OUTER HOUSE, COURT OF SESSION

[2019] CSOH 46

CA35/19

OPINION OF LADY WOLFFE

In the cause

GT EQUITIX INVERNESS LIMITED

Pursuer

against

BOARD OF MANAGEMENT OF INVERNESS COLLEGE

Defender

Pursuer: Moynihan QC; Burness Paull LLP
Defender: Walker QC; Brodies LLP

18 June 2019

Introduction

Nature of action

[1] The pursuer seeks enforcement of an adjudicator's award in its favour dated 20 January 2019 ("the Decision)" issued by Dr Robert Hunter ("the Adjudicator") following an adjudication between the parties ("the second adjudication"). The defender resists this and seeks reduction of the Decision *ope exceptionis*. While the Decision was in the sum of £828,091, the pursuer seeks decree for payment in the sum of £499,014.68. This is to reflect a sum said to have been paid by the defender.

Issues

[2] The defender's grounds of challenge to enforcement of the Decision are as follows:

(1) Issue 1: Jurisdictional challenge: the defender argued that the appointment of the Adjudicator was invalid either

(i) because the pursuer circumvented the procedure under the parties' contract ("the Project Agreement", as after defined) by unilaterally inviting the panel member who would have been the adjudicator on the panel of adjudicators next due to be appointed to retire ("the interference argument"), or

(ii) because the pursuer failed to follow the mandatory procedure in the Project Agreement for referral of a dispute to adjudication ("the prematurity argument").

(2) Issue 2: Failure to exhaust jurisdiction: separately, the defender argued that the Adjudicator adopted an incorrect interpretation of the Project Agreement. As a consequence, the Adjudicator adopted too restrictive an approach and he failed to consider a significant line of defence (essentially one of set-off of sums claimed in respect of certain EDF invoices). This constituted a failure to exhaust his jurisdiction. While this was also presented in the alternative as a breach of natural justice, because the Adjudicator was said to have applied an argument not canvassed with the parties, this alternative formulation was not advanced (or was not advanced with any enthusiasm) at Debate. I shall refer to this as "the failure to exhaust jurisdiction argument".

The Decision fell to be reduced *ope exceptionis* if one of these grounds was established.

Debate

[3] Parties lodged Notes of Arguments in advance of the debate, together with a joint bundle of 54 productions and a joint bundle of cases. They were unable to conclude the debate on the allocated day two weeks ago and the debate was continued to a second day last week. They also produced further written submissions in advance of that continued diet. I have had regard to all of the parties' written and oral submissions. I do not propose to repeat those in any detail in this Note.

[4] Parties did not lodge a joint minute. However, Senior Counsel made extensive reference to the Project Agreement (as after-defined) and also to a number of communings between the parties or by one of the parties to third parties (the retiring adjudicator, Mr Robert Blois-Brooke ("Mr Blois-Brooke") or the Chartered Institute of Arbitrators Scottish Branch ("the CIArb SB")). So far as necessary, I summarise those matters in the next two sections of this Note (headed "Background" and "Chronology of events"). The defender formally reserved its position to the effect that, simply because a matter was narrated in the Joint Chronology, it was not necessarily an "agreed" act. Evidence might still be required to inform the Court's understanding of the phrase "as soon as practicable" (in paragraph 4.2.4 of Schedule Part 20 of the Project Agreement), on the basis it might be fact-sensitive, or to prove that it would have taken longer than six hours to convene the defender's Board of Management. The pursuer accepted that evidence may be necessary if the defences were relevant. Otherwise, it was not suggested that evidence would be required to resolve this dispute. Mr Moynihan QC, for the pursuer, sought decree *de plano*. Mr Walker QC, for the defender, sought dismissal of the action.

Background

Project Agreement

Clauses in the Project Agreement

[5] The parties entered into an agreement on or about 29 May 2013 ("the Project Agreement") in terms of which the defender engaged the pursuer to procure the design, construction, finance and maintenance of a new College campus. It is necessary to note certain provisions in the Project Agreement in order to understand the prematurity argument. The relevant provisions in the main body of the Project Agreement are as follows:

(1) Clause 34.4 ("Disputes"): this provided *inter alia* that parties "shall use all reasonable endeavours" to resolve a dispute falling within clause 34.4 within 10 Business Days of the dispute arising. If that failed, either party could refer the matter to the dispute resolution procedure (which is set out in Schedule Part 20, noted below).

(2) Clause 34.6 ("Set-Off"): this entitled the defender to set-off certain sums in certain circumstances.

(3) Clause 64 ("Notices"):

(i) Clause 64.1 this provided that all notices were to be in writing and, further, that "all certificates, notices or written instructions to be given under the terms" of the Project Agreement shall be served by sending the same by first class post, by hand, or by email. Notices to the defender would be marked "FOA: Principal and Chief Executive", who was and is Professor O'Neil, and there was an agreed project-specific email for the defenders. This was different from Professor O'Neill's professional email.

(ii) Clause 64.5 this contained a deeming provision to the effect that emails sent on a Business Day between the hours of 9 AM and 4 PM were deemed to have been received at the time they entered the Information System of the intended recipient otherwise, if sent after 4 PM on a Business Day but before 9 AM, they were deemed to have been received by 11 AM that following day.

The Schedule Part 20 Dispute Resolution Procedure

[6] Schedule Part 20 to the Project Agreement set out the "Dispute Resolution Procedure" ("the DRP Schedule"). I shall refer to the relevant provisions as "paragraphs" in order to distinguish these from the clauses in the main body of the Project Agreement just noted.

[7] Paragraph 4 was headed "Adjudication".

