SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2018] SC GLA 64

CA88/18

JUDGMENT OF SHERIFF S REID

in the cause

SITEMAN PAINTING AND DECORATING SERVICES LIMITED

Pursuer

against

SIMPLY CONSTRUCT (UK) LIMITED

Defender

Pursuer: Middleton; Lyons Davidson, Edinburgh
Defender: Massaro; The Building Law Practice, Glasgow

GLASGOW, 4 December 2018

The sheriff, having resumed consideration of the cause, Repels the defender's preliminary pleas (pleas-in-law numbers 2 & 3); Sustains the pursuer's preliminary plea (plea-in-law number 2); Repels the defences; Grants decree *de plano* against the defender for payment to the pursuer of the sum of SIXTY EIGHT THOUSAND EIGHT HUNDRED AND SIXTY EIGHT POUNDS TWENTY THREE PENCE (£68,868.23) STERLING together with interest thereon at the rate of eight per cent per annum from 31 May 2018 until payment; Finds the defender liable to the pursuer in the expenses of the action as taxed; Allows an account thereof to be given in and Remits the same, when lodged, to the Auditor of Court to tax and to report.

NOTE:

Summary

[1] The parties entered into a construction contract whereby the pursuer carried out painting and decorating work at the defender's construction site in London. The pursuer sought payment under the contract. The defender refused to pay.

[2] The dispute was referred to adjudication. The adjudicator issued a decision. The adjudicator ordered the defender to pay to the pursuer the sum of £68,868.23. The defender refused to pay.

[3] In this commercial action, the pursuer seeks to enforce the adjudicator's decision.

[4] On two grounds the defender challenges the jurisdiction of the adjudicator to issue a decision. First, the defender submits that a claim of sufficient clarity and precision was not referred to adjudication. Second, the defender submits that the pursuer referred multiple disputes to adjudication. Either way, it is alleged that the adjudicator's decision is *ultra vires*.

[5] In my judgement, neither jurisdictional challenge is well-founded. Accordingly, I have repelled the defender's preliminary pleas, sustained the pursuer's preliminary plea, and granted decree *de plano* against the defender. I explain my reasoning below.

Procedural history

[6] The action was served on 31 May 2018. On 28 June 2018, defences were lodged. At a first case management conference on 1 August 2018, the record was closed and a debate was allowed on the relevancy of the parties' pleadings. No motion was lodged for summary decree.

[7] On 12 September and 4 October 2018, the action called before me at a diet of debate. Both parties had lodged detailed notes of argument in support of their respective

preliminary pleas (items 9 & 11 of process). On the pursuer's unopposed motion, the record was opened up and amended to allow a general relevancy plea to be added to the pursuer's pleas-in-law.

[8] On 4 October 2018, I reserved judgment.

The pleadings

[9] The pleadings are brief. It is a matter of admission on record that in May 2016 the parties entered into a construction contract involving the provision of painting and decorating services by the pursuer at the defender's construction site in London; that, during the course of the works, a dispute arose between the parties; that the defender refused to pay the pursuer the sum of £105,140.82 plus VAT; that the pursuer served a notice of adjudication on the defender dated 16 August 2017; that the adjudicator issued his decision on 14 September 2017; and that the adjudicator awarded the pursuer the sum of £68,868.23 (being £57,390.19 plus VAT). The construction contract, the notice of adjudication and the adjudicator's decision are all referred to for their terms.

[10] For its part, the defender avers that, from the outset (specifically in its response to the referral notice), it has challenged the jurisdiction of the adjudicator on the following two grounds: (i) the pursuer's "failure to refer a clear and precise claim to adjudication" and, in any event, (b) the pursuer's purported referral of "multiple disputes" to adjudication, contrary to section 108 of the Housing Grants, Construction & Regeneration Act 1996. For these reasons, the defender avers that the adjudicator lacks jurisdiction, that he acted *ultra vires* by issuing a decision, and that his decision falls to be reduced *ope exceptionis* (pleas-in-law numbers 5, 6 & 8, respectively). The defender also advances preliminary pleas to the

relevancy and specification of the pursuer's averments (pleas-in-law numbers 2 & 3, respectively).

[11] The pursuer challenges the relevancy and specification of the defender's averments in answer (plea-in-law number 2) and seeks decree *de plano*.

