirely reasonable view for

him to have taken of the complaint made, given the terms of the email and the Rejoinder, noted above. The challenge made before the adjudicator was not that the Notice of Adjudication did not cover "non-notified defects". It was not a challenge based on the Notice, but rather arose, the defender expressly stated, "for the first time" from the Referral. In these circumstances, I do not consider that the point now argued by the defender was taken by it in the course of the adjudication.

[20] In *GPS Marine Contractors Ltd* v *Ringway Infrastructure Services Ltd*, at para 7, Ramsay J stated that if a party raises only specific jurisdictional objections and those are found by the court to be unfounded, then that party is precluded from raising other grounds which were available to it, if it then participates in the adjudication. In my view, that is the correct approach. I also accept, as the judge in that case went on to state and as is plain from the law on waiver, that if the jurisdictional objection taken before the court was not available at the time of the adjudication, it cannot have been waived. In the present case, however, the issue raised before the court was plainly available to be taken during the adjudication and indeed could have been raised on receipt of the Notice of Adjudication.

[21] I also accept the pursuer's submission that *Specialist Insulation Ltd* v *Pro-Duct (Fife) Ltd* involved (see para [37] of the Opinion) a full and express reservation of the party's position, reserving the right to challenge the legality of any award. It did not deal with a specific jurisdictional challenge, such as had occurred in the present case, where the defender reserved its "rights in respect of *this* jurisdictional challenge" (emphasis added). In the present case, there was no reservation of the defender's position which would allow the point made now to be raised.

[22] In these circumstances, I consider that the defender is now barred from raising this challenge to jurisdiction.

Issue 2: did the adjudicator decide on matters which were outwith the scope of the dispute and hence outwith his jurisdiction?

[23] It is appropriate that I express my views on the substance of the point, notwithstanding my conclusion that the defender is now barred from raising it.

[24] The defender submitted that the relevant legal principles were as follows. If an adjudicator purports to decide matters which, on a true construction of the referral, were not referred to him then his decision is outside his jurisdiction, rendered a nullity and ought not to be enforced: *Bouygues (UK) Ltd* v *Dahl-Jensen (UK) Ltd* [2001] All ER (Comm) 1041, Buxton LJ at paras 12-14 and Chadwick LJ at para 27. In addressing itself to the issue as to whether or not the adjudicator had jurisdiction, the court should ask: has the adjudicator answered the right question in the wrong way or has the adjudicator answered the wrong question? The former approach permits of enforceability, the latter does not: *Bouygues (UK) Ltd* v *Dahl-Jensen (UK) Ltd*, Chadwick LJ at para 27. The Notice of Adjudication defines the limits of the adjudicator's jurisdiction and later documents such as the Referral notice cannot extend the same: *KNS Industrial Services Ltd* v *Sindall Ltd* (2001) 3 TCLR 10, at para 21.

[25] The pursuer submitted that, on a proper construction of the terms of the Notice of Adjudication, in the context of the relevant background, the scope of the dispute was not limited as the defender suggested. Rather, it did indeed cover the question of whether the whole of the flooring required to be replaced, for the reasons the pursuer had advanced.

[26] The pursuer accepted the application of the legal principles founded upon by the defender. However, the Notice of Adjudication was not necessarily determinative of what the true dispute comprised or as to whether there was more than one dispute; it was necessary to look also at the background facts: *Witney Town Council* v *Beam Construction*

(Cheltenham) Ltd [2011] EWHC 2332 (TCC) at para 38; *Wales and West Utilities Ltd* v *PPS Pipeline Systems GmbH* [2014] EWHC 54 (TCC) at paras 25 – 27.

[27] The pursuer accepted that it is the Notice of Adjudication, and not any other or later documents such as the Referral, which falls to be construed. The pursuer also accepted that paragraph 6.5 of the Notice of Adjudication "was not happily worded". However the pursuer placed emphasis upon the section of the notice which expressly dealt with the dispute (section 7). This, the pursuer contended, made it abundantly clear that the issue in dispute was the underlying cause of the bubbling and blistering. The pursuer also submitted that this part of the Notice, read in the context of the background correspondence, also made clear that the remedial works required replacement of the whole of the flooring and not simply those sections mentioned in the Schedule of Defects sent on 12 July 2013.

ISSUE 2: DECISION AND REASONS

[28] For present purposes, the relevant parts of the Notice of Adjudication are as follows:

> "5.2 Harndec completed its Subcontract Works in July 2012. The whole of the Project, and Morgan Sindall's Works (under the Main Contract) were complete on 15 August 2013…
>
> 5.3 Since that date, as is described in detail below, the parties have been in discussion in relation to defects which have appeared in the Subcontract Works…
>
> 6.4…clauses 42.2 and 43.2 of the Subcontract Conditions can be read to the effect that: until 15 August 2013, Morgan Sindall were entitled to notify Harndec of defects, and that Harndec had to correct such a defect within 3 weeks of having been notified.
>
> 6.5 The present facts are that in accordance with clause 42.2 of the Subcontract Conditions, Morgan Sindall issued Harndec with a list of Defects (Appendix 4) on 12 July 2013 ("the Defects List"). The Defects List noted that the flooring which had been installed as part of Harndec's Subcontract Works was "bubbling and blistering" ("the Defect") and other defects with Harndec's works (noted at items 2, 3, 7, 10, 12, 35, 48, 76, 84, 104, 105, 107, 108, 109 , 121, 122, 123, 131, 132, 152, 159, 183, 188, 189, 193, 205, 207 and 215). …

6.6 In accordance with clause 43.2. of the Subcontract conditions, Harndec ought to have attended to all of the defects on the Defects List by 2 August 2013 (being the date 3 weeks after the date of the Defect having been notified).

6.7 Harndec commenced works in July 2013 and completed certain of the items noted on the Defects List. Other defects remain outstanding.

