



OUTER HOUSE, COURT OF SESSION

[2021] CSOH122

CA45/20

OPINION OF LORD CLARK

In the cause

D MCLAUGHLIN & SONS LIMITED

Pursuer

against

EAST AYRSHIRE COUNCIL

Defender

**Pursuer: Howie QC; DAC Beachcroft Scotland LLP**  
**Defender: Thomson QC, Broome; Shepherd & Wedderburn LLP**

7 December 2021

**Introduction**

[1] The pursuer was the contractor, employed by the defender, for the construction of a new single storey extension at Hurlford Primary School, East Ayrshire. A dispute arose regarding sums claimed by the pursuer to be due for payment. The pursuer raised an action in the sheriff court. Some months thereafter, the pursuer referred certain matters to adjudication. The adjudicator found in favour of the pursuer. The pursuer raised proceedings for enforcement of the adjudicator's decision by this court. The defender lodged defences challenging the enforcement and also lodged a counterclaim seeking orders contrary to the adjudicator's findings. This court enforced the adjudicator's award

(*D McLaughlin & Sons Ltd v East Ayrshire Council* [2020] CSOH 109). The counterclaim by the defender remains to be dealt with. The defender argues that based upon the counterclaim and answers thereto the court can reach a final determination of the dispute dealt with by the adjudicator and that determination should be in the defender's favour. The pursuer argues that the defender's counterclaim is irrelevant. The matter called before me for a debate on those issues in this commercial action. The sheriff court action was remitted to the Court of Session as an ordinary action and is continuing, although it has not been significantly progressed by parties.

### **Factual background**

[2] Cash-flow is obviously a key factor in the construction industry. Historically, many contractors and sub-contractors were placed in real difficulty by not receiving payments. The Housing Grants, Construction and Regeneration Act 1996, as amended, made significant changes to try to sort that out. As well as introducing adjudication as a speedy remedy, the Act remedied the frequently occurring problem of work being done, either by a contractor or sub-contractor, and no interim payments being made for that work. Its provisions are now reflected in the standard building contracts, including in the present case (the Standard Building Contract with Quantities for use in Scotland (SBC/Q/Scot) 2011 edition, as amended by the Preliminaries). Put shortly, the contract allows an Interim Certificate to be issued on behalf of the defender, as employer, indicating the sum due for each four weeks of work. If no Interim Certificate is issued, the pursuer, as contractor, can issue an Interim Payment Notice indicating the sum it says is due for that four week period. The defender can, if it wishes, then issue a Pay Less Notice stating and explaining a

reduction in the sum sought. If an Interim Payment Notice is issued and there is no Pay Less Notice in response, the sum in the Interim Payment Notice must be paid.

[3] The sequence of key events was as follows:

(i) On 10 August 2017, no Interim Certificate having been issued, the pursuer issued an Interim Payment Notice to the defender's quantity surveyor. The Interim Payment Notice stated that the pursuer considered that the sum of £949,556.50 was due to it as at 27 July 2017.

(ii) No Pay Less Notice was issued on behalf of the defender. The pursuer sought payment of the whole sum in the Interim Payment Notice. The defender refused to make payment.

(iii) Between August 2017 and July 2019 the defender made various interim payments to the pursuer under the contract.

(iv) On 17 July 2019, after the works were completed and such things as rectification or the making good of defects took place, a Final Certificate was issued on behalf of the defender. The Final Certificate valued the works at £3,343,223.82. That sum was paid by the defender to the pursuer.

(v) The pursuer contended that it was entitled to a higher sum. On 12 September 2019 the pursuer raised proceedings in the sheriff court, arguing that the Final Certificate did not accurately reflect the proper value of the works, including variations.

(vi) On 23 March 2020, the pursuer then served a Notice of Referral for adjudication.

[4] In the adjudication, the pursuer argued that payment was due under the Interim Payment Notice. The defender argued that the notice was not valid as it was issued one day

earlier than the relevant due date. The defender also argued that even if payment was due under the Interim Payment Notice, the award should be nil because the Final Certificate was conclusive evidence of the sum due and that sum had been paid. The adjudicator decided the issues in favour of the pursuer and found the defender liable to make payment, including interest on the sum claimed and further interest for any period between the date of the finding and the making of payment. Following upon enforcement of the adjudicator's decision by this court, the defender made payment. The counterclaim and answers were adjusted and the issues raised therein were the subject of the present debate.