Submissions for the pursuer

[12] By agreement, the pursuer's submissions at debate were advanced first. The pursuer's note of argument (item 9 of process) was adopted. As regards the defender's first ground of challenge, the pursuer's counsel submitted that the dispute referred to adjudication was clear and precise in its terms. The construction of the notice of adjudication (which was the determining document) was to be approached having regard to the surrounding context (specifically, the construction contract itself). Reference was made to *Carillion Construction Ltd* v *Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358 per Chadwick LJ at paragraph 22; and in the Court of Appeal at paragraphs 85 & 87; Coulson on *Construction Adjudication* (3rd ed.), paragraph 7.49; *Fastrack Contractors Ltd* v *Morrison Construction Ltd* [2000] BLR 168; *Morgan Sindall Construction & Infrastructure Ltd* v *Westcrowns Contracting Services Ltd* [2017] CSOH 145; and *David McLean Housing Contractors Ltd* v *Swansea Housing Association Ltd* [2002] BLR 125.

[13] As regards the defender's second ground of challenge, it was submitted that only one dispute had been referred to adjudication, namely what sum (if any) was due by the defender to the pursuer for the work undertaken by the pursuer under the construction contract. In order to resolve that single dispute, many questions might require to be answered, but that did not deprive the adjudicator of jurisdiction to determine the single dispute. Reference was made to *Dalkia Energy & Technical Services Ltd* v *Bell Group UK Ltd*

[2009] EWHC 73; *Witney Town Council* v *Bean Construction (Cheltenham) Ltd* [2011] EWHC 2332; *Morgan Sindall*, *supra,* paragraph 30; *Amec Civil Engineering Ltd* v *Secretary of State for Transport* [2004] EWHC Civ 2339 and (on appeal) [2005] 1 WLR 2339; and *Barr Ltd* v *Law Mining Ltd* 2003 SLT 488. Counsel also sought to distinguish the authorities referred to by the defender in its note of arguments (item 11 of process).

[14] I was invited to repel the defender's preliminary pleas, sustain the pursuer's second plea-in-law, and to grant decree *de plano*.

Submissions for the defender

[15] For the defender, it was submitted that the adjudicator had no jurisdiction for two reasons: firstly, a dispute had not crystallised between the parties; secondly, in the event that a dispute had crystallised, multiple disputes had purportedly been referred to the adjudicator.

[16] As regards the first ground of challenge, in order to competently refer a matter to adjudication there required to be a "dispute". Reference was made to the so-called seven propositions in *Amec Civil Engineering Ltd* v *Secretary of State for Transport* [2004] EWHC Civ 2339 at paragraph [68] per Jackson J (approved by the Court of Appeal in [2005] 1 WLR 2339). The defender's counsel submitted that there was no "dispute" in the present case because the pursuer's notice of adjudication was (adopting the seventh of Jackson J's propositions in *Amec, supra*) "so nebulous and ill-defined as to prevent the [defender] from properly responding to it". The notice of adjudication was said to lack clarity as to the nature of the pursuer's claim; it did not identify whether the pursuer was claiming interim payments, a final account or damages; it merely sought quantification of the "proper value of the works undertaken"; and did not cross-refer to any of the contractual provisions. It was

submitted that the pursuer's notice of adjudication should be given a strict interpretation as it had been drafted by solicitors (*Griffin t/a K & D Contractors* v *Midas Homes Ltd* 78 Con LR 152 at 153). While he acknowledged that the pursuer's referral notice itself (item 6/2 of process) was not relevant for the purpose of defining the "dispute", counsel submitted that the referral notice added to the confusion with multiple alleged internal inconsistences including references to purported variations, a final account, and an alleged unlawful termination). The requirement for there to be a clear dispute was said to be an important aspect of natural justice, particularly in the context of adjudication which was conducted within an extremely short timeframe (*Costain Ltd* v *Strathclyde Builders Ltd* 2004 SLT 102 at paragraphs [10] to [14]). The defender had to know what case it was to answer. Counsel did not seek to advance a "free-standing natural justice argument" (as in *Costain, supra*) but relied on *Costain* to underscore the principle that a "threshold of specificity" required to be passed in the notice of adjudication. Reference was made to the parties' construction contract (item 5/1 of process) and to the detailed provision therein as to the circumstances in which the pursuer was to be paid for its work, the distinction between interim payments and final payments, and the procedures regulating payment applications and pay less notices.

