OUTER HOUSE, COURT OF SESSION

[2024] CSOH 94

CA93/24

OPINION OF LORD SANDISON

In the cause

ATG SERVICES (SCOTLAND) LIMITED

Pursuer

against

OGILVIE CONSTRUCTION LIMITED

Defender

Pursuer: McKenzie, KC; DAC Beachcroft Scotland LLP
Defender: G. Walker, KC; Brodies LLP

4 October 2024

Introduction

[1] This is an action seeking the court's aid to enforce the decision of an adjudicator appointed to resolve a dispute which arose under a construction contract falling within the scope of the Housing Grants, Construction and Regeneration Act 1998. The contract largely incorporated the terms of the Scheme for Construction Contracts (Scotland) Regulations 1998. The adjudication was commenced on 21 May 2024 and the adjudicator's decision in favour of the pursuer and awarding it a sum slightly in excess of £1 million was issued on 26 June. The defender declined to pay, claiming that the decision was tainted by breaches of natural justice on the part of the adjudicator. The pursuer raised this

commercial action to enforce the decision and the matter came before the court for an accelerated one-day diet of debate to resolve the matter.

Background

[2] The defender is a construction company and main contractor. It appointed the pursuer as a sub-contractor for a groundworks package at a project for the construction of a housing and care facility at Newmills Road, Dalkeith.

[3] The dispute arose in connection with an interim application which the pursuer had made to the defender for payment of a sum claimed to be due to it. The adjudicator (who was appointed by the Scottish Building Federation) received a referral notice from the pursuer, a response from the defender, and a further round of written submissions from each party. He decided that the pursuer had made a valid application for payment; that there was no valid notice specifying the sum that the defender considered to be due; that no valid pay less notice had been issued by the defender; that the final date for payment had passed without full and proper payment in respect of the application, and that the notified sum of £1,081,254.83 (excluding VAT) was to be paid by the defender not later than 7 days from the date of the decision, with interest, fees and expenses. In terms of section 108(3) of the 1996 Act and paragraph 23(2) of the Scheme, his decision is binding and enforceable until the dispute is finally resolved by agreement or by a final tribunal.

[4] The defender maintains that the adjudicator materially breached the rules of natural justice. The sub-contract required notices served under it to be sent by first class recorded delivery post to a stipulated address or to such further address as might be notified in writing from time to time, or else by fax. It was further agreed at a pre-contract meeting that any applications for payment to the defender had to be submitted to two specified email

addresses. The application in question took the form of an attachment to an email sent to a different email address, albeit one that was associated with the defender, and it did not seek to argue that it had not duly received the email. Rather, it maintained at adjudication that the use of a method of service other than that stipulated in the contract rendered what was sent invalid as an application for payment of a notified sum within the meaning of the 1996 Act. The pursuer argued that the parties had adopted a course of conduct which treated applications served other than in accordance with the provisions of the contract as nonetheless valid. It relied on a witness statement to that effect and on observations in the judgment of Carr J (as she then was) in *Jawaby Property Investment Ltd* v *Interiors Group Ltd* [2016] EWHC 557 (TCC), [2016] BLR 328. On 21 June 2024, after receiving all the other submissions, the adjudicator asked the parties which law governed the contract, and they told him it was Scots law.

Defender's submissions

[5] On behalf of the defender, senior counsel submitted that before the adjudicator the pursuer had founded on *Jawaby* and had furnished him with a witness statement setting out the factual basis for its contention that that case was in point. In response, the defender had submitted that the pursuer had not set out any principle of Scots law, or relied on any such principle, in relation to its submissions on the alleged course of conduct. The pursuer had not argued that Scots law was the same as English law, or suggested that a Scots law principle was engaged. It had made no submissions under the Scots law principles of waiver or personal bar. Had it done so, it would have been open to the defender to advance submissions to the effect that waiver and personal bar (or whatever other principle might have been relied on by the pursuer) were not engaged on the facts of the case. As no such

argument had been advanced, it was not necessary (or indeed possible) for the defender to make any such submissions.

