OUTER HOUSE, COURT OF SESSION

[2023] CSOH 14

CA98/22 & CA101/22

OPINION OF LORD SANDISON

In the cause

ATALIAN SERVEST AMK LIMITED

Pursuer

against

B W (ELECTRICAL CONTRACTORS) LIMITED

Defender

and

B W (ELECTRICAL CONTRACTORS) LIMITED

Pursuer

against

ATALIAN SERVEST AMK LIMITED

Defender

Atalian Servest AMK Limited: MacColl KC; Brodies LLP
B W (Electrical Contractors) Limited: Moynihan KC, Broome; MacRoberts LLP

16 February 2023

Introduction

[1] In 2020 Atalian Servest AMK Limited ("AMK") was carrying out certain construction work as a subcontractor at Lord's Cricket Ground in London. In turn it engaged B W (Electrical Contractors) Limited ("BW") as a subcontractor to it in respect of various electrical works. Those works did not proceed as the parties had envisaged. Each now

conceives itself to have a financial claim against the other in respect of the issues encountered. These actions are not the vehicles by which those claims will be finally determined. That will happen, in the absence of agreement otherwise, in another action (the "substantive action") raised in this Court in May 2022 at the instance of BW against AMK. The summons in that action, though raised and served before the present proceedings, has not been lodged for calling. These actions seek, at least in large measure, to determine which party (if either) should make payment to the other pending the conclusion of the substantive action. They are satellite litigations. They called before the Court for a joint diet of debate on each parties preliminary pleas.

Background

[2] The background relevant to the determination of the current actions includes the following features. Clause 33 of Schedule 3 to the parties' subcontract included the following provisions relevant to these actions:

> "33. Final Account
>
> 33.1 AMK shall notify the Subcontractor of the date when it considers the Subcontract Works have been completed or in the absence of such notice, the date named in the Subcontract works for completion or any revised completion date.
>
> 33.2 Within 2 months of this notification, the Subcontractor shall submit a detailed final account to AMK of the Subcontract works. The account shall contain the Subcontractor's final valuation of the Subcontract Works and include all payments considered to be due under the Subcontract, including (without prejudice to the foregoing generality) any payment for loss and expense, breach of Subcontract and prolongation ('the Final Account'). It is a condition precedent of any final payment which may be due, that the Subcontractor submits the Final Account within 2 months of notification of completion of the Subcontract Works. If the Subcontractor fails to submit the Final Account within the said 2 month period, the Subcontractor shall not be entitled to claim any further payment under the Subcontract, or at common law.

> 33.3 Within 28 days of the receipt of the Final Account, AMK shall state the amount which it considers to be due to the Subcontractor ('the Final Account Statement').
>
> 33.4 The Final Account Statement shall be final and binding on the Subcontractor unless the parties agree to any modification of it or, where the Subcontractor disagrees with the AMK Final Account Statement, unless the Subcontractor has commenced adjudication or court proceedings within 20 working days of the date of the AMK Final Account Statement.
>
> 33.5 The balance brought out in the AMK Final Account Statement (if any) shall become due 35 days after the date on which it is issued, and the final date for payment shall be 30 days after the due date.
>
> 33.6 Not less than 5 days before the final date for payment, AMK may give written notice to the Subcontractor of its intention to pay less than the sum due. Such notice shall specify the sum that AMK considers to be due in terms of the Final Account Statement, and the basis on which that sum is calculated."

[3] On 11 February 2022 AMK notified BW that Practical Completion of the subcontract works had in its view been achieved on 17 September 2021. On 8 April 2022, BW submitted its Final Account to AMK in the gross sum of £3,099,350.60 (excluding VAT) and three days later it issued its corresponding Final Application for Payment. On 6 May 2022 AMK in turn issued its Final Account Statement, bringing out an amount said to be due for payment by BW to it of £1,039,438.14. AMK's Final Account Statement briefly set out the basis for the calculation of that sum as follows: (a) Sub-contract works valued at £715,000 (b) Variations valued at £306,198.74 (c) less: (i) contra charges of £243,676.56; (ii) non-provision of electrical materials to the value of £595,965.79; and liquidated damages amounting to £178,750. That left a total sum said to be payable in respect of the works of £2,806.39, to which a retention of 2.5% was applied, leaving the works valued at a net sum of £2,736.23. Payments had previously been certified in the sum of £1,042,174.37, giving rise to the balance said to be due from BW to AMK of £1,039,438.14.

[4] Perhaps unsurprisingly in those circumstances, BW wrote to AMK on 10 May 2022 disputing the Final Account Statement. The subcontract made express provision for either

party to it to refer a dispute or difference arising under or in connection with it to adjudication at any time. Since the subcontract was a construction contract as defined by section 104 of the Housing Grants, Construction and Regeneration Act 1996, section 108 of that Act would in any event have conferred that right. On 19 May BW notified its intention to refer the dispute to adjudication and on 26 May it served a Referral Notice seeking, amongst other orders, a decision that the value of the Subcontract final account was £3,099,350.60. Mr Mark Entwistle was appointed as adjudicator in this adjudication but resigned as such on 15 June 2022 on the basis that the amount of material presented to him was not capable of being properly considered within the time made available to him. Meanwhile, on 27 May 2022 (within the 20 working day period allowed for by clause 33.4 of the subcontract set out above) BW served the summons in the substantive action in this Court on AMK, seeking declarator that the final account should be valued in the sum of £3,099,350.60 and that it is entitled to payment from AMK of £1,897,117.74.

[5] On 8 September 2022, after the expiry of the 20 working day period set out in clause 33.4, BW served a new Notice of Adjudication, with the Referral following on 15 September 2022. Mr Tony Bingham was appointed as adjudicator. After extensive exchange of documents serving the function of pleadings and submissions, Mr Bingham issued his decision in the adjudication on 11 November 2022. He decided that the gross sum due in respect of the final account (accounting for contra charges, retention and discount) was £2,526,570 (excluding VAT); that the net sum due to be paid by AMK to BW was £1,401,821 (excluding VAT); and that AMK was liable to pay interest of £18,435 together with his fees and expenses. On the way to that decision, he held that AMK's Final Account Statement had not been validly issued and further that it was not binding on the parties or him.