[17] As for the second ground of challenge, *esto* there was a "dispute" (which was denied), it was submitted that the notice of adjudication, on a proper reading, purported to refer multiple disputes to adjudication including disputes concerning interim payment applications, variations, possibly a final account, possibly a damages claim, together with a dispute concerning unpaid VAT. This was said to be incompetent. Absent consent, the adjudicator did not have jurisdiction to resolve multiple disputes in the same adjudication. Reference was made to *Bothma & Bothma* v *Mayhaven Health Care Ltd* [2006] EWHC 2601;

Fastrack Contractors Ltd, supra; *Barr Ltd, supra; Muir Construction Ltd* v *Capital Residential Ltd* 2017 SLT 1294; *Caledonian Modular Ltd* v *Marr City Developments Ltd* [2015] EWHC 1855; and *David Maclean Housing Contractors Ltd*, *supra.* The defender's note of arguments (item 11 of process) was adopted, subject to a minor amendment of paragraph 15.

[18] I was invited to sustain the defender's seventh and eighth pleas-in-law, to repel the pursuer's pleas-in-law, to reduce the adjudicator's decision *ope exceptionis,* and to assoilzie the defender.

Supplementary submissions

[19] As the diet of debate was adjourned part-heard, at the adjourned diet the pursuer's counsel took the opportunity to tender written supplementary submissions for the pursuer. In summary, the pursuer's counsel submitted that it was not open to the defender to assert that no dispute had arisen at all, standing admissions on record. In any event, the defender's submission anent the existence of a "dispute" was said to proceed upon an erroneous understanding of *Amec, supra*. There was said to be no authority to vouch the proposition that a notice of adjudication required to define a claim with precision. Reference was made to paragraph 1(3) of the Scheme. It was also observed that, although copies of the payment applications were not appended to the notice of adjudication, or lodged, the defender could not deny receiving any of those applications standing admissions in paragraph 7.1 of the defender's response to the pursuer's referral notice (which was itself incorporated into the pleadings). Lastly, if anything was said to turn on the failure of the pursuer to produce copies of the payment applications, that omission constituted no more than a plea to the specification of the nature of the dispute, and could only support the defender's second plea-in-law (to relevancy and specification), justifying dismissal.

[20] In his supplementary submission, the defender's counsel stated that the mere admission that "a dispute" had arisen between the parties was not equivalent to an admission that the notice of adjudication passed the threshold of specificity. While the defender's counsel accepted that the degree of specification required in a notice of adjudication was not high, some degree of specification was still required to satisfy the requirement in the Scheme that there be a "brief description of the dispute" (paragraph 1(3), the Scheme). The principles set out by Jackson J in *Amec, supra,* were said to be applicable both to pre-notice communications and to the notice of adjudication itself; and the referral notice could not, by providing greater specification, save an otherwise defective notice of adjudication. In short, the notice of adjudication should have specified the particular payment applications that were being referred to. The failure to do so rendered the referral "nebulous and ill-defined".

Discussion

[21] Adjudication is a statutory dispute resolution procedure introduced by the Housing Grant, Construction and Regeneration Act 1996. It applies to "construction contracts" as defined by section 104 of the 1996 Act. It cannot be contracted out of.

[22] Adjudication emerged as an antidote to the weary "grinding detail" (per Dyson J in *Macob Civil Engineering Ltd* v *Morrison Construction Ltd* (1999) 64 Con LR 1, paragraph 14) of the traditional approach to construction dispute resolution, which often resulted in the strangulation of cash flow to contractors and the dislocation of important building projects while the bonfires of litigation or arbitration raged interminably.

[23] Part II of the 1996 Act provides that every party to a construction contract has the right to refer a dispute arising under the contract to adjudication under a procedure

complying with section 108 of the 1996 Act. If the construction contract itself confers such a right, the contractual provisions will apply. If the construction contract contains no such right, then the adjudication provisions of Part I of the Schedule to the Scheme for Construction Contracts (Scotland) Regulations 1998 (SSI 1998/687) ("the Scheme") will apply and will have effect as implied terms of the contract.

[24] The crux of adjudication is that it provides a speedy mechanism for settling disputes in construction contracts, albeit on a provisional basis, by requiring the decisions of adjudicators to be enforced pending the final determination of those disputes by arbitration, litigation or agreement (1996 Act, section 108(3); the Scheme, paragraph 23(2)). The procedure is summary in nature. Adjudications operate within very tight timescales. The adjudicator must reach a decision within 28 days of the referral of the dispute to him, absent an agreed extension. Within that tight timescale, the adjudicator is largely given free rein to determine procedure (1996 Act, section 108(2)(f); the Scheme, paragraph 13).