7. The Dispute

7.1 In light of the background and facts set out above, a dispute has arisen in relation to:

7.1.1 Whether the Defect which has appeared in the soft floor installed by Harndec is Harndec's responsibility and

7.1.2 Therefore whether Harndec are responsible for the cost of the remedial works.

8. Morgan Sindall asserts that there are two causes of the Defect:

8.1.1 an overly moist anhydrite screed; and

8.1.2 the misuse of a primer…

9.3 In accordance with clause 45.1 of the Subcontract Conditions, Morgan Sindall has assessed the cost to it of having the Defect corrected by others. This sum has been assessed at £537,706.21. A breakdown and details of this sum is provided below and in Appendix 26..."

[29] Appendix 26 was actually appended to the later Referral document issued by the pursuer and not to the Notice of Adjudication. Appendix 26 contained within it a reference to "Future Costs for Remedial Works" and stated "Remove and Relay Works 3982m²". The parties were agreed that this was a reference to what was effectively the whole of the area covered by soft flooring installed by the defender. As is discussed below, the defender had been sent this information in February 2017.

[30] Like many words or phrases in the English language, there are various shades of meaning one can give to the word "dispute". In a dispute under a construction contract, where the claim is for a specific sum and is made on a specific basis (such as that a particular part of a sub-contractor's works require to be re-done) that must plainly inform the question of the substance and scope of the dispute. While there may be several points relied upon to

make up the assertion of disconformity with the contract and responsibility for the consequences, and while the sum claimed may be able to be broken down into individual heads, it will in many cases still be appropriate to conclude that there is a single dispute. I agree with the view expressed by Akenhead J in *Cantillon Ltd* v *Urvasco Ltd* [2008] EWHC 282 (TCC), at para 55, that the courts should not adopt an overly legalistic analysis of what the dispute between the parties is, but should determine in broad terms what is the disputed claim or assertion. If the courts were to take an overly legalistic approach, each sub-issue or individual point of difference between the parties could be taken as a dispute. That approach is unrealistic and not in accordance with commercial common sense.

[31] In my view, the question to be determined in respect of the scope of the dispute is what a reasonable person in the position of the defender, having the background knowledge available to the parties, would have understood the Notice of Adjudication to mean. The language used in the Notice must be construed against that background. In that regard, I agree with the observations in *Fastrack Contractors Ltd* v *Morrison Construction Ltd* [2000] BLR 168 by HHJ Thornton QC at para 20, adopted in *KNS Industrial Services Ltd* v *Sindall Ltd* at para 14, and in *Witney Town Council* v *Beam Construction (Cheltenham) Ltd* at para 38, and in *Wales and West Utilities Ltd* v *PPS Pipeline Systems GmbH* at para 26. The short point simply is that in a case like the present the exchanges between the parties leading up to the issuing of the Notice of Adjudication may well assist in construing the terms of the Notice, in order to determine the scope of the dispute.

[32] As the Notice of Adjudication narrates, in para 5.3, the parties had been in discussion "in relation to defects" after August 2013. In an email of 25 September 2013, the pursuer drew the defender's attention to "new items…that have appeared throughout the last 6 to 8 weeks", referring, in essence, to further bubbling and blistering that had appeared. By letter

dated 5 December 2013, the pursuer referred to "further areas of vinyl flooring where 'bubbling' is occurring…" and indicated the current extent of the problem, as set out on appended floor plans. The parties met on 8 January 2014, the purpose of the meeting, as recorded in the minutes, being "to agree a way forward to identify the technical reasons for the floor defects at Chryston High School project." On 3 April 2014, the pursuer sent the defender a letter referring to "the ongoing issue of Vinyl Floor bubbling" and stating that a report had been received showing that the flooring was not subject to excessive temperatures (a point which the defender had earlier raised). The letter went on to state: "With reference to the above, we therefore record that there is a Defect in the Works …that requires to be rectified." It attached an updated drawing indicating the areas concerned. It also gave notice of a requirement to complete the rectification of "this Defect" within three weeks. The pursuer's expert report, which supported the position the pursuer had advanced about the cause of the bubbling and blistering, was sent to the defender on 3 November 2015. The covering letter sent with that report referred to an earlier letter of 16 June 2015 which had identified "the following defects" and then referred to the use of the wrong primer and the failure to carry out proper testing.

[33] The pursuer again wrote to the defender on 1 February 2016, "in relation to the vinyl flooring defect" and referred to the letter of 3 November 2015 as having identified "the following defects" in the sub-contract works and again referred to the use of the wrong primer and the failure to carry out proper testing. It referred to repeated requests, in earlier correspondence, for "the notified defects to be remedied". On 27 February 2017, the pursuer stated that it sought to recover from the defender the cost "of having the defect remedied by other people", that sum being £527,550. It enclosed "the quantum information" which it said

would be submitted with the Referral and which in due course became Appendix 26 to the Referral.

[34] In its replies to the correspondence, the defender denied liability for any issue with the flooring. The defender made reference in its replies to the bubbling and blistering which had occurred over the whole period, and not merely to that which was evident in July 2013, and gave its views on the causes of the problem.

[35] As noted above, the document enclosed with the pursuer's letter of 27 February 2017, which became Appendix 26 to the Referral, made it clear that the pursuer intended to have other contractors remove and replace the entirety of the soft flooring that had been laid by the defender.

[36] It was, therefore, clear to the defender from the correspondence and documents that the remedial works proposed by the pursuer were not restricted to the individual areas of flooring identified in the list dated 12 July 2013.

[37] This background material also shows that the pursuer notified to the defender, after 12 July 2013, the location of a number of additional areas where bubbling and blistering was said to be apparent, for the reasons put forward. It is plain from that correspondence that the pursuer, at this stage at least, was proceeding upon the basis that these were further notifications of defects in terms of the contract which had not been dealt with within the three week period for correction of defects.

