OUTER HOUSE, COURT OF SESSION

[2020] CSOH 19

CA142/19

OPINION OF LORD ERICHT

In the cause

TRANSFORM SCHOOLS (NORTH LANARKSHIRE) LIMITED

Pursuers

against

(FIRST) BALFOUR BEATTY CONSTRUCTION LIMITED,
and (SECOND) BALFOUR BEATTY KILPATRICK LIMITED

Defenders

Pursuer: Walker QC, McKinlay; Anderson Strathern LLP
Defenders: Borland QC, Manson; Pinsent Masons

18 February 2020

Introduction

[1] The pursuers engaged the defenders in respect of construction work to be undertaken at various schools in North Lanarkshire, including the Stepps Primary and Stepps Cultural Centre Project (the "Stepps Project"). A dispute between the parties in relation to latent defects was submitted for adjudication. The adjudicator found in favour of the pursuers. The pursuers subsequently raised a commercial action for enforcement of the adjudicator's decision and payment of various other sums. The matter came before me on a motion by the pursuers for enforcement of the adjudicator's decision. This was opposed by

the defenders on the basis of the use made by the adjudicator of certain documents bearing to be "without prejudice".

The adjudicator's decision

[2] On or about 24 May 2005, the pursuers entered into a Project Agreement with North Lanarkshire Council. By a building contract dated 27 May 2005, the pursuers engaged the defenders jointly and as an unincorporated joint venture to perform the pursuers' obligations under that Project Agreement. This comprised, *inter alia*, the carrying out and completion of the design, construction, fitting-out, equipping, testing and commissioning of the whole works to be undertaken at various schools in North Lanarkshire. One of these schools was the Stepps Project.

[3] The Stepps Project was constructed between 2006 and 2007 by the defenders. In or around August 2015, the pursuers' management company gave notice to the defenders of drain blockages. A survey of the drainage system found that there were various defects, such as a collapsed pipe, displaced joints, a reformed sewer and quantities of debris in the pipework. Subsequent investigation disclosed further defects. In about June 2019, a drain collapsed requiring emergency repairs.

[4] In around July 2019, a dispute between the pursuers and defenders in respect of the drainage crystallised and a Notice of Adjudication was served and an adjudicator appointed. On 6 September 2019, the adjudicator issued his decision. The adjudicator found as follows:

> "1. The latent defects, those concerning the foul drainage identified in the three CCTV surveys conducted between 2015 and 2017 and summarised at paragraph 50 of the Referral, are Latent Defects as defined in the Contract.

2. [The defenders] liable to [the pursuers] in damages of £4,029,574.58, net of VAT, in respect of Costs and Direct Losses incurred by [the pursuers] as a consequence of these Latent Defects affecting the Works.

3. [The defenders] shall pay the said sum of £4,029,574.58 to [the pursuers] within 14 days of the date of this Decision.

4. [The pursuers'] claim for interest is dismissed.

5. [The defenders'] claims are dismissed. [The pursuers'] claim in this Adjudication under clause 36.1 has not prescribed and is not premature.

6. As between the parties and without affecting their joint and several liability for my fees, [the defenders] shall pay my invoiced fees, there are no expenses. If [the pursuers] pays any amount towards my fees, [the defenders] shall reimburse that amount to it within seven days of a written request to do so."

The "without prejudice" correspondence

[5] In his decision, the adjudicator referred to three documents which bore to be "without prejudice":

a A letter from the first defender to the pursuers' solicitors (Fladgate LLP) dated 12 October 2016. The letter stated "Based on the survey information provided we would propose to carry out the following works on a without prejudice basis or without admission of liability" and then went on to list specific work such as survey, reconstructing manholes following investigations, repairs to reformed sections of pipe and the remedying of various open joints.

b A letter of 8 November 2016 from the first defender to the pursuers' solicitors setting out various proposed works. The letter concluded with the following paragraph:

> "We note that, although you claim in your correspondence that there have been breaches of contract on the part of Balfour Beatty, nothing has been provided to evidence that assertion and accordingly our proposals above for the carrying out of remedial works remains on an entirely without prejudice basis without admission of liability."

c A letter from the second defender to the pursuers' agents dated 16 January 2017.

That letter was headed:

> "**B7 Stepps Primary School – Drainage**
> **Without Prejudice**"

The letter stated:

> "The 'without prejudice' offer of remedial works that we made in our letter of 8 November 2016 was based on the surveys that you have provided to us and our own inspections of the alleged defects."

The letter went on to disagree with the pursuers as to whether certain defects existed and to maintain that the remedial work proposed by the defenders would be adequate.