(i) Paragraph 4.1: By paragraph 4.1 either party was permitted at any time to give the other party notice of its intention to refer a dispute to adjudication ("Notice of Adjudication") and which required at the same time to be copied to the intended adjudicator (selected in accordance with paragraph 4.2).

(ii) Paragraph 4.2: subject to an exception here not relevant, the nominated adjudicator was to be selected "on a strictly rotational basis" from the relevant panel of adjudicators. There were two panels, namely a Construction Panel and an Operational Panel. The Construction Panel was the relevant panel in this case and was comprised of three adjudicators (known as "Panel Members" and identified in paragraph 7 of the DRP Schedule). The initial selection to the Construction Panel required to take place within 28 days of the date of the Project Agreement.

(iii) Paragraph 4.2.4 to 4.2.6: As these provisions are central to the jurisdictional challenge I set these out in full:

> "4.2.4 if any member of either panel resigns during the term of the Agreement, a replacement adjudicator shall be appointed by [the parties] as soon as practicable;
>
> 4.2.5 if [the parties] are unable to agree on the identity of the adjudicators to be selected for the panels or any replacement adjudicator, the Chairman (or Vice Chairman) for the time being of the Chartered Institute of Arbitrators Scottish Branch shall appoint such adjudicators(s) within seven (7) days of any application for such appointment by either party;
>
> 4.2.6 in the event that the first panel member is unable or unwilling to confirm acceptance of his appointment as Adjudicator or where he fails to respond within two (2) days of the date of the Notice of Adjudication, then the Referring Party shall invite the person next in line to act as Adjudicator. In the event that the second panel member is unwilling or unable to confirm acceptance of his appointment as Adjudicator within four (4) days of the date of the Notice of Adjudication or if the parties disagree as to the relevant panel of the adjudicators to be used, then the Referring Party may apply to the Chairman (or Vice Chairman) for the time being of the Chartered Institute of Arbitrators Scottish Branch shall within seven (7) days of the date of the Notice of Adjudication, nominate an Adjudicator (who shall also within the same period, confirm acceptance of his appointment as Adjudicator) to determine the Dispute described in the Notice of Adjudication;"

(iv) Paragraph 7: in terms of this paragraph Mr Blois-Brooke was the second-named Panel Member and, in the absence of retirement, would have been the next adjudicator to serve in compliance with the requirement of strict rotation provided for in paragraph 4.2. The third-named Panel Member was Mr Robert Howie QC.

Comment on the DRP Schedule

[8] It is important to note that the appointment of members to the Construction Panel is provided for in paragraphs 4.2.4 and 4.2.5; the referral to a particular adjudicator to initiate an adjudication is governed by paragraph 4.2.6.

[9] Paragraph 4.2.4 envisages that a panel member may resign from the panel and, in the first instance, a replacement adjudicator is to be appointed by the parties "as soon as practicable". In the debate before me, parties were agreed that any replacement adjudicator takes the same position on the list of panel members (in para 7) of the adjudicator who is being replaced.

[10] If one of the parties wished to initiate an adjudication, then the selection of the panel member was to be made from the list of Construction Panel members as it stands at the date of the Notice of Adjudication. I did not understand Mr Walker to dissent from this as a generality; the defender's criticism is that the pursuer "manipulated" this list (ie the interference argument) so as "to avoid" the appointment of Mr Howie.

[11] While the DRP Schedule provides for different forms of dispute resolution, it contains a discreet procedure within the contractual adjudication scheme (comprising paragraph 4 of the DRP Schedule), in paragraph 4.2.5, if parties are "unable to agree" on the appointment of an adjudicator to one of the panels or, if they are unable to agree the identity of any replacement adjudicator. The prematurity argument engages paragraph 4.2.5. As will be seen, the pursuer operated this discreet procedure, to replace Mr Blois-Brooke. The defender contends that no dispute had yet crystallised about the identity of any adjudicator to replace Mr Blois-Brooke such as to entitle the pursuer to operate the paragraph 4.2.5 procedure (ie by going to the CIArb SB).

[12] There is no express provision in the Project Agreement or the DRP Schedule governing the scenario that arose here, where the adjudicator who falls to be appointed in

accordance with the requirement of strict rotation had just resigned and no replacement yet appointed. (Mr Walker QC likened this, somewhat dramatically, to a "perfect storm".) While parties' positions were initially fluid, it became common ground between them that in that scenario the Project Agreement is not prescriptive. In other words, a party wishing to initiate an adjudication could either first seek the appointment of a replacement adjudicator (under para 4.2.4); and operate the procedure under paragraph 4.2.5, if that is not agreed (assuming the pre-conditions for para 4.2.5 are met (which in this case the defender disputes)). Alternatively, the referring party could adhere to the strict rotation, and simply commence the adjudication (under para 4.2.6) using the adjudicator who next falls to be appointed. Notwithstanding that apparent common ground, one of the arguments the defender advanced was that, nonetheless, the pursuer was first obliged to make the reference to Mr Blois-Brooke.

Chronology of events

[13] Parties lodged a Joint Chronology, cross-referenced to documents in the Joint Bundle. This dispute arises out of the second adjudication between the parties under the Project Agreement.