[38] The fact that the pursuer was proceeding upon this basis is of some significance, because it shows that the pursuer considered all locations of the bubbling and blistering to be manifestations of a defect or defects which the defender required to remedy in terms of the contract. In my view, this makes it very difficult for the defender to contend, as it does, that the pursuer had, when serving the Notice of Adjudication, made a fundamental

distinction between (i) defects notified under the contract and requiring correction thereunder and which were to be the subject of the adjudication, and (ii) defects notified after the end of the defects notification period, in respect of which the remedy should, the defender contends, have been damages for breach of contract, and which were not to be the subject of the adjudication. Whether or not, after the adjudication procedure, the pursuer acknowledged that defects noted after the end of the defects notification period may not give rise to a remedy based on clauses 43 and 45 of the contract, the fact is that throughout the background correspondence leading up to the Notice of Adjudication that was not the pursuer's position. Indeed, the point taken by the pursuer, which the adjudicator ultimately accepted, was that the notification of bubbling and blistering prior to the end of the defects notification period was a notification of an underlying defect and, since that affected all of the flooring, all of it had to be replaced in terms of the contractual provisions on rectification of defects.

[39] It is a feature of the correspondence and other documents (including the Notice of Adjudication) in this case that the words "defect" and "defects", whether beginning with a capital or not, are used in various ways. However, viewing the correspondence as a whole, it is plain that these words, while not consistently deployed with the same meaning, are not used by the parties to refer merely to bubbling and blistering at the locations identified in the letter dated 12 July 2013. Rather, the pursuer consistently contended that the problem related to the flooring generally and that it had specific causes, and the defender responded to that position. In light of the correspondence, it would have been very surprising, to say the least, if the pursuer had sought adjudication only in respect of the areas identified in July 2013.

[40] From the correspondence, one also sees on several occasions the use of the word "defect" in the singular as connoting an underlying global issue affecting the whole of the flooring. Thus, in its letter of 27 February 2017, the pursuer refers to the cost of repairing "the defect" as £527,550, the cost estimate for replacing the whole of the soft flooring.

[41] As is set out above, the Notice of Adjudication, at para 5.3, referring back to the completion date of August 2013 in the previous paragraph, states:

> "Since that date, as is described in detail below, the parties have been in discussion in relation to defects which have appeared in the Subcontract Works".

There is therefore an express reference to the exchanges which occurred after the intimation of the Schedule of Defects on 12 July 2013. In paragraph 6.5 of the Notice of Adjudication, it is stated that

> "The Defects List noted that the flooring which had been installed as part of Harndec's Subcontract Works was "bubbling and blistering" ("the Defect")…".

So, the issue raised concerned "the flooring which had been installed" by the defender and that it was "bubbling and blistering". It is possible to read that sentence as referring to bubbling and blistering on the flooring in general. It is also, I accept, possible to read it as referring only to the locations stated in the Defects List and to read paragraphs 6.6 and 6.7 of the Notice (noted above) as supporting that meaning.

[42] However, when one turns to the section of the Notice which identifies the dispute, it begins by referring to "the background and facts set out above", which must on any view include the correspondence from August 2013. It goes on to state that a dispute has arisen in relation to:

> "7.1.1 Whether the Defect which has appeared in the soft floor installed by Harndec is Harndec's responsibility; and
> 7.1.2 Therefore whether Harndec are responsible for the cost of the remedial works".

[43] In my opinion, read in the context of what was known to the parties and what they had discussed in correspondence, this description of the dispute concerns the bubbling and blistering wherever it had appeared in the soft flooring installed by the defender. The reference to whether it "is Harndec's responsibility" necessarily brings into play the causes of the bubbling and blistering in the flooring, the pursuer's contentions on which are themselves expressly stated in paragraph 8 of the Notice of Adjudication. Should there be any lingering doubt as to the meaning of the scope of the dispute, it is dispelled by the fact that it was made clear that the cost of the remedial works was the cost for the replacement of the whole of the flooring. The pursuer's assertions and its claim (for the cost of replacing the whole of the flooring) thereby defined the scope of the dispute and the defender admitted, in its Response, the terms of paragraphs 7.7.1 and 7.7.2 as being what was in dispute.

[44] Accordingly, reading the Notice of Adjudication in context, and in particular in light of the correspondence between the parties, what was being referred to adjudication was the cause of bubbling and blistering in the vinyl flooring, and responsibility for that problem. If that was a cause which affected the whole of the flooring, and arose from a defect for which the defender was responsible, which was the pursuer's position, then all of the flooring required to be replaced at the defender's expense.

[45] For these reasons, the adjudicator did not decide on matters which were outwith the scope of the dispute referred to him and thereby outwith his jurisdiction.

Issue 3: did the adjudicator deal with two disputes?

[46] The defender submitted that if the court were to hold, contrary to the defender's earlier submissions, that the "non-notified defects" did form part of the questions referred to the adjudicator, then this must result in the conclusion that more than one dispute was

referred to him. This was because the "notified defects" represented a claim for payment in terms of the contract. That is, in respect of the "notified defects" the pursuer sought redress by way of application of the contractual terms. The defender argued that a claim in respect of the "non-notified defects", properly understood, represented a claim for damages for breach of contract. The two claims were, therefore, distinct, such as to give rise to different disputes. It was said that the adjudicator bore to have considered and decided upon the merits of the damages claim (in paragraphs 8.131-8.133 of his decision) and rejected the same in favour of the remedy under the contract. He had therefore considered and decided upon two distinct disputes.

[47] The defender submitted that, in circumstances where more than one dispute has been referred to adjudication and then decided upon, the adjudicator's decision is rendered unenforceable: *Hillcrest Homes Limited v Beresford & Curbishley Limited* [2014] EWHC 280 (TCC), paras 54-60. This is because the governing legislation, the Housing Grants, Construction and Regeneration Act 1996, provides, in section 108(1), that a party to a construction contract has the right to refer *a dispute* arising under the contract for adjudication under a procedure complying with the section.

