OUTER HOUSE, COURT OF SESSION

[2020] CSOH 17

CA153/19

OPINION OF LORD CLARK

In the cause

FIELD SYSTEMS DESIGNS LIMITED

Pursuer

against

MW HIGH TECH PROJECTS UK LIMITED

Defender

Pursuer: Barne QC; CMS Cameron McKenna Nabarro Olswang LLP
Defender: McKenzie; Clyde & Co (Scotland) LLP

11 February 2020

Introduction

[1] On 4 October 2019, following an adjudication arising from a dispute between the pursuer and the defender, the adjudicator made an award in the pursuer's favour. In this action, the pursuer seeks enforcement of that decision. The defender argues that it should not be enforced and seeks reduction of the decision. The case called before me for a debate and also on the pursuer's motion for summary decree.

Background

[2] On about 27 November 2015, the parties entered into a contract for the design and construction of electrical, control and instrumentation works at a waste plant. Various differences and disputes arose and on about 22 January 2018 the parties entered into a further agreement ("the Supplemental Agreement"). As part of the Supplemental Agreement the parties agreed to value the works completed as at 3 December 2017 at £9,600,000. They also agreed that any remaining works carried out after that date would be valued on the basis of schedule 19 to the initial contract, as varied by the Supplemental Agreement. Schedule 19 set out, for present purposes, two bases on which the remaining elements of the works were to be valued. The first is the schedule of Rates listed in clause 19.5, to be applied using Table 19.2. This basis for valuation would apply to payment for all staff and labour directly and indirectly employed by the pursuer. The second is a "cost plus" basis set out in clause 19.6 which involves a 7.5% uplift applied to substantiated actual costs, in terms of Table 19.3. This would apply to supplies and services from a third party, including bought-in plant, materials and labour. The contrast is therefore between agreed hourly rates (Table 19.2) and actual costs plus an uplift (Table 19.3).

[3] On about 28 May 2019 the pursuer submitted an interim request for payment in respect of the works undertaken up to and including that date. The gross value of the works identified in that request for payment was £15,083,510.21. The pursuer's interim request for payment included claims in respect of work carried out by Cepha Controls Limited ("Cepha") and Anord Control Systems Limited ("Anord"). In all requests for payment after the Supplementary Agreement was reached, the pursuer had applied for and the defender had certified payment for the Cepha and Anord work on the basis of the agreed hourly rates (Table 19.2) rather than the cost plus approach (Table 19.3). The interim request for payment

proceeded on that basis. On 21 June 2019, the defender issued its payment notice in response the pursuer's request for payment. The defender valued the pursuer's works at £14,008,181.86. This gave rise to a shortfall of £1,075,328.35 when compared to the figure in the pursuer's application. The defender's valuation also proceeded upon the basis of the agreed hourly rates in Table 19.2.

[4] In his decision, the adjudicator narrates the following sequence of events, which occurred prior to the hearing. On 12 July 2019 the pursuer served its Referral, containing two lever arch files of evidence. On 26 July 2019 the defender served its Response, containing two lever arch files of evidence. On 4 August 2019 the pursuer served its Reply, containing one lever arch file of evidence and then on 16 August 2019 the defender served its Rejoinder, containing further evidence. On 30 August 2019 the pursuer served a Surrejoinder, containing further evidence. Thereafter, on 10 September 2019 a hearing was conducted.

[5] The Referral identified twenty-five issues which were in dispute. These included Issue 6, which related to "Cepha support", in respect of which the deduction made by the defender was £25,498.35, and Issue 7 which related to "Anord panel modifications", the deduction by the defender in that regard being £972. The defender maintained that these deductions made by it were valid because, put very broadly, the claims for payment were not supported by the timesheets and other data submitted with the request for payment. The Referral, Response, Reply, Rejoinder and Surrejoinder, and the volumes of evidence produced therewith, dealt with the parties respective positions on valuation in respect of each one of the twenty-five issues and in particular on whether the deductions made by the defender were valid.