[6] The adjudicator accepted the pursuer's position, and held that the 25 March application was validly issued because of the established course of conduct. It was evident that he had applied an English case decided by an English court under English law to the case before him - which was a Scottish one that he was specifically told by both parties fell to be decided under Scots law. He appeared to criticise the defender for not providing him with any authority as to why a course of conduct was not sufficient for the pursuer's case to succeed, saying at paragraph 6.25 of his decision: "The Respondent does not provide any authority as to why a change of format would defeat a course of conduct relative to who the applications were to be served upon". That was a reference to another argument that was advanced by the defender, but was indicative of the adjudicator thinking that the onus of proof relative to establishing that the English case relied on did not apply rested on the defender.

[7] The principles applicable to enforcement actions had been reiterated recently by the Inner House in *Atalian Servest AMK Ltd* v *BW (Electrical Contractors) Ltd*. At [35] the court cited *Bresco Electrical Services* v *Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, [2020] Bus LR 1140. It stated that it agreed with what had been said there by Lord Briggs at [12], namely:

> "A very important underlying objective … of adjudication was the improvement of cashflow to fund ongoing works on construction projects. A particular concern was that a dispute between (say) a sub-contractor and a sub-sub-contractor which could only be resolved by litigation or arbitration could in the meantime disrupt the entire project while a refusal of interim payment led to the cessation of significant works. The motto which has come to summarise the recommended approach is 'pay now, argue later'. Adjudication was one of five reforms … designed to facilitate the realisation of the cash flow aspiration behind that motto. … It is achieved by rigorous time limits for the conduct of the adjudication, the provisionally binding nature of

> the adjudicator's decision and the readiness of the courts … to grant speedy summary judgment by way of enforcement, leaving any continuing disagreement about the merits of the underlying dispute to be resolved at a later date by arbitration, litigation or settlement agreement."

At para [36] the court also cited *J&A Construction (Scotland) Ltd* v *Windex Ltd* [2013] CSOH 170 where Lord Malcolm had adopted a passage from the judgement of HHJ Wilcox in *Absolute Rentals Ltd* v *Gencor Enterprises Ltd*, unreported, 16 July 2000 as follows:

> "The purpose of the Scheme is to provide a speedy mechanism for settling disputes in construction contracts on a provisional basis and, by requiring decisions by adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement, whether these decisions are wrong in point of law or fact, if within the terms of reference. It is a robust and summary procedure and there may be casualties although the determinations are provisional and not final …"

The court went on at [36] to say that it was:

> "reluctant to interfere with an adjudicator's award unless the adjudicator has acted *ultra vires* by, for example, failing to answer the questions posed to him or if he has acted in a manner contrary to natural justice (the principle of fairness)."

[8] The law in relation to the circumstances in which an adjudicator's decision would be vitiated by a breach of the rules of natural justice was discussed in *Van Oord UK Limited* v *Dragados UK Limited* [2022] CSOH 30, [2022] SLT 521. The ground on which enforcement was successfully resisted in that case was that the adjudicator had decided the dispute on the basis of a programme which neither party founded upon, and did so without telling either party that that was his intention or seeking submissions from them on it. That was held to have given rise to the risk of material injustice, and enforcement of his decision was refused accordingly. The applicable legal propositions were set out at [15] - [19] as follows:

> "[15] The underlying legal principles are not in dispute. As a starting point, the courts will in general summarily enforce decisions of adjudicators: *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358 at 84-87. As it was put in that case at paragraph 86, the need to have the 'right' answer is subordinated to the need to have an answer quickly. Having regard to that statutory objective, it was said that challenges to an adjudicator's decision on the ground of breach of natural justice were likely to succeed only in the plainest of cases.

[16] Nonetheless, where an adjudicator is found to have acted contrary to the interests of natural justice, enforcement will be refused: *Gillies Ramsay Diamond v PJW Enterprises Limited* 2004 SC 430, per the Lord Justice Clerk (Gill) at 25.

