OUTER HOUSE, COURT OF SESSION

[2021] CSOH 2

CA64/20

OPINION OF LORD TYRE

In the cause

BARHALE LIMITED

Pursuer

against

SP TRANSMISSION PLC

Defender

Pursuer: McKinlay; Burness Paull LLP
Defender: Howie QC; Shepherd & Wedderburn LLP

12 January 2021

Introduction

[1] This is an action for enforcement of an adjudicator's decision. The defence is that the decision should be set aside *ope exceptionis* on the ground that the adjudicator failed to exhaust his jurisdiction or, alternatively, failed to give adequate reasons for his decision. The material facts are not in dispute.

The parties' contract

[2] In about February 2018, the pursuer and defender entered into a contract whereby the pursuer agreed to carry out works described as "the carrying out and construction of

Currie Switchgear Modernisation & Group Reinforcement - Civil Works" at an electricity sub-station at Currie, Edinburgh. The terms of the contract included (i) the conditions in the NEC3 Engineering and Construction Contract, Main Option B, Third edition, April 2013, and (ii) the Contract Data part one in Appendix 1 to the contract. The Contract Data part one provided *inter alia* that the method of measurement to be used was the Civil Engineering Standard Method of Measurement, 3rd edition ("CESMM3").

[3] The works undertaken by the pursuer included the construction of a number of foundations in an area of existing made ground. In order to construct the foundations, the pursuer required to carry out excavations and remove the made ground down to competent strata at a minimum excavation level indicated on drawings in the Works Information. The pursuer then required to bring levels back up in imported fill, constructing the foundations as it brought up the levels.

[4] The pursuer executed the works by carrying out a bulk excavation of an area greater than the area of the foundations to be constructed, down to a level where adequate bearing capacity was found. In most places the surface achieved acceptable bearing at the formation level for the foundations. In a limited number of areas, where the bearing was inadequate, the pursuer continued further excavations in stages, testing until good bearing was achieved and then up-filling to the underside of foundations. It then proceeded with backfilling and construction of the foundations from that level.

The dispute referred for adjudication

[5] A dispute arose between the parties as to the amount due to the pursuer for the excavation and filling work that it had carried out. The pursuer sought payment for the remeasured quantities based upon the actual bulk excavation, disposal and filling carried

out, applying the relevant rates from the bill of quantities. The defender refused to make payment on this basis, contending that the pursuer was entitled to be paid only on the basis of the net volume of excavation for the foundations constructed, including excavation and fill directly beneath or above those foundations, but excluding the remaining area excavated and backfilled as a consequence of the bulk excavation.

[6] In refusing to make payment for the actual bulk excavation, the defender founded upon the following measurement rules in Class E (Earthworks) in section 8 of CESMM3:

> "M1: In accordance with paragraph 5.18 the quantities of earthworks shall be computed net using dimensions from the Drawings with no allowance for bulking, shrinkage or waste…
> …
>
> M6: The volume measured for the excavation of a structure or foundation shall be the volume which is to be either occupied by or vertically above any part of the structure or foundation.
> …
>
> M16: Filling of excavations around completed structures shall be measured only to the extent that the volume filled is also measured as excavation in accordance with rule M6."

[7] On 29 May 2020, the pursuer served a notice of intention to refer the dispute to adjudication and applied to the Institution of Civil Engineers for nomination of an adjudicator. On 8 June 2020 the pursuer referred the dispute to the nominated adjudicator.

[8] In its referral to the adjudicator, the pursuer submitted that it was apparent that the drafter of the bill of quantities had had in mind that (in line with the Works Information) the made ground would be removed and replaced in bulk, thus forming the "platform" for construction of the foundations. Reference was made to clause 11.2 (28) of NEC3, Option B, which stated: "The Price for Work Done to Date is the total of the quantity of the work which the Contractor has completed for each item in the Bill of Quantities multiplied by the rate…". The pursuer asserted that in any payment assessment prepared by the project

manager, he was required to include the measured quantity of work actually completed by the contractor, ie the whole volume of the bulk excavation and fill, and to apply the appropriate rates from the bill of quantities to that volume. Appended to the pursuer's referral was its measure submission to the defender which had *inter alia* explained why the pursuer considered that measurement rules M6 and M16 were not relevant to the circumstances of this case.