[25] The decision of the adjudicator is binding on the parties and immediately enforceable (the Scheme, paragraphs 23(2) & 24; *Gillies Ramsay Diamond* v *PJW Enterprises Ltd* 2004 SC 430 at paragraph [23]; *The Construction Centre Group Ltd* v *Highland Council* 2003 SC 464 at paragraph [14]). This is underlined by paragraph 24 of the Scheme which provides that the party against whom an adjudicator's decision is to be enforced shall, on being requested to do so, forthwith consent to the execution of summary diligence on that decision by means of registration for execution in the Books of Council and Session. In practice, of course, such consent may not be readily forthcoming, so decisions of adjudicators are often enforced by means of an action for payment (with a timely motion for summary decree). Courts of law must interpret construction contracts consistently with the Parliamentary intent of swift dispute resolution and lend their assistance to the prompt enforcement of decisions made by

adjudicators within the scope of their jurisdiction (*The Construction Centre Group Ltd* v *Highland Council* 2003 SC 464 at paragraph [14]).

[26] But, though binding on the parties and immediately enforceable, the decision of an adjudicator is also provisional in nature. That means that it is binding and enforceable only until the dispute is finally determined by litigation, arbitration or agreement. Adjudication does not oust the jurisdiction of the court or of an arbiter. The primary purpose of adjudication is to regulate a dispute *ad interim,* pending a definitive resolution of that dispute by litigation, arbitration or agreement. So, whereas litigation and arbitration are forms of conclusive dispute resolution, adjudication is merely a form of provisional dispute resolution (*Gillies Ramsay Diamond, supra*.)

[27] There is no incompatibility between the grant of a decree in a court action to enforce an adjudicator's decision and the provisional character of the adjudicator's award, because the decree in such an action would not be a judicial determination of the merits of the dispute, but merely the enforcement of the contractual obligation of the other party to abide by, and make payment in accordance with, the adjudicator's provisional determination (*Stair Memorial Encyclopedia*, Building Contracts, paragraph 177).

[28] Consistent with the foregoing rationale, the defences to an action for enforcement of an adjudicator's decision are limited. Broadly speaking, the decision of an adjudicator will only be unenforceable if the adjudicator has acted in excess of his jurisdiction or in breach of principles of natural justice. Lack of jurisdiction may arise in a variety of ways.

[29] In contrast, a decision that is challenged merely as to the soundness of its factual or legal conclusions, or as to procedural error, remains enforceable. A decision that is erroneous, even if the error is disclosed by the reasons, will ordinarily still be enforced (*Sherwood & Casson Ltd* v *Mackenzie* (2000) 2 TCLR 418; *Northern Developments (Cumbria) Ltd* v

J & J Nichol 2000 BLR 158 at 162; *Watson Building Services Ltd* v *Harrison* 2001 SLT 846; *Barr Ltd* v *Law Mining Ltd* 2003 SLT 488 at paragraph [6]. An adjudicator's decision may even be "inept" (as in *Diamond* v *PJW Enterprises Ltd, supra* at paragraph [43]) but an adjudicator's *intra vires* error of law will afford neither a defence to enforcement of the decision nor a right to seek judicial review. As Knox J put it in *Nikko Hotels (UK) Ltd* v *MEPC plc* [1991] 2 EGLR 103 at 108 (cited by Lord MacFadyen in *Barr Ltd, supra*):

> "If the adjudicator has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity".

According to HH Judge Thornton QC in *Sherwood & Casson Ltd, supra,* the logic is that:

> "The adjudication is intended to be a speedy process in which mistakes will inevitably occur. Thus, the court should guard against characterising a mistaken answer to an issue, which is within an adjudicator's jurisdiction, as being in excess of jurisdiction…"

Most succinctly perhaps, in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358, the Court of Appeal observed (per Lord Justice Chadwick at paragraph [86]) that in the context of adjudication:

> "The need to have the 'right' answer has been subordinated to the need to have an answer quickly."

Lord Justice Chadwick observed at paragraph [85]:

> "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 be only in rare circumstances that the courts will interfere with the decision of an adjudicator…. ";

and continued at paragraph [87]:

> In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration

> proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense…."