[48] The pursuer did not contend that this was an incorrect statement of the law, but simply submitted that on a proper analysis only one dispute had been referred to the adjudicator and dealt with by him.

[49] There is a reference in the Notice of Adjudication (para 12.1.1(c)) to damages for breach of contract, as an alternative to the remedy under clause 45 of the contract. However, that does not appear to be directed at what the defender describes as "non-notified defects". Rather, as it was put by Senior Counsel for the pursuer, it was simply a "belt and braces" approach. In other words, the pursuer did not suggest that any specific part of the dispute

required to be resolved solely by reference to damages for breach of contract. The reference to damages was expressed as being an alternative basis for the whole claim, rather than a basis for one part of the claim.

ISSUE 3: DECISION AND REASONS

[50] This issue goes back to the question of the appropriate approach to the meaning of the word "dispute". As I have noted above, the dispute in the present case was about the cause of the bubbling and blistering in the flooring and the question of who was responsible for it. That dispute embraced what the defender describes as the "notified defects" and the "non-notified defects".

[51] The factual basis for each of what was described as the two disputes was exactly the same, namely the cause of the bubbling and blistering. The contractual standard which the adjudicator had to apply (namely whether the cause of this manifestation was a defect in terms of clause 11.2(5) of the sub-contract) was the same. The difference, if the adjudicator had decided to go down the common law route, concerned analysis of the legal consequences at common law as opposed to under the contract. Even if the adjudicator had followed that approach, it seems to me that this would not have been enough to result in the characterisation of what occurred as two separate disputes being referred to and determined by him. He was determining the dispute I have described above. If the defender is correct, then an adjudicator could not in this case (and indeed it would appear could not in any case) determine a dispute which relied for its resolution partly upon implementation of the contract and partly upon common law damages, notwithstanding that the underlying factual basis and the contractual standard were the same in each case. That would be an overly restrictive approach. In that regard, I agree with the view expressed by Akenhead J in

Witney Town Council v *Beam Construction (Cheltenham) Ltd*, at para 36, that one dispute might encompass two or more causes of action, heads of claim or issues.

[52] In the present case, the reality is that there was one dispute and it is in my view artificial to seek to characterise it as involving two separate disputes.

[53] In any event, in this case the adjudicator did not determine a claim for damages at common law in respect of what the defender describes as the "non-notified defects". As the adjudicator put it (at paragraph 8.133 of his decision):

> "On the basis of my statement above (para 8.11-121) confirming that the defect is not a latent defect, I am of the conclusion that the provisions of the contract provides [sic] for recovery of costs for uncorrected defects, therefore common law damages are not applicable to this adjudication."

In short, the adjudicator viewed the issues raised as all falling within the contractual mechanism for correction of defects. As a result, he did not embark upon an analysis of any claim at common law. Whether he was right or wrong in that regard is of course at this stage entirely irrelevant.

[54] The defender's contention appears to be that because the adjudicator found the defect not to be a latent defect and common law damages therefore not to be applicable, he thereby determined a claim at common law. To the extent that he found common law damages not to be applicable, it might be said that he did reach a view on such a claim. But the more accurate characterisation of what occurred is that the adjudicator saw no basis upon which to distinguish between what the defender describes as the "notified defects" and the "non-notified defects". It appears that the adjudicator accepted the pursuer's point articulated in paragraph 9.7.1 of its Reply, to the effect that notification of a defect which was manifested as bubbling and blistering constituted notification of that same defect in areas where it was yet to be manifested in that manner. He therefore determined the whole

dispute on the basis of the contractual remedies and did not go down the common law route.

[55] For these reasons, I therefore conclude that this criticism of the adjudicator's approach is not well founded.

Issue 4 – did the adjudicator leave out of account a relevant consideration?

[56] In its Note of Argument, the defender submitted that the following material was placed before the adjudicator: (a) submissions by the defender on the question of the flooring in an area of the building described as the "social area" and (b) a statement by Alan MacDonald in respect of the flooring in the social area. The latter document in particular was agued to be a critical feature of the defender's case, bearing directly upon one of the issues which the adjudicator had to decide. In addition, during the course of a visit to the school, requested by the adjudicator, he had noted that a water fountain was leaking badly and that this could cause de-bonding and blistering of the floor coverings.

[57] The defender argued that, in arriving at his decision, the adjudicator bears to have left these matters wholly out of account. Mr MacDonald was made available as a witness but the adjudicator elected not to examine him. The evidence of Mr MacDonald was therefore left unchallenged but did not accord with the decision arrived at. The adjudicator neither commented upon nor analysed this evidence anywhere in his decision. Similarly, in his decision, the adjudicator considered the issue of "Environmental Conditions – Post Construction Presence of Moisture" but made no mention of the water fountain. It cannot sensibly be contended, submitted the defender, that the unchallenged evidence of Mr MacDonald and the findings made by the adjudicator himself during the visit by him were

not relevant considerations. Once it was accepted that either of these was a relevant matter then it must also be accepted that the adjudicator was bound to consider it.

[58] The defender further submitted that if an adjudicator fails to take account of relevant material which has been placed before him then that amounts to (a) a breach of natural justice; (b) a failure to fulfil the statutory duty incumbent upon him to decide the dispute and (c) a failure to conform with the Scheme for Construction Contracts applicable to adjudication, with the result that his decision is not enforceable. Reference was made to *Keating on Construction Contracts* 10th edition, para 18-094; *Buxton Building Contractors Limited* v *Governors of Durand Primary School* [2004] EWHC 733 (TCC), at paras 16-21; Housing Grants, Construction and Regeneration Act 1996, section 108(2); and paras 17 and 20 of the Schedule to the Scheme for Construction Contracts (Scotland) Regulations 1998.