[6] At the hearing on 10 September 2019, at which these matters were the subject of evidence and submissions, the defender brought up what it describes as a new matter. It argued that Cepha and Anord were subcontractors to the pursuer and therefore that Table 19.2 did not apply. The correct basis to calculate that aspect of valuation of the claim should have been Table 19.3. In response, the representative of the pursuer argued that Cepha and Anord were in a joint venture with the pursuer, which, it was alleged, was known to the defender and that Table 19.2 was therefore the correct basis. This new point (the status of Cepha and Anord) came to be referred by the parties as the "Subcontract/JV point". On 10 September 2019 the adjudicator gave directions about closing submissions and stated:

> "The Respondent shall on or before 16:30 hours Wednesday 18 September 2019 file and serve its Reply to the Referring Party's submission regarding the discrete issue of the 'Subcontract'/'JV' point."

On 13 September 2019 the parties simultaneously exchanged closing submissions and on 18 September 2019 the defender replied to the pursuer's position on the Subcontract/JV point. In that Reply, the defender contended that the works of Cepha and Anord should be valued at nil. According to the defender, this would result in a substantially higher deduction, of greater than £890,000.

[7] In his decision, issued on 4 October 2019, the adjudicator noted that it was not disputed by the parties that the sum of £1,075,328.35 was in dispute. He also noted that pursuant to the provisions in the Supplementary Agreement, the defender had the opportunity to audit and validate costs incurred by the pursuer. He listed the submissions received from the parties, including the defender's Reply dated 18 September 2019 (on the Subcontract/JV point) and stated:

> "In total, there have been eleven (11) pleaded submissions complete with supporting files of evidence and a one-day hearing. This Decision is a summary of the Parties' arguments and for the sake of brevity although I have been unable to refer to each and every detail thereto I have nonetheless carefully considered all documents and submissions provided to me in reaching my Decision."

In relation to issues 6 and 7, put broadly, the adjudicator decided that the defender had failed to show that the timesheets did not reconcile with the other data or that the data showed that these parts of the claim were overvalued. On issue 6, the adjudicator noted that Cepha had accepted a reduction of £14,476.29 in the valuation thereby reducing what is described as "the delta" (or difference) from £25,498.35 to £11,022.06. The pursuer agreed with that position. Thus, the adjudicator determined the true gross value for "Cepha Support" at £840,113.07 (that is, £11,022.06 greater than the defender's certified valuation of £829,091.01). The result was that on Issues 6 and 7, the adjudicator rejected the defender's contention that deductions of £11,022.06 (Issue 6) and £972 (Issue 7) should be made.

[8] The defender contends that the adjudicator's decision should not be enforced and should be set aside *ope exceptionis* because (i) the adjudicator failed to address a material line of defence which was advanced before him (the Subcontract/JV point) and so failed to exhaust his jurisdiction, and (ii) *esto* the adjudicator did address said line of defence, he failed to provide any, or any adequate, reasons for his decision.

[9] The pursuer contends (i) that the adjudicator did address the defence advanced to him, (ii) that in any event, any failure by the adjudicator to address the line of defence relied upon by the defender was not material, and (iii) that the adjudicator's reasons were adequate. The pursuer further contends that *esto* the court considers that the adjudicator did fail to exhaust his jurisdiction or failed to give adequate reasons, any such failure affects only certain parts of the adjudicator's decision. The pursuer argues that, on this hypothesis, the affected parts of the adjudicator's decision should be severed and the balance of the

adjudicator's decision should be enforced. In response to those arguments, the defender contends that if the court considers that the adjudicator did fail to exhaust his jurisdiction or failed to give adequate reasons, his decision should be set aside in its entirety.

[10] Finally, the pursuer contends that it is entitled to recover from the defender one half of the adjudicator's fees and expenses. The defender argues that, the adjudicator having failed to produce an enforceable decision, the pursuer's remedy in relation to the adjudicator's fees and expenses lies against the adjudicator, not against the defender.