[30] Risks of injustice are inherent in adjudication, not least arising from the speed of the process (*Diamond* v *PJW Enterprises Ltd, supra*, paragraph [43]). For example, where an adjudicator erroneously rejects a party's well-founded claim or defence, the subsequent vindication of that aggrieved party's position may well be defeated by an intervening bankruptcy of the successful party (*Bouygues (UK) Ltd* v *Dahl-Jensen (UK) Ltd* (2001) 1 All ER 1041. Nevertheless, since its introduction adjudication has proved to be very successful. Perhaps the risks of adjudication are perceived by those in the construction industry to be outweighed by the benefits. Certainly, very few construction disputes ever proceed to a subsequent definitive determination by litigation or arbitration, following an adjudicator's decision.

[31] In short, adjudication is a form of rough and ready, quick and dirty, summary justice. It offers a swift, temporary solution which is binding on the parties *ad interim,* and is to be implemented by them, pending a definitive resolution of the dispute by litigation, arbitration or agreement.

[32] Against that background, I turn to consider the two grounds advanced by the defender to prevent enforcement of the adjudicator's decision in the present case.

Was there a "dispute"?

[33] For the defender it was submitted that the adjudicator lacked jurisdiction because no adequately defined "dispute" existed between the parties. The defender's counsel founded

heavily upon the so-called seventh proposition in Jackson J's decision at first instance in *Amec, supra* (at paragraph [68]).

[34] Only a "dispute" may be referred to adjudication. But dispute "includes any difference" (section 108(1), 1996 Act; paragraph 1(1), the Scheme; clause 26.2.1 of the parties' contract). A difference is "less hard-edged" than a "dispute" (*Amec, supra* [2005] 1 WLR 2339 at paragraph [31] per May LJ). A "difference" is merely a "failure to agree" (*F & J Skyes* v *Fine Fare* [1967] 1 LLR 53 at page 60 per Danckwerts LJ).

[35] There are numerous decisions on the question of what constitutes a "dispute". It is generally accepted that the proper approach is set out by Jackson J in his seven propositions enunciated, at first instance, in *Amec* [2004] EWHC Civ 2339. These seven propositions were accepted by the Court of Appeal as "broadly" correct in both *Collins (Contractors) Ltd* v *Baltic Quay Management Ltd* [2004] EWCA Civ 1757 and on appeal in *Amec* ([2005] 1 WLR 2339), subject to certain further observations and clarifications.

[36] I need not reproduce the seven *Amec* propositions. The crucial point, for the purposes of this case, is that they clearly involve an analysis of the communications (or non-communications) between the parties *prior to* the service of the notice of adjudication (or, as in *Amec* itself, and in some of the older cases discussed by Jackson J, the notice of referral to arbitration).

[37] Thus, in *Tradax International* v *Cerrahogullari Tas* [1981] 3 All ER 344 the claimant demanded payment of money, which was indisputably due. The defendant did not admit liability. Instead, the defendant simply ignored the claim and all communications relating to it. The court had little difficulty in concluding, by inference, that there was a "dispute". So the arbitration clause (in that case) could properly be invoked.

[38] In *Ellerine Brothers (Pty) Ltd* v *Klinger* [1982] 1 WLR 175, the claimant repeatedly requested the defendant to account for certain monies. The defendant delayed. His secretary made non-committal responses. Again, the court held that, despite the absence of any express rejection, a dispute had arisen, entitling the triggering of (in that case) the arbitration process.

[39] Similarly, in *Beck Peppiatt Ltd* v *Norwest Holst Construction Ltd* [2003] BLR 316, *Fastrack Contractors Ltd* v *Morrison Construction Ltd* [2000] BLR 168 and *Sindall Ltd* v *Sowland* [2001] 3 TCLR 712, the crux of the issue was whether a dispute existed as at the date of the notice of adjudication. In each of these cases, the question was whether the issues identified in the notice of adjudication had "ripened into disputes" (*Fastrack Contractors Ltd*, *supra*, at 179 per HHJ Thornton QC) by the time that the notice of adjudication was served. In each case, the answer turned upon an analysis of the parties' communications (and non-communications) *prior to* service of the notice.

[40] Reading the *Amec* propositions in context, the defender's position can be seen to be misconceived.

[41] The first point to note is that the defender's "no dispute" submission was not clearly foreshadowed in the defences. To explain, in Answer 3, the defender avers:

> "Admitted that during the course of the works a dispute arose between the parties. Admitted that the defender refused to pay the pursuer the sum of £105,140.82 plus VAT under explanation that the defender is not entitled to the same."