[6] These "without prejudice" letters were part of a chain of letters between the first defender and the pursuers' solicitors running from 8 March 2016 to 10 December 2018.

Submissions for the defenders

[7] Senior Counsel for the defenders submitted that the court should refuse to enforce the adjudicator's award for five reasons:

1. The "without prejudice" correspondence was completely protected against any use in the adjudication (*Richardson* v *Quercus Limited*, 1999 SC 278; *Bradford & Bingley* v *Rashid*, [2006] 1 WLR 2066; and *Ofulue* v *Bossert*, [2009] 1 AC 990).
2. The adjudicator relied upon the protected items of correspondence to a material extent in determining an important issue critical to liability, namely prescription.
3. The approach of the adjudicator offended against the public policy which underpinned the "without prejudice" privilege (*Rush & Tomkins Limited* v *Greater London Council*, [1989] AC 1280; *Richardson*; *Bradford & Bingley;* and *Ofulue*). If

parties could not enter into "without prejudice" settlement discussions without the risk of these being relied on in an adjudication, the process of adjudication would be damaged.

4. The adjudicator was guilty of a material error in admitting, considering and relying upon the "without prejudice" correspondence.
5. The adjudicator's error amounted to a material breach of natural justice. The defenders were denied a fair opportunity of presenting their case (*Costain Limited* v *Strathclyde Builders Limited*, 2004 SLT 102). In appropriate circumstances the court could refuse to enforce an adjudicator's decision which relied on without prejudice correspondence (*Ellis Building Contractors Limited* v *Goldstein*, [2011] EWHC 269 (TCC)) and can give rise to apparent bias (*Specialist Ceiling Services Northern Limited* v *ZVI Construction (UK) Limited*, [2004] BLR 403; *Helow* v *Advocate General*, [2007] SC 303; *Coulson on Construction Adjudication* paragraphs 12.33 to 12.35).

Pursuer's submissions

[8] Senior Counsel for the pursuers submitted that the decisions of adjudicators were to be enforced pending the final determination of disputes (*Macob Civil Engineering Ltd* v *Morrison Construction Ltd* [1999] BLR 93 at para [14]). The policy of the courts was to take a robust approach to enforcement of adjudicator's decisions. The court would only refrain from enforcing in limited circumstances (*Keating on Construction Contracts* (10th edn.) at paragraph 18-056; *GT Equitix Inverness Ltd* v *Board of Management of Inverness College* [2019] SLT 957 at para [34]; *Guidance by the Commercial Court Judges on the Enforcement of Adjudication Awards* January 2019). The courts are to treat adjudicator's decisions as binding

and enforceable until any challenge is finally determined, even if the adjudicator errs on facts or law or makes a procedural error (*GT Equitix* at para [34]; *Macob* at paras [12] to [14], [19], [20]; *Keating* at paragraph 18-065; *Bouygues UK Ltd* v *Dahl-Jensen UK Ltd* [2000] BLR 522 at paras [11] to [15] and [27] to [28]; *Outwing Construction Ltd* v *H Randall & Son Ltd* [1999] BLR 156 at 160). Any breach of natural justice required to be material and only in the plainest of cases would a challenge on the basis of breach of natural justice be successful (*Cantillon Ltd* v *Urvasco Ltd* [2008] BLR 250; *Balfour Beatty Construction Ltd* v *Lambeth LBC* [2002] BLR 288; *Carillion Construction Limited* v *Devonport Royal Dockyard Limited* [2006] BLR 15 at paras [53.3], [84] and [87]; *Dickie & Moore Limited* v *McLeish & Ors* [2019] SLT 1487 at para [33]; *Ardmore Construction Ltd* v *Taylor Woodrow Construction Ltd* [2006] CSOH 3 at para [48]; *GT Equitix* at para [34]). The test for apparent bias was set out in *AMEC Capital Projects Ltd* v *Whitefriars City Estates Ltd* [2005] BLR 1 at para [16] and *Porter* v *Magill* [2002] 2 AC 357 at para [103]. It was incumbent on the party resisting enforcement to plead and establish a basis to justify a court refraining from enforcement (*GT Equitix* at para [35]).

[9] Counsel submitted that the adjudicator had provided both parties with an opportunity to make representations in relation to the "without prejudice" material. The adjudicator considered submissions by both parties on whether the "without prejudice" material was admissible. He was correct in law to reach the view which he did. Even if he was not correct as a matter of law, he was not plainly wrong and the finding was one which was open to him to reach (*Richardson* v *Quercus Limited*). Even if the adjudicator erred on law there was no breach of natural justice as parties had an opportunity to make representations. The defender's case does not fall within the examples of successful natural justice challenges provided in *Keating* at paragraph 18-094. There was no basis for the defender's assertion of bias. The existence of "without prejudice" wording was not

determinative of the issue of whether the correspondence was a relevant acknowledgement for the purpose of stopping prescription (*Richardson* v *Quercus Ltd* and *Bradford & Bingley* v *Rashid*).