The first adjudication

[14] Some reference was made to the first adjudication (commenced on 9 November 2018) ("the first adjudication"), as affording a context for parties' understanding of their actions preceding the commencement of the second adjudication (with which this action is concerned.) The pursuer commenced the first adjudication by notice sent on 9 November 2018. While there was a failure message on 14 November from the project-specific email agreed between the parties, the defender's Principal and Chief Executive, Professor O'Neil, confirmed on 15

November receipt of the electronic and hard copies of the notice of the first adjudication. The first adjudicator was appointed on 16 November and issued directions (on 19 November) requiring the defender to respond by 22 November. The defender made no response prior to that date. On 23 November the first adjudicator advised that he was bound to determine the first adjudication regardless of whether the defender participated. Later that same day the defender contacted the pursuer's agents to request a sist in order to settle the subject matter of the first adjudication. Against this background, the pursuer argued that the conduct of the first adjudication demonstrated a pattern of delay on the part of the defenders (said to be illustrated by the defender's failure to comply with the timetable imposed by the first adjudicator and its request to settle the first adjudication). The defender argued that the defender's initiation of settlement demonstrated "engagement".

Events culminating in the commencement of the second adjudication

[15] The Joint Chronology, which ran to five pages, details events between June 2018 and April 2019. It suffices for present purposes to note the following:

(1) 22 November 2018: The pursuer's agents emailed Mr Blois-Brooke on 22 November 2018 (which email was cc'd to the professional email address of the defender's chief executive, Professor O'Neil). After identifying the parties and the nature of the project, the email stated:

> "You may be aware that you are named as an adjudicator on the adjudicator panel created for the Project. A copy of Schedule Part 20 of the Dispute Resolution Procedure extracted from the Project Agreement is attached.
>
> I understand from your former colleagues at WJM that you are now retired. If you are no longer in a position to perform the role of adjudicator I wonder if we might invite you to resign from the panel in order that a replacement may be appointed to the panel.
>
> I look forward to hearing from you as soon as possible."

(Mr Moynihan emphasised the passage underlined.)

(2) 26 November 2018: Mr Blois-Brooke confirmed that he is retired and he resigned from the panel, writing:

> "You are correct that I have now retired and in the circumstances wish to resign from the Construction Panel for Adjudicators of the Inverness College project as set out in Schedule Part 20 of the contract. I should be grateful if you would inform the Parties to the Project Agreement accordingly."

His email was cc'd *inter alia* to the defender's Professor O'Neil.

(3) 26 November 2018: the pursuer's agents emailed the defender's Professor O'Neil (at 14:47) attaching a letter (respectively, "the Email" and the "Letter"). The Letter explained for whom the pursuer's agents were acting. It referred to the list of three panel members for the Construction Panel set out in paragraph 7 of the DRP Schedule. It noted that Mr Blois-Brooke "has now retired and resigned from the Panel". The relevant copy correspondence with him was enclosed. (This comprised the email exchanges of 22 and 26 November described in the preceding sub-paras.) The Letter continued:

> "We note that if any member of the Construction Panel resigned during the term of the Agreement, a replacement adjudicator shall be appointed as soon as practicable. We therefore propose the following individuals as replacement adjudicators".

Three names were provided but without any of their contact details. (The Adjudicator was not listed among these three names.) The Letter concluded asking for a reply by return to confirm the defender's "agreement to any of the aforementioned as replacement adjudicator for the Construction Panel" and advised that if no response was received by noon the next day (ie Tuesday, 27 November 2018), "we will consider the parties are unable to

agree on the identity of the replacement adjudicator and we will therefore apply to the [CIArb SB] for a replacement adjudicator to be appointed."

(4) 27 November 2018: the Letter was sent by recorded delivery and the proof of delivery showed that this was delivered at 8.26 am on 27 November 2018. The defender did not respond to the Letter or the Email.

(5) 27 November 2018: the pursuer's agents wrote to the CIArb SB ("the Letter to the CIArb SB") seeking the appointment of a replacement adjudicator to the Construction Panel in terms of para 4.2.5. The Letter to the CIArb SB was sent as an attachment to an email on 29 November 2018 (timed at 12:22) which was copied to *inter alia* the defender's Professor O'Neil. After identifying the parties, the project and after referencing the dispute resolution procedure in paragraph 4.2.5 of the DRP Schedule, it was explained that the second-named panel member, Mr Blois-Brooke, had written to confirm that he was now retired and has resigned from the Construction Panel (the exchange of emails with him described in para [15(1) and (2)] were enclosed). The Letter to the CIArb SB continued:

> "At paragraph 4.2.4 of the procedure, if any member of either Panel resigned during the term of the Agreement, a replacement adjudicator shall be appointed as soon as practicable. The parties to date have been unable to agree on the identity of the replacement adjudicator. We are therefore writing to you to request that the Chairman (or Vice Chairman) for the time being of the [CIArbSB] appoints a replacement adjudicator to the construction panel as soon as possible and in any event, within seven days' of today's date".

(6) 29 November 2018: the CIArb SB appointed the Adjudicator to the Construction Panel. Their email enclosing the Notice of Selection of the Adjudicator (timed at 14:22) was also cc'd to Mr O'Neil.

(7) 29 November 2018: the pursuer's agents forwarded by email (timed at 14:24) the CIArb SB's email, for its information. That email, which was sent to a Lindsay Ferries of the defender (as wll as cc'd to Mr O'Neil), explained that Professor O'Neil had been copied in on the relevant correspondence and asked if the defender required hardcopies of the communications from the CIArb SB. The letter concluded by asking if the pursuer's agents "should be using a different email address in order to communicate with the Board of Management in relation to this matter".

(8) 29 November 2018: the pursuer's agents commenced the second adjudication, sending the appropriate Notice to the Adjudicator.

Events post-dating commencement of the second adjudication

[16] The pursuer relies on several later communings, namely,

(i) the Adjudicator's email of 13 December 2018 noting that the defender (as "Responding Party") had ignored his direction seven days earlier requiring a response by 12 December 2018, and had also ignored his request on 13 December asking if the defender was participating in the Adjudication; and the defender's request later on 13 December 2018 for an adjournment "to allow the respondents to review the paperwork submitted…";

(ii) The email from the defender's agents on 19 December 2018, shortly after they were instructed, challenging jurisdiction on the basis (now accepted to be incorrect) that the Adjudicator had accepted appointment for the second adjudication without first having been appointed to the Construction Panel (which, in fact, had happened,

albeit the regularity of that is the subject-matter of the prematurity argument).