[59] As I understood it, the reference to section 108(2) of the 1996 Act was to sub-paragraph (e), which provides that the parties' contract shall impose a duty on the adjudicator to act impartially. Paragraph 17 of the Scheme states that the adjudicator shall consider any relevant information submitted to him by any of the parties to the dispute. Paragraph 20 refers to the adjudicator having to decide the matters in dispute.

[60] Notwithstanding the fact that the Note of Argument referred only to the social area, the defender's position in oral submissions was that there were actually two areas of flooring in respect of which the adjudicator had failed to consider the material put forward by the defender: the social area and "the 2014 area". In relation to these two areas, the adjudicator had therefore failed to consider part of the defence.

[61] Senior Counsel for the defender explained that the defender had laid flooring in the social area in 2012 and re-laid the flooring there in October 2013. After bubbling and blistering was discovered in 2012 the defender had been instructed to uplift the flooring and

repair it, which it did, with the pursuer paying for the remedial work. There had been no subsequent bubbling or blistering in the flooring in the social area.

[62] In relation to the 2014 area, Senior Counsel stated that the flooring had been laid as part of the initial works in 2012 but had been uplifted in 2014 and re-laid. Further, when the flooring was re-laid, it was done on the pursuer's instruction at a time when the anhydrite screed was still wet. Reference was made to an email dated 6 August 2014 from the defender to the pursuer advising that in its opinion the re-laid flooring would fail due to high moisture content and that this was only a temporary repair.

[63] The defender's point was a causation issue: that the bubbling and blistering would have happened in these two areas in any event because instructions had been given by the pursuer to lay the flooring on unsuitable surfaces.

[64] The pursuer relied upon the following legal propositions in relation to the defender's contentions. Adjudication is intended to be a speedy method by which disputes under construction contracts can be resolved on a provisional basis: *Bouygues (UK) Ltd* v *Dahl-Jensen (UK) Ltd*. In respect of a defence, it is not practicable for an adjudicator meticulously to consider every aspect of the evidence; it is sufficient for him to consider the substance of the defence: *London and Amsterdam Properties Ltd* v *Waterman Partnership* [2003] EWHC 3059 (TCC), para 179. Allegations of breach of natural justice should be examined critically by the court so as not to undermine the purpose of adjudication: *Amec Capital Projects Ltd* v *Whitefriars City Estates Ltd* [2004] EWCA Civ 1418, para 22; *Dorchester Hotel Ltd* v *Vivid Interiors Limited* [2009] EWHC 70 (TCC); *Cantillon Ltd* v *Urvasco Ltd*. Any breach of natural justice proved must be substantial and relevant: *Discain Project Services Ltd* v *Opecprime Developments Ltd* [2001] BLR 285, para 29; *Ardmore Construction Limited* v *Taylor Woodrow Construction Limited* [2006] CSOH 3, para 43. The adjudicator has to conduct the

adjudication in accordance with natural justice or as fairly as the limitations imposed by Parliament, in particular the strict time limits, permit; *Discain*, para 29. One had to distinguish between a failure by an adjudicator to consider a substantial (factual or legal) defence and an actual or apparent failure or omission to address all aspects of the evidence which go to support that defence. While the adjudicator required to address the substantive issues, he did not need (as a matter of fairness) to address each and every aspect of the evidence: *Jacques v Ensign Contractors Ltd* [2009] EWHC 3383 (TCC), Akenhead J at para 26(d).

[65] The pursuer's position was that the defender's contentions on the social area and the 2104 area in its pleadings and in the witness statement of Alan MacDonald were incomprehensible. Senior Counsel also referred to factual matters raised in the defender's submissions which were not accepted by the pursuer as being accurate, including whether the pursuer did indeed instruct that the flooring in the social area be laid on wet screed, whether signs of bubbling and blistering had become apparent in that area after it had been re-laid in 2013, and the extent of the areas involved.

[66] It was submitted that even if sense could be made of the contentions made by the defender in respect of the social area and the 2014 area, while it was accepted that the adjudicator did not specifically refer to these two areas in his decision, they were irrelevant to the key issue as to the existence of the global defect. It was plain from the adjudicator's decision that he was of the view that the flooring required to be replaced because of the global defect. It was the defender's contractual responsibility to ensure that the screed was sufficiently dry before laying the flooring, to accept the surfaces upon which its work would be done and to carry out adequate and sufficient testing, as specified in the contractual documents, in order to satisfy itself of the levels of moisture content in the screed. If the

defender had found the presence of high levels of moisture, it should have advised the pursuer and not carried out any works to these areas. The adjudicator had considered the relevant defences put forward by the defender in relation to the cause of the global defect. The points made about the social area, the 2014 area and the water fountain were not of sufficient weight and value as to require actual discussion by the adjudicator in his decision. Reliance was placed on the observations made by Akenhead J in *Jacques v Ensign Contractors Ltd*, referred to above. There was no question of these points being material or the absence of dealing with them having caused any substantial prejudice.