Discussion and decision

[10] It is important to emphasise at the outset that this action came before me on the limited issue of whether the adjudicator's decision should be enforced by the court.

[11] The principles to be applied in considering whether to enforce an adjudicator's decision are conveniently set out in *Carillion Construction* at paragraph 52 as follows:

> "1. The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish).
>
> 2 The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law…;
>
> 3 Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision….
>
> 4. Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice."

[12] The final determination of the questions considered by the adjudicator (in particular whether the claim has prescribed and whether the "without prejudice" letters are admissible) is a matter for this court in a later stage of this action. The facts and law as set out in this opinion relate only to the question of enforcement and are not intended to be binding on the court in its final determination. Any reference to the "without prejudice" letters is made under reservation of the defenders' right to argue in due course that they are not admissible in relation to the final determination of this action. Nothing in this opinion is

to be taken as expressing a binding view as to whether the adjudicator was correct in his conclusions on prescription or on admissibility of the "without prejudice" letters.

[13] The challenge to enforcement in the current action proceeds under the third principle set out in *Carillion*, namely natural justice. The defenders' fourth plea-in-law is to the effect that the adjudicator having acted to a material degree in breach of natural justice, the decision is unenforceable and the decision should be reduced *ope exceptionis* and the defenders *assoilzied* from the conclusions which seek enforcement of the decision. The defenders also challenge enforcement on the grounds of apparent bias. Their fifth plea-in-law is to the effect that the adjudicator having acted in a manner such as to create a situation of apparent bias, with the result that his decision is unenforceable, the decision should be reduced *ope exceptionis* and the defenders *assoilzied* from these conclusions.

[14] Both of these challenges turn on the use made by the adjudicator of letters which bore to be "without prejudice".

[15] The policy underlying the "without prejudice" rule was set out by Lord Griffiths in *Rush and Tompkins* v *GLC*:

> "The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver L.J. in *Cutts v. Head* [1984] Ch.290, 306:
>
> > 'That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in *Scott Paper Co. v. Drayton Paper Works Ltd.* (1927) 44 R.P.C. 151, 156, be encouraged fully and frankly to put their cards on the table. ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.'" (p1299 D)

[16] However, the scope of the "without prejudice" rule does not extend to exclude all consideration of documents which bear to be "without prejudice". Where there is a dispute as to whether the rule applies to a particular document, the court is entitled to look at the document, even if it bears the words "without prejudice", in order to make a decision as to whether the "without prejudice" rule applies to it and accordingly whether or not it is admissible. Thus for example, in *Rush and Tompkins*, the House of Lords considered whether "without prejudice" documentation between the plaintiffs and the first defendant was admissible as between the plaintiffs and the second defendant. In *Richardson* v *Quercus Ltd* an Extra Division considered whether the surrounding circumstances had obliterated the effect of the words "without prejudice" in a letter so as to make a letter admissible (p283F to 284C, 290 F-G).

[17] In the context of the current case, the significance of the "without prejudice" letters lies in relation to the question of whether the obligation to make payment has prescribed.

[18] The adjudicator found that the prescriptive period commenced in late autumn 2013 (paragraphs 142, 153, 175). The adjudication commenced more than 5 years after late autumn 2013. Accordingly, the obligation would have prescribed unless it had been relevantly acknowledged during the prescriptive period under section 10(1)(b) of the *Prescription and Limitation (Scotland) Act 1973*, or the prescriptive period fell to be extended under section 6(4) of that Act.

[19] The pursuers argued before the adjudicator that both of these sections applied and the obligation had not prescribed.

[20] The adjudicator rejected the pursuers' section 10(1)(b) argument, finding that the letters of 14 October and 8 November were not a relevant acknowledgement in terms of

section 10. He considered the terms of the "without prejudice" letters, and concluded that their wording did not constitute a clear admission of liability as required by section 10(1)(b) (paragraph 197.4).