The jurisdictional challenge

The interference argument

Submission for the defender

[17] The defender argues that the correspondence from the pursuer's agents to Mr Blois-Brooke (set out in para [15(1) and (2)], above) constituted an interference with the intended machinery of the dispute resolution procedure in the DRP Schedule. In essence, it was argued that the pursuer "unilaterally interfered" with the dispute resolution procedure envisaged and that the pursuer "procured" Mr Blois-Brooke's resignation. It did not matter, it was argued, that the pursuer's agents' email to Mr Blois-Brooke was also copied to the defender's Professor O'Neil. This did not detract from the "unilateral" character of the pursuer's agents' approach to Mr Blois-Brooke. The damage had been done.

[18] The case of *IDE Contracting Limited* v *RG Cambridge Limited,* [2004] EWHC 36 (TCC) ("IDE"), was said to illustrate the proposition that interference in the appointment process can vitiate the subsequent appointment of an adjudicator by depriving him of jurisdiction (unless the respondent has submitted to the adjudicator's jurisdiction). That case was also support for the proposition that the defender did not require to show it was prejudiced by the irregularity (because in that case the counterargument, that the irregularity had no practical consequence, was rejected).

[19] Mr Walker advanced a subsidiary criticism that the Email had not been sent to an individual within the defender who had had practical involvement with the project, namely Lindsay Ferries. He contrasted the omission to do so in the emails recorded at paragraph [15 (1), (2), (3) and (5)] above with the pursuer's agents' email of 29 November

2018 advising of the CIArb SB's appointment of the Adjudicator to the Construction Panel. While it is now accepted that Mr Blois-Brooke had resigned before the Notice of Adjudication had been issued (the defender had previously objected to the Adjudicator's appointment on the incorrect premise that Mr Blois-Brooke had not yet resigned), the defender contends that the pursuer engineered or "procured" that resignation. This, it was argued, tainted all that followed.

[20] The defender contends that there should have been no prior communication to Mr Blois-Brooke to ascertain his availability. Instead, the pursuer should have served the Notice of Referral on Mr Blois-Brooke (the next panel member to be appointed following strict rotation); and, if it transpired that he was unable or unwilling to accept the referral, then the procedure in the latter part of paragraph 4.2.6 should have been operated. On this approach, Mr Howie QC would have been the appropriate adjudicator in terms of the Project Agreement. The defender would have had the benefit of the few days while that process was operated. Furthermore, parties had taken care to agree the identity of the panel members of the Construction Panel. As a result of the pursuer's "interference", the defender has been denied the services of one of the pre-agreed adjudicators, in this instance Mr Howie QC, and it had had a person whom they had not agreed included within the Construction Panel.

The submissions on behalf of the pursuer

[21] Mr Moynihan took issue with the insinuation that the pursuer "procured" Mr Blois-Brooke's resignation and invited the Court to reject the characterisation of the pursuer's agents' email to him on 22 November 2018 as "interference". A plain reading of that email simply did not support such an interpretation. He emphasised the open-ended nature of the enquiry in the phrase, "If you are no longer in a position to perform the role of

adjudicator…" (see para [15 (2)], above). This email did not mandate a response. It was entirely open to Mr Blois-Brooke to decide if he was in a position to perform the role of an adjudicator. If he had been willing, then paragraph 4.2.6 would have come into play. However, after he indicated his intention to resign, the pursuer's agents approached matters in a perfectly sensible way. All his resignation did was to trigger paragraph 4.2.4 and this is what the pursuer's agents then followed. The case of *IDE* was not relevant as that concerned the side-lining of an adjudicator who remained eligible for appointment. That case was, accordingly, distinguishable and inapplicable to the facts of the present case.

Discussion and determination of the interference argument

[22] In my view, the submissions of the pursuer are to be preferred. A fair reading of the email exchange of 22 and 26 November 2018 between Mr Blois-Brooke and the pursuer's agents simply does not support the insinuation of "interference" the defender sought to advance or any other underhanded conduct on the part of the pursuer or its agents. The pursuer's agents' communication with Mr Blois-Brooke was, in my view, sensible, appropriate and above criticism. They had heard via a professional connection that he was, or might be, retired. They wrote in open-ended language to clarify if he were retired (not to direct that he should retire). Mr Walker's suggestion that one did not know whether Mr Blois-Brooke might nonetheless have accepted a referral, had one been made to him, is untenable. It is flatly contradicted by the clear words of Mr Blois-Brooke's response: "…I <u>have now retired</u> and in the circumstances <u>wish to resign</u> from the Construction Panel of Adjudicators…." (emphasis added). Mr Blois-Brooke was extricating himself from this kind of work and was indicating this in appropriately polite but unambiguous terms. Furthermore, on no view could the email of 22 November 2018 be characterised as "unilateral" when it was copied by email to the appropriate official, namely the chief

executive (Professor O'Neil), and using his current professional email address. It would be the triumph of formalism over commercial or common sense to require the pursuer to serve a Referral Notice to Mr Blois-Brooke (for the purposes of operating paragraph 4.2.6) after it was apparent that he was no longer accepting this kind of work.