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[6] In this action BW asks the Court to pronounce decree for certain sums in order to enforce Mr Bingham's adjudication in its favour, in accordance with paragraph 23(2) of Part I of the Scheme for Construction Contracts (Scotland) 1998, which provides that:

> "The decision of the adjudicator shall be binding on the parties, and they shall comply with it, until the dispute is finally determined by legal proceedings …".

AMK maintain that that adjudicator's decision should be set aside *ope exceptionis*.

Defender's Submissions

[7] In written and oral submissions, senior counsel for AMK acknowledged that the statutory process of adjudication required courts to respect and enforce an adjudicator's decision unless it was plain that the question which he had decided was not the question referred to him, or else the manner in which he had gone about his task was unfair. In particular, if the adjudicator had acted in excess of his jurisdiction, had failed to exhaust his jurisdiction, had acted in breach of the rules of natural justice, or where his reasoning was non-existent or unintelligible, the Court would not enforce his decision. The proper scope of an adjudication was defined by the relevant notice of adjudication, together with any ground founded upon by the responding party to justify its position in defence of the claim made. A line of defence to a claim made required to be dealt with substantively by the adjudicator, not merely by way of general assertion that he had considered all relevant matters. So far as natural justice was concerned, each party had to be given the opportunity to present its case in a manner consistent with fair play so that there was no opportunity for injustice to be done. The adjudicator was not entitled to go off on a frolic of his own and purport to decide a case on a factual or legal basis which had not been put forward by either side without giving the parties an opportunity to comment on and respond to such bases.

[8] In support of these propositions, reference was made to *Carillion Construction Limited* v *Devonport Royal Dockyard Limited* [2006] BLR 15 at [85]; *Gillies Ramsay Diamond* v *PJW Enterprises Limited* 2004 SC 430 at [25] and [31]; *Construction Centre Group Limited* v *Highland Council* 2002 SLT 1274 at [19] and [20]; *Connaught Partnerships Limited (in administration)* v *Perth & Kinross Council* 2014 SLT 608 at [18], [19] to [21]; *Barhale Limited* v *SP Transmission plc* 2021 SLT 52 at [32]; *Amec Group Limited* v *Thames Water Utilities Limited* [2010] EWHC 419 (TCC) at [83]; *Pilon Limited* v *Breyer Group plc* [2010] BLR 452 at [22]; *NKT Cables A/S* v *SP Power Systems Limited* 2017 SLT 494 at [17] to [20] and [110] to [114]; *Costain Limited* v *Strathclyde Builders Limited* 2004 SLT 102 at [20]; *Carillion Utility Services Limited* v *SP Power Systems Limited* 2012 SLT 119 at [17] to [26]; *Highland and Island Airports Limited* v *Shetland Islands Council* [2012] CSOH 12 at [28] to [30]; *Ardmore Construction Limited* v *Taylor Woodrow Construction Limited* [2006] CSOH 3 at [43] and [48]; *Barrs* v *British Wool Marketing Board* 1957 SC 72 at 82; *McAlpine PPS Pipeline Systems JV* v *Transco plc* [2004] EWHC 2030 (TCC) at [124]; *Cantillon Limited* v *Urvasco Limited* [2008] BLR 250 at [57]; and *Van Oord UK Limited* v *Dragados UK Limited* [2022] CSOH 30 at [18].

[9] In the present case, Mr Bingham had arrived at his conclusion not by answering the question referred to him (ie what sum was properly due to BW by AMK under the lump sum, fixed price subcontract) but rather by deciding that there had been a new contract created by circumstances, and by assessing what he regarded as a fair price to be paid by AMK in terms of that new contract.

[10] That was a frolic of his own, and moreover one upon which he had embarked without regard to natural justice, by not raising the matter in a substantive fashion with the parties or affording them an opportunity to respond. Additionally, the adjudicator had *ex proprio motu* suggested that the AMK Final Account Statement should not be regarded as contractually valid, without this issue previously having been raised by either party.

[11] Mr Bingham had separately failed to address, and thus failed to exhaust his jurisdiction in relation to, various lines of defence advanced by AMK. Not only had he raised the issue of the validity of the AMK Final Account Statement, he had made no mention in his decision of the arguments made in favour of its validity on behalf of AMK, which were based on the terms of clause 33.4 of the subcontract, the distinct nature of his adjudication from that timeously begun under the auspices of Mr Entwistle, and the availability of a challenge to the Final Account Statement in the substantive court proceedings, which gave rise to the reasonable inference that he had not taken those arguments into account in reaching his determination on the issue. The arguments of AMK had similarly apparently been ignored in relation to the proper manner in which the subcontract works and associated management time should be valued and the risks and inaccuracies inherent in the approach which Mr Bingham intended to take to those issues; to its argument that BW's claim for additional plant and equipment costs related to costs which would have been incurred in any event; to the proper approach to be taken to the assessment of the period during which BW was entitled to be on site for completion of works; to the significance of clause 16 of the subcontract in the proper assessment of AMK's contra-claim for materials; and to AMK's position in relation to liability for interest.