[11] At the beginning of the hearing before me, the defender sought to lodge two affidavits. The pursuer opposed that motion. While these affidavits were presented at this late stage, on the basis that there was at that stage a motion before the court for summary decree and all relevant material could be considered for that purposes, and that senior counsel for the pursuer did not, as he put it, see anything additional in the affidavits, I allowed them to be received.

[12] At the hearing, the pursuer advanced its case on the basis of relevancy. The pursuer made no submissions in relation to the relevant legal criteria to be satisfied in order for a motion for summary decree to be granted. That issue does not therefore arise, but I am in any event satisfied that a valid defence is pled by the defender and that summary decree should not be granted. The matter to be resolved, therefore, is the relevancy of each side's case.

The issues

[13] The issues which I require to determine, as articulated in the parties' joint statement of issues, are:

1. Whether or not the adjudicator failed to exhaust his jurisdiction in respect of the "JV/Subcontract" issue and/or whether the adjudicator provided any, or any proper, reasons for his decision, as described in the defences? ("Issue 1");

2. On the hypothesis that the adjudicator failed to exhaust his jurisdiction and/or to provide any, or any proper, reasons for his decision, whether or not the decision is severable in respect of issues unaffected by any such failure? ("Issue 2")

3. On the hypothesis that the adjudicator failed to exhaust his jurisdiction and/or to provide any, or any proper, reasons for his decision and the decision is set aside, whether or not the defender is required to make payment to the pursuer in respect of its half of the adjudicator's fees? ("Issue 3").

Submissions

Submissions for the pursuer

Issue 1: failure to exhaust jurisdiction and/or give adequate reasons

[14] The dispute that was referred to the adjudicator was one of valuation. In the matters relevant to this enforcement action, the adjudicator had preferred the pursuer's approach to valuation to that of the defender. The defence to the enforcement proceedings was entirely without merit. It was important to note that, in both the request for payment and the payment certificate, both parties applied the Table 19.2 rates to the work done by Cepha and Anord. In its Response to the Referral, one of the defender's complaints under reference to Issue 6 (Cepha Support) was that "the actual costings incurred by CEPHA [*sic*] were not issued, rather they appear to be [the pursuer's] inflated rates". The correct approach to valuation (agreed rates versus cost plus) was clearly being raised. Furthermore, it had always been the defender's position that Cepha was the pursuer's subcontractor, as was clear from the defender's Response and the witness statements.

[15] Further, in relation to Table 19.2, it should be noted that there are columns for "switchgear", "Electrical" and "Controls", which correspond respectively to the specific work areas undertaken by Anord (switchgear), the pursuer (electrical) and Cepha (controls). This was a matter of admission. Indeed, Anord is itself expressly referenced in Table 19.2. It was in this overall context that the adjudicator's decision should be read. In addition, the defender was entirely opaque about the implications of the Subcontract/JV issue in a context where the defender had issued a payment certificate in the sum of £14,008,181.86, which certified particular sums on a basis inconsistent with the arguments it had later made on the Subcontract/JV issue. At no point was it suggested by the defender that the certificate issued by it should somehow be set aside or disregarded by the adjudicator. That was not surprising since it would be an entirely illegitimate thing for the adjudicator to have done. The sums comprising Issues 6 and 7 had been certified and were due for payment.

[16] In his decision, the adjudicator stated that he had carefully considered all documents and submissions provided to him. The presumption of regularity applied: *SW Global Resourcing Limited* v *Morris & Spottiswood Limited* [2012] CSOH 200 at [13]. The policy reasons that lay behind the introduction of the adjudication process are well-known: see eg *Integrated Building Services Engineering Consultants Ltd* v *Pihl UK Ltd* [2010] BLR 622 at paragraph [15]. It was to provide a swift mechanism to resolve disputes arising under a building contract with a view to preserving cash-flow and protecting contractors and subcontractors. As such, the courts have been and should be extremely slow to refuse to enforce adjudicators' decision except in the most obvious of cases. Reference was also made to *Carillion Construction Ltd* v *Devonport Royal Dockyard Ltd* [2006] BLR 15 (para [85]); *Coulson on Construction Adjudication* 4th ed., at paragraph 13.55; *Pilon Ltd* v *Breyer Group plc* [2010] EWHC 837 (TCC) (para [22]) and *Gillies Ramsay Diamond* v *PJW Enterprises Limited* 2004 SC

430. Any failure by an adjudicator to address an issue referred to him required to be material, in the sense that it has a potentially significant effect on the overall result of the adjudication: *Morgan Sindall Construction and Infrastructure* v *Westcrowns Contracting Services Ltd* 2018 S.C.L.R. 471 at [83].