### **Issues**

[5] The issues that arose in the debate were:

- (i) the effect of the Final Certificate;
- (ii) the validity of the Interim Payment Notice;
- (iii) whether, if the defender succeeds, it is entitled to repayment of interest arising after the date of the adjudicator's award.

### **Relevant contractual provisions**

[6] The Standard Conditions include the following terms:

"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:

...

2 conclusive evidence that any necessary effect has been given to all the terms of the 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 ...;

3 conclusive evidence that all and only such extensions of time, if any, as are due under clause 2.28 have been given; and

4 conclusive evidence that the reimbursement of direct loss and/or expense, if any, to the Contractor pursuant to clause 4.23 is in final settlement of all and any claims which the Contractor has or may have arising out of the occurrence of any of the Relevant Matters, whether such claim be for breach of contract, duty of care, statutory duty or otherwise.

...

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.

1.9.4 In the case of a dispute or difference on which an Adjudicator gives his decision on a date after the date of issue of the Final Certificate, if either Party wishes to have that dispute or difference determined by arbitration or legal proceedings that Party may commence arbitration or legal proceedings within 28 days of the date on which the Adjudicator gives his decision."

...

Contractor's Interim Applications and Payment Notices

4.11.2 If an Interim Certificate is not issued in accordance with clause 4.10.1, then:

...

2 where the Contractor has not made an Interim Application, he may at any time after the 5 day period referred to in clause 4.10.1 give an Interim Payment Notice to the Quantity Surveyor, stating the sum that the Contractor considers to be or to have been due to him at the relevant due date in accordance with clause 4.9.2 and the basis on which that sum has been calculated."

Parties were in agreement that the first "relevant due date" for the purposes of clause 4.11.2.2 was 4 weeks after the works commenced and thereafter the same date, or nearest business day, in each following month. However, they disagreed about the date when the works commenced.

## **Submissions for the pursuer**

### *The effect of the Final Certificate*

[7] The Final Certificate was not conclusive evidence against the pursuer in the adjudication. The certificate was conclusive only to the extent set out in clause 1.9.1. Clause 1.9.1.2 makes the terms of the Final Certificate conclusive evidence that proper effect has been given to those terms of the Contract which require the making of additions to, or subtractions from, the Contract Sum (i.e., the final price for the Works). That was not an issue which arose in the adjudication. It was concerned with the question of how much ought to have been paid to account of the ultimate Contract Sum for work done in July 2017. The defender's argument was ill-founded.

[8] If the Final Certificate should nevertheless have operation in the present circumstances, clause 1.9.3 was relevant. The sheriff court action was raised within the period of 60 days referred to in that clause. Accordingly, the exception from clause 1.9.1 applied. The matters to which those proceedings relate were removed from the list of matters which would be subject to the conclusive evidence rule, in respect of any court action or arbitration or adjudication on that subject. The certainty aimed at by clause 1.9 was thus maintained. The subject of the sheriff court action was the sum payable by way of the price for the execution of the Works.

[9] The decision in *Trustees of the Marc Galbard 2009 Settlement Trust v OD Developments and Projects Ltd* [2015] BLR 213; 159 Con LR 150; [2015] CILL 3651, relied upon by the defender, was distinguishable. In any event, notwithstanding its authorship (by Coulson J, as he then was), its reasoning was unpersuasive and ought not to be followed. Conclusive evidence clauses are to be strictly construed: *Cantrell v Wright & Fuller* [2003] BLR 412. The effect of the defender's construction, that a subsequent litigation designed to reverse the

result of the adjudication is subject to the conclusive effect of the Final Certificate, resulted in a commercial nonsense. A correct decision of the adjudicator would be overturned because the subsequent litigation happened after the expiry of the 60 days. That would make the adjudication pointless because very often, if not inevitably, a “corrective” action bolstered by the Final Certificate will commence later, and more than 60 days after the certificate is issued.

### ***Interim Payment Notice***

[10] The due date in any month depended upon when the works began on site. This occurred on 30 May 2016. As a result, four weeks after that day was 27 June 2016. Consequently, 27 July 2017 was a due date. In any event, the sum asserted as due would also have been a sum considered by the pursuer to be due to it on the following day. The notice therefore qualified as an Interim Payment Notice whether or not that figure correctly represented the figure so due. Payment for work done on 28 July 2017 could be asked for in relation to the next payment. The adjudicator was therefore correct to hold that the sum was payable to the pursuer by the defender pursuant to the Interim Payment Notice.