Pursuer's Submissions

[12] On behalf of BW, senior counsel did not take issue with the propositions of law advanced on behalf of AMK in relation to the main principles governing the susceptibility of an adjudicator's decision to reduction *ope exceptionis* in circumstances such as these. He further submitted orally and in writing that propositions of general application could be taken from *Gillies Ramsay Diamond* v *PJW Enterprises* (*supra*), namely (a) that it was to be assumed that an adjudicator had considered any relevant information submitted to him by

either party unless his decisions and reasons suggested otherwise (para 28), and (b) that a challenge to the sufficiency of the reasons stated could succeed only if the reasons were so incoherent that it was impossible for the reasonable reader to make sense of them (para 31); and from *Dickie & Moore* v *Trustees of the Lauren McLeish Discretionary Trust* 2021 SC 1, namely (a) that the provisions of the Scheme for Construction Contracts (Scotland) 1998 should be interpreted in such a way that they achieve its fundamental purpose, which is to enable the obtaining of payment of sums to which a party has been found entitled without undue delay (para 25), and (b) that the procedures to be used in an adjudication were intended to be simple, straightforward and immediately effective, and those considerations should guide the approach to interpretation of the Scheme (*ibid*). Counsel also drew attention to certain provisions of Part I of the 1998 Scheme, in particular paragraph 13:

> "The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and shall decide on the procedure to be followed in the adjudication. In particular, he may - … (c) … question any of the parties to the contract …; … (f) obtain and consider such representations and submissions as he requires …; (h) issue other directions relating to the conduct of the adjudication …"
>
> and 20(2):
>
> "The adjudicator may take into account any other matters … which are matters under the contract which he considers are necessarily connected with the dispute …"

[13] Turning to the specific criticisms advanced in relation to Mr Bingham's decision, the dispute referred to him had been one as to the proper sum due to BW by AMK under the subcontract. That is the dispute which he had decided. He was entitled to take the initiative in ascertaining the facts and the law necessary to determine the dispute referred to him, which he had done in the context of deciding how the work done should be evaluated by inviting parties' comments on a suggestion he advanced that the original work scope might be regarded as having been entirely superseded by essentially *ad hoc* arrangements which he dubbed a "beck and call contract". Both parties had then taken the opportunity on various

occasions to comment at length on that suggestion and on the issue of basis of valuation more generally. That dealt with the allegation that there had been a breach of natural justice in how the issue was dealt with.

[14] As to the substance of how to approach valuation issues, the adjudicator had sufficiently explained how he had approached the questions which he considered arose and set out how he had arrived at his decision. He had explained how the duration of the subcontract works had increased and had required additional work by BW. He had explained how and why he valued BW's work, including non-productive overtime and management input. He had done exactly the same with the valuation of plant and equipment which was required.

[15] In relation to the adjudicator's raising the question of the validity of the AMK Final Account Statement and then deciding that it was not valid, that had been a matter already raised by BW in the substantive Court of Session action and the adjudicator again had been entitled in terms of the Scheme to take the initiative in ascertaining the facts and the law necessary to determine the dispute referred to him. He also gave the parties ample opportunity to comment on the point, noted their positions and dealt with them in his decision, from which his decision on interest also flowed.

[16] In relation to the suggestion that the adjudicator had, in various ways, failed to exhaust his jurisdiction by failing to address specific lines of defence advanced by AMK, an examination of the decision undertaken on a fair basis indicated that the defences in question had indeed been considered, although not ultimately favoured, by him. Likewise, he had explained clearly why he did not find that BW had been responsible for delay in the completion of the works, and what his view was on the arguments made about AMK's contra-claim for the provision of materials.

Decision

[17] The principles on which the Court will, exceptionally, refuse to enforce an adjudicator's decision, were canvassed fully in argument and are too clear and familiar to warrant further repetition here. The Court's approach requires to be informed, indeed infused, by the need to promote the aims of the statutory scheme for adjudication, which provides parties to construction contracts with a simple and rapid means of determining their mutual financial rights and obligations, at least on an interim basis. Subject to the minimum legal standards which any power of decision-making must observe, the Court should avoid an approach to the assessment of criticisms of the work of an adjudicator which would tend to complicate and delay such work.

[18] In this case, the question put to the adjudicator for decision could scarcely have been wider in scope – essentially, what sum (if any) was due to BW by AMK under the subcontract. In order to attempt make out a case that he had in fact answered a different question, and in particular that he had addressed himself, not to rights arising out of the subcontract, but rather to potential extra-contractual rights, AMK suggested that the adjudicator had strayed onto the field of unjustified enrichment and had decided how much was due to BW on the basis that it was entitled to be paid a fair and reasonable amount for all the work it had done, whether forming part of the originally-anticipated scope of the subcontract or not, in *quantum meruit*. That issue is complicated by the fact that the subcontract, through its variations clauses, permitted the valuation of additional works on a "fair and reasonable" basis, and further that it may as a matter of general law be possible to value contractual works for which a contract provides no workable valuation mechanism on the same basis, and that both situations may, with a greater or lesser degree of accuracy, be described as a valuation of works *in quantum meruit*. It may be that the adjudicator did not always nimbly navigate the pitfalls with which that landscape presented him. He may have

allowed a hare to be set running in this context by his reference in the course of correspondence during the adjudication to the original subcontract having been arguably transformed into a "beck and call" contract, which could be interpreted either as a suggestion that a new *ad hoc* contract had come in place of the original contract by way of facts and circumstances, or else that the scope of the contractual work had been so altered that "beck and call" was an appropriate description of how the existing subcontract was in point of fact operated so far as BW's services were concerned. However, the parties made it clear to him that they were not suggesting that a new contract had come into existence and there is no compelling reason to suppose that any initial attraction (if that is what it was) which he may have had to that notion was persisted in as informing his decision. It may yet transpire, in the substantive action, that the adjudicator's approach to valuation (which in essence involved the valuation of all works done by BW, whether within the original scope of the contract or not, at rates derived from the contract and said to be fair and reasonable) was not in point of law the correct approach to that issue. That, however, is not the question which falls to be asked at this stage and I remain unpersuaded that the adjudicator's approach to valuation was a frolic of his own as opposed to a genuine attempt to deal with the question posed of him. The attack on his decision based on that ground fails accordingly.