[21] However the adjudicator accepted the pursuers' section 6(4) argument. He considered letters dated 8 March 2016, 12 October 2016, 14 October 2016, 8 November 2016, 16 January 2017, 5 June 2017, 1 February 2018, 21 March 2018, 14 June 2018, 26 November 2018 and 10 December 2018. These included the letters of 12 October 2016, 8 November 2016 and 16 January 2017 which bore to be "without prejudice". He concluded:

> "198. Considering this correspondence as a whole for the purposes of s. 6(4) of the 1973 Act, I am satisfied that by its correspondence in the period from the 8th March 2016 and prior to 1st February 2018, [the defenders], by stating its continuing commitment to remediate Latent Defects if they were demonstrated to be such induced or contributed to [the pursuers] erroneously believing that this would be done without the need for formal proceeding and that, in consequence, it refrained from making a relevant claim against [the defenders]. I am not persuaded, if such is alleged, that during this period, [the pursuers] could, with reasonable diligence have discovered this error.
>
> 199. It follows that, by operation of s. 6(4), the period from the 8th March 2016 to the 1st February 2018, a period of just less than 23 months, is not to be reckoned as part of the prescriptive period that I have concluded under Issue 2D commenced in the late Autumn of 2013. Thus, [the pursuers'] claim in this adjudication has not yet prescribed."

[22] Before coming to his conclusions on sections 10(1)(b) and 6(4), the adjudicator gave careful consideration to the prior question of whether the "without prejudice" letters were admissible.

[23] In their initial submissions to the adjudicator (the pursuers' Referral Notice of 25 July 2019, the defenders' Response of 7 August 2019 and the pursuers' Reply of 15 August 2019) neither the pursuers nor the defenders identified the use of "without prejudice" material as being an issue in the adjudication. The issue was identified and raised for the first time

ex proprio motu by the adjudicator in his List of Issues and Observations dated 19 August 2019. The adjudicator is legally qualified as an English barrister. He raised the following observation, adding emphasis by his use of bold type:

> "93 I note that the 16th January 2017 letter referred to in paragraph 21 of the Reply and in paragraph 44.3 of the Mr Weare's WS [witness statement] accompanying the Reply is headed 'without prejudice'. I have not read that letter and propose to ignore paragraph 44.3 of the witness statement and the reference to that letter in paragraph 21 of the Reply **pending submissions on whether I may read that letter**".

[24] The pursuers responded to that observation (Response to the adjudicator's List of Issues and Observations dated 23 August 2019) stating:

> "14. Paragraph 93.
>
> 14.1 [The pursuers] submits that the letter dated 16 January 2017 is not without prejudice and may be read.
> 14.2 The letter needs to be viewed in the context of the relevant chain of correspondence and in particular its reference to an earlier open letter dated 8 November 2016. That earlier letter sets out [the defenders'] remediation proposals and refers to another open letter dated 12 October 2016 which once again sets out [the defenders'] remediation proposals."

[25] The defenders also responded to the observation (Submissions dated 23 August 2019) stating:

> "2.3.8 Paragraph 26 of the List of Issues refers to the [pursuers'] position that it requested the [defenders] to put forward a remediation proposal in 2016 for the drainage and it did so by letters dated 12 October 2016 and 8 November 2016. This is taken from paragraph 45 of the Referral.
> 2.3.9 The [pursuers] fails to note that the letters referred to and relied on were written without prejudice. As a result, the Adjudicator *cannot* consider the content of those letters. Indeed, the writer is somewhat surprised that the [pursuers'] representatives consider it appropriate to make reference to these letters given that they are both written without prejudice. For the avoidance of doubt, given the without prejudice status of those letters, the content of the letters cannot be said on any level to amount to a relevant acknowledgement on the part of the [defenders] which the [pursuers] seeks to argue in the Reply"……
>
> 9.2 The Adjudicator has correctly noted that the letter dated 16 January 2017 referred to in the Reply and Mr Weare's statement is headed without prejudice. As noted above, that is not the only correspondence issued on a without prejudice basis.

> Letters dated 12 October 2016 and 8 November 2016 are also without prejudice and so should not be reviewed by the Adjudicator."

The defenders went on to make specific submissions about the significance of these letters being without prejudice, making reference to *Richardson* v *Quercus*.

[26] In a Further Submission dated 30 August 2019 the pursuers submitted under reference to *Richardson* v *Quercus* that the "without prejudice" correspondence could amount to a relevant acknowledgement for the purposes of section 10(1)(b). (Paragraph 32.)

[27] In a further submissions document dated 30 August 2019 the defenders made further submissions to the effect that the "without prejudice" letters set out proposals made in a genuine attempt to resolve matters on a without prejudice basis could not be referred to, relied upon or reviewed by the adjudicator. (Paragraph 2.17.)