### ***Whether the defender is entitled to repayment of interest***

[11] The interest sought to be repaid here was in the same position as the fees of an adjudicator whose decision is effectively reversed by a court. It was not open to the court in an action on the merits of the dispute to order payment by the winning party in the adjudication to the other (ultimately successful) party of the adjudicator’s fees and expenses earlier paid by the latter. Reference was made to *Castle Inns (Stirling) Ltd v Clark Contracts Ltd* 2006 SCLR 663 and *Halsbury Homes Ltd v Adam Architecture Ltd* [2016] BLR 419. Since the

interest in issue had accrued on the sum awarded by the adjudicator, and arose therefore on account of the tardiness of the defender in paying what it was legally obliged to pay, it did not form part of the “dispute” on which the court could decide under section 108(3) of the 1996 Act. It was not money to which the implied term about repayment, recognised in the authorities, applied. The claim for repayment under the implied term is a claim in debt. The pursuer could not have been indebted to the defender until such time as the pursuer had been paid by the defender. Thereafter, the right to interest arises as from judicial demand: *Elliot v Combustion Engineering Ltd* 1997 SC 126. That demand occurred in this case on the amendment of the fourth conclusion of the counterclaim in May 2021. The claim to payment of this element of interest was accordingly irrelevant.

### **Submissions for the defender**

#### *The effect of the Final Certificate*

[12] In terms of clause 1.9, the Final Certificate was conclusive evidence in the adjudication and it was also conclusive evidence in the counterclaim in the present case, because both were raised more than 60 days after the certificate was issued. The purpose of clause 1.9.3 was to limit the matters in respect of which the Final Certificate is not conclusive to the matters raised in any proceedings commenced within the 60 day period. Doing so would achieve the aim of such provisions, which is to provide proper certainty and clarity. Reliance was placed on the reasoning and decision of Coulson J in *Trustees of the Marc Gilbard Settlement Trust v OD Developments and Projects Ltd*. Clause 1.9.3 was predicated on the assumption that the party who wishes to challenge the Final Certificate can choose the forum in which that is done. The challenger can choose one of adjudication, arbitration or other proceedings.



[13] The reasoning of Coulson J made the following points clear. The clause does not permit a series of proceedings subsequent to the Final Certificate, with the first commenced within 60 days and others starting months or years later. No proceedings were permitted on the merits of the Final Certificate after the expiry of 60 days following the issue of the Final Certificate. If the Final Certificate is challenged by means of court proceedings within the 60 day time limit, those proceedings constitute the only vehicle by which the Final Certificate is capable of being challenged. If adjudication proceedings are commenced after the 60 day time limit, the Final Certificate is conclusive evidence therein on the subjects identified in Clause 1.9.1 This construction of Clause 1.9.3 was in accordance with the spirit and purpose of Part II of the Housing Grants, Construction and Regeneration Act 1996, operating as it does to encourage, among other matters, prompt and cost-effective resolution of disputes. It was also a construction arising by application of the usual principles of contractual construction, in particular in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 (at paras [20] and [21]); and *HOE International Ltd v Andersen* 2017 SC 313 (at paras [24] and [25]).

[14] In contrast, the construction of Clause 1.9.3 advanced by the pursuer was not consistent with the usual principles of contract construction and was at odds with the essential difference between interim and Final Certificates as explained in, for example, *Castle Inns (Stirling) Ltd v Clark Contracts Ltd* (at para [33]) and *Scottish Equitable plc v Miller Construction Ltd* (IH) 2002 SCLR 10 (at paras [27] and [29]).

### ***Interim Payment Notice***

[15] The notice issued on 10 August was not an Interim Payment Notice. It did not state “the sum the Contractor considers ... due ... at the relevant due date” as required by Standard Condition 4.11.2.2. It stated the sum considered due as at the date of 27 June 2017,

but that was not the “relevant due date”. The correct due date was 28 June 2017. The difference between the parties arose out of a difference as to whether the works commenced on site on 30 May 2016, which is the pursuer’s position, or on 31 May 2016, which is the defender’s position. The works commenced on site on 31 May 2016, conform to Site March-In Meeting Minutes of that date which recorded, among other things, that: “all areas were suitably clear to allow the works to commence”. The Notice on 10 August 2017 did not state any sum that the pursuer considered due as at the relevant due date of 28 June 2017. Thus, it was not an Interim Payment Notice in terms of clause 4.11 and could not give rise to a sum due to be paid by the defender under clause 4.12.