[19] Turning to the suggestion that the adjudicator had relevantly erred in raising the issue of the validity of the Final Account Statement and then holding it invalid, it is clear that he was entitled, in terms of paragraphs 13 and 20 of the Scheme, if not otherwise, to raise with parties any matter which he considered relevant to his determination of the question put before him for adjudication. The issue of the validity of the Final Account Statement was one such matter. Once that issue had been raised, there was extensive correspondence amongst the parties and the adjudicator, in the course of which every

opportunity was offered, and taken, for the relative positions being adopted by each party to be amply elucidated. There is no proper basis for any suggestion that the *audi alteram partem* principle (which I understood to be the particular aspect of natural justice said to have been offended by the adjudicator) was less than fully observed. Similarly, the fact that each party's position was so clear, and in essence amounted to a contradiction of the other's, explains how and why the adjudicator's acceptance of one party's position amounted to a rejection of the other's and a sufficient indication that the arguments in support of the accepted position were favoured over those detracting from it. Had there been some entirely free-standing matter advanced by AMK which was not affected by the adjudicator's evident preference for the arguments on fact and law put forward by BW, then a question as to whether or not that matter had indeed been overlooked might have arisen. However, no such matter existed.

[20] On each of the residual complaints of breach of natural justice and failure to exhaust jurisdiction by failing to deal with AMK's position on various matters, similar observations may be made. It is plain that AMK disagrees with practically every view which the adjudicator took on the questions which arose, but that is of no moment so long as the minimum standards for legal decision-making were observed on the way to each of his conclusions. The correspondence forming part of the process of adjudication was gone through extensively at the debate – indeed, perhaps too extensively in the context of what it must be recalled is simply a satellite litigation seeking only to regulate the parties' interim financial position. It is evident from a fair reading of that correspondence and of the adjudicator's decision firstly that each party was given ample opportunity to advance its own arguments and address those of the other – indeed, if a criticism is to be advanced about how the adjudication was conducted, it might be that the parties were over-indulged in that respect given that adjudication is intended to be a streamline mode of dispute

resolution – and secondly that the adjudicator accepted BW's arguments in a way which necessarily entailed the rejection of AMK's, 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 material doubt as to whether any matter put forward by AMK had been overlooked. It may be that on occasion the adjudicator could have expressed his reasoning in a way that would have made it quite impossible to suggest that he had not exhausted his jurisdiction, but a failure to achieve perfection of expression is not a proper basis upon which to build a such a case when, read fairly and in context, the decision indicates at the very least by necessary implication how each of AMK's arguments was regarded.

[21] It follows that no relevant criticism of the adjudicator's decision has been made out, that it accordingly stands as the fount and measure of the obligation incumbent on AMK to pay BW until final determination of the parties' dispute, and that decree falls to be granted as variously concluded for in the action at the instance of BW.

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[22] In this action AMK seeks declarator (a) that its Final Account Statement was validly issued in terms of clause 33.3 of the subcontract; (b) that it is final and binding on BW unless and until the contrary may be determined in the substantive action; and (c) that it was final and binding on Mr Bingham in his adjudication. It finally seeks decree for payment of the sum of £1,039,438.14, being the amount brought out by the Final Account Statement as due from BW to it.

Pursuer's Submissions

Competency of Action

[23] AMK's action was competent as it raised matters of legal and practical significance to the resolution of the parties' dispute and did not in itself seek to affect the binding nature of the adjudicator's decision on the parties pending final resolution of that dispute. AMK did challenge the adjudicator's decision, but that was by way of the attack on its validity mounted as a response to BW's enforcement action. Even if the AMK action did properly fall to be regarded as an attack on the interim binding nature of the adjudicator's decision, the basis on which such an attack might or might not be permitted remained somewhat nebulous, at least in this jurisdiction. The basic principle ought to be to favour parties having free access to the court for the determination of their disputes unless and until some plainly overwhelming contrary consideration appeared.

Validity of the Final Account Statement

[24] On behalf of AMK, senior counsel submitted that the Final Account Statement was issued in accordance with clause 33.3 of the subcontract, which simply required AMK to state the amount which it considered to be due to BW within 28 days of the receipt of BW's Final Account. Both of those conditions were met; the Final Account Statement had been issued on 6 May 2022, BW's Final Account having been issued on 8 April 2022, and it stated the amount AMK considered due to BW, albeit that was a negative sum of £1,039,438.14. It had gone on to set out the manner in which and basis on which that sum had been calculated.

[25] Section 110A of the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (Scotland) 1998 had no application to the question of whether the Final Account Statement had been validly issued in terms of the subcontract,

which was the only question at which the relevant declarator was directed. If, contrary to that submission, AMK was obliged in the Final Account Statement to specify, in consequence of the 1996 Act and the Scheme, the sum that it considered to be due, the work to which the payment related, and the basis on which that sum had been calculated, the Final Account Statement had in fact met those requirements. What was required in order to satisfy the statutory test had been considered by the Sheriff Appeal Court in *Tierney* v *G F Bisset (Inverbervie) Limited* 2022 SLT (Sh Ct) 113. The Court held at [14]:

> "Here, what the respondent refers to as line items show how the amount the payee considers to be due is calculated. Absent that detail, there would simply be the amount considered due and that, alone, does not meet the requirements of the section. There requires to be some specification as to how the sum claimed is calculated. In the present case, there is sufficient specification. The appellant has fair notice of the amounts claimed and what those amounts relate to. It is a matter of fact and degree as to whether sufficient specification of a sum claimed has been provided."

Further, in *Grove Developments Limited* v *S&T (UK) Limited* [2018] Bus LR 954, it was observed by Coulson J that:

> "One way of testing to see whether the contents of the notice are adequate is to see if the notice provides an adequate agenda for a dispute about valuation and/or any cross-claims available to the employer."

Given that BW was able to commence an adjudication and the substantive court action following receipt of the Final Account Statement, that document must at the very least have provided an "adequate agenda for a dispute about valuation".

Binding nature of the Final Account Statement

[26] Counsel further submitted that clause 33.4 of the subcontract rendered the Final Account Statement binding directly upon BW and indirectly (by dint of BW not lawfully being permitted to challenge it) on Mr Bingham for the purposes of the latter's adjudication. It will be recalled that that clause provides:

> "The Final Account Statement shall be final and binding on the Subcontractor unless the parties agree to any modification of it or, where the Subcontractor disagrees with the AMK Final Account Statement, unless the Subcontractor has commenced adjudication or court proceedings within 20 working days of the date of the AMK Final Account Statement."