Pausing there, it is plain that the defender admits that "a dispute" arose between the parties; and it is equally plain that the dispute relates to the defender's refusal to pay a specific sum claimed by the pursuer.

[42] The defence on record is that the pursuer failed "to refer a clear and precise claim" to adjudication (per Answer 5). In other words, the defence is directed at the wording of the notice of adjudication itself, not at the pre-notice communications between the parties. The defence is directed at the degree of specification in the notice, not at whether a dispute had crystallised prior to the service of the notice. Nowhere in the Answers is it stated that a "dispute" had not arisen. Indeed, such an averment would be difficult to reconcile with the defender's express admission that "a dispute arose between the parties" (in Answer 2) and with the defender's fifth plea-in-law to the effect that the adjudicator had no jurisdiction "to decide the dispute between the parties".

[43] The defender's note of arguments (item 11 of process) and oral submissions can be seen to have shifted the goalposts ever so slightly. In the note of arguments, the defender alleges that "there was no dispute because the pursuer's referral was so nebulous and ill-defined as to prevent the defender from properly responding to it" (paragraph 9). In a subtle but important sense, this is different from the position foreshadowed in the defences. That said, even here, the defender's argument is still directed at the wording of the notice of adjudication itself, not at the pre-notice communications between the parties. The thrust of the defender's argument is that the drafting of the notice was inadequate.

[44] In his oral submissions at the bar, the defender's counsel sought to address head-on the alleged inconsistency between the defences and the note of arguments. He was explicit. He insisted that there was "no difference" between a submission that "no dispute had crystallised" and a submission that a dispute had not been sufficiently described in the notice of adjudication. He submitted that there was no crystallised dispute in the present case because, in terms of Jackson J's seventh proposition in *Amec, supra,* the notice of

adjudication was "so nebulous and ill-defined" as to prevent the defender from properly responding to it.

[45] In my judgment, therein lies the flaw in the defender's reasoning.

[46] Firstly, standing the express admissions on record, it is not open to the defender to advance the argument that no dispute had arisen. It is expressly admitted in the Answers that a dispute had arisen, and what that dispute related to.

[47] Secondly, the defender attacks the wording of the notice of adjudication by reference to Jackson J's seventh proposition in *Amec.* However, none of the seven *Amec* propositions relates to the wording of the notice of adjudication (or notice of arbitration, as the case may be). The *Amec* propositions relate to the *pre-notice* communications between the parties. They are aimed at identifying whether a dispute has ripened or crystallised *prior* to service of the notice of adjudication. In the present case, no challenge was made to the pre-notice communications or actings of the parties.

[48] Thirdly, the defender seeks to define, and to impose upon the notice of adjudication, a threshold of specificity by reference to Jackson J's seventh proposition in *Amec.* But the seventh *Amec* proposition does not purport to define the standard of specification required of a notice of adjudication at all. It relates to the pre-notice communications. The standard of specification required of a notice of adjudication is defined elsewhere, namely in paragraph 1(3) of Part I of the Scheme.

[49] In conclusion, the defender's argument conflates two discrete issues: first, whether a dispute had "crystallised" prior to the date of the pursuer's notice of adjudication; and, second, whether that notice of adjudication contained adequate specification of the dispute that was being referred to the adjudicator. The first issue is regulated by the *Amec* propositions; the second issue is not.

[50] Although the point was not expressly advanced in submissions for the defender, I have considered whether the pursuer's notice of adjudication satisfies the "threshold of specificity", as properly understood, competently to refer a dispute to, and confer jurisdiction upon, the adjudicator. The proper test is set out in paragraph 1(3) of Part I of the Scheme. It states:

> "1(3) The notice of adjudication shall set out *briefly* –
> (a) the nature and a *brief description* of the dispute"

The Notice merely requires to set out "briefly" the nature and a "brief description" of the dispute. The repeated invocation for brevity merely underscores that not much is required of the notice to meet the necessary threshold of specificity. Parliament has set a very low bar.

[51] The rationale for the defender's criticism was that, absent greater specification in the notice of adjudication, the defender was prevented from "properly responding to it"; that it was "an important issue of natural justice" for there to be a "clear dispute"; and that the defender had to "know what case it is that it has to answer" (paragraphs 9 & 13, defender's note of arguments). But the defender's approach betrays a blurring of the distinction between the limited (though significant) purpose of the notice of adjudication (which is to confer jurisdiction upon the adjudicator in respect of a pre-existing dispute) and the purpose of the subsequent referral notice (which is to set out the basis of the referring party's claim) (paragraphs 7(1) & (2), the Scheme).