*Whether the defender is entitled to repayment of interest*

[16] It was a necessary legal consequence of adjudication provisions which are consistent with the provisions of the 1996 Act that parties must have a directly enforceable right to recover any overpayment to which an adjudicator’s decision can be shown to have led, once there has been a final determination of the dispute. The right arises by way of an implied term to that effect in the construction contract (*Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2015] 1WLR 2961, at para [23]). Such a right arises out of restitutionary considerations (*ibid at* para [24]). An overpayment arises if and to the extent that the basis on which payment has been made falls away as a result of the court’s determination (*ibid*). If a more detailed implied term was required, the term averred by the defender would be appropriate. If the present case was resolved in favour of the defender, that would establish that the defender has made an overpayment to the pursuer in the whole amount paid by the defender pursuant to the adjudicator’s decision, including the payment of interest. There

was in any event a right to payment of interest, at an appropriate rate fixed by the court, on any repayment to be made to the defender (*Aspect Contracts*, at para [24]).

[17] The pursuer's reliance on the reasoning of the Lord Ordinary in *Castle Inms (Stirling) Ltd v Clark Contracts Ltd* was misplaced. That case preceded *Aspect Contracts* and in any event concerned the separate question of recoverability of the adjudicator's fees and expenses. The adjudicator's decision on interest was, like all other aspects of his decision on the dispute referred to him, only binding until the dispute is finally determined by legal proceedings, such as this counterclaim. In any event, the Lord Ordinary's reasoning in *Castle Inms* ought not to be followed in this case, on the ground of it not being in accordance with the normal principles of contractual construction discussed above.

## **Decision and reasons**

### *The remitted sheriff court action*

[18] Adjudication is a speedy means of resolving a dispute, but arbitration or legal proceedings for final determination of the dispute can of course be raised, whether in advance of the adjudication or afterwards. Often they are not raised, because the adjudicator's decision is accepted. But if it is not accepted, and then enforced by the court, in the subsequent proceedings the adjudicator's decision is not the subject of an appeal or review; rather, the arbitrator or the court simply deals with the dispute. As I have noted, in the sheriff court action later remitted to the Court of Session, which remains in play, the pursuer argues that the Final Certificate is incorrect. The pursuer avers that the sum identified does not reflect the variations and the measured works. The defender denies that position. Accordingly, the factual details of the work done and its true value remain in issue in that other action.

[19] Each party in this case has sought to use the procedures to put itself in a commercially advantageous position on an interim basis, leaving the other party to seek success in the remitted sheriff court action. Thus, having challenged the Final Certificate in the remitted sheriff court action, the pursuer then took the point about the Interim Payment Notice to adjudication, more than two and half years after it had been issued and not paid. Success in that adjudication, followed by enforcement, effectively meant that the pursuer had received what it claims (and indeed more than is sought in the now remitted sheriff court action), and progressing with that action may have become less attractive. The defender, in its counterclaim, seeks determination that the Interim Payment Notice is invalid and in any event the Final Certificate is conclusive, again avoiding the need for resolution of detailed factual issues about the work done and seeking to have the advantage at the interim stage of a return of sums paid. Each side's strategy is sensible and pragmatic. But I must give appropriate weight to the fact that litigation remains extant between them about proper calculation of the final sum due for the works, including variations, and that action was raised within 60 days of the Final Certificate being issued.

### *Interim payments and the Final Certificate*

[20] Before dealing with the three issues, in order to put matters in context it is appropriate to note in broad terms the way in which interim payments and Final Certificates operate. In simple terms, the Contract Sum agreed by the parties at the outset is adjusted to reflect the work actually done. In issuing an Interim Certificate, the defender has to carry out a Gross Valuation of the work done and site materials at each monthly due date. It appears to be clear that each certificate supersedes its predecessor and effectively constitutes a revaluation of the whole works carried out: *Scottish Equitable plc v Miller Construction Ltd*

2002 SCLR 10 (at para [29]). In *Rupert Morgan Building Services (LLC) Ltd v Jervis & Anor* [2004] 1 WLR 1867, [2004] 1 All ER 529 the Court of Appeal in England endorsed the views reached by Sheriff Taylor in *Clark Contracts Ltd v The Burrell Co* [2002] SLT 103 that an Interim Certificate is not conclusive evidence that the works in respect of which payment was sought were in accordance with the contract, but it nonetheless states a sum due under the contract. As the Court of Appeal observed (at para [14] (d)) that does not preclude an employer, who has paid, from subsequently showing he has overpaid and that can be put right in subsequent certificates, or the employer could raise the matter by way of adjudication or arbitration or legal proceedings. It is equally clear that an Interim Payment Notice is also not viewed as conclusive evidence of the sums due and indeed if it caused an overpayment that can be put right in a subsequent Interim Certificate or in the Final Certificate or dealt with by adjudication or other proceedings.