[9] The defender submitted its response to the pursuer's referral. The response included five "significant points", three of which may be noted here. Point 1 reiterated the argument based on rule M6 of CESMM3. Point 3 took issue with the pursuer's interpretation of the bill of quantities; the defender argued that the bill did not provide for a bulk excavation, and that accordingly bulk excavation had been nothing more than the pursuer's chosen methodology. Point 5 reiterated the argument based on rule M16 of CESMM3.

[10] The pursuer submitted a reply to the defender's response. The reply addressed each of the defender's five points in turn. In relation to point 1, the pursuer maintained its position that rule M6 was irrelevant to the claim because the works consisted of construction of a platform and not separate foundations.

[11] The defender submitted a rejoinder to the pursuer's reply. The rejoinder began by noting that on the day after the pursuer had submitted its reply, the adjudicator had sent an email advising that he considered that his decision was basically upon the question: "Does the Works Information instruct Barhale to undertake bulk earthworks, or not?". The defender stated that it considered that a second question had to be answered, so that together, the questions were: (i) what works was the pursuer required by the Works Information to undertake, and (ii) what does the contract provide for the pursuer to be paid

for its works? The second of those questions is the CESMM3 argument. Points made by the pursuer in its reply in relation to that argument were responded to.

[12] The pursuer submitted a surrejoinder to the defender's rejoinder. The arguments in the surrejoinder focused primarily on whether the Works Information required the pursuer to undertake bulk earthworks, and on the status of the bill of quantities.

[13] No further formal arguments were submitted by either party. However, on 15 July 2020, the adjudicator sent an email to the parties' representatives stating:

> "The principle [sic] decision that I'm to make is 'Does the Works Information require the bulk excavation and filling work that was undertaken by Barhale, or not?' Both parties have advanced their best case in respect of their contentions, but neither party has advanced a contention that should I decide for the opposing party in principle then the quantities stated in Barhale's Application for Payment dated 17th April 2020, or the Project Manager's Assessment of 1st May 2020, are incorrect.
>
> Therefore, unless a party challenges the quantities contended for by the opposing party, then I shall accept them at face value…"

The defender's agents replied the following day (16 July 2020), stating *inter alia*:

> "Please note that SPT considers the primary dispute in this matter concerns the applicable contractual method of measurement. Whilst it is relevant to determine whether or not bulk excavation was required, the true question is what is BH entitled to be paid for those works, whether required or not, and this is to be determined by applying the method of measurement stated in the contract…"

The adjudicator immediately responded:

> "It is clear that SP has failed to understand the question I asked in my email dated 15 July 2020, timed at 15:59, and decided to re-run its contentions. So I will spell it out.
>
> If in principle I decide that the Works Information has instructed Barhale to undertake the bulk excavation, disposal and filling work, does SP disagree the quantities advanced by Barhale?"

The adjudicator's decision

[14] The adjudicator issued his decision on 27 July 2020. At paragraphs 21 and 22 of his decision, the adjudicator summarised the dispute between the parties as follows:

> "21. The dispute between the parties was that Barhale contended that the Works Information instructed it to undertake the bulk excavation, disposal and filling work, whereas SP contended that whilst Barhale undertook constructing its contracted work this way, it was Barhale's methodology of undertaking the work, not that it was instructed to be undertaken by the Works Information this way and, therefore, all Barhale was entitled to be paid was for the net excavation, disposal and backfill required to construct each of the foundation bases in accordance with the Civil Engineering Standard Method of Measurement 3rd edition ('CESMM3'), which was incorporated into the contract.
>
> 22. The primary decision that I have to decide is whether the Works Information instructed the bulk excavation, disposal and filling work undertaken by Barhale, or not."