[23] As noted above, at paragraph [12], upon the resignation of Mr Blois-Brooke, the pursuer had a choice. In terms of paragraph 4.2.6 it could have sent the Notice of Referral to the third–named panel member, Mr Howie QC. It did not do so. (Parenthetically, I should note that there was nothing in the material I have considered which affords any foundation for Mr Walker's suggestion that the pursuer were seeking "to avoid" appointing Mr Howie QC.) The pursuer's other option was first to seek a replacement panel member in terms of paragraph 4.2.4. It did so and recommended three names to the defender. Absent a response, it then applied to the CIArb SB in terms of paragraph 4.2.5. In doing so, it was foregoing the prospect of participating in the selection of an individual known to it to the Construction Panel. The Adjudicator was not one of those named in the pursuer's list. This is the very opposite of "manipulation" of a process to secure a desiderated outcome. Accordingly, there is no substance to the allegation of manipulation.

[24] In my view, *IDE* is readily distinguishable on its facts. In that case the judge held that the prescribed contractual procedure was that the application had to be made to the sole-named adjudicator in the contract, and refused by him, before a request could be made to the CIArb for appointment of a replacement. The outcome of the informal contact the prospective referring party had had with the sole-named adjudicator simply ascertained that he was busy. It was in that context that the claimant's direct application to the CIArb was found to have "bypassed" the prescribed contractual procedure (see para 9). In this case, as parties accept that the pursuer had a choice between operating paragraph 4.2.6 (to seek to initiate the second adjudication) or paragraph 4.2.4 (to seek a replacement adjudicator), no

prescribed order or procedural step was bypassed. In any event, and in my view fatally for the defender in this case, the court in *IDE* observed that the claimant was bound first to contact the only named adjudicator in the agreement "unless he has already indicated to parties that he is unwilling or unable to act". That is precisely the circumstance here and, accordingly, to the extent that the facts of the instant case and *IDE* coincide, that case supports what the pursuer did here.

[25] It follows that I do not accept that the pursuer's agents' email exchange with Mr Blois-Brooke constituted any "interference" with the machinery in paragraph 4.2.4, much less that it affected or tainted any subsequent involvement of the replacement adjudicator selected by the CIArb SB – subject, of course, to the prematurity argument to which I now turn.

The prematurity argument

Submissions on behalf of the defender

[26] The second argument under the jurisdictional challenge was the "prematurity" argument. So far as I understood it, this had two strands:

(1) It was a precondition of any application to the CIArb SB under the latter part of clause 4.2.5 that there was a dispute between the parties in relation to any replacement adjudicator, and

(2) The tight timescale the pursuer's agents sought to impose did not accord with the phrase "as soon as practicable" under paragraph 4.2.4, regardless of whether one commenced with the sending of the Email on 26 November 2018 para [15(3)] above), for which notice was less than 24 hours, or if one commenced with the delivery of the recorded delivery letter to the defender

at 8.35 am on 27 November 2018) (see para [15 (4)]), for which notice was only 3.5 hours.

In support of the second strand of this argument, Mr Walker referred to other, longer timeframes stipulated in the Project Agreement. He referred to the period of 28 days within which any adjudication required to be completed (para 4.5), the allowance of two days to the adjudicator approached first, and the allowance of four days to the second or fallback adjudicator (under the first and second part of paragraph 4.2.6, respectively) and the period of two days within which the defender was obliged to respond to the pursuer's request for a new dispute to be consolidated with an ongoing adjudication (as a "related" adjudication under para 4.14). In addition, he noted that a period of seven days was allowed to the CIArb SB under the latter part of paragraph 4.2.6, for appointment of a replacement adjudicator to a panel. The deadline imposed in the Email and Letter was arbitrary and unjustified. The defender did not require to show prejudice. In his second written submission, Mr Walker added the argument that the need for speed did not extend to the pre—notice period of an adjudication.

[27] In relation to the first limb of this argument, Mr Walker submitted that there was no "dispute crystallised" between the parties regarding the appointment of any replacement for Mr Blois-Brooke. A dispute only crystallised once a proposal for a replacement adjudicator had been made and rejected. (The observation at para 25(3) of *Amec Civil Engineering Ltd* v *Secretary of State for Transport* [2005] EWCA Civ 291 ("*Amec*"), that "a dispute does not arise unless and until it emerges that the claim is not admitted", and the further discussion at paragraph 19 in *Beck Interiors Ltd the UK Flooring Contractors Ltd* [2012] EWHC 1808 (TCC), were prayed in aid of this submission.) As the pursuer does not aver that the defender rejected the names contained in the Email and Letter, it must be inferred, he argued that rejection arose from the defender's silence. However, no such implication arose. There was

no offer by the pursuer to prove why it was necessary to proceed at "breakneck" speed. Mr Walker argued that any dispute was manufactured by the pursuer and the process it adopted, and this precondition had not been satisfied by the time the pursuer's agents made the reference to the CIArb SB on 27 November 2018. Indeed, it was absurd to justify a shorter period of time than might otherwise be imposed because one knew the legally unrepresentative non—commercial recipient will be unlikely to meet it. *Pace* Mr Moynihan, the period of inactivity (as Mr Monaghan characterised it) from the Notice of Adjudication on 26 November 2018 to 19 December 2018 was irrelevant to the question of whether a "dispute" had arisen about the identity of any replacement adjudicator.

[28] While he did not formally abandon it, Mr Walker did not refer in his oral submissions to the defender's contention for implication of a term requiring "reasonable notice"; the defender's Note of Argument simply stated that the law was authoritatively set out in *Marks & Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey Ltd)* [2015] UKSC 72. Mr Walker also argued that the Letter and Email had to comply with the requirements attendant on "Notices" in clause 64.

Submission on behalf of the pursuer

[29] Mr Moynihan's reply was to the effect that adjudications were extremely quick procedures conducted in short timeframes.