ISSUE 4: DECISION AND REASONS

[67] The relevant passage in the defences dealing with this issue is in Answer 8:

> "*Separatim*, and in any event, the adjudicator having concluded that the pursuer was entitled to recover in respect of "all areas" of flooring has necessarily included an area, namely, the so-called "Social Area", in respect of which the pursuer could not possibly be entitled to recover, whatever view is taken in relation to the proper scope of the dispute. This is because the flooring in the Social Area was required by the pursuer in 2014 to be re-laid by the defender in the circumstances that are narrated in paragraph 6.12 of the defender's Response in the adjudication, and in paragraph 7.6 of the Rejoinder. Said Response and Rejoinder are produced and their terms held to be incorporated herein *brevitatis causa.* It was accepted by all concerned that the fundamental problem as regards the Social Area was the high moisture content in the anhydrite floor slab at a time when the school would shortly be required to reopen after the summer holidays. In order to avoid being exposed to unavailability charges in their contract with the Council, the pursuer instructed the defender to lay the vinyl floor over a wet floor slab, even though, as the defender had advised, the flooring was bound to fail due to the high moisture content, and at best could be considered no more than a temporary repair. Further, part of the defender's proof included the evidence of a Mr Alan MacDonald who provided a witness statement, signed and dated 5 May 2017, to the effect that he was instructed to install the flooring in the Social Area without first carrying out any testing. Mr MacDonald attended the adjudication hearing on 10 May 2017. The adjudicator did not ask him any questions. While he acknowledged receipt of the Response and Rejoinder, as well as of the witness statement, nowhere in the Decision does the adjudicator discuss or even refer to either the defender's submissions regarding the Social Area in general or Mr MacDonald's evidence in particular. In addition, during the inspection visit to the school made by the adjudicator and representatives of the

> parties on 2 May 2017, the adjudicator noted the presence of a water fountain which was leaking badly onto the floor, and agreed that this could cause de-bonding and blistering of the floor coverings. However, no mention is made of this factor in the Decision."

[68] The social area (also referred to in other documents as "the social space") is described in the defender's Response document as the main dining room area. Para 6.12 of the Response, referred to in the passage in the pleadings quoted above, deals with the defender's contentions as to the presence of moisture within the anhydrite screed. This is said to be "the underlying problem" and the tenor of the language used is that it is generic to the flooring, rather than affecting only the social area. This paragraph in the Response goes on to say that some 400m² of flooring in the areas where bubbling and blistering had been observed was uplifted in June 2014. The Response continues to the effect that the screed in that area remained wet and that the pursuer instructed the defender to lay the flooring over wet screed. Reference is then made to the email dated 6 August 2014. The Response goes on to state that as predicted the floor began to fail soon afterwards. The defender attended to carry out the temporary repair of this area and charged £11,627. 07.

[69] Paragraph 7.6 of the Rejoinder, also referred to in the pleadings, refers to the flooring in the social area as having been re-laid by the defender in 2013 and not having blistered since. This paragraph goes on to mention "the 2014 area" and that it had displayed subsequent blistering.

[70] The defender's Note of Argument and its pleadings relate the alleged failure by the adjudicator solely to the social area. Mr MacDonald's witness statement refers to the "Social Space" and does not in fact make any reference to the 2014 area. The pleadings and Mr MacDonald's witness statement appear to confuse matters in relation to the social area and the 2014 area. Senior Counsel for the defender accepted that there was a degree of

confusion in the defences. Against that background, there is much force in the view that the defender's position on these two areas is lacking in coherence.

The Social Area

[71] In relation to the social area, the defender's position as advanced to the adjudicator is noted above. The pursuer had paid the defender the cost of re-laying that part of the flooring. The pursuer's position, as advanced to the adjudicator, was that it agreed to make payment on the basis that at that time the cause of the bubbling and blistering was unknown.

[72] On the adjudicator's findings, the re-laying of the flooring in the social area by the defender in October 2013 must have been done using the wrong primer, with inadequate quantities of primer and without appropriate testing for moisture (as he had found to be the case in respect of the whole of the flooring). It was not suggested to me that these failures did not occur in respect of the re-laid flooring. Thus, the global defect applied also to the re-laid flooring in the social area. It follows that, even if no bubbling or blistering was evident after the re-laying of the flooring in 2013, the replacement, once again, of this part of the floor was thereafter required for the reasons given by the adjudicator. The adjudicator was plainly aware of the factual issues with the social area, as he made specific reference to it in his decision (paragraphs 6.32, 6.33 and 6.56). As the adjudicator also noted in his decision (at paragraph 8.13) it was the defender's duty to ensure that the surface was dry, in accordance with the contractual specification, before laying the flooring. In these circumstances, it cannot be concluded that the adjudicator has left the defender's contentions about the social area out of consideration - this area is covered by his overall reasoning and conclusions.

[73] Further, the adjudicator required to consider all relevant information submitted to him by the parties (see *Buxton Building Contractors Limited* v *Governors of Durand Primary School*, at para 20). In circumstances in which the defender's contractual obligations included laying flooring only when the screed was sufficiently dry, I consider that the alleged conduct of the pursuer founded upon by the defender in relation to the social area was not relevant.

The 2014 area

[74] In my opinion, it is simply not open to the defender, in light of the terms of its pleadings and its Note of Argument, which focus on the social area, to introduce into this litigation at the stage of submissions the argument that the adjudicator failed to have proper regard to the defender's contentions and evidence about the 2014 area. On that basis alone, the submissions in respect of the 2014 area fall to be rejected.

[75] In any event, I find there to be no substance in the contentions made. The 2014 area is referred to in the email from the defender dated 6 August 2014 which stated that the work being undertaken was "purely a temporary repair" and gave three reasons as to why, in its view, the re-laid flooring in this area would fail – "high moisture content, the laitance and cracks within the floor slab". That email was sent in response to an email from the pursuer the previous day, which referred to a discussion in which it had been "agreed to relay the previously lifted area in time for the school returning and then seek a solution that will permanently remediate this issue".

[76] The pursuer maintained before the adjudicator that the defender was responsible for the costs associated with repairing this area because, despite being given ample opportunity to carry out the necessary remedial works since 2014, the defender had failed to do so. The defender was not entitled to be paid for carrying out works to rectify problems which it had

caused. The pursuer also contended that when the remedial works were done in 2014, the defender did not follow the guidance given by the manufacturer of the primer. The defender was under an obligation to ensure that the moisture level was appropriate prior to laying the flooring and the defender was responsible for the consequences of not doing so.