[15] The adjudicator's decision includes a section headed "The Issues", containing a narrative of the parties' contentions. This section has three sub-headings, namely "Does the Works Information instruct Barhale to undertake the bulk dig, disposal and filling work, or not?" (paragraphs 26-40); "The Parties' Quantities" (paragraphs 41-48); and "SP's Counterclaim" (paragraphs 49-51). At paragraphs 36-40, the adjudicator summarised the defender's contentions in the following terms:

> "36. SP's contention was that the work undertaken by Barhale was subject to re-measurement in accordance with CESMM3 and that in accordance with the terms and conditions of the Contract the Project Manager had duly assessed the value of Barhale's work in accordance with this and supported this with voluminous technical quantity surveying detail, including a copy of CESMM3, in support of its contentions in this regard.
>
> 37. SP also contended that Barhale's reliance upon the quantities stated in the Bills of Quantities could not be relied upon because the quantities are not Works Information, notwithstanding that the descriptions were due to the amended Z clause. SP went to considerable length in advancing this contention, notwithstanding that at no time did Barhale contend that the quantities in the Bill of Quantities were a part of the Works Information.

> 38. The whole of SP's contentions were that the only excavation, disposal and filling that it was contracted to pay Barhale for, were the net quantities under and around each of the 440 No. isolated foundations, nothing more and whilst Barhale undertook the bulk excavation, disposal and filling operation, this was solely its methodology adopted of its own volition. It was not required by the Works Information incorporated into the Contract.
>
> 39. SP agreed that the documents relied upon [by] Barhale… were Works Information but contended that Barhale's claims that Drawing 2208 shows construction by bulk excavating was misconceived as there is no such reference stated on the drawing.
>
> 40. Other than this [sic] denial at paragraph 3.7 of SP's Response to the Referral, SP did not provide any other interpretations to the above mentioned Works Information, other than to state that it did not instruct Barhale to undertake the bulk excavation, disposal and filling work for which Barhale is seeking payment. SP agreed that Barhale undertook this work, but its contention was that Barhale had chosen to do this as its methodology of undertaking the construction of the foundations, not that the Works Information obligated Barhale to undertake this work."

[16] The decision itself, which begins at paragraph 53, follows the same structure. The adjudicator's conclusion in relation to the first issue is set out at paragraphs 71 and 72:

> "71. Because of all of the above, especially the impracticability of Barhale being able to construct the work as measured by the Project Manager in compliance with the Specification, especially that of the compaction and proof rolling of the upfill, I decide that the Works Information does instruct Barhale to undertake the bulk excavation, disposal and filling operation to construct the platform and also that this was the design intent of SP's designer of the Contract Works.
>
> 72. Therefore, I also decide that the works should be measured and valued in accordance with Barhale's Method of Working as stated at paragraphs 1.9, 1.11, 1.12 and 1.13 of Barhale's Referral."

The adjudicator then turned to the issue of the quantities that the pursuer was to have valued and paid and, in essence, accepted the pursuer's figures. He rejected the defender's counterclaim. No argument is advanced in the present proceedings in relation to either of those parts of the adjudicator's decision.

[17] In the light of his decision on the three issues identified above, the adjudicator found the pursuer entitled to an additional payment of £196,606.33 for the bulk excavation,

disposal and filling work to construct the platform. He made further orders in relation to interest, VAT and payment of his fee.

Arguments for the parties

Argument for the defender

[18] On behalf of the defender it was accepted that in the vast majority of cases, an adjudicator's decision would be enforced by the court. Nevertheless it was submitted that the present case fell within one of the limited but well recognised categories in which enforcement should be refused. The adjudicator had failed to exhaust his jurisdiction or, if not, had failed to give proper and adequate reasons for his decision.

[19] The adjudicator's decision failed to consider the defender's argument as to the proper contractual basis for assessment and payment for the excavation and associated disposal and filling works, and in particular failed to consider its argument as to the operation and effect of rules M6 and M16 in CESMM3. This had been a significant point in dispute during the adjudication and had been highlighted as such in the defender's written submissions. The adjudicator had simply determined that a bulk excavation was required by the contract, and then awarded the pursuer's full claim and dismissed the counterclaim. In so doing the adjudicator had failed to address points 1 and 5 in the defender's response to the pursuer's referral.

[20] It could not be maintained that the measurement argument had been considered and impliedly rejected. The two issues were discrete: the first was a question of contractual interpretation; the second concerned the measurement of the sum due to the pursuer on the assumption that its argument on interpretation was preferred (as it was). The adjudicator may have misunderstood his jurisdiction; it appeared from the email correspondence that

he had applied his mind to the extent of his jurisdiction and concluded that it was restricted to the interpretation point. It was unlikely that he had simply missed the point altogether, because it had been expressly drawn to his attention. In the circumstances, the presumption of regularity could not be relied upon by the defender.