[28] The adjudicator gave careful consideration to the arguments of both parties on the admissibility of the "without prejudice" correspondence:

> "34. [The pursuers] also referred to a 16th January 2017 letter in this context, a letter to which I referred in paragraph 93 of the [List of Inquiries]:
>
> > 'I note that the 16th January 2017 letter referred to in paragraph 21 of the Reply and in paragraph 44.3 of the Mr Weare's WS accompanying the Reply is headed 'without prejudice'. I have not read that letter and propose to ignore paragraph 44.3 of the witness statement and the reference to that letter in paragraph 21 of the Reply **pending submissions on whether I may read that letter.**'
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> 35. [The defenders] agrees with this statement but says that this was not the only such letter. Its letters of the 12th October and 8th November 2016 also being without prejudice, thus should not be reviewed by the Adjudicator.
> 36. [The pursuers] says that the 16th January 2017 letter is not without prejudice and may be read. It needs to be viewed in the context of the relevant chain of correspondence, in particular its reference to the open latter of the 8th November 2016 which sets out [defenders'] remediation proposals and, in turn, refers to another open letter of the 12th October 2016 which also sets out [defenders] remediation proposals.
> 37. Considering first the 12th October and 8th November 2016 letters, these, which both concern survey and remedial works which [the defenders] proposes to carry out in connection with the drainage, are not headed 'without prejudice'. However both state that the works proposed are on a without prejudice basis without admission of liability. Considered the context of the letters, specifically

> Messrs Fladgate's [ie the pursuers' solicitors] letters of the 9th September and 14th October 2016, I consider that the use of the words 'without prejudice' was intended to convey that by offering to carry out the works proposed, [the defenders] was not admitting liability, not that the correspondence was to be regarded as without prejudice in the sense of not being referable to in subsequent proceedings.
> 38. As for the 16th January 2017 letter, although this is headed 'Without Prejudice', not only does it refer back to correspondence, [the defenders'] letter of the 8th November 2016 which, for reasons given above, I have concluded is not subject to the without prejudice rule, it is part of a chain of correspondence and meetings which continues into 2017 about whether, and if so, what defects in drainage are identified in the surveys being carried, and what works are necessary to address those defects; none of which was stated by [the defenders] at the time, or contended by it in this Adjudication, to be subject to the without prejudice rule. Rather, as [the defenders] accepts, during this period it was working with [the pursuers] to investigate the matter and understand the extent, if any, of [the defenders'] liability.
> 39. Thus, I conclude that, like in the earlier correspondence, the use of the words 'without prejudice' in the 16th January 2017 letter were intended to make clear, by proposing to carry out the works referred to, [the defenders] was not admitting liability, not that the letter was not to be referred to in subsequent proceedings."

[29] In paragraph 93.9 the adjudicator considers the question of whether what is stated in "without prejudice" correspondence can amount to a relevant acknowledgment for the purposes of section 10(1)(b), and discusses *Richardson* v *Quercus* in that context. That need not concern us in considering enforcement of his decision, as he found in favour of the defenders on that point.

[30] In considering whether the adjudicator's decision should be enforced the focus must be on the section 6(4) case and the use made by the adjudicator of the "without prejudice" letters in concluding that prescription had not operated as the prescriptive period had been extended. The adjudicator's approach was to look at the correspondence as a whole. He looked at letters over a 23 month period, most of which were not marked "without prejudice." He took the view, based on *Richardson* v *Quercus*, that it was possible for a court, and thus an adjudicator, to conclude that words in a letter such as "without prejudice to liability" do not, when considered in the wider relevant context, necessarily mean what they appear to say (paragraph 197.2). In looking at the correspondence as a whole, he placed

particular significance on letters which were not marked "without prejudice" and both pre-dated and post-dated the "without prejudice" letters:

> "197.1 In its letter of the 8th March 2016 [the defenders], after denying, for reasons given in that letter by reference to various Latent Defects alleged by [the pursuers], the suggestion that it was in breach of contract or negligent, concludes: 'we reaffirm our commitment to resolving Latent defects that are demonstrated and agreed between us, in accordance with the building contract'. These words ….. are a commitment from [the defenders] to resolve Latent Defects, by which I accept is meant, remediate such defects, if they are demonstrated to be such.
>
> 197.2 The letter of the 12th October 2016 identifies certain works which [the defenders] proposes to carry out 'on a without prejudice basis and without admission of liability'. I have considered *Richardson v. Quercus* under Issue 2B above, concluding that it stands for the proposition that it is possible for a court, thus an adjudicator, to conclude that words in a letter, such as 'without prejudice to liability' do not, when considered in the wider relevant context, necessarily mean that they appear to say.
>
> 197.3 I have been provided with very little correspondence between the 8th March 2016 and the date of this letter. However it appears in subsequent correspondence, specifically Fladgate's letter of the 14th October, [defenders'] letter of the 8th November and Fladgate's letter of the 15th December 2016, that [the pursuers] did not consider [the defenders'] proposals adequate to address what it considered were [defenders'] breaches and, this clearly being stated in [the defenders'] letter of the 8th November 2016, [the pursuers] considered that nothing had been provided to evidence [the pursuers'] assertion that it had been in breach of contract: 'accordingly the proposals above for the carrying out of the remedial works remain on entirely without prejudice basis without admission of liability'.
>
> ….
>
> 197.5 However, despite the 'without prejudice as to liability' qualification, and the parties disagreeing about what remedial work was required, this correspondence is consistent with [the defenders'] letter of the 8th March 2016, in that, as [the pursuers] says, it shows [the defenders'] continuing commitment to remediate Latent Defects if they are demonstrated to be such. A commitment that was reiterated in at a time when, by Fladgate's letter of the 12th October 2016, [the pursuers] was stating that if [the defenders] did not respond with proposals, [the pursuers] would 'proceed with the required remediation works without further reference to you, save in relation to the cost of the works which it will pursue against the Joint Venture …'. Thus indicating an intention to address Latent Defects without the need for such proceedings.