[30] In respect of Mr Walker posing the question (in his second written submission), as to whether the pursuer could have gone straight to Mr Howie QC, Mr Moynihan's answer is that this was purely hypothetical and the court should not consider this suggestion. By the date of the Notice of Referral to the Adjudicator, there was no "vacancy" on the Construction Panel. Secondly, Mr Walker's argument was wholly inconsistent with the challenge the defender's agents advanced on behalf of the defender on 19 December 2018

(see para [15(9)(ii)], above). Nor was the defender's proposed interpretation of the operation of paragraph 4.2.6 "more commercially sensible", as Mr Walker contended. Under reference to comments made by Sir Rupert Jackson in *S & T (UK) Ltd* v *Grove Developments* [2018] EWCA Civ 1998 (at para 121) Mr Moynihan cautioned the court about too readily imposing its notions of commercial common sense. The defender's argument highlighted the contradictory interpretations adopted by the defender to suit its own convenience as it perceived it from time to time. The court should simply resolve matters on the basis of the facts presented, and should not consider what would have happened if there had been a vacancy at the time the Notice of Adjudication had been served. The question Mr Walker posed was a red herring.

[31] Mr Moynihan submitted that the relevant time frame included the period up to 6 December 2018, by which date Professor O'Neil confirmed receipt of the Referral Notice commencing the second adjudication. He stressed that this was a week after the pursuer's agents issued the Notice of Adjudication (on 29 November 2018) and the Adjudicator's confirmation (on 30 November 2018) that he was able to accept the appointment. At no point did the defender seek more time.

[32] Mr Moynihan noted that as both parties accepted that before a party could invite the Chairman or Vice Chairman of the CIArb SB to appoint a replacement adjudicator to the Construction Panel, it must be the case that the parties were "unable to agree on the identity" of the adjudicator(s) to be appointed: paragraph 4.2.5. In response to Mr Walker's reference to a "dispute" (and the cases he cited expounding on that term), Mr Moynihan stressed that "unable to agree" is different than "a dispute" or, indeed, the defender's assertion that there was "no crystallised dispute between the parties" when the pursuer issued its request to the CIArb SB. There was no warrant to require a "crystallised dispute" That was not the language of paragraph 4.2.5. The relevant wording was "unable to agree".

He noted that whether a "dispute" has arisen is itself protean: *Amec* at paragraphs 29 to 31. The wording "unable to agree" was, he submitted, an objective, factual phrase.

[33] In relation to the defender's contention for a term to be implied that there must be a reasonable time for a dispute to manifest itself, Mr Moynihan submitted that it was unworkable to seek to imply a term that there would be "a reasonable" lapse of time (much less a "crystallised dispute") into paragraph 4.2.4. Where the Project Agreement was at pains to identify a timeframe when that was necessary, it did so. However, it had not done so in respect of paragraph 4.2.4. Mr Walker advanced no basis for implying any qualification on the wording used. Finally, there was no requirement to serve a notice complying with clause 64 as a precondition of operating a procedure under paragraph 4.2.4 of the DRP Schedule.

Discussion and determination of the prematurity argument

[34] In determining the prematurity argument, it is important to bear in mind that the pursuer's action is an application to the court for enforcement of an adjudicator's award. As is now well established, courts will respect and enforce adjudicators' awards unless it is plain that the adjudicator has not decided the question referred to him or her, or s/he has otherwise proceeded in a manner which is obviously unfair. Accordingly, it is only in limited circumstances that courts will interfere with the decision of an adjudicator or refrain from enforcing it: *Carillion Construction Ltd* v *Devonport Royal Dockyard Ltd* [2005] EWHC 718 (TCC) at paragraphs 85-87; *AMEC Group Ltd* v *Thames Water Utilities Ltd* [2010] EWHC 419 (TCC) at paragraphs 21 and 54. Furthermore, the court does not review the adjudicator's decision before deciding whether or not to enforce it. So long as the adjudicator was validly appointed and acted within his or her jurisdiction, answered the question posed and observed the rules of natural justice, his or her decision will be enforced.

[35] Each party contends that the onus was on the other to make the requisite averments. Having regard to the character of the pursuer's action as one to enforce an adjudicator's award and to the approach the courts generally take to such actions, it is in my view incumbent upon a defender to plead and establish a basis to justify a court in refraining from the enforcement of an adjudicator's award. This would include breach of a material precondition to any appointment. It matters not, in my view, that the source of the adjudication scheme in this case was contractual, rather than statutory. It has the same rationale underpinning it, being the expeditious resolution of parties' disputes.

[36] On the question of the meaning of "as soon as practicable", it is in my view significant that the defender nowhere pleads any fact or circumstance to support its legal submission that what the pursuer's agents did was dissonant with the phrase "as soon as practicable". I found Mr Walker's reference to other stipulated timeframes in the contractual adjudication scheme to be unpersuasive. Those are fairly standard time limits applicable to specific or predictable stages in an adjudication. In my view, the absence of a timeframe in paragraph 4.2.4 was intentional and to ensure that the resignation of a panel member (a circumstance which was outwith the control of the parties and unpredictable) did not disrupt the appropriate expedition with which any contractual adjudications and matters ancillary to them should be conducted. Nor am I persuaded by Mr Walker's submission that different considerations apply to the "pre-notice" conduct. While Mr Walker sought to argue that different considerations might apply to "pre-notice" conduct, this is to ignore, in this case, the operation of paragraph 4.2.5. *That* procedure, for the appointment of a replacement adjudicator, *had* already been initiated by the Email and Letter.