[21] There was English case law to the effect that a failure by an adjudicator to address a question referred to him might render his decision unenforceable, but only if the failure was deliberate. However, that case law should be approached with caution in Scotland. It appeared to consist of cases in which the ground of challenge was breach of natural justice, as opposed to failure to exhaust jurisdiction. The Scottish courts had not gone down the line of distinguishing between deliberate and inadvertent failure, perhaps because the usual ground of challenge was failure to exhaust jurisdiction. There was no good reason to draw a distinction between deliberate and inadvertent failure. If, however, it was considered appropriate to make such a distinction, the present case was properly to be regarded as a deliberate failure.

[22] Alternatively, if it were to be held that the adjudicator had not failed to exhaust his jurisdiction, then he had failed to give adequate, or indeed any, reasons for rejecting the defender's CESMM3 argument.

Argument for the pursuer

[23] On behalf of the pursuer it was submitted that the defence was irrelevant and that the adjudicator's decision should be enforced by the granting of decree *de plano*. It was obvious that the adjudicator had addressed the defender's CESMM3 argument. The adjudicator's analysis of the dispute was that the scope of the pursuer's instruction was the primary issue. His use of the words "Therefore, I also decide" in paragraph 72 showed that

he regarded the pursuer's entitlement to payment as a separate issue from the scope of instruction. His approach of treating the issues of "scope of instruction" and "entitlement to payment" as inextricably linked was readily capable of being understood. The defender had accepted that the scope of instruction was relevant in assessing the pursuer's entitlement to payment. Whether the adjudicator was correct, as a matter of law, to regard it as the most important factor was irrelevant. Any error of law in taking that approach would be *intra vires* and would not provide a basis for resisting enforcement. Rejection of the defender's argument was also implicit in the adjudicator's decision on the central issue referred to him, which was to accept that the works should be measured and valued in accordance with the basis proposed in the pursuer's referral.

[24] If the court was in any doubt as to whether the CESMM3 argument had been considered and rejected, regard should be had (i) to the presumption of regularity; (ii) to it being inherently unlikely that the adjudicator would fail to consider an argument which featured prominently in the defender's submissions and in email correspondence, and which the adjudicator had summarised at paragraphs 36 and 38; and (iii) to the nature of adjudication, which could be a "rough and ready" process that did not demand the same level of reasoning as a judicial decision. The issues referred to the adjudicator had been addressed at the correct level of generality.

[25] In any event, even if the adjudicator had not considered a relevant defence argument, this was not a case of deliberate exclusion or refusal to address. On that basis, and in light of the line of English authority on inadvertent failure to exhaust jurisdiction, the decision should be enforced.

Legal principles

[26] The legal principles applicable to enforcement of an adjudicator's decision were largely a matter of agreement between the parties. They include the following:

- The intention of Parliament in enacting the Housing Grants, Construction and Regeneration Act 1996 was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by litigation, arbitration or agreement: *Macob Civil Engineering Ltd* v *Morrison Construction Ltd* [1999] BLR 93, Dyson J at page 97;
- The objective which underlies the 1996 Act and the statutory Scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him, or the manner in which he has gone about his task is obviously unfair. It should only be in rare circumstances that the courts will interfere by refusing to enforce an adjudicator's decision. In the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication must be to pay the amount that he has been ordered to pay by the adjudicator: *Carillion Construction Ltd* v *Devonport Dockyard Ltd* [2006] BLR 15, Chadwick LJ at paragraphs 85-87;
- If an adjudicator's decision on an issue referred to him is wrong, whether because he erred on the facts or the law, or because in reaching his decision he made a procedural error, it is still an enforceable decision on the issue referred: *Macob* (above), Dyson J at page 98. This applies even where the error in the adjudicator's decision is plain from the reasons given: *Bouygues UK Ltd* v *Dahl-Jensen UK Ltd* [2000] BLR 522, Buxton LJ at paragraphs 11-15; Chadwick LJ

at paragraphs 27-28; *Amec Group Ltd* v *Thames Water Utilities Ltd* [2010] EWHC 419 (TCC), Coulson J at paragraph 78;