No question of any agreed modification arose in this case, so the focus was on the proper reach of that part of clause 33.4 dealing with the significance of timeous adjudication or litigation. Mr Bingham's adjudication was not raised timeously for the purposes of the clause. The question was whether the timeous raising of Mr Entwistle's adjudication or the substantive court action meant that the Final Account Statement ceased in consequence to be binding on BW in any process, or whether it simply ceased to be binding on it for the purposes of those timeous processes alone. According to counsel, the answer to that question was clearly indicated, if not supplied, by *D McLaughlin & Sons Limited* v *East Ayrshire Council* [2022] CSIH 42, 2022 SLT 1245. In that case, the Inner House was considering the binding status of a Final Account Certificate in terms of clause 1.9 of the JCT/SBC standard form contracts, and in particular whether a timeous challenge to that Certificate in one process enabled subsequent challenges to be brought outwith the stipulated period for such challenge in other processes. The Inner House held, applying the ratio of *Trustees of the Marc Gilbard 2009 Settlement Trust* v *OD Developments and Projects* [2015] EWHC 70 (TCC), [2015] BLR 213 that it did not. That would be contrary to the large degree of conclusivity which the contract fell to be regarded as having intended to give to Final Account Certificates. Reference was made to the opinions of the Lord President (Carloway) at [20], Lord Malcolm at [76] and Lord Woolman at [93]. While the contractual terms under consideration in *McLaughlin* and *Marc Gilbard* were not the same as those presently in issue, the Inner House's approach was predicated upon an underlying legal policy – the promotion of the greatest possible degree of conclusivity of Final Account Certificates and functionally similar documents – which was of equal application to this

case. Applying that approach, the substantive Court of Session proceedings were now the correct (and only) vehicle within which the final account dispute fell to be addressed. For the purposes of Mr Bingham's adjudication, the Final Account Statement was binding on BW and he should accordingly have refused the orders it sought.

[27] Mr Bingham's adjudication could not be assimilated for any relevant purpose with that of Mr Entwistle. It proceeded on the basis of a fresh Notice of Adjudication in September 2022. The retiral of Mr Entwistle was not treated by paragraph 9 of Part I of the Scheme, or otherwise, as resulting in the potential continuation of his adjudication process. Moreover, different remedies were sought in each adjudication and the manner in which the sums making up the Final Account were presented were different. Mr Bingham's adjudication was commenced almost three months after the resignation of Mr Entwistle. *Bennett* v *FMK Construction Limited* [2005] EWHC 1268 and *Brighton University* v *Dovehouse Interiors Limited* [2014] EWHC 940 did not support BW's position, since in those cases the dispute being addressed before and after the resignation of the first adjudicator was identical and was prosecuted immediately upon the failure of the first adjudication.

[28] For those reasons, AMK's Final Account Certificate was valid and binding upon BW and Mr Bingham. AMK was entitled to the declarators sought to that effect; the decree for payment finally concluded for followed inexorably from those conclusions.

Defender's Submissions

Competency

[29] On behalf of BW, counsel first maintained that AMK's action was incompetent, being a direct challenge to the correctness of Mr Bingham's decision, but not with a view to securing a final determination of the dispute between the parties. In English law, a challenge to the merits of an adjudicator's decision could be advanced while that decision

was in the course of being enforced only if it was short and self-contained, required no oral evidence or elaboration beyond what the court could accommodate in an interlocutory hearing, and would be unconscionable for the court to ignore – *Hutton Construction Limited* v *Wilson Properties (London) Ltd* [2017] Bus LR 908. In Scotland, *D McLaughlin & Sons* v *East Ayrshire Council* [2020] CSOH 109; 2021 SLT 1427 had decided that such a challenge could proceed if it was ripe for decision and could result in final determination of the dispute. AMK's action would require consideration of complex issues, some of which were not ready for decision in the context of the present debates, and (given that AMK accepted that the Final Account Statement was not binding in the substantive action) would not be determinative of the dispute.

Formal Validity of the Final Account Statement

[30] On the question of the formal validity of the Final Account Statement, counsel submitted that clauses 33.3 and 33.4 fell to be construed so as to require an informative statement meeting the test in *Grove Developments* (*supra*) at paragraph 26; in other words, it had to provide an adequate agenda for a dispute about valuation. The sequence of events which had actually occurred demonstrated clearly that the Final Account Statement failed to meet that test. The detail additional to that contained in the Final Account Statement which AMK had seen fit to supply to Mr Entwistle so that he could discharge his functions had been so voluminous as to cause him to resign. It was only because of that, and other, information provided before and during the Bingham adjudication that that adjudication was able to proceed to a conclusion. As a further example of its inadequacy, the Final Account Statement was the first intimation by AMK to BW that the former wanted to charge the latter for materials, and that by way of intimation only of an aggregate total of almost £600,000 with no hint of the basis on which such a charge had been calculated nor the

basis on which it could be levied. Applying basic principles of commercial contract construction, such as those found in *Rainy Sky SA* v *Kookmin Bank* [2011] 1 WLR 2900, there was good reason to construe the subcontract as requiring the Final Account Statement to contain such information. Absent that information, BW would not be (and was not) in a position to be prepared adequately for the adjudication envisaged by clause 33.3 as one of the means of avoiding the Final Account Statement becoming final and binding.

[31] Further, even if the Final Account Statement did what was required of it in terms of the subcontract clauses, section 110A of the Housing Grants, Construction and Regeneration Act 1996 required a construction contract to require a paying party to give, "in relation to every payment provided for by the contract", a notice which specifies:

> "(i) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and (ii) the basis on which that sum is calculated".