197.6 Other than to confirm that the proposals previously made were without prejudice, [the defenders'] letter of the 16th January 2017 does not take matters further in respect of [the pursuers'] case under s. 10(1)(b). …, the letter concludes 'we are willing to work with your client and are prepared to continue discussions in that respect and agree proposals where that is appropriate but we can only do that based on the evidence that is available to us. Until such times you can explain the obvious inconsistencies between the evidence that you have provided and the statements that you make on what remedial works are required and provide substantiation for the assertion that the JV is liable for all the of the defects you allege, our position remains in our letter of 8 November 2016 for the present time.'

197.7 …. that letter … it reiterates [the defenders'] previous commitment to resolve Latent Defects if they are demonstrated to be such.

197.8 The letter of the 27th June 2017 refers to a meeting of the 30th May 2017; matters discussed at that meeting being recorded in Fladgate's letter of the 5th June 2017. There is nothing in Fladgate's letter or in the 27th June 2017 letter to suggest that the meeting, or the letter itself were intended to be without prejudice. Rather it appears from the notes of the meeting and [the defenders'] letter, that [the defenders] had accepted that, at least to some extent, it had a liability for certain of the defects in the foul drainage identified by [the pursuers]. Thus, I do not accept [the defenders'] submission that the meeting and letter were without prejudice.

197.9 The 27th June 2017 letter states in respect of foul drainage runs having sags of 20% or greater that 'we will now prepare detailed proposals to remedy out of tolerance areas suspended under the piled concrete slab'. In respect of the popups, the letter accepts that the Hamilton survey have highlighted that some have open joints that will require repair but further surveys will require to be undertaken to obtain a better understanding the scope this work before any remedial works are proposed'. The letter concludes by requesting confirmation 'that we are able to agree access and methodology direct with your client commence remedial work of two out of tolerance areas and undertake further surveys'.

197.10 ….., by proposing to carry out such work [the defenders], is reinforcing the impression given in its earlier correspondence that it is committed to remediating Latent Defects, if they are demonstrated to be such without the need for legal proceedings. This impression was, I am satisfied, also reinforced by [the defenders] paying for the 2017 Hamilton Survey the purpose of which was to establish the extent to which there were Latent Defects in the pop-ups.

197.11 [the defenders'] letter of the 1st February 2018 addresses a number of different matters. In respect of the design of the drainage system and the

hangers, it is clear that [the defenders] is not accepting liability and that any proposals for work associated with the hangers are on a without prejudice basis. Thus, in respect of those matters, this letter cannot be read as an unequivocal, absolutely clear, admission of the obligations which [the pursuers] seeks to enforce by its claim in this Adjudication of the type required by s. 10 (1) (b).

197.12 The letter also addresses under a separate margin heading 'October Surveys' the content of the October 17 pop-up surveys. It states that [the defenders] 'agree that it appears that the 11 areas of open/displaced joints identified as open or displaced will require remedial detailed to be agreed … prior to work being undertaken'. There is no suggestion that this section of the letter or the remedial work to which it refers is also intended to be carried out without prejudice. Indeed, it appears to refer back to the work to the pop-ups which [the pursuers] accepted was required, subject to further surveys to establish the extent of such work, in its letter of the 27th June 2017. This is, I am satisfied, and unequivocal, absolutely clear, admission of the obligations which [the pursuers] seeks to enforce by its claim in this Adjudication of the type required by s. 10 (1) (b), in so far as those obligations concern the 11 areas of open/displaced joints referred to.