[21] However, it is also important to recognise that if the sum specified in an Interim Payment Notice which is held to be valid is not paid, subsequent interim payments which bear to properly value the works done, even if not challenged, will not absolve the party who was due to pay from the contractual obligation to make payment in terms of the Interim Payment Notice (see eg *J & B Hopkins Limited v Trant Engineering Limited* [2020] EWHC 1305 (TCC)). If the sum is paid, then subsequent Interim Certificates can take that payment into account and thus seek to put interim payments back in order. Alternatively, the party who has made payment in terms of the Interim Payment Notice is free to commence adjudication proceedings (or arbitration or a legal action) to dispute that the sum paid was the true value of the works for which the contractor has claimed (see *S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448). The Final Certificate is intended to accurately reflect the Contract Sum as properly adjusted, and with any other appropriate

deductions or additions. The Final Certificate is conclusive evidence of the sum due, unless a challenge to it occurs in the period stated in the relevant provisions in the contract, quoted above.

### ***Final determination***

[22] At the earlier hearing, the defender was seeking to challenge the adjudicator's decision without having made payment in terms of the Interim Payment Notice. I concluded that the defender did not meet the test set out by Coulson J in *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] BLR 344 for dealing with final determination in enforcement proceedings, and so its challenge could not be dealt with. I also made observations about the remitted sheriff court action, which as noted remains in play, and the fact that it deals with the issue of whether the Final Certificate was correct in terms of its valuation of the measured works and variations. There has, however, been an important development since that earlier decision: the defender has made the payment awarded by the adjudicator and enforced by the court. Averments in the counterclaim found upon the adjudicator being wrong, but the counterclaim is free-standing and is not, and cannot be, an appeal against the adjudicator's decision: *Castle Inns (Stirling) Ltd v Clark Contracts Ltd* (at para [13]). The counterclaim is therefore an action for recovery of an alleged overpayment rather than a challenge to the adjudicator's decision. Moreover, senior counsel for the defender argued that what was being sought was determination of the issues that were put before the adjudicator, rather than final determination of the overarching point about the correctness of the Final Certificate. He also observed that the remitted sheriff court action may yet require to be the subject of judicial decision. In that context, the fundamental

question is whether the defender is entitled, by means of the counterclaim, to invoke the conclusive nature of the Final Certificate pending the outcome of the other action.

[23] In my previous decision (at para [37]), I said that it was inappropriate at that point to reach a concluded view on the parties' respective submissions on Coulson J's decision and reasoning in *Trustees of the Marc Gilbard Settlement Trust v OD Developments and Projects Ltd.*

I also noted that the defender might come to argue that the issues before the adjudicator differed from those in the sheriff court action. That is indeed the defender's position here.

As I am dealing now with this separate claim for repayment, I consider it appropriate to deal with the arguments about that case.

### ***Issue 1: The effect of the Final Certificate***

#### *Preliminary points for the pursuer*

[24] The pursuer argued that *Trustees of the Marc Gilbard Settlement Trust* could be distinguished from the present case. In essence, the defender's position is that as the adjudication commenced outwith the 60 day period stated in clause 1.9.3, the Final Certificate was, for the purposes of the counterclaim, conclusive evidence of the sum due.

The decision in *Trustees of the Marc Gilbard Settlement Trust* was that in a forthcoming adjudication the Final Certificate would be conclusive evidence, if that adjudication was not commenced within the stated period (28 days in the contract in that case, 60 days here).

Unlike that case, here the adjudication had proceeded and the adjudicator reached the view that the Final Certificate was not conclusive evidence. But even if *Trustees of the Marc Gilbard Settlement Trust* can to that extent be distinguished on the facts, it nonetheless concludes that on a proper construction of the contract terms, in any form of proceedings commenced after

the specified period the Final Certificate must be conclusive evidence. That is an issue here and I therefore do not accept the pursuer's position that the case can be distinguished.

[25] On behalf of the pursuer it was also submitted that the matters in respect of which the Final Certificate was conclusive evidence did not arise in the adjudication and were therefore not part of the dispute now sought to be resolved by the counterclaim. However, in the adjudication the defender did seek to rely upon the Final Certificate as conclusive evidence of the final Contract Sum and hence as the actual amount due, superseding previous interim payments and notices. So, the issue did arise although the defender's position was rejected by the adjudicator, based upon the matter having been raised in the now remitted sheriff court action.