To the extent that the subcontract did not comply with that requirement, the relevant provisions of the Scheme applied. Paragraph 9 of Part II of the Scheme in turn required the relevant notice to be given "not later than 5 days after the payment due date" and to specify:

> "(a) the sum that the payer considers to be or to have been due at the payment due date, (b) the work to which the payment relates, and (c the basis on which that sum is calculated".

If one construed clause 33 of the subcontract in the manner contended for by AMK, it did not comply with section 110A. The Final Account Statement required to state the amount which AMK considered was due to BW. Unless appropriately challenged, or unless AMK issued a notice of intention to pay less in terms of clause 33.6, that statement could become final and binding on BW, and the balance brought out become due from it in terms of clause 33.5. As construed by AMK, clause 33 did not make provision, compliant with section 110A, for it to issue a notice specifying the basis on which the sum due in the Final Account Statement was calculated. As a result, paragraph 9 of Part II of the Scheme applied

and AMK was obliged to specify, in respect of the sums due in terms of the Final Account Statement, the sum that AMK considered to be or to have been due at the payment due date, the work to which the payment related and the basis on which that sum was calculated. The Final Account Statement failed to do that.

Binding Nature of the Final Account Statement

[32] On the question of the binding nature of the Final Account Statement, counsel submitted that the timeous commencement of the Entwistle adjudication and separately of the substantive action prevented the Final Account Statement becoming final and binding. It was necessary to bear in mind that clause 33.4 was a simple and bespoke clause. It was not readily comparable with more complex dispute resolution, conclusivity or finality provisions in certain standard form contracts, such as those in issue in *McLaughlin & Sons* and *Marc Gilbard*. In particular, clause 33.4 did not seek to confer an evidential conclusivity on the Final Account Statement in any particular dispute resolution process. Further, it did not attempt to render the Final Account Statement binding under any circumstances on any party other than BW, and indeed AMK had in the Bingham adjudication contended that a sum was due to it which was different from that brought out in the Final Account Statement. Properly construed, clause 33.4 required BW to have commenced adjudication or court proceedings within 20 working days of the date of the Final Account Statement in order to avoid the Final Account Statement becoming final and binding on it. It had done both of those things, and upon the first being done, the Final Account Statement lost the capacity to become final and binding on it.

[33] The timeous raising of the substantive action made it unnecessary to consider the proper categorisation of the relationship between the Entwistle and Bingham adjudications. If it was necessary to consider that relationship, the proper conclusion was that the Bingham

adjudication was a continuation of the Entwistle one and the whole adjudicative process fell to be regarded as having been timeously commenced for the purposes of clause 33.4. That approach was supported by the *Bennett* and *Brighton University* cases (*supra*), in both of which contractual conclusivity provisions were held not to apply to "second", non-timeous, adjudications in circumstances where an adjudicator had resigned in circumstances not attributable to the referring party. Such a construction of clause 33.4 would, again, give it a commercial sense which would be lacking from other available constructions. Any differences between the two adjudications were more formal than substantial.

[34] Counsel went on the argue that the Final Account Statement was produced in breach of AMK's contractual obligations, in that it included a deduction from the sum otherwise due to BW in respect of AMK's supply of materials. There was no basis in the parties' contract for AMK to charge BW for the supply of materials. The suggestion that such a charge could be made involved a misconstruction of the subcontract which, viewed as a whole, was in essence one for the provision of labour only by BW. That was how the contract had been operated; a circumstance capable of explaining any ambiguity in the written terms of the subcontract, or in any event giving rise to a plea of personal bar against AMK along the familiar lines set out in *Gatty* v *Maclaine* 1921 SC (HL) 1. Although proof might be required to make out some aspects of this argument, that in itself showed that the AMK action was not an appropriate mode of challenge to the merits of Mr Bingham's adjudicatory decision.

[35] Counsel finally observed that AMK now accepted that it could not be bound by the Final Account Statement. That that was the correct position could be seen, not only from the terms of clause 33.6, which empowered AMK to give written notice that it intended to pay less than the sum due from it in terms of the Final Account Statement, but also from the fact that, subsequent to the Final Account Statement, on 15 June, AMK had issued a purported

payment notice in terms of which it revised the balance it considered due to it upwards. It had further altered the sum said to be due to it, this time downwards, in the course of the adjudication. The grant of decree for payment of the sum said to be due to AMK in the Final Account Statement would result in the payment to it of a sum greater than it in fact currently claimed to be due to it.

Decision

Competency

[36] As already noted, paragraph 23(2) of Part I of the Scheme for Construction Contracts (Scotland) 1998, provides that "The decision of the adjudicator shall be binding on the parties, and they shall comply with it, until the dispute is finally determined by legal proceedings …" (cf section 108(3) of the Housing Grants, Construction and Regeneration Act 1996). A preliminary question in this action is, therefore, to what if any extent would the grant of any or all of the decrees sought result in the adjudicator's decision (ie that AMK should pay BW the various sums concluded for in the BW action) not being binding on the parties. The question arises most starkly in the context of the third conclusion, by which AMK seeks an order for payment to it by BW of the sum of £1,039,438.14, being the amount brought out by the Final Account Statement as due from BW to it. In a very superficial sense, decree in respect of that conclusion would not deprive the adjudicator's decision of its binding quality; AMK would still be liable to pay BW the principal sum of £1,401,821 and the ancillary amounts found due to it by way of the decision, but could set off against that liability the sum awarded to it in its own action. In reality, however, such a result would deprive the adjudicator's decision of its binding quality, since contained within the express decision that AMK should pay BW a sum in excess of £1.4 million is an implicit decision that BW should pay AMK nothing, all until the final resolution of the parties' dispute. It follows

that the decree for payment sought by AMK in this action cannot properly be granted, whatever might have been capable of being said about the substantive merits of the claim it embodies, and in those circumstances it would have been appropriate to dismiss that conclusion as incompetent. However, as BW's competency plea extends only to the other two conclusions in the action, I shall simply dismiss it as irrelevant.