[17] The application of the principles of natural justice to the process of adjudication, and the extent to which an adjudicator may fairly decide a case other than by accepting the submissions of one or other party, has been the subject of much judicial discussion. Lord Drummond Young considered the interaction of natural justice and adjudication in *Costain Limited v Strathclyde Builders Limited* 2004 SLT 102, in particular at paragraph [20]; and the following cases were also referred to in submissions: *Roe Brickwork Ltd v Wates Construction Ltd* [2013] EWHC 3417; *Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd* [2009] EWHC 2218; and *Miller Construction (UK) Ltd v Building Design Partnership Ltd* [2014] CSOH 80.

[18] These cases give rise to the following propositions, which to some extent overlap, but none of which is controversial:

> (i) Each party must be given a fair opportunity to present its case: *Costain*.
> (ii) If the adjudicator makes investigations and inquiries of his own, or proposes to use his own knowledge and experience to advance significant propositions of fact or law which have not been canvassed by the parties, it will normally be appropriate to canvas those propositions with the parties before a decision is made: *Costain*.
> (iii) The adjudicator should not decide a point on a factual or legal basis that has not been argued or put forward before him: *Roe Brickwork*, per Edwards-Stuart J at paragraph 22.
> (iv) However, an adjudicator can reach a decision on a point of importance on the material before him on a basis for which neither party has contended provided that the parties were aware of the relevant material and that the issues to which it gave rise had been fairly canvassed: *Roe Brickwork* at 24.
> (v) For a breach of natural justice to vitiate a decision, it must be a material breach. A breach is likely to be material where the adjudicator has failed to bring to the attention of parties a point or issue which they ought to have been given the opportunity to comment on, if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute: *Balfour Beatty Engineering Services* at paragraph 41 (quoting from *Cantillon Ltd v Urvasco Ltd* [2008] BLR 250 at paragraph 57). The question comes to be whether, in deciding the case, the adjudicator went off on a frolic of his own.
> (vi) An adjudicator is afforded considerable leeway and is entitled to adopt an intermediate position not contended for by either party without giving notice of his intention to do so: *Miller Construction (UK) Ltd v Building Design Partnership Ltd* [2014] CSOH 80, Lord Malcolm at paragraph 17.

[19] In applying these principles, and asking whether there has been a breach of natural justice, the words of Lord President Clyde in *Barrs v British Wool Marketing Board* 1957 SC 72 at 82 must be borne in mind: 'The test is not 'Has an unjust result

> been reached?' but 'Was there an opportunity afforded for injustice to be done?' If there was such an opportunity, the decision cannot stand.'"

[9] An adjudicator had to give adequate and cogent reasons for the decisions he made that were responsive to the issues in dispute. Incoherent or unintelligible reasons would not form the basis of a reasoned decision: *Balfour Beatty* at [48]. Further, the arguments placed before the adjudicator could not simply be ignored. That would represent a failure to exhaust his jurisdiction: *DC Community Partnerships Limited* v *Renfrewshire Council* [2017] CSOH 143 at [26]; *Atholl Developments (Slackbuie) Ltd, Petrs* [2010] CSOH 94, 2011 SCLR 637 at [17]; *Connaught Partnerships Limited (in administration)* v *Perth & Kinross Council* [2013] CSOH 149, 2014 SLT 608 at [18] - [21]; *NKT Cables A/S* v *SP Power Systems Limited* [2017] CSOH 38, 2017 SLT 494 at [113] - [114], and *Whyte and Mackay* v *Blyth and Blyth Consulting Engineers Ltd* [2013] CSOH 54, 2013 SLT 555 at [35]. The authorities demonstrated that while the courts were reluctant to interfere with adjudicators' decisions, they would do so in circumstances where clear, material breaches of the rules of natural justice could be demonstrated or where the adjudicator had otherwise acted *ultra vires* or failed to provide intelligible reasons engaging with all of the significant lines of argument.