[37] Furthermore, the defender had already had some prior notice of the pursuer's likely intentions in the form of the pursuer's email exchanges with Mr Blois-Brooke. In respect of *that* part of the contractual scheme of adjudication, it provided that a replacement

adjudicator is to be appointed "as soon as practicable". It is notable that the phrase "as soon as practicable" is not qualified by the element of "reasonably" (cf the use of this qualifier in paragraph 4.14 in relation to a failure on the part of the defender to respond within two days to a request that a new adjudication be treated as a Related Adjudication). The defender makes no averments as to what timeframe would have been "practicable". Correctly analysed, for the reasons discussed at paragraph [35] above, the onus is on the defender to aver and establish the facts and circumstances relevantly to put in issue why the pursuer's timeframe breached the requirement to proceed "as soon as practicable" in paragraph 4.2.4. A bare assertion that this is so, is, in my view, insufficient.

[38] I am fortified in this view by the observations of Jackson J (as he then was), and quoted with the approval by the Court of Appeal in *Amec* (at paragraph 30, *per* May L J, quoting paragraph 68 (5) of Jackson J's decision at first instance) to the effect that "[t]he period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily on the facts of the case and the contractual structure". The defender has no relevant or specific averments as to facts and circumstances. (Mr Moynihan notes that the defender does not aver that the outcome of the Email or Letter would have been any different.) As for the contractual structure, paragraph 4.2.4 of the DRP Schedule enjoins parties to agree "as soon as practicable" and it does so in the context of a contractual scheme of *adjudication* (with the attendant need for speed). I find persuasive May L J's further comment in *Amec* (at para 31 (3)), anent the interpretation of a dispute resolution clause, that "[c]ommercial good sense does not suggest that the clause should be construed with legalistic rigidity so as to impede parties starting timely arbitration proceedings. The whole clause should be read in this light." While the language of the clause under consideration in *Amec* was different, in my view those comments apply with equal force in this case.

[39] In considering the prematurity argument, I accept Mr Moynihan's submission that it is appropriate in this case to look at the period immediately preceding and following the request the pursuer's agents made to the CIArb SB. One may ask, objectively what did the defender know (or what could it have reasonably anticipated) as at the date of the Email and Letter? By that date, the defender had been involved in the first adjudication, which it brought to an end by an offer (on 23 November 2018) to sist the first adjudication the day after having failed to comply with the adjudicator's timetable; the pursuer was taking steps (by email on 22 November 2018) to ascertain the availability of Mr Blois-Brooke, who would have been the next adjudicator to be selected (in accordance with the strict rotation required by para 7 of the DRP Schedule) if he had not retired; and Mr Blois-Brooke had stated unequivocally (in his email of 26 November 2018) that he had retired.

[40] Accordingly, by the time the Email or Letter was received (on 26 or 27 November 2018), the defender, and Professor O'Neil in particular, could have been in no doubt that an adjudication was a quick procedure attended by short timetables used to secure a party's compliance with *inter alia* payment obligations under the Project Agreement. In this context, the argument about compliance with clause 64 (governing notices) arises. I reject as inconsistent with clause 64 Mr Walker's submission that the Email or Letter required to be by a notice complaint with clause 64. In any event, the pursuer does not rely on the deeming provisions in clause 64. Mr Walker made much of the fact that no contact details were provided for the three individuals named in the Email. Mr Moynihan replied that while there *might* have been some force in this observation, if the defender had responded timeously and asked for them, it did not do so. There was never any suggestion the defender endeavoured to seek more information about the three individuals proposed in the Email, or that they were hampered in that enquiry. Mr Moynihan described the defender's non-admission about receipt of the Email as one of the features of the defender's case said to be lacking in candour. It does not aver or admit when the

Email was received, a matter likely to be readily ascertainable from its email server. The defender confined its position on this issue to contending that Professor O'Neil did not remember when he first opened the Email. I accept Mr Moynihan's submission that it is not a complete or candid answer simply to explain that Professor O'Neil could not remember when he first read the Email. Again, if the defender wished to establish a relevant case to contest that the timeframe (whether measured from receipt of the Email or delivery of the Letter) was dissonant with clause 4.2.4, it was incumbent upon it to make the relevant averments. It did not do so.

[41] In the very specific context of this case, the pursuer might reasonably infer that the defender's silence, even for a short period of time, was symptomatic of the inactivity it had exhibited during the first adjudication. More to the point, the defender has not discharged the onus of pleading a relevant case.

[42] In relation to the period after the commencement of the second adjudication, while I place little weight on this, I accept Mr Moynihan's submission that the defender's silence for some weeks was not insignificant. At no point did the defender state that more time was needed; that the relevant communication was sent to the wrong person or the wrong email address; or that the communication was misunderstood. The defender did not ask for more time in order to consult its agents or to convene the Board of Management of the defenders or, even, that it intended or required to do so. There is therefore some force in Mr Moynihan's submission that the defender did not object at the earliest opportunity. While the defender seeks to meet this criticism by noting that objection was taken shortly after the defender's agents became involved a month or so later, it remains the case that those grounds of objection did then not include the prematurity argument. Mr Walker's submission that the defender here was without legal representation or was a "non-commercial entity" has, in my view, little merit. First, whether the defender is a "commercial

entity" or not, the defender has entered into the Project Agreement containing detailed provisions for adjudication. The counterparty, the pursuer, can reasonably assume that the defender understands what is required if those provisions are operated and to be complied with. Secondly, the defender had just had experience of the alacrity with which adjudications are conducted: it had sought to settle the first adjudication (commencing on 9 November 2018 and acknowledged by Professor O'Neil on 15 November 2018), after failing to comply with the adjudicator's timetable.