[37] As to the two further conclusions in the AMK action, it must be borne in mind that it is a fundamental element of the rule of law that parties should be able to bring their disputes as and when they wish for substantive resolution by the courts unless there is some clear reason why such resolution would be illegitimate. Such a reason exists in relation to AMK's conclusion for payment, as already explained. In relation to the remaining two conclusions, namely that the Final Account Statement was validly issued in terms of clause 33.3 of the subcontract; and further that it is final and binding on BW unless and until the contrary may be determined in the substantive action, and was final and binding on Mr Bingham in his adjudication, only the latter element appears to call into question the binding nature of the adjudicator's decision, and that only indirectly, by seeking a declaration that the reasoning underpinning it is erroneous. With some hesitation, I have concluded that it would not be appropriate to treat these conclusions as incompetent and to decline to deal with them in the context of the present action; although this action does not seek a final resolution of the parties' dispute, nor do these conclusions seek to render the adjudicator's decision other than binding in the meantime on the parties, or to excuse their compliance with it.

Formal Validity of the Final Account Statement

[38] On this matter, I prefer the submissions for AMK. Clause 33.3 of the subcontract required AMK to state the amount which it considered to be due to BW within 28 days of

the receipt of BW's Final Account, nothing less and nothing more. That it did. It is not possible to construe that very simply-expressed contract clause, in its context, as requiring the Final Account Statement to do more or other than that without re-writing the clause in a manner for which there is, at present, no proper basis in the law of Scotland. It must be recalled that the relative conclusion for declarator addresses itself only to the question of whether the Final Account Statement "was validly issued under and in terms of Clause 33.3". No question is raised as to whether a Statement validly issued under and in terms of the clause has legal validity in any wider context.

[39] It is against that background that the submissions concerning section 110A of the 1996 Act and paragraph 9 of Part I of the Scheme fall to be seen. Section 110A requires a contract to provide for certain detail to be included in what the headnote to the section calls a "payment notice". I am prepared to accept that, in the context of the parties' subcontract, the Final Account Statement may properly be regarded as a payment notice within the meaning of the section, for the reasons advanced in argument by BW. However, all that the section itself stipulates is that the contract must require a payment notice to state the sum considered to be due and the basis on which that sum is calculated. If a contract does not require a payment notice to contain that information (and, as already noted, I consider that clause 33.3 does not require a statement of the basis on which the sum is calculated), then the relevant provisions of the Scheme apply. The effect of those provisions, and in particular of Regulation 4 of the Scheme, is to supply content requirements not present in the contract with which a notice will have to comply if it is to gain the status of a valid payment notice in law; it is not to alter the terms of the underlying contract. It follows that a notice invalid in terms of the Scheme may still have been validly issued in terms of the contract, being the matter to which the relative conclusion in the AMK summons directs itself.

[40] If that analysis is wrong (either because my construction of clause 33.3 is erroneous, or because the Scheme does impose requirements for the contractual validity of a notice), and the Final Account Statement did thus require to contain the information required by the Scheme, then I consider that it did so. The authorities cited to me, *Tierney* and *Grove*, are not particularly helpful, but on the assumption that it is correct to proceed on the basis that sufficient information is given if what is stated provides an adequate agenda for a dispute about valuation or other matters in dispute, then I consider that the Final Account Statement did so. It began by setting out the subcontract lump sum as originally agreed, it identified that it accepted, and set out a valuation of, variations to the original scope of works, and it advanced claims in specified amounts for contra charges, the supply of materials and liquidated damages. The reasonable recipient of the Statement would know enough about the composition of the sum ultimately brought out to table an agenda of matters where disagreement existed – for example, that the variations were valued at too low a sum, or that the charge for the supply of materials had no basis in the contract, etc. The precise nature of the disagreement(s) which the Statement brought out could then be developed from that basic initial agenda, which is all that the Scheme – intended as it is only to provide for minimum requirements of general application in all sorts of situations – demands.

[41] For the foregoing reasons I shall grant decree of declarator as first concluded for in the AMK action (CA98/22), affirming the validity of the Final Account Statement for the purposes of clause 33.3.

Binding Nature of the Final Account Statement

[42] If AMK is to succeed in this branch of its argument, it requires to persuade the Court that the italicised words in the following version of clause 33.4, or something very like them, fall properly to be grafted on to the clause:

> "33.4 The Final Account Statement shall be final and binding on the Subcontractor unless the parties agree to any modification of it or, where the Subcontractor disagrees with the AMK Final Account Statement, unless the Subcontractor has commenced adjudication or court proceedings within 20 working days of the date of the AMK Final Account Statement, *in which adjudication or court proceedings alone shall the Final Account Statement be subject to challenge*."

[43] AMK claims that that step should be taken by way of analogy with what was done in *Marc Gilbard* and in the Inner House in *McLaughlin & Sons*. It will be recalled, however, that those cases were dealing with Clause 1.9 of the JCT/SBC standard form contracts, which is, so far as directly relevant for present purposes, in the following terms:

> **"1.9 Effect of Final Certificate**
>
> 1.9.1 Except as provided in clauses 1.9.2, 1.9.3 and 1.9.4 (and save in respect of fraud) the Final Certificate shall have effect in any proceedings under or arising out of or in connection with this Contract (whether by adjudication, arbitration or legal proceedings) as:
>
> … conclusive evidence that any necessary effect has been given to all the terms of this Contract which require that an amount be added to or deducted from the Contract Sum or that an adjustment be made to the Contract Sum …;
>
> …
>
> 1.9.3 If adjudication, arbitration or other proceedings are commenced by either Party within 60 days after the Final Certificate has been issued, the Final Certificate shall have effect as conclusive evidence as provided in clause 1.9.1 save only in respect of the matters to which those proceedings relate."