- The scope of an adjudication is defined by the notice of adjudication, together with any ground founded upon by the responding party to justify its position in defence of the claim made: *Construction Centre Group Ltd* v *Highland Council* 2002 SLT 174, Lord Macfadyen at paragraph 19. If a responding party in adjudication proceedings raises a line of defence to a claim made against it, the adjudicator requires to deal with it: *Connaught Partnerships Ltd (in administration)* v *Perth & Kinross Council* 2014 SLT 608, Lord Malcolm at paragraph 19.
- There is however no requirement for an adjudicator expressly to address every point taken by the parties in their submissions. The court should not put a fine tooth comb through the adjudicator's decision, seeking to ensure that every single point has been addressed. It is necessary to take a more broad-based approach, looking at the dispute that was referred and the result. It is not a breach of natural justice if one particular sub-issue is not referred to in the decision: Coulson, *Construction Adjudication* (4th ed, 2018), paragraphs 13-53 to 13-55.

[27] Parties were not, however, in agreement as to the circumstances in which the court may refuse to enforce an adjudicator's decision on the ground of failure to exhaust jurisdiction. On behalf of the pursuer it was accepted that failure to exhaust jurisdiction might render a decision unenforceable, but it was contended that that could be so only where the failure was deliberate and not inadvertent. In support of that proposition, reference was made to the judgment of Coulson J in *Pilon Ltd* v *Breyer Group plc* [2010] BLR 452 at paragraph 22:

> "…22.1 The adjudicator must attempt to answer the question referred to him. The question may consist of a number of separate sub-issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question then, whether right or wrong, his decision is enforceable: see *Carillion* v *Devonport*.
>
> 22.2 If the adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his jurisdiction (and has, for example, failed even to consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice: see [*Ballast plc* v *The Burrell Company (Construction Management) Ltd* 2001 SCLR 837], [*Broadwell* v *k3D [2006] ADJ CS 04/21*], and [*Thermal Energy Construction Ltd* v *AE and E Lentjes UK Ltd* [2009] EWHC 408 (TCC)].
>
> 22.3 However, for that result to obtain, the adjudicator's failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the decision unenforceable: see *Bouygues* and *Amec* v *TWUL*…"

[28] A distinction between deliberate and inadvertent failure to consider an issue was not expressly drawn in either *Bouygues UK Ltd* v *Dahl-Jensen UK Ltd* or *Amec Group Ltd* v *Thames Water Utilities Ltd*. *Bouygues* was concerned with a patent arithmetical error by the adjudicator, which was held not to render his decision unenforceable. *Amec* v *TWUL*, another decision of Coulson J, contained the following analysis at paragraphs 86-88:

> "86 Thus there are two strands of authority. If the adjudicator makes an error of calculation his decision will still be enforced (see, for example, *Bouygues*). But if he fails to address the critical element of the dispute, his decision will not be enforced (see, for example, *Ballast* and [*Quartzelec Ltd* v *Honeywell Control Systems Ltd* [2009] BLR 328]). There was at least a suggestion in this case that these authorities may be difficult to reconcile.
>
> 87 In my judgment there is no inconsistency between these two lines of authority. If an adjudicator wrongly fails to have regard to the responding party's defence to the claim, because he erroneously thought that he could not do so (as for example happened in *Broadwell*), then he was not addressing the question that had been asked of him. He manifestly could not engage with the dispute that had been referred if he was failing to consider the responding party's defence to the claiming party's claim. Of course, such a conclusion can only be reached by the court 'in the plainest cases' (Chadwick LJ in *Devonport*).
>
> 88 On the other hand, if the adjudicator sought to answer the right question and engage with the dispute that had arisen between the parties, even if in so doing he

> made a mistake and forgot something or gave undue significance to something else, then that decision was still enforceable and no jurisdictional issue or breach of natural justice could arise (see *Bouygues*). There is a significant difference in law between, on the one hand, not answering the right question at all and, on the other, answering the right question but in the wrong way."