[17] The adjudicator had answered the dispute referred to him. He had set out his view on what the proper valuation was on each of the issues (1-25) dealt with in the Referral. The two payment mechanisms under schedule 19 and their correct application were central points throughout the adjudication. This was reflected in the fact that the adjudicator set out *ad longum*, in paragraphs 15 to 25 of the decision, the relevant parts of schedule 19. It was therefore clear that the adjudicator gave careful consideration as to how the particular mechanisms should be applied in the context of the dispute and the issues referred to him.

[18] In finding that the Table 19.2 rates applied, it was obvious that the adjudicator rejected the defender's argument: *SW Global Resourcing Limited* v *Morris & Spottiswood Limited* [2012] CSOH 200 (at para [17]) . That was sufficient for the purposes and validity of his decision. It is not necessary for an adjudicator expressly to address every point taken by a party: *DC Community Partnerships Limited* v *Renfrewshire Council* [2017] CSOH 145 (paras [24] –[26]; *Morgan Sindall Construction and Infrastructure Limited* v *Westcrowns Contracting Limited* (paras [83], [88], [96], and [98]).

[19] Moreover, the adjudicator identified in his narration of the arguments the defender's key complaint on the Subcontract/JV issue: that the actual costs incurred by Cepha had not been provided (para 109). The adjudicator had accepted the pursuer's position, that the appropriate approach to valuation for the Cepha and Anord works are the agreed hourly rates set out in Table 19.2 (paras 357 and 360). Furthermore, the adjudicator correctly found that the defender had waived any right to argue that the materials submitted for payment

were noncompliant with the contract (para 454). The adjudicator had determined the Subcontract/JV issue that was referred to him.

[20] It was at least implicitly clear that the adjudicator considered that the correct approach to valuation was that put forward by the pursuer. In this regard, when considering whether an adjudicator has given sufficient reasons on a particular issue, a distinction should be drawn between something that is a standalone defence, such as a claim to set off, and an issue that is raised as a potential alternative manner of valuation. The argument made on the Subcontractor/JV point was wholly opportunistic and entirely without merit. It was blatantly a misguided attempt to seek a tactical advantage.

Issue 2: Severability

[21] In relation to the law on the severability of adjudicators' decisions, reference was made to the analysis given by Lord Doherty in *Dickie & Moore Ltd* v *The Lauren McLeish Discretionary Trust* [2019] CSOH 87. If the court considered that the adjudicator did fail to exhaust his jurisdiction then in respect of Issues 6 and 7, the sum certified by the defender would apply instead of the sums allowed by the adjudicator.

Issue 3: Responsibility for the adjudicator's fees

[22] Under the adjudicator's terms and conditions, the pursuer and the defender were jointly and severally liable for the adjudicator's fees. Accordingly, even if the decision was set aside, the defender would still be liable to relieve the pursuer to the extent of 50% of the adjudicator's fees in circumstances where the pursuer has discharged the defender's liability to the adjudicator for his fees.