*The reasoning of Coulson J*

[26] In consequence, the key issue is whether the reasoning of Coulson J in *Trustees of the Marc Gilbard Settlement Trust* should be accepted and the same conclusion reached here. The exception to the Final Certificate being conclusive evidence is expressed, in clause 1.9.3, as "save only in respect of the matters to which those proceedings relate". Those words were taken by Coulson J to limit the exception only to the proceedings raised within the specified period. He rejected the alternative construction put to him (also relied upon by the pursuer in this case) that if the same matters are raised in proceedings after the specified period the exception will also apply.

[27] I accept that clause 1.9 is not expressed with absolute clarity and I approach its meaning on the basis of the well-established authorities on construction of contract terms. In summary, a contract must be construed objectively, contextually, purposively, and in a manner which accords with commercial common sense: *Park's of Hamilton (Holdings)*



*Limited v The Scottish Football Association Limited* [2021] CSIH 61 (at para [17], under reference to *Ardmair Bay Holdings v Craig* 2020 SLT 549, Lord Drummond Young, delivering the opinion of the court, at para [47] *et seq*). While the points made by senior counsel for the pursuer in criticism of Coulson J's reasoning were properly arguable, I respectfully agree with the careful reasoning of Coulson J. I add only the following brief observations, focussing on the language of clause 1.9 as a whole.

[28] Firstly, clause 1.9.1 lists the matters (albeit not referred to by use of that word) in respect of which the conclusive evidence rule applies, in any adjudication, arbitration or other proceedings. The words "conclusive evidence that" appear at the beginning of each listed set of matters. The reference in clause 1.9.3 to the Final Certificate having effect as conclusive evidence "as provided in clause 1.9.1" must in my view be a reference to conclusive evidence on the matters listed in clause 1.9.1. The proceedings raised by a party will concern (as Coulson J noted) particular matters. I therefore read the words "save only in respect of the matters to which those proceedings relate" as meaning that it is only in respect of the particular matters and those proceedings that the exception to the conclusive evidence rule applies.

[29] Secondly, clause 1.9.4 is of crucial significance in interpreting clause 1.9 as a whole. Clause 1.9.1 sets out the matters on which the Final Certificate will be conclusive evidence, subject to exceptions provided in other sub-clauses, including clause 1.9.4. There is no express provision in clause 1.9.4 (as there is in clause 1.9.3) about the Final Certificate not being conclusive evidence in the circumstances covered by clause 1.9.4. However, the clear implication is that if there is an adjudicator's decision after the Final Certificate is issued (and if a challenge to it was referred to adjudication within 60 days) arbitration or legal proceedings on that dispute can be raised within a further 28 days and the Final Certificate

will still not be conclusive evidence in those proceedings. Clause 1.9.4 thus makes clear that a dispute giving rise to a decision in an adjudication after the Final Certificate has been issued can only be dealt with in arbitration or legal proceedings raised within 28 days after the decision. It thereby strictly limits the period during which the exception to the Final Certificate being conclusive will apply, which fits with the views of Coulson J as the main purpose of clause 1.9. It would make no sense to conclude that even though further proceedings after an adjudication in those circumstances are subject to the strictly limited timing of 28 days, the purpose of clause 1.9 was somehow intended to allow, if a litigation was raised, no time limit to raising, for example, an adjudication thereafter on the same matter and in which the Final Certificate would not be conclusive evidence.

[30] If there is an alternative construction to clause 1.9.3 (as Coulson J did not accept, and nor do I for the reasons given), commercial common sense would be a factor to take into account. Coulson J's approach is said to prevent multiple future proceedings after the specified period and to leave it open to the contractor to take protective measures within that specified period by raising proceedings, and perhaps also an arbitration, and also an adjudication. Viewing the contractual terms as having the consequence that such protective steps should be taken, thus requiring more than one set of proceedings, is argued for the pursuer to be against commercial common sense. However, adjudication is of course just a temporary solution. Although the adjudicator's decision may be accepted, final determination of the dispute or difference remains open. A pursuer who relies only on an adjudication within the 60 days would not be making a legal challenge on final determination. It makes more sense to also raise arbitration or legal proceedings. Indeed, it is instructive that both here and in *Trustees of the Marc Gilbard Settlement Trust* litigation was

raised rather than proceeding only to adjudication. No case was put before me where the person seeking to challenge the Final Certificate did so only by adjudication.