[29] The distinction between deliberate and inadvertent failure to address an issue (including a critical defence) was further discussed by Jefford J in *RGB P&C Limited* v *Victory House General Partner Limited* [2019] EWHC 1188 (TCC) at paragraph 53:

> "The analysis in *Pilon* v *Breyer* left open the possibility that an inadvertent failure to consider one of a number of issues might render a decision in breach of natural justice, but it would not ordinarily do so, and it is difficult to identify any case in which a decision has not been enforced for such a reason. The only example identified in *Construction Adjudication* is the decision of the Outer House in *Whyte and MacKay* v *Blyth and Blyth Consulting Engineers* [2013] CSOH 54. The rarity of such cases seems to me to be for two reasons. Firstly, an inadvertent failure to address a particular issue is in the nature of an error within the adjudicator's jurisdiction rather than a breach of the rules of natural justice. Secondly, and if that is wrong, it would be an unusual case where the court would both draw the inference that an issue had not been addressed and conclude that the failure to address the issue was so significant that it meant that the adjudicator had not decided the dispute referred to him and/or that the conduct of the adjudication was so unfair that the decision should not enforced. The more significant the issue, the less likely it is to be inadvertently overlooked; the less significant it is, the more likely it is that it has been taken account of in the round."

For my part, and with respect to Jefford J, I find this analysis somewhat difficult to reconcile with the clear distinction drawn in *Bouygues* (by Chadwick LJ at paragraph 27) and in *AMEC* v *TWUL* (by Coulson J at paragraph 88, above) between not answering the right question at all and answering the right question but in the wrong way. Whilst I respectfully share Jefford J's difficulty in envisaging situations in which an inadvertent failure to consider an issue could constitute a breach of natural justice, it does not appear to me to be necessary to characterise every failure by an adjudicator to answer a question that he was bound to address as a breach of natural justice.

[30] More recently, the test for unenforceability based on an inadvertent failure was considered by Stuart Smith J in *KNN Coburn LLP* v *GD Holdings Ltd* 2013 EWHC 2879 (TCC), at paragraph 49:

> "It will be noted that an inadvertent failure to consider one of a number of issues will 'ordinarily' not render the decision unenforceable. This qualification admits the possibility that an inadvertent failure may in an extraordinary case bring the principle into play. No clear guidance is available about when an inadvertent failure will render the decision unenforceable. Since the essence of the adjudication process is that the real dispute between the parties should be resolved, it seems to me that the touchstone should be whether the inadvertent failure means that the adjudicator has not effectively addressed the major issues raised on either side…"

[31] A distinction between deliberate and inadvertent failure to address the critical issues does not, in my view, emerge clearly from the Scottish case law. The approach in Scotland was reviewed by Lord Clark in *Field Systems Designs Ltd* v *MW High Tech Projects UK Ltd* [2020] CSOH 17 (and again in *Hochtief Solutions AG* v *Maspero Elevatori SpA* [2020] CSOH 102, a decision issued since the hearing in the present case). Lord Clark's conclusion was that the test adopted by Lord Doherty in *DC Community Partnerships Ltd* v *Renfrewshire Council* [2017] CSOH 143 at paragraph 24 and by Lady Wolffe in *NKT Cables A/S* v *SP Power Systems Ltd* 2017 SLT 494 at paragraphs 113-114 was akin to the "touchstone" identified by Stuart Smith J in *KNN Coburn LLP* v *GD Holdings Ltd* above, ie that the adjudicator has not effectively addressed the major issues raised on either side. I respectfully agree, and I note that the application of such a test is entirely consistent with earlier decisions of this court in *Ballast plc* v *The Burrell Company (Construction Management) Ltd* (above) (Lord Reed at paragraphs 39-42); *RBG Ltd* v *SGL Carbon Fibers Ltd* 2010 SLT 631 (Lord Menzies at paragraph 28); *SGL Carbon Fibers Ltd* v *RBG Ltd* 2011 SLT 417 (Lord Glennie at paragraph 46); and *Whyte and Mackay Ltd* v *Blyth & Blyth Consulting Engineers Ltd* (above) (Lord Malcolm at paragraph 35).