[52] If we turn to look at the notice of adjudication in the present case (item 5/2 of process), in my judgment it satisfies the statutory requirement to "set out briefly…a brief description of the dispute" (paragraph 1(3)(a), the Scheme). It identifies the dispute as relating to:

> "…the sums due and payable by [the defender] to [the pursuer] in respect of the proper value of the works undertaken";

and further explains that the dispute arose:

> "…following [the defender's] failure to pay amounts applied for by [the pursuer] within its payment applications".

The notice then goes on to quantify precisely the gross and net sums sought by the pursuer for the "works undertaken".

[53] The reference in the notice to the pursuer's "payment applications" is particularly significant. It is competent for a notice to define the dispute by the "short cut" of referring to other documentation (*Griffin t/a K & D Contractors* v *Midas Homes Ltd* [2000] EWHC 182). That is what the pursuer's notice of adjudication has done. It has, in effect, "briefly" described the dispute by reference to the preceding payment applications and precisely quantified (to the penny) the value of its claim for "works undertaken" by it.

[54] Of course, the notice is also a contractual document. The usual principles of contractual construction require to be applied (*Rainy Sky SA* v *Kookmin Bank* [2011] 1 WLR 2900; *Arnold* v *Britton* [2015] UKSC 36; *Wood* v *Capita Insurance Services Ltd* [2017] UKSC 24). In the specific context of the construction of a notice of adjudication, according to Lord Clark in *Morgan Sindall Construction & Infrastructure Ltd* v *Westcrowns Contracting Services Ltd* [2017] CSOH 145 (at paragraph [31]):

> "…the question to be determined in respect of the scope of the dispute is what a reasonable person in the position of the defender, having the background knowledge available to the parties, would have understood the notice of adjudication to mean."

Applying these principles, the pursuer's notice should be construed "in a sensible manner" (*David McLean Housing Contractors Ltd, supra,* at paragraph [8] per Lloyd J), in the context of the parties' construction contract and the (contractual) payment applications submitted and referred to. Read in that context, no reasonable person in the position of the defender could

have been in any doubt that the dispute that was referred to adjudication concerned "the proper value of the works undertaken" by the pursuer, as referred to in the pursuer's "payment applications". Whether or not the pursuer was entitled to payment in respect of any of that work, or any of those applications, was an entirely different matter.

[55] For the foregoing reasons, the defender's first line of defence fails.

Were multiple disputes referred to adjudication?

[56] The second challenge to the adjudicator's jurisdiction is that the pursuer sought to refer more than one dispute to adjudication, without the defender's consent.

[57] On this issue, I prefer and adopt the pursuer's submissions. The courts have taken a firm line against those who seek to avoid their statutory and contractual obligation to comply with an adjudicator's decision (per paragraph 23(2), the Scheme) by attempting to characterise one dispute, which has several issues, as "multiple" separate disputes. The "multiple disputes" argument has been described as a "bold submission" in light of its "inglorious history" (*Dalkia Energy and Technical Services Ltd* v *Bell Group UK Ltd* 2009 EWHC 73 at paragraph 90 per Coulson J). That is because disputes arising out of commercial contracts almost invariably give rise to more than one issue. To require each issue to be referred to a separate adjudication would render the statutory Scheme unworkable. It would lead to a multiplicity of adjudications and enforcement actions, and would be inconsistent with the statutory objective, which is to achieve an expeditious and inexpensive mechanism for the resolution of construction disputes.

[58] As Akenhead J stated in *Witney Town Council* v *Beam Construction (Cheltenham) Ltd* [2011] EWHC 2332 (at paragraph 33):

> "It is important to bear in mind that construction contracts are commercial contracts and parties, at least almost invariably, can be taken to have agreed that a sensible interpretation will be given to what the meaning of a dispute is. It is conceivable that there may be a dispute on a construction contract which is simply: what is due to one or other of the parties? That could be a very broad dispute covering a large number of issues… One could say that there were 100 disputes… Alternatively, and obviously sensibly, one could and should say that there was one dispute with 100 sub-issues".

Likewise, Lord Clark in *Morgan Sindall, supra,* (at paragraph 30) stated:

> "…the courts should not adopt an overly legalistic analysis of what the dispute between the parties is, but should determine in broad terms what is the disputed claim or assertion. If the courts were to take an overly legalistic approach, each sub-issue or individual point of difference between the parties could be taken as a dispute. That approach is unrealistic and not in accordance with commercial common sense".