[77] In my opinion, it is clear from the decision of the adjudicator that this area of flooring was affected by the global defect when it was laid. The re-laying in July/August 2014 was, as both parties contended, merely a temporary repair. The cause of the defect was identified by the adjudicator and, on his findings, is the responsibility of the defender. It was therefore the defender's responsibility to uplift and replace the flooring in that area, which it did in 2014, because of its initial failure. It was also the defender's responsibility to correct the underlying defect and its temporary repair was known by the parties not to do so. On the adjudicator's findings, the defender is liable for the ultimate cost of repair. The fact that the defender had put in place a temporary repair does not allow it to escape responsibility or to avoid the effect of the adjudicator's overall conclusion, which as I have said dealt with all areas, including this area. The adjudicator was plainly aware of the 2014 area and of it being lifted and re-laid, given that he discusses it in his decision (at paragraphs 6.57 – 6.67). In the circumstances, it cannot in my view be said that he left the 2014 area out of consideration. On the contrary, like the social area, it was covered by his overall reasoning and conclusions.

[78] As I have noted, the adjudicator referred to the contractual duties of the defender as including the requirement to ensure that the surface was dry prior to laying flooring. Standing his findings on those contractual duties, I further conclude that the evidence put forward by the defender about the 2014 area was not relevant.

The Water Fountain

[79] The defender also referred to observations made by the adjudicator when he visited the site, to the effect that the water fountain was leaking badly and this could cause de-bonding and blistering of the floor coverings. The actual text of the adjudicator's notes on this point, recorded in a "Memo" dated 2 May 2017, was as follows:

> "Defects were evident at the escape doors beside the locker area. SW [from the pursuer] and DA [from the Council] confirmed that this had been caused by a leaking water supply from the water fountain located on the wall adjacent to the Base Room. SW confirmed that this was not included within the claim presented in the Adjudication."

This is the only mention of the water fountain in that document and it clearly states that the defects referred to were not part of the adjudication.

[80] If, contrary to that statement (and in view of the references in the decision to the defect affecting the whole of the flooring) the area at the escape doors was in fact part of the adjudication, it is again covered by the adjudicator's overall conclusions. The adjudicator dealt with all of the points raised by the defender, including by its expert, in respect of the causes of the presence of moisture in the screed, whether during or post-construction. His key conclusions on the cause of the bubbling and blistering related to use of the incorrect primer, which was in any event insufficiently applied, and to failure to test for moisture. These were the defender's responsibility, he found. I am therefore of the view that this is another matter which the adjudicator did not require to address explicitly in his decision, it being covered by the route which his reasoning followed and by the conclusions that he reached.

[81] In relation to all three points raised by the defender, I would make the following additional observations.

[82] The present situation is entirely unlike the position in *Buxton Building Contractors Limited* v *Governors of Durand Primary School*, founded upon by the defender, where there was a catalogue of widespread failures by the adjudicator to consider matters raised, and where the adjudicator considered only that part of the dispute referred to him by one party.

[83] A failure by an adjudicator to address an issue referred to him requires to be material, in the sense that it has a potentially significant effect on the overall result of the adjudication: *Keir Regional Ltd* v *City and General (Holborn) Ltd* [2006] EWHC 848 (TCC), cited in *Pilon Ltd* v *Breyer Group plc* [2010] BLR 452). Moreover, In *Thermal Energy Construction Ltd.* v *AE & E Lentjes UK Ltd* [2009] EWHC 408 (TCC), reference was made (at para 19) to the decision of Mr Justice Jackson in *Carillion Construction Limited* v *Devonport Royal Dockyard Limited* [2005] EWHC 779 (TCC), where it was stated (in para 81) that:

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

In the present case, for the reasons I have explained above, it cannot be said that the absence of separate consideration of the three points mentioned by the defender in the adjudicator's decision was material or that it caused any substantial prejudice to the defender.

[84] Accordingly, I am not persuaded that there is any substance in this challenge.

Issue 5 – did the adjudicator act in a way which was procedurally unfair?

[85] The defender submitted that the leaving out of account of these three points by the

adjudicator also amounted to a procedural impropriety such as to render the decision unenforceable as a breach of natural justice.

[86] For the same reasons as given in relation to the previous issue, I do not consider that there is any force in this submission.

Issue 6 – did the adjudicator fail to exhaust his jurisdiction, or fail to give reasons or intelligible reasons?

[87] The defender also submitted that the adjudicator had failed to exhaust his jurisdiction by not dealing with a specific point which the defender had raised as part of its defence, or had given no reasons, or at least no intelligible reasons, for any decision he had reached on the matter. The specific point was that, as stated in its Response to the Referral notice, the defender advanced a defence that the pursuer was withholding or retaining sums due to the defender totalling £71,075.20. This amount was said by the defender to have been withheld on the grounds of claimed breach of contract relating to the bubbling and blistering issue at Chryston, and as a result this sum fell to be deducted from any liability on the part of the defender.

[88] The defender submitted that the adjudicator simply failed to mention or address this defence in any way. He accordingly failed to exhaust his jurisdiction. Separately, he failed to give reasons, or at least intelligible reasons, for his treatment of this defence. This had the result, it was argued, that the decision is unenforceable. As to the law, if a responding party in an adjudication raises a line of defence to a claim made against it, the adjudicator requires to deal with it. If he fails to do so, he has failed to exhaust his jurisdiction: *Bouygues (UK) Ltd* v *Dahl-Jensen (UK) Ltd*, paras 113-114. Reasons given by an adjudicator must show that he has dealt with the matters submitted to him, and must show his conclusions on each issue so

that the informed reader can make sense of them: *NKT Cables A/S* v *SP Power Systems Ltd.* 2017 SLT 494, para 115; *Thermal Energy Construction Ltd* v *AE & E Lentjes UK Ltd*, para 21.