197.13 However, the letter concludes by stating 'We concur that we need to reach agreement on what appropriate remedial solution needs to be put in place, however we are not in a position to provide a remedial solution to the drainage system as a whole because we fundamentally disagree that design principles behind the drainage details are incorrect, that the design has failed to accommodate the anticipated movement, or that the drains have not been laid true to line between manholes. We consider that the solution that needs to be agreed between our expert engineers is one to implement rectification works to deal with any workmanship issues that may have led to areas of the drainage being out-with standard industry tolerances. If we can agree to this, our offer to assist the remedial works naturally still stand'.

197.14 Given these words, [the pursuers] cannot have been in any doubt that [the defenders] did not consider that there were Latent Defects due to defects in the design of the foul drainage, specifically the hanger system, or that, despite the impression given by [the defenders] in its earlier correspondence that it was committed to remediating Latent Defects, if they are demonstrated to be such, that it would do so to the extent required by [the pursuers], that is rectifying the whole of the foul drainage because of defects in the hanger system, without the need for formal proceedings.

197.15 The letter of the 21st March 2018, concerns a proposal to share on a 50/50 basis reasonable costs incurred in carrying out intrusive investigation work between MH F2-F4, [the defenders] stating that its agreement to share these cost 'shall in no way be construed as any admission of liability on our part in respect of these issues: rather we agree that this provides a positive

> opportunity to information gathering scope any remedial works that may be required (if any). … Neither, read in the context of [the defenders'] letter of the 1st February 2018, does this letter suggest that [the defenders] is committed to remediating Latent Defects to the extent required by [the pursuers], that is rectifying the whole of the foul drainage because of defects in the hanger system, without the need for formal proceedings.
>
> 197.16 [The defenders'] letter of 14th June 2018, refers to 'a slide deck which explains the works to the external drainage which [the defenders] propose to carry out on a without prejudice basis …'. I have not been provided with a copy of the slide deck referred to, thus am unable to establish whether any of the external drainage referred to concerns [the pursuers'] claims in this adjudication. ….. Neither does this letter suggest that [the defenders] is committed to remediating Latent Defects to the extent required by [the pursuers], that is rectifying the whole of the foul drainage, without the need for formal proceedings.
>
> 197.17 The letter of the 26th November 2018 refers to the intrusive investigation works which it was proposed in [the defenders'] letter of the 21st March 2018 to share on a 50/50 basis which, it appears that letter, had now been carried out. ….. Neither does this letter suggest that [the defenders] is committed to remediating Latent Defects to the extent required by [the pursuers], that is rectifying the whole of the foul drainage, without the need for formal proceedings.
>
> 197.18 It is, in any case, clear from Fladgate's letter of the 10th December 2018, that [the pursuers] realised that agreement would not be reached with [the defenders] about what remedial works were required, stating that it intended to proceed with a remedial scheme without reference to [the defenders]."

[31] It is clear from the adjudicator's decision and the submissions made to him by parties that the task of the adjudicator was to decide whether or not the pursuers' claim had prescribed. In order to do that he had to make a decision as to whether the "without prejudice" letters were admissible. Having considered parties' submissions and the case law to which he was referred he decided that they were admissible. Then as a consequence of his decision that they were admissible he took them into account in deciding that the prescriptive period had been extended under section 6(4). He considered them in the context of the whole chain of correspondence since March 2016, giving greater weight to

letters which were not marked "without prejudice", such as the letter of 16 March 2016 and those subsequent to January 2017.

[32] In my opinion the adjudicator was entitled to consider the question of whether the letters were admissible. He was entitled to consider the submissions which the parties had made to him in that regard. A court would be entitled to look at the "without prejudice" documents and make a decision as to whether they were admissible. There is no reason why an adjudicator should not be entitled to do likewise. The adjudicator in this case may or may not have been right to decide they were admissible. But if he was wrong, then that was an error of law, and errors of law on the part of the adjudicator do not justify this court in refusing to enforce the adjudicator's decision (*Carillion*, *supra*).

[33] This court will however be justified in refusing to enforce the adjudicator's decision if there has been a serious breach of natural justice (*Carillion*, *supra*). The application of the principles of natural justice in the context of adjudication was given careful analysis by Lord Drummond Young in *Costain Ltd* v *Strathclyde Builders Ltd:*

> "[10]…. I am of opinion that certain minimum standards of conduct are required from adjudicators, and that those standards are found in the well-established principles of natural justice. These are traditionally expressed in the maxims *nemo judex in causa sua*, no one appointed to determine a dispute should have any bias or personal interest in the outcome of that dispute, and *audi alteram partem*, both sides must be given a fair opportunity to present their cases. In the context of adjudication, it is usually the second principle that will be relevant. I mention this because in certain of the English decisions on the applicability of the principles of natural justice to adjudicators there has been a tendency to run the two principles together, and to treat a failure to give one side a fair opportunity to present its case as a form of bias. In some relatively extreme cases, such as *Discain Project Services Ltd v Opecprime Development Ltd,* [2001] BLR 285, that may be justified. Nevertheless, the existence of bias is not essential to the principle that parties must be given a fair opportunity to present their respective cases, and usually it will only be necessary to consider the latter principle."