The high water-mark of this approach may be seen in *Fastrack Contractors Ltd supra,* where HHJ Thornton QC stated (at paragraph 20):

> "It is to be noted that [the 1996 Act] refers to a 'dispute' and not to 'disputes'. Thus, at any one time, a referring party must refer a single dispute, albeit that the scheme allows the disputing parties to agree, thereafter, to extend the reference to cover 'more than one dispute under the same contract' and 'related disputes under different contracts'. During the course of a construction contract, many claims, heads of claims, issues, contentions and causes of action will arise. Many of these will be, collectively or individually, disputed. When a dispute arises, it may cover one, several or many of one, some or all of these matters. At any particular moment in time it will be a question of fact what is in dispute. Thus, the "dispute" which may be referred to adjudication is all or part of whatever is in dispute at the moment that the referring party first intimates the adjudication reference. In other words, the 'dispute' is whatever claims, heads of claim, issues, contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference."

While Lord MacFadyen in *Barr Ltd, supra,* expressed reservations as to the broader interpretation of "dispute" expounded in *Fastrack Contractors Ltd*, he did not expressly reject the approach.

[59] In other words, a single dispute may have several component parts. The fact that there are multiple elements in a claimant's claim does not necessarily mean that what is

referred to adjudication is not a single "dispute". That a "dispute" may comprise multiple issues is implicit in paragraph 20(1) of the Scheme which provides:

> "The adjudicator shall decide the matters [*plural*] in dispute and may make a decision on different aspects of the dispute at different times".

This is illustrated by decisions such as *Whiteways Contractors (Sussex) Ltd* v *Impresa Castelli Construction UK Ltd* [2000] EWHC 20 in which the "dispute" referred to adjudication concerned failure to pay a final account and two interim applications as well as an issue over an extension of time. The adjudicator's jurisdiction was sustained. Similarly, in *Barr Ltd, supra*, each of two referrals in that case concerned issues as to the amount due under an interim certificate, the amount due under a further application for payment, and an issue as to extension of time. The defender's contention that more than one dispute had been referred to the adjudicators was unsuccessful.

[60] The present case is comparatively straightforward. In my judgment, a single dispute was referred to adjudication, namely, what sum was due to the pursuer "in respect of the proper value of the works undertaken by it" (per paragraph 2 of the notice of adjudication) (item 5/2 of process), with specific reference to the pursuer's payment applications? Under that broad umbrella, multiple consequential issues arose for determination by the adjudicator including whether the contractual stipulations for the submission of payment applications had been complied with, whether purported variations constituted additional works; whether there had been valid variations to the sub-contract works; and the proper quantification of valid variations.

[61] I also observe that the adjudicator reached the same conclusion at paragraph 21 of his decision (item 5/3 of process). He recorded that the dispute referred to him was a single dispute about "the gross value and the sums due, if any, to [the pursuer] and the VAT issue

or liability for VAT will follow from that". I am not persuaded that the adjudicator was wrong to take that view.

[62] In general terms, this conclusion accords with the approach adopted by HHJ Lloyd QC in *David McLean Housing Ltd* v *Swansea Housing Association Ltd* (at paragraph 12), where he stated:

> "… Accordingly, giving the notice a benevolent interpretation, I would hold that this notice did not refer more than one dispute. It referred a single dispute, namely, 'how much should I be paid?' or 'should I have been paid on application 19?' Had the notice not been directed to such a single question then it would have referred more than one dispute. A notice that refers more than one dispute is invalid…"

The same approach was taken by Mr Justice Coulson in *Dalkia Energy & Technical Services Ltd* v *Bell Group UK Ltd* (at paragraph 92).

[63] For these reasons, in my judgment the pursuer's notice of adjudication referred a single dispute to adjudication. Accordingly, the adjudicator did not fall into jurisdictional error and his decision is not unenforceable on that account.

Decision

[64] For the foregoing reasons, I found in favour of the pursuer. Accordingly, I have repelled the defender's pleas-in-law, I have sustained the pursuer's pleas-in-law, and I granted decree against the defender as first craved.

[65] In respect that the pursuer has been wholly successful, I find the defender liable to the pursuer in the expenses of the action as taxed. I was not addressed on ancillary issues, such as sanction for the employment of counsel. Parties remain at liberty to raise such issues by motion, if they so wish.