[10] In the instant case, the defender advanced two closely connected lines of argument. First, it contended that the adjudicator went off on a frolic of his own. He was not provided with any submissions by the pursuer to the effect that English law applied, or that Scots law was the same as English law or that there was a Scots law principle that was the same as those upon which the English court in *Jawaby* had founded. He must either have decided that, contrary to what he had been told, English law applied, or else that Scots law was the same as English law or that there was some Scots law principle (on which he was not favoured with any submissions) that gave rise to the same result as that which pertained in

Jawaby. In either case, he had breached the rules of natural justice. He did not tell the parties that he was intending to adopt either of those courses. The defender had been materially prejudiced. It was not aware that the adjudicator would apply a foreign law when he had specifically been told that Scots law applied, or that he would search out an equivalent Scots law principle and apply it. It did not know that the adjudicator would treat Scots law as being identical to English law, or that he would place on the defender the onus of providing an authority that vouched the proposition that an English case decided under English law did not apply. That gave rise to a situation where the defender was effectively deprived of any opportunity to make responsive submissions. If the adjudicator had directed himself that English law applied, he ought to have alerted the parties to his intention to do so, in circumstances where they had specifically informed him that Scots law applied. The defender could have made submissions as to why that was inappropriate. If the adjudicator had investigated the law and directed himself that Scots law and English law were the same, he ought to have alerted the parties to his intention to do so. The defender could have made submissions as to why that was wrong. If he had investigated the law and directed himself that there was some Scots law principle that he himself had identified as potentially applying, then he ought to have invited submissions on that. It was impossible to know what he had done or what submissions might have been capable of being made. It was equally impossible to know if such submissions would have been successful or not. A real and substantial opportunity for injustice had arisen.

[11] Secondly, the defender contended that the adjudicator failed to engage with the defender's argument to the effect that the pursuer had not provided any basis in Scots law for its submission that an established course of conduct meant that its failure to follow the express contractual provisions pertaining to the service of notices was not fatal to its claim.

Again, the defender had been prejudiced. It did not know why that argument was unsuccessful. That was amply demonstrated by the fact that the defender was unable to be specific about how or why the adjudicator considered himself bound by *Jawaby* or a principle of Scots law arising out of a course of conduct. There were several possible ways that he might have directed himself with the effect that he felt it necessary to follow the *Jawaby* decision or some unknown and undisclosed Scots law principle. The absence of reasons on this important issue meant that the decision failed to engage with the argument and failed to let the defender know why it lost on this point.

Submissions for the pursuer

[12] On behalf of the pursuer, senior counsel submitted that the point raised in the defences was a narrow one, which boiled down to the suggestion that the adjudicator had failed to address a material line of defence, namely an argument that the pursuer had failed to set out any principle of Scots law or authority upon which it could rely in relation to its submissions on a course of conduct validating service on the defender of the pursuer's application for payment. The pursuer's position was that, on a fair and proper reading of his decision, the adjudicator did not go off on a frolic of his own, but clearly addressed that line of defence (which was in any event not material), rejected it and gave adequate reasons for his decision. Whether the decision was correct or not, in law or fact, did not matter. There was no breach of the requirements of natural justice and the decision should, accordingly, be enforced.

[13] Adjudication had two main objectives. First, to facilitate cash-flow in the construction industry by encouraging parties to "pay now, argue later". Second, to provide a speedy mechanism for settling disputes in construction contracts on a provisional basis by

requiring decisions by adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement, whether these decisions were wrong in point of law or fact, so long as they fell within the terms of reference. It was a robust and summary procedure and there might be casualties although the determinations were provisional and not final: *Atalian Servest* (IH) at [35] - [36]. The adjudication procedure ought not to be derailed by the pursuit of technical legal arguments: *Charles Henshaw and Sons Ltd* v *Stewart & Shields* [2014] CSIH 55 at [17]. As a result, the court's approach to the enforcement of adjudicators' decisions had been developed over a series of cases and was summarised in *Hochtief Solutions AG* v *Maspero Elevatori SpA* [2021] CSIH 19, 2021 SLT 528 at [22] thus:

> " … the court will only interfere in the plainest of cases - it is chary of technical defences - if the adjudicator has answered the right questions, his decision will be binding, even if he is wrong in fact or law - the court will, however, intervene if the adjudicator: (a) was not validly appointed, (b) acted outside his jurisdiction, (c) did not comply with the rules of natural justice, or (d) provided inadequate reasoning".

Where an adjudicator had failed to address and determine a material line of defence, this might result in unfairness and a breach of natural justice which would mean that the court would not enforce his decision: *UK Grid Solutions Ltd* v *Scottish Hydro Electric Transmission plc* [2024] CSOH 5, 2024 SLT 232 at [41] and the authorities there cited. An adjudicator might be described as going off on a "frolic of his own" if he had failed to bring to the attention of parties a point or issue which they ought to have been given the opportunity to comment on, if it was either decisive or of considerable potential importance to the outcome of the resolution of the dispute: *Van Oord* at [18(v)]. An adjudicator could not be said to have gone off on such a frolic if the parties had made submissions about the very matter which was said to be the subject of the alleged frolic: cf. *GT Equitix Inverness Ltd* v *Board of Management of Inverness College* [2019] CSOH 46, 2019 SLT 957 at [48] - [50].

[14] An adjudicator enjoyed a presumption of regularity and propriety. It was to be assumed that he had considered any relevant information submitted to him by either party, unless his decision and reasons suggested otherwise. Whether the adjudicator understood the significance of that information was another matter: *Gillies Ramsay Diamond* v *PJW Enterprises Ltd* at [28]; *SW Global Resourcing Ltd* v *Morris & Spottiswood Ltd* [2012] CSOH 200 at [13] and [17]. It was not necessary for an adjudicator to deal in his decision expressly with every argument made to him provided that he dealt with the arguments which were sufficient to establish the route by which the decision was reached: *UK Grid Solutions* at [49]. A failure to refer to a specific point would not of itself matter and it had to be apparent from the adjudicator's decision or reasoning that a material issue had not been addressed: *Hochtief Solutions AG* at [26]. If an adjudicator failed to reference in his reasons a particular submission, that could not give rise to the inference that he omitted altogether to take the relative submission into account: *Atholl Developments* at [19]. Acceptance by an adjudicator of one position might be sufficient to indicate the reasons for rejecting the other position; or rejection of a defence might be implicit in, or a corollary of, the reasons given by the adjudicator: *SW Global Resourcing* at [17]; *DC Community Partnerships Ltd* at [26]. An adjudicator might accept the arguments of one party in a way which necessarily entailed the rejection of the other party's arguments, so that the reasonable reader of the decision would be aware, at least in general terms, of what its basis was without being left in any material doubt as to whether any matter put forward had been overlooked. A failure to achieve perfection of expression of reasoning was not a proper basis upon which to build a case of failure to exhaust jurisdiction when, read fairly and in context, the decision indicated at the very least by necessary implication how the arguments were regarded: *Atalian Servest AMK Ltd* v *BW (Electrical Contractors) Ltd* [2023] CSOH 14, 2023 SLT 385 at [20]. Given the rough

and ready nature of adjudication, and the fact that an adjudicator's decision was enforceable even if the question referred had been wrongly answered, it would be rare for a reasons challenge to succeed if an argument based on failure to exhaust jurisdiction had been rejected: *Barhale Ltd* v *SP Transmission plc* [2021] CSOH 2, 2021 SLT 852 at [35].