[31] The pursuer also contends that if the contractor raised only an adjudication within the specified period after the issuing of the Final Certificate, disputing that certificate, a positive result could automatically be destroyed by any litigation or arbitration raised by the employer in respect of the dispute after that period. That is said to make no commercial sense. But as explained above clause 1.9.4 precludes that result. Thus, I accept the reasoning in *Trustees of the Marc Gilbard Settlement Trust*, the case heavily relied upon by the defender and claimed to support its position.

*Additional fundamental points*

[32] To the extent noted above, the reasoning does assist the defender. But there is a twist in the tale: two fundamental points arise from the reasoning of Coulson J, one of which is from an earlier case. If followed, these are in my view fatal to the defender's argument in this case.

[33] Firstly, clause 1.9.4 was construed by Coulson J in *Jerram Falkus Construction Ltd v Fenice Investments Inc* [2011] EWHC 1935 (TCC), (2011) 138 Con LR 21 as meaning that, where the adjudicator rejected a challenge to the final account and no proceedings were raised within 28 days, the adjudicator's decision was conclusive. As noted above, I agree with that interpretation. This issue was not raised in the debate before me, but while the case was at *avizandum* I considered that it would be helpful to hear any submissions parties wished to make about it, although that slightly delayed the issuing of this Opinion. Each party made brief written submissions, which I have taken into account. The wording of clause 1.9.4 (quoted above) is not restricted to a specific party or to adjudications concerning

the Final Certificate, but rather includes each party and any adjudication determined after the issuing of the Final Certificate. Here, the defender's counterclaim was lodged on 17 July 2020, eight days after the defences were lodged, but the adjudicator's decision was issued on 11 May 2020, more than 28 days before the counterclaim. On that basis alone the defender's challenge must fail.

[34] Secondly, in *Trustees of the Marc Gilbard Settlement Trust* Coulson J went on to deal with the contention of the claimant that, as a result of his findings on the meaning of clause 1.9, the claimant could rely upon the Final Certificate as conclusive evidence for the purpose of getting payment of the sum to which the certificate referred, albeit to hold the sum on a temporary basis pending resolution of the other litigation previously raised. The claimant sought a declaration to that effect, which in essence is what the defender asks for here. While not reaching a concluded view on the matter, Coulson J held (at para [45]) that a judge dealing with such an argument in the context of a summary judgment being sought may decide to reject it and conclude that there was a triable issue as to whether or not the sum was due, raised in detail in the extant proceedings. Moreover, there could also be a legitimate ground for a stay of execution. His view was that it would be unusual for a claimant to recover summary judgment in respect of a claim when the defence to it (namely the challenge to the Final Certificate) has been outlined in detail in pre-existing court proceedings. He refused to grant the declaration sought.

[35] This reasoning could be argued to be contradictory to his earlier point that a matter about the Final Certificate raised in, for example, court proceedings within the time period does not mean that the Final Certificate is not conclusive evidence in later proceedings. However, it proceeds on a quite different basis: even with the Final Certificate viewed as now conclusive, the orders sought in reliance thereon will not be granted. While Coulson J

was referring to these points in the hypothetical context of enforcement proceedings after a further adjudication in which the adjudicator had found the conclusive evidence rule to apply, I view the comments as applying also in the present context of the counterclaim. The reference Coulson J made to stay of execution does not apply here and there was no suggestion before the court that the contractor would become insolvent if the payment were to be made. But here the pre-existing court proceedings outline the challenge to the Final Certificate. In short, I agree with Coulson J's approach.

[36] Senior counsel for the defender relies upon this being a different dispute, on the interim issue and not involving the correctness of the Final Certificate, but rather just its conclusive effect. In my view, there is no basis in clause 1.9 for the conclusion that the parties intended the contract to mean that if only legal proceedings are raised within 60 days of the Final Certificate being issued, challenging the accuracy of the Final Certificate, the defender can at any time thereafter automatically obtain interim relief based on the Final Certificate being conclusive. The provisions in clause 1.9 provide an evidential bar in any further proceedings raised outwith the 60 day period, but they do so to deal with the position after the works are complete and the provisions are aimed at resolving, swiftly and finally, the outstanding issues rather than interim matters. It would be artificial to characterise the dispute or difference in relation to the Final Certificate as limited to whether the Final Certificate is conclusive evidence for the purposes of interim measures when the wider dispute about it is already going on in the court process. Accordingly, I am not persuaded that the Final Certificate must be treated as conclusive evidence for interim purposes, when there is nothing to support that as the contractual intention and in any event the accuracy of the certificate is currently under challenge in the other action.