Application of principles to the present case

[32] The dispute before the adjudicator raised four issues for determination, namely (i) whether the Works Information required the pursuer to carry out a bulk excavation, disposal and fill; (ii) if so, how that work was to be measured in terms of CESMM3; (iii) the quantities that the pursuer had to be valued and paid; and (iv) the defender's counterclaim. There is no doubt that the adjudicator addressed issues (i), (iii) and (iv). However, in my opinion, he did not effectively address issue (ii), or indeed address it at all. It is clear that this was a critical issue raised by the defender in its response to the referral, which had to be addressed by the adjudicator when reaching his decision. In its response, again in its rejoinder, and again in the email sent to the adjudicator on 16 July 2020, the defender emphasised that its primary contention was that even if the pursuer was correct that the Works Information required a bulk excavation, disposal and filling, CESMM3 was applicable and restricted the volume measured for both the excavation and the filling to the volume occupied by (including beneath) or vertically above any part of the foundation. The adjudicator simply did not address that argument, and in failing to do so, in my opinion, he failed to exhaust his jurisdiction, and his decision cannot be enforced.

[33] I reject the pursuer's argument that the adjudicator was entitled to treat the two issues as inextricably linked; they were obviously quite separate. His view on the first was in no way determinative of his view on the second. I also reject the argument that the words "Therefore, I also decide" in paragraph 72 afford an indication that he considered and decided the second issue, albeit without giving specific reasons. On the contrary, it appears to me that those words confirm that the adjudicator regarded his decision on the proper interpretation of the Works Information as determinative of the merits of the dispute,

leaving only the parties' quantities and the counterclaim to be addressed thereafter. Reading the decision as a whole it is obvious that the adjudicator did not engage with the CESMM3 argument at all, and there is no basis for applying the presumption of regularity.

[34] For the reasons that I have already given, I am not persuaded that it is necessary to characterise the adjudicator's failure to exhaust jurisdiction as deliberate before it can be held to be unenforceable. If, however, I were wrong about that, I would hold that the failure in the present case is fairly characterised as deliberate. On two separate occasions the adjudicator put it to the parties that he considered that the decision he had to make was whether the Works Information instructed the pursuer to undertake bulk earthworks, or not. On both occasions the defender replied, insisting that the adjudicator also had to decide the issue of the applicable contractual method of measurement. On the second of those occasions, this elicited a terse response from the adjudicator that the defender had failed to understand the question that he had asked. In these circumstances, if it were necessary to decide that the failure to exhaust jurisdiction was deliberate, then I would be minded to do so.

[35] In the light of my decision on failure to exhaust jurisdiction, it is unnecessary for me to consider the defender's alternative argument based on inadequacy of reasons. As senior counsel for the defender acknowledged, if (as I have found) the adjudicator failed to address the critical issue, no question of adequacy or inadequacy of reasoning can logically arise. Given the admittedly rough and ready nature of adjudication, and the fact that an adjudicator's decision is enforceable even if the question referred has been wrongly answered, it will be rare for a reasons challenge to succeed if an argument based on failure to exhaust jurisdiction has been rejected. In the circumstances of the present case it seems to

me that the question of adequacy of reasoning is entirely hypothetical, and I need say no more about it.

[36] Finally, I should note that the pursuer presented a "severability" argument in the eventuality that I held that either of the defender's arguments was well-founded in relation to backfill (Point 5 of the defender's response to the referral) but not in relation to excavation (Point 1 of the response). It was submitted, in that eventuality, that the adjudicator's decision in relation to backfill was severable, on the basis of the test applied by the court in *Dickie & Moore Limited* v *Trustees of the Lauren McLeish Discretionary Trust* [2020] CSIH 38, ie whether, approaching the matter in a flexible and practical manner, there was a core nucleus of the decision that was untainted by the unenforceable part and which might therefore be safely enforced. On behalf of the defender it was accepted, under reference to the value of the respective works, that the adjudicator's decision in relation to backfill was severable. I would not therefore have had to decide this point, had it arisen.

Disposal

[37] For these reasons, I hold that the adjudicator's decision must be set aside *ope exceptionis*. I shall repel the pursuer's pleas in law, sustain the defender's fourth plea, and grant decree of absolvitor. Questions of expenses are reserved.