[15] The parties had joined issue before the adjudicator *inter alia* on whether the pursuer's interim payment application of 25 March 2024 had been validly served by the pursuer on the defender. A number of points had been advanced on either side in relation to that issue, including one based on a claimed course of conduct, namely that the defender had treated as valid several previous interim applications served on it in the same way as the one in issue, and could not now deny the validity of its service. That argument had been attacked by the defender in its response in the adjudication, initially by seeking to show that on the facts no relevant course of conduct had been established. In responding, the pursuer had submitted:

> "3.3.4. The fundamental point is whether or not the interim application for payment was valid. It is clear from *Jawaby* that the conduct of the payer plays an important role in that determination. If interim applications for payment have been treated as valid, then the recipient is incapable of denying applications received in the same manner. As if to confirm the foregoing, Justice Carr continues in paragraph 50 of *Jawaby*, stating:
>
> > '…In any event APS (on behalf of JPIL) waived any requirement for hard copy service by its dealings with TIG on Valuations 1 to 6, all of which were sent by email. Alternatively, JPIL is estopped from asserting that notification by email is invalid by reason of the parties' course of conduct, which extended over months and on a significant number of valuations. APS clearly had authority to act on behalf of JPIL in relation to the mode of service under Article 3 of the Contract. It would be unconscionable to allow JPIL to resile from the convention in this regard now.'
>
> …
>
> 3.3.14 Following *Jawaby*, having for c.2.5 years, accepted interim applications for payments issued via email to the same email addresses as the Application, it would be unconscionable to allow OCL to resile from the established convention now."

The defender in turn rejoined:

> "2.18.3 Reason 3: ATG has failed to evidence any principle of Scots law upon which it is seeking to rely in relation to its submissions on course of conduct. This case is

> about ATG arguing that its Application becomes payable in full (i.e. it is attempting to exert a legal entitlement). What is the principle that an application becomes payable in full through a course of conduct even if such conduct did exist (which is denied). ATG has not explained its position in this regard nor provided any authority.
> …
> 2.30.8.3 [ATG] has failed to provide a Scots law principle or any authority for their assertions."

No further substantive submissions on the point had been made by the parties to the adjudicator, although the defender had made fairly extensive submissions to the adjudicator concerning a separate point arising under reference to *Jawaby*. In his discussion of the parties' arguments in his decision, the adjudicator had set out the terms of paragraph 50 of *Jawaby* and said:

> "6.24 I consider this matter turns on course of conduct.
>
> 6.25 It is clear that the contract requirements for the serving of applications for payment were not followed (Pre-Contract Meeting Minutes item 3.8) in that it was not issued to the relevant email addresses as stated herein. However I am satisfied that the issuing to Mr Hyslop was the accepted practice for the serving of applications for payment, evident the examples provided by Mr Pollock in his witness statement. I am not persuaded that the change of format in the application content as highlighted by the Respondent has any effect on that. The Respondent does not provide any authority as to why a change of format would defeat a course of conduct relative to who the applications were to be served upon. Mr Hyslop received the applications and issued payment notices relative to those applications. There can be no doubt that this was the accepted procedure. I am satisfied a course of conduct was established and in line with the findings in *Jawaby* (reference item 6.18 above) it would be incorrect to fail to accept that course of conduct in respect of the subject payment application."

The adjudicator had further formally confirmed that he had considered all the matters put to him.

[16] It was quite clear that in relying on *Jawaby* the adjudicator was not going off on a frolic of his own. The pursuer had expressly relied on *Jawaby* in its submissions. The defender had made no positive case to the effect that Scots law was materially different from what was stated in *Jawaby* or why, on a proper application of Scots law, the result contended

for by the pursuer, in reliance on *Jawaby*, would not be achievable. The defender merely confined itself to a rather meek submission that the pursuer did not set out any Scots law principle or authority upon which it could rely.

[17] In these circumstances, the defender's assertion that the adjudicator went off on a frolic of his own in applying *Jawaby* without any material before him to allow him to do so was misconceived, and amounted merely to the suggestion that the adjudicator was wrong to rely on *Jawaby* and that his resultant decision was wrong. That was an irrelevant assertion in the context of the action.