[44] It may immediately be seen that those provisions differ materially from those under consideration in the present case. Clause 1.9.1 begins by providing as a basic rule that a Final Certificate issued in terms of the contract is, read short, to be conclusive evidence of the matters to which it relates in any proceedings (be that adjudication, arbitration or litigation) in any way connected with the contract. The relevant exception for present purposes is that if such proceedings are raised within the period stated, the Final Certificate is not to be conclusive "in respect of the matters to which those proceedings relate". The question which arose in *Marc Gilbard* was whether, on a proper construction of the contract,

the exception to the over-arching conclusivity of the Final Certificate was to apply to matters raised in timeous proceedings only within the context of those proceedings, or whether it was to apply to any matter raised in timeous proceedings even if that matter for whatever reason ultimately fell to be determined outside the context of such proceedings. The decision that the exception to the conclusivity of the Final Certificate applied only to matters raised in timeous proceedings within the context of those proceedings themselves was based, firstly, on the fact that that was an available if not perhaps the most natural construction of the contractual words used and, secondly, that it was the construction which was thought best to promote the commercial object of giving Final Certificates the greatest degree of conclusivity and finality reasonably available in conformity with the wording of the contract. That commercial object was in turn capable of being identified because the contract was in a well-established and complex standard form which had for a long period been the object of examination and comment within the construction industry as well as judicially, from which rich background the object of maximising conclusivity clearly appeared.

[45] In the present case, there is no standard form hinterland from which one can objectively derive an intention to take the finality of the Final Account Statement to the extent contended for by AMK. This is not a standard form contract and no other background material points to the conclusion that the parties objectively fall to be regarded as having intended any particular degree of finality beyond that which the contractual wording itself suggests. That wording plainly does not contemplate the extreme degree of intended finality which has been ascribed to the JCT/SBC standard form; its basic position as to the effect of the Final Account Statement is far less emphatically stated than is the case in the JCT/SBC form concerning Final Certificates, and the standard form contract re-iterates in clause 9.1.3 the conclusivity of the Final Certificate in the same breath as delineating the

very limited exception thereto. Further, it seems clear from clause 33.4 of the subcontract in this case, supported to some degree by the terms of clause 33.6, that the Final Account Statement is never to become binding on AMK, but only on BW, a consideration which in itself powerfully detracts from any conclusion that the maximisation of finality may objectively be regarded as the parties' relative intention.

[46] Further, even if one allows for the existence of a legal policy favouring finality in this context, such a policy can only receive effect in a contractual context insofar as the wording of the contract permits it. I find it very difficult to see that the construction of the subcontract for which AMK contends would amount to anything other than an imposition on the parties thereto of an intention which it might be thought they ought to have had, but which cannot properly be discerned from the contractual words they have chosen. In other words, I do not accept that clause 33.4 admits of the AMK construction. The natural construction of the clause is that the Final Account Statement is binding on BW unless relevant proceedings are timeously raised, in which case it is not so binding. There is no commercial consideration which is capable of displacing that natural construction, which provides a route to potential (if partial) finality for the Final Account Statement, but which also permits very quick action on the part of BW to prevent that, resulting in that event in the option for the parties either to compose their differences or to resort to formal dispute resolution processes in order to achieve finality by way of an externally imposed solution. There is nothing uncommercial about that, even if some might think it a suboptimal way of dealing with disputes of the kind likely to emerge in the context of construction contracts.

[47] I do not consider that that conclusion is affected by the reasoning or the decision of the Inner House in *McLaughlin & Sons*, which was in turn an application of *Marc Gilbard*. Those cases concerned the JCT/SBC form, which differs from the contract currently under consideration in the ways already discussed. Counsel for AMK conceded that I was not

bound by *McLaughlin & Sons* because of the very different contractual context. It is therefore unnecessary for me to examine very closely the ratio of *Marc Gilbard* and how far, if at all, it should extend beyond the specific context against which it and *McLaughlin & Sons* were decided. It may be as well to note, however, that as presently advised I would require some persuasion that the reach of *Marc Gilbard* ought to be extended beyond the limits which it already occupies. If adjudication

> "was designed to be, and more importantly has proved to be, a mainstream dispute resolution mechanism in its own right, producing *de facto* final resolution of most of the disputes which are referred to an adjudicator"

(*Bresco Electrical Services Ltd* v *Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, per Lord Briggs at [13]), it seems odd that the policy of the law should be to encourage if not indeed require the raising of court proceedings before parties know that they will indeed be necessary (cf the observations concerning the improbability of the statutory scheme requiring any party to start court proceedings in order to confirm its rights in *Aspect Contracts (Asbestos) Ltd* v *Higgins Construction Plc* [2015] UKSC 38; [2015] 1 WLR 2961, per Lord Mance at [14]). Further, the policy that Final Certificates may be challenged only in proceedings timeously raised rears up disputes as to whether one set of proceedings is or is not to be properly to be regarded as a continuation of another set, as in the *Bennett* and *Brighton University* cases already noted. Those artificial disputes raise questions to which there can be no clear answers, because there is no sensibly applicable taxonomy of identity and difference, so that the consequence of a decision one way or the other inevitably becomes its cause. Other examples of seemingly undesirable consequences flowing from any wider application of the result in *Marc Gilbard* may be figured. It may be that those are consequences which do truly flow, albeit unintended, from particular contractual arrangements which parties have chosen to enter into. However, it seems to me that careful

consideration of the wider implications ought to be given to any attempt to extend the scope of *Marc Gilbard* beyond its current reach.

[48] It is unnecessary to deal with the remaining arguments advanced by BW as to the binding nature of the Final Account Statement and, given that they may be returned to in the substantive action, it would be unhelpful for me to make any comment on them. AMK's conclusion directed at the claimed binding character of its Final Account Statement falls to be dismissed.

Disposal

[49] In the action at the instance of BW (CA101/22), I sustain the first, second and third pleas-in-law for the pursuer, repel the defender's pleas, and grant decree *de plano* as first to third concluded for.

[50] In the action at the instance of AMK (CA98/22), I shall sustain the pursuer's first plea-in-law and grant decree of declarator as first concluded for, and repel the pursuer's remaining pleas. I shall sustain the defender's second plea in relation to the second and third conclusions of the action, and dismiss those conclusions. I shall repel the defender's first plea.