The implication of a term

[43] For completeness, I deal with the defender's suggestion of an implied term (although no particular wording is suggested). In my view, there is simply no relevant basis pled or argued for the implication of any term of a "reasonable time" as suggested in the defender's first Note of Argument (albeit not advanced in oral submissions). There were no relevant pleadings to support implication of a term. No attempt was made to bring the defender's case in line with *Marks and Spencer*. The omission to define "as soon as practicable" at the end of paragraph 4.2.4 by reference to a stipulated period was, in my view, intentional and not a drafter's oversight. It would introduce uncertainty into a contractual scheme of adjudication in which, in common with statutory adjudications, speed is of the essence. Further, in my view it is not insignificant that the common qualifier of "reasonable" in such a phrase was also omitted. Nothing within this part of the Project Agreement is redolent of sloppy or careless drafting. The Project Agreement bears to have been negotiated between highly skilled agents. The scheme of adjudication set out in paragraph 4 of the DRP Schedule is a detailed, carefully constructed and complete scheme for resolution of disputes. All of this leads me to reject the defender's attempt to imply a term. To do so would be inconsistent with the language and intent of this part of the DRP Schedule.

The failure to exhaust jurisdiction

Submission for the defender

[44] In its Note of Argument the defender argued that the Adjudicator failed to address the defender's line of defence based on set-off of certain EDF invoices. It had been submitted that the Adjudicator had done so, either because of a misunderstanding on his part of the correct legal interpretation of the Project Agreement (thereby a failure to exhaust jurisdiction) or because he considered a line of defence and excluded it on some basis which had not been advanced by either party or canvassed by the Adjudicator with the parties (a breach of natural justice). Mr Walker asked the court to note to paragraphs 332 to 363 of the Adjudicator's Decision and to clauses 34.4 and 34.6 the Project Agreement.

[45] The courts will not enforce a decision of an adjudicator who takes an unduly restrictive view of his jurisdiction and who, as a consequence, fails to consider a significant line of defence to the claim before him. Mr Walker referred to *NKT Cables A/S* v *SP Power Systems Ltd* [2017] CSOH 38; 2017 SLT 494 and *Joint Administrators of Connaught Partnerships Ltd* v *Perth & Kinross Council* [2014] CSOH 149.

Submission for the pursuer

[46] Mr Moynihan submitted that this kind of challenge, however characterised by Mr Walker, was misconceived. (In passing, he observed that Mr Walker's two variations of this challenge were mutually inconsistent.) In the first place, the Adjudicator was not addressing a point of his "own making" (one of the variations Mr Walker suggested). He had, in fact, addressed the pursuer's argument at paragraphs 3.32 to 3.6 of its submission dated 18 January 2019. Accordingly, read in the light of that submission, it was clear that the Adjudicator had exhausted his jurisdiction. He had considered the set-off defence (see

para 321 of the Decision) and decided that the electricity charges could not be set off for the reasons submitted by the pursuer, namely, those charges first required to go through the contractual procedure for handling "Monthly Service Payments". He referred to paragraph 362 of the Adjudicator's Decision. By the time of the second day of the debate, Mr Walker appeared to have accepted that the pursuer had made such a submission. In that case, this first formulation of this challenge disappeared. The Adjudicator had not "developed a number of points of his own making".

[47] Mr Moynihan made a further submission that Mr Walker appeared now to advance a new argument that the pursuer "deliberately led the adjudicator in to error". There was no Record for such a contention and this submission should not be entertained. This constituted an illegitimate attempt by the defender to open up the merits of that part of the Adjudicator's Decision.

Discussion and determination of the failure to exhaust jurisdiction argument

[48] This issue was briefly argued and may be shortly despatched.

[49] The defender's initial presentation of this issue was predicated on what was said to be an error in law on the part of the Adjudicator in the interpretation of the set-off clause of the Project Agreement and which became a failure to exhaust his jurisdiction because the Adjudicator wrongly excluded a relevant line of defence. However, by the time of the second day of the debate, in the light of Mr Moynihan's submissions (which identified the passages in the pursuer's submissions to the Adjudicator and where this was dealt with in the Decision), Mr Walker accepted that it was "correct to say that the pursuer did make a submission".

[50] Mr Walker no longer sought to argue that the Adjudicator had gone off on a frolic of his own. He did not identify the particular error of law the Adjudicator was said to have

fallen into nor what was the correct interpretation of the relevant clause of the Project Agreement. Mr Walker simply asserted that the clause 34.4 "plainly" entitled the defender to argue for set-off of the EDF invoices and the pursuer's submission to the adjudicator was "plainly erroneous".

[51] I do not accept Mr Walker's submission that the pursuer "deliberately led the adjudicator into the error that he then went on to make concerning the question of whether set-off could be prayed in aid by the defender in the adjudication". There is nothing in the documentation exhibited to me in the course of the two-day debate which provided any support for such an assertion. It is contradicted by the passages Mr Moynihan identified. On a fair reading of the Decision, the Adjudicator did consider the arguments about set-off. He determined this point in favour of the pursuer. There was therefore no failure by the Adjudicator to exhaust his jurisdiction. I accept Mr Moynihan's submission that it would be impermissible to explore this as an error of law, as this is classically a matter that is *intra vires* of the Adjudicator and the defender has no pleaded case. This ground of challenge also fails.

[52] Accordingly, the second challenge on the basis that the Adjudicator failed to exhaust his jurisdiction also fails.

Decision

[53] It follows from the foregoing that the defender's several grounds of challenge fail and that effect must be given to the Decision. I shall put the case out By Order to confirm the terms of the decree, to address any question of expenses and to enable parties to address the Court on the impact of this decision on the orders made in relation to the defender's counterclaim at last week's Procedural Hearing following the second day of the debate.

[54] I reserve meantime the question of expenses.