[18] Although the defender sought to frame an additional argument in terms of failure to give reasons, that amounted to the same point, namely that the adjudicator had failed to address the defender's argument that the pursuer had not set out any principle of Scots law or authority upon which it could rely in relation to its submissions on course of conduct - cf. *UK Grid Solutions* at [40]. The defender's argument was not a positive case about the application of Scots law leading to a different result from that which the pursuer sought under reference to *Jawaby*. The court should proceed on the basis that the adjudicator had considered all the relevant material submitted to him by both parties. At any rate, failure to reference the defender's argument that the pursuer had not set out any principle of Scots law or authority upon which it could rely in relation to its submissions on course of conduct could not give rise to the inference that he omitted altogether to take the submission into account: *Atholl Developments* at [19]. There was no need for the adjudicator to deal expressly with the argument that the pursuer had failed to set out any principle of Scots law or authority upon which it could rely in relation to its submissions on course of conduct. His express reliance on *Jawaby* clearly indicated that he was unpersuaded that the defender's argument represented a barrier to him reaching the decision which he reached.

The reasonable reader of the decision would be aware of what the basis of the decision was, without being left in any material doubt as to whether any matter put forward by either party had been overlooked. The decision indicated at the very least by necessary implication how the parties' arguments were regarded.

[19] The defender's averments were bound to fail, the defence to the action was irrelevant, and the court should grant decree *de plano* in terms of the first conclusion of the summons.

Decision

[20] The defence to this action is entirely without merit. The law on the application of the principles of natural justice to adjudicators' decisions has been the subject of authoritative discussion in this court for at least 20 years, and its content is not open to serious doubt. It is perhaps unfortunate that the number of occasions on which the court had had to deal with the matter, and the level of detail and analysis in which it has engaged, may have given rise to the impression (or at least furnished the opportunity to argue) that the questions raised are more complex and subtle than in fact they are. I do not propose in this opinion to add further to the already unwieldy jurisprudence on the subject.

[21] To describe an adjudicator as having gone off on a frolic of his own is to maintain that his decision depends to some material extent on a ground which was not suggested to him by the parties and on which he gave them no sufficient opportunity to comment. It is that lack of opportunity to state one's case which permits the categorisation of such a frolic as a breach of the requirements of natural justice. In the present case, both parties accepted that a live question in the adjudication was whether the defender's behaviour in having accepted and dealt with earlier payment applications from the pursuer which had not been

made by the means prescribed by the contract resulted in its not being entitled in point of law to insist on those means having been used for the application in question. The pursuer submitted as the applicable legal principle in such circumstances that "If interim applications for payment have been treated as valid, then the recipient is incapable of denying applications received in the same manner", and cited paragraph 50 of *Jawaby* "[a]s if to confirm the foregoing". In other words, a legal principle was asserted to be applicable and its deployment in very similar facts as arose in the present case was exemplified by reference to *Jawaby*. The nature of the legal principle being asserted as applicable by the pursuer was entirely clear. It was open to the defender to submit whatever it chose in response to that assertion. It could, for example, have denied the existence of such a legal principle, or argued that any such principle was inapplicable to the facts of the case as either party maintained they were. Instead, it contented itself with the somewhat delphic pronouncement that the pursuer had "failed to evidence any principle of Scots law upon which it is seeking to rely in relation to its submissions on course of conduct", adding later that the defender had "failed to provide a Scots law principle or any authority for their assertions." Counsel for the defender was adamant that that amounted to a positive submission that *Jawaby* did not exemplify a principle recognised in Scots law. I rather doubt that, but the matter is of no moment, since even if the defender had made such a submission in so many words to the adjudicator, he was perfectly entitled to prefer the pursuer's submission that the principle exemplified in *Jawaby* applied to the case he was deciding, and even if he was wrong in his determination of what the applicable content of the law was, that would represent no more than an *intra vires* error of law on his part, about which the defender could have no relevant complaint in the present context.