[34] The relationship between "without prejudice" documents and the rules of natural justice has been considered in two English first instance cases. In both cases the court enforced the adjudicator's decision.

[35] In *Specialist Ceiling Services Northern Limited* v *ZVI Construction UK Limited* the defendant opposed enforcement of adjudication by the court on the ground that the adjudicator should have recused himself after the claimant had submitted without prejudice material to him in the Referral, and that as a result the adjudication was unfair and should not be enforced. The Referral stated that a "without prejudice" offer to settle by the defendant had been rejected by the claimant. A "without prejudice" covering letter bearing to enclose the offer was submitted to the adjudicator, but the breakdown of the offer was not. The defendant's solicitor objected to the adjudicator continuing with the adjudication. The adjudicator refused the objection on the basis that he had not had sight of the offer and was not aware of its content. The court held that the adjudicator was entitled to do so: the adjudicator was entirely uninfluenced by the "without prejudice" material he had seen, and had "in effect brushed aside the material and properly ignored it when reaching the various decisions on the issues before him" (para [26]).

[36] In *Ellis Building Contractors Limited* v *Vincent Goldstein*, after the notice of adjudication had been issued the defendant's solicitor sent to the claimant's solicitor a "without prejudice" letter offering to settle the adjudication for a specified sum. The claimant referred to the letter in its Reply. The defendant did not object to the reference nor rebut the Reply. The defendant opposed enforcement of the adjudication by the court on the basis that there was apparent as opposed to deliberate bias on the part of the adjudicator in allowing in and not raising with the parties the "without prejudice" letter. The court held that the deployment of the "without prejudice" letter was improper and the material was not

admissible, but the adjudicator did not base his decision on its contents and on the facts of the case there was no legitimate fear that the adjudicator might not have been impartial. In his judgment Akenhead J considered the use of "without prejudice" material in adjudications:

> "25. The improper deployment of 'without prejudice' material in adjudication is something which happens in adjudication as in court although this Court has at least anecdotally seen an increase in this behaviour in adjudication. This often arises because parties represent themselves or are represented by consultants who are not legally qualified and, perhaps, they do not fully understand that truly 'without prejudice' communications are privileged and should not be referred to in any legal or quasi-legal proceedings, including adjudication. Whilst if 'without prejudice' communications surface in a court, the judge being legally qualified and experienced can usually put it out of his or her mind, it is a more pernicious practice in adjudication because most adjudicators are not legally qualified and there will often be a greater feeling of unease that the 'without prejudice' material may have really influenced the adjudicator. This Court can only strongly discourage parties from deploying 'without prejudice' communications in adjudication."

[37] Akenhead J then went on to review the authorities and came to the following conclusion:

> "29. One can draw the following conclusions about the consequences and ramifications of the improper submission of 'without prejudice' material before an adjudicator:
>
> (a) Obviously, such material should not be put before an adjudicator. Lawyers who do so may face professional disciplinary action.
>
> (b) Where an adjudicator decides a case primarily upon the basis of wrongly received 'without prejudice' material, his or her decision may well not be enforced.
>
> (c) The test as to whether there is apparent bias present is whether, on an objective appraisal, the material facts give rise to a legitimate fear that the adjudicator might not have been impartial. The Court on any enforcement proceedings should look at all the facts which may support or undermine a charge of bias, whether such facts were known to the adjudicator or not."

[38] The current case is far removed from the scenario deplored by Akenhead J. The current case was not a situation where the adjudicator was improperly made aware of an

irrelevant and collateral "without prejudice" offer to settle which he ought to put out of his mind. In the current case the question of the admissibility of the "without prejudice" letters was one which the adjudicator had to decide as one of the central issues in the adjudication. The adjudicator was legally qualified. It was the adjudicator himself who identified admissibility as being a central issue. The adjudicator gave both parties an opportunity to make submissions on the question. He considered their submissions and the case law to which he was referred and came to a reasoned decision on the question. It cannot be said that the submission of the letters to the adjudicator, or the way in which he dealt with them, was in any way improper or involved any breach of natural justice or apparent bias.

Order

[39] I shall sustain the pursuer's fifth plea-in-law and repel the defenders' fourth and fifth pleas in law and grant decree in terms of the first and second conclusions, and reserve all questions of expenses in the meantime. I shall put the case out by order for discussion of expenses and further procedure.