[37] For the reasons given, I do not accept the defender's position that the Final Certificate is conclusive evidence for the purpose of this counterclaim.

*Issue 2: Interim Payment Notice*

[38] In relation to the Interim Payment Notice, that issue was determined at the adjudication and again, in terms of clause 1.9.4, the defender had 28 days in which to bring proceedings to resolve that dispute but did not do so. Accordingly, its counterclaim in respect of the validity of the notice must also fail. I should, however, express my views on the arguments made.

[39] It was submitted on behalf of the pursuer that even if the Interim Payment Notice used the wrong relevant due date, being one day early, the sums identified in the notice would still be due for payment and the notice should therefore be viewed as valid. I do not accept that submission. The whole matter of interim payments in construction contracts can have significant financial consequences for either party and has been the subject of numerous court decisions.

[40] The employer must be given reasonable notice that the payment period has been triggered in the first place: *Caledonian Modular Ltd v Mar City Developments Ltd* [2015] EWHC 1855 (TCC). The validity of the notice has been assessed by having regard to its substance, form and intent (see eg *Henia Investments Inc v Beck Interiors Ltd* [2015] EWHC 2433 (TCC); *Jawaby Property Investments Limited v Interiors Group Ltd* [2016] EWHC 577 (TCC)). Quite properly, the cases have regard to the important fact that service of an Interim Payment Notice places the employer at risk that failure to serve a Pay Less Notice at the appropriate time will render him liable in full for the amount claimed. For the employer to be placed in that position, the contractor must have complied with the contractual terms. The particular

contract term here (clause 4.11.2.2) expressly requires that the Interim Payment Notice states “the sum that the Contractor considers to be or to have been due to him at the relevant due date”. If the contractor does not use the relevant due date, he does not comply with that provision. The fact that the date used is close to that of the relevant due date does not in my view assist (see eg *RGB Plastering Limited v Tawe Drylining and Plastering Limited* [2020] EWHC 3028 (TCC), at para [22]). It is also not certain that the sum identified on an earlier date must be payable, since events up to and including the due date, positive or negative in respect of further payment, have not been taken into account. I conclude that if the Interim Payment Notice did not refer to the relevant due date, it was not valid and therefore reject the alternative argument for the pursuer. If the defender’s claim had not been barred as a result of clause 1.9.4, the issue of the validity of the Interim Payment Notice turning on the disputed question of the starting date for the works would have required to be dealt with at a proof, but in view of my findings on clause 1.9.4 that does not arise.

***Issue 3: Whether the defender is entitled to repayment of interest***

[41] As a result of my decisions on the Final Certificate not being conclusive evidence for present purposes and on the Interim Payment Notice, this issue does not arise. However, it is appropriate that I express my views on it. The short point is whether, following enforcement of an adjudicator’s award, interest on the sum awarded for the period from the date of the award until payment, is recoverable if the defender succeeds in its claim for repayment of the sum awarded. In *Aspect Contracts Ltd v Higgins Construction plc* (at para [23]) Lord Mance (with whom the other Supreme Court judges agreed) stated that the payer “must have a directly enforceable right to recover *any overpayment* to which the

adjudicator's decision can be shown to have led, once there has been a final determination of the dispute" [emphasis added].

[42] In my view, the adjudicator's fees and expenses (discussed in *Castle Inns (Stirling) Ltd v Clark Contracts Ltd*) are quite different from interest which has to be paid from the date of the award. The latter is not ancillary to the dispute; rather, it is part and parcel of the adjudicator's award. Interest payable from the date of the adjudicator's decision will commonly arise because the decision is being challenged. It would not be right to allow a party who has received a payment to which it was not entitled to retain that part of the payment which comprised interest arising from the date of the award. Accordingly, if (contrary to the view I have reached) the defender's counterclaim had resulted in final determination of the dispute in its favour, I would have allowed recovery of this element of interest.

### **Conclusion**

[43] The counterclaim must therefore fail. As a consequence the defender does not, at this stage, recover what is claimed to have been overpaid to the pursuer. However, the issue of what actual amount required to be paid under the contract remains in dispute in the ordinary action.

### **Disposal**

[44] I shall repel the pleas-in-law for the defender, sustain the third plea-in-law for the pursuer and dismiss the counterclaim.