[22] What the adjudicator decided was that he was satisfied that the course of conduct alleged by the pursuer was made out and that "it would be incorrect to fail to accept that course of conduct in respect of the subject payment application", that conclusion being "in line with the findings in *Jawaby*". I have no difficulty in reading that as a decision that the applicable legal principle to the matter in issue was that the defender was not entitled to take any point about the nature of the service of the payment application in question because it had previously accepted as valid applications from the defender served otherwise than in accordance with the contractual conditions. That that conclusion was said to be "in line with" *Jawaby* does not suggest to me that the adjudicator considered that case to be anything more than an example of the application of the identified principle in analogous circumstances, but even if it means that he felt bound by the decision in *Jawaby*, again that would represent a conclusion which, for present purposes, he was entitled to reach. It may be tempting to forget from time to time that it is no part of the function of this court to act as a general appeal tribunal in respect of the adjudicator's decision, but it must not be lost sight of that the criticism of the adjudicator in this connection is that he breached the requirements of natural justice by going off on a frolic of his own. Once it is recalled that the issue of the import of the defender's previous conduct in accepting irregularly-served applications was well known by both parties to be a live one in the adjudication, that each party was given ample opportunity to say whatever it wanted on the subject, and that the adjudicator decided the issue by applying the legal principle claimed to be applicable by the pursuer and under reference to the very authority cited to him as apposite, it may readily be seen that the suggestion that he went off on a frolic of his own is nothing less than an inversion of reality. No opportunity for injustice to be done was afforded.

[23] Turning to the defender's secondary argument that the reasons given by the adjudicator for his decision on the point in issue were inadequate, I see no difficulty at all in concluding that any reasonable reader of his decision would readily understand that his rationale was that the legal principle applicable to the matter was that the defender was not entitled to take any point about the nature of the service of the payment application in question because it had previously accepted as valid applications from the defender served otherwise than in accordance with the contractual conditions. That amply exceeds the degree of explanation required of adjudicators for their decisions.

[24] The squall got up by the defender about a distinction (real or imagined) between the content of Scots and English law applicable to this issue is an immaterial distraction from the true questions in this case. The adjudicator was well aware that the dispute fell to be dealt with by the application of Scots law. He must be presumed to have attempted to discern and apply that law in the absence of clear demonstration to the contrary. No such demonstration has been provided. If the adjudicator was wrong in thinking that the principle espoused by the pursuer and exemplified in *Jawaby* formed part of Scots law (and I am very far from suggesting that he was wrong in that) then, as already explained, that was nothing more than an unexceptionable *intra vires* error of law. There is nothing at all in the defender's complaint about the adjudicator's reasons. At the conclusion of the debate, I granted decree *de plano* for the principal sum sued for, with interest.

[25] The legislative policy behind the relevant sections of the 1998 Act is well-known, and is summarised in the aphorism "pay now, argue later". Judicial policy ought to be to discourage, so far as properly possible, the statement of frivolous defences, such as those advanced here, to actions seeking to enforce adjudicators' decisions. As it happened, unexpected availability in the court's diary meant that in this case decree was granted only

14 days after the case first came before the court for a preliminary hearing, but that will by no means be the sort of timetable ordinarily capable of being applied to actions of this sort, with the result that contractors entitled to immediate payment are liable to be left standing out of what is their due for relatively lengthy periods if defences of the kind stated here are advanced. There is also the consideration that a complaint that an adjudicator has breached the requirements of natural justice inevitably calls into question the professionalism or competence of the adjudicator, in this case without the slightest warrant. In these circumstances I was left in no doubt that the statement and maintenance of the defence in this case fell comfortably within the kind of unreasonable behaviour described in *McKie* v *Scottish Ministers* [2006] CSOH 54, 2006 SC 528, 2006 SLT 668 at [3] as justifying an award of expenses on the agent and client, client paying scale, and I duly found the defender liable to the pursuer in the expenses of and incidental to the debate on that scale.