[89] The pursuer accepted, as was plainly the case, that the adjudicator had made no reference to this issue in his decision. The pursuer's position, in short, was that the figure of £71,075.20 did not, on any view, fall to be deducted from the present claim. The sum was made up of four separate amounts. The first of these was money which the pursuer had refused to pay for remedial works carried out at Chryston by the defender in 2014. This appears to be the remedial works to the 2014 area, in respect of which the defender had sought payment of £11,627.07. This, said the pursuer in the adjudication, was "in relation to rectifying a Defect and therefore not a valid payable sum". The second amount related to works done at a building in Uddingston, being a different project from Chryston, subject to a different contract. However, the pursuer had retained £938.06 against future liabilities and that sum had been withheld in respect of the Chryston project. Otherwise, the pursuer submitted, this second component of the sum of £71,075.20 was irrelevant to the present dispute. The third and fourth components also related to different projects and contracts, one at Lennoxtown and one at Woodside, and no sum involved had been withheld in respect of the Chryston project, with the result, the pursuer submitted, that any contentions about these sums were also irrelevant to the present dispute. In short, the pursuer stated that it was withholding £983.06 plus VAT and not the £71,705.20 plus VAT which the defender claimed was being withheld.

ISSUE 6: DECISION AND REASONS

[90] In the absence of any discussion of these matters in the adjudicator's decision, it

would plainly be inappropriate to speculate on the reasons, if there were any, for their exclusion.

[91] However, it is in my view clear that, as explained above, the first component part of the sums claimed to have been withheld did not, on the adjudicator's overall conclusions, fall due for payment by the pursuer. In respect of the second, third and fourth component parts of the sums claimed to have been withheld (with the exception of the sum of £983.06) the pursuer did not, for the purposes of the adjudication, accept that these related to the present dispute. On the contrary, the pursuer made plain its position that in fact the withholding of these sums was irrelevant to the present dispute. It is apparent from the documents submitted by the defender in the adjudication, in support of its claim for deduction of the sums, that the other projects have different contract numbers from the sub-contract at Chryston and it was not suggested to me that they were somehow part of that sub-contract.

[92] The defender pointed out in submissions to the court that no issue about jurisdiction of the adjudicator to deal with these sums had been raised during the adjudication and therefore that point could not now be taken by the pursuer.

[93] While not put by the pursuer expressly as a challenge to the adjudicator's jurisdiction, it was in my view plainly implicit in the pursuer's Reply that the adjudicator should not and indeed could not determine these other disputes, in respect of different projects arising under different contracts. Had the adjudicator decided upon claims made based on the other projects, he would have been open to valid criticism for deciding more than one dispute, which were not under the same contract, without the consent of the parties (see paragraph 8 of the Schedule to the Scheme for Construction Contracts (Scotland) Regulations 1998) .

[94] Separately, even if the adjudicator had been willing to consider the points, there was in fact no appropriate ventilation of the issues such as to allow any proper consideration and determination of them by him. In its Rejoinder, the defender did not respond to the pursuer's points and did not advance any further details or submissions on them. None of the witness statements that I have seen made any reference to the matter. No proper case was ever made out by the defender. A criticism of an adjudicator advanced on the basis that he did not decide upon certain matters, or at least give reasons for his decision on them, in my view has no substance where it relates to matters which were not properly developed as part of the dispute referred to the adjudicator and where fundamental points taken about their relevance were left unanswered. In reality, all that was omitted from the adjudicator's decision was a comment that he could not decide upon these issues.

[95] The adjudicator did not give effect to the admission by the pursuer that the sum of £983.06 had been retained in respect of the Chryston dispute with which he was dealing. This sum should have been deducted by the adjudicator in arriving at the sum due by the defender to the pursuer. However, his failure to mention this sum or how he proposed to deal with it, given its amount, is not material and has caused no substantial prejudice to the defender.

[96] In *NKT Cables A/S* v *SP Power Systems Ltd*, Lady Wolffe held that the adjudicator had failed to deal with a number of substantive issues and hence had failed to exhaust his jurisdiction. The court further held that, if he had indeed considered these points, the adjudicator had failed to state that he had done so or to give reasons as to why he had rejected them. Lady Wolffe found that the adjudicator had failed to deal with no less than six substantive defences advanced by the defender, each of which was a free-standing defence. The failure was material as each of the defences afforded a complete defence to the

claims to which they were related. It seems to me that the facts of that case disclose failures which are plainly material and substantive and are of a wholly different character from the point complained of in the present case.

[97] In *Thermal Energy Construction Ltd* v *AE & E Lentjes UK Ltd*, the claimant, a sub-contractor to the defendant, sought payment on the basis of an allegation that the defendant had failed properly to value and certify payment for certain works carried out by the claimant. The adjudicator awarded the claimant £904,567.60, plus VAT. The defendant had presented a defence of set-off and a counterclaim, which in essence was that the defendant had suffered a liability of £3,750,000 to its client as liquidated damages, caused by the claimant's alleged failure to achieve completion of certain aspects of the works in terms of the contract. The adjudicator had wholly failed to deal with that matter. His decision was held to be unenforceable. It was held that the defendant had lost the opportunity of having the adjudicator decide on that defence (which was of course a complete defence to the whole claim) and that even if the defendant was to seek to have a further adjudication on the point it would have to pay up in the meantime and hence the defendant had suffered substantial prejudice. Once again, the failure in that case was of a wholly different scale and character from any failure of the adjudicator in the present case.

[98] For these reasons, I do not consider the absence in the adjudicator's decision of any reference to, or consideration of, the issues concerning the retained sums, and the absence of any reasons for any views reached on them, to be material or to have caused substantial prejudice to the defender. Accordingly, I do not consider that this criticism of the adjudicator's decision is well-founded.

Conclusion

[99] For these reasons, I shall sustain the first, second and third pleas-in-law for the pursuer, repel the defender's pleas, and find the defender liable to make payment to the pursuer of the sum first concluded for, £430,654.44, plus VAT.