Submissions for the defender

Issue 1: Failure to exhaust jurisdiction and/or give adequate reasons

[23] The scope of an adjudicator's jurisdiction is defined by the Notice of Adjudication together with any ground relied upon by the responding party to justify its position: *Construction Centre Group* v *Highland Council* 2002 SLT 1274,per Lord Macfadyen at [19]; *Pilon Ltd* v *Breyer Group plc*, per Coulson J at [25]. If a responding party in adjudication proceedings raised a line of defence which could be a defence to the claim made against it, the adjudicator is required to deal with it and could not ignore it (even if he or she considered that there were difficulties or problems in the way in which a matter had been raised): *Joint Administrators of Connaught Partnership* v *Perth & Kinross Council 2014* SLT 608, per Lord Malcolm at [19]. Failure by an adjudicator to deal with a material line of defence amounts to a failure to exhaust the adjudicator's jurisdiction, rendering the decision unenforceable: *Gillies Ramsay Diamond* v *PJW Enterprises Ltd*, per Lord Gill at [25]; *Carillion Construction Ltd* v *Devonport Royal Dockyard Ltd*, per Chadwick LJ at [52]; *RGB Ltd* v *SGL Carbon Fibres Ltd*[2010] CSOH 77 per Lord Menzies at [22]; *NKT Cables A/S* v *SP Power Systems Ltd* 2017 SLT 494 per Lady Wolffe at [113]-[114]; *DC Community Partnerships Ltd v Renfrewshire Council* [2017] CSOH 143 per Lord Doherty at [24].

[24] In the present case, the adjudicator was invited to decide the gross value of the pursuer's interim request for payment dated 28 May 2019. The adjudicator therefore also had jurisdiction to consider any ground advanced by the defender which might affect the gross value of that application in a material way. Importantly, the adjudicator's jurisdiction was not confined merely to deciding upon the differences between the amount applied for by the pursuer and the amount certified by the defender. The substance of the Subcontract/JV point advanced by the defender in the adjudication was, therefore, that the

sums claimed in the pursuer's interim application of 28 May 2019 in respect of each of these three issues should be valued at nil, because the pursuer's application proceeded on the wrong contractual basis (i.e. Table 19.2 when it should have been Table 19.3). The adjudicator manifestly had not made any explicit reference to the Subcontract/JV point in his decision on Issues 6 and 7 at the adjudication, either in his rehearsal of parties' submissions or in the operative parts of his decision. Indeed in his rehearsal of parties' submissions on these issues, the adjudicator did not reference anything after the pursuer's Surrejoinder of 30 August 2019.

[25] In relation to the points made by the pursuer about specific paragraphs of the adjudicator's decision, it was clear, in context, that the adjudicator did not address the defender's position that the claim should be valued at nil as the pursuer had no entitlement to valuation on the basis of Table 19.2. As to the waiver argument, the adjudicator was merely determining that the defender had waived the right to withhold payment on the basis that the information contained within the pursuer's timesheets did not provide sufficient detail.

[26] The adjudicator's failure to deal, explicitly, with the Subcontract/JV point was remarkable in light of his directions of 10 September 2019 in which he directed the defender to serve a discrete Reply on the Subcontract/JV point. It was all the more remarkable in light of the defender's specific request in the discrete Reply that the adjudicator should address the issue. Moreover, it simply did not follow that because the adjudicator had approached the valuation of Issues 6 and 7 on the basis advanced by the pursuer he must be taken to have addressed and rejected the Subcontract/JV point. That outcome was equally consistent with him not having addressed the Subcontract/JV point at all. In a nutshell, the adjudicator failed to "reach a decision which was responsive to the issues referred in the adjudication",

which included the Subcontract/JV issue: *AMEC Group* v *Thames Water Utilities Ltd* [2010] EWHC 419 at [83], as referred to in *NKT Cables A/S* v *SP Power Systems Ltd* at [114]. The court should adopt a similar line of reasoning to that of Lord Doherty in *DC Community Partnerships Ltd* v *Renfrewshire Council*, at [26].

[27] The adjudicator's failure to address the Subcontract/JV point was plainly material. If the adjudicator had addressed and upheld the defender's argument and valued Issues 6 and 7 at nil, as he was invited to do, the effect would have been an overall reduction in the gross value of the pursuer's interim application of 28 May 2019 of over £890,000.

[28] In any event, the adjudicator simply gave no reason or indeed any indication why he rejected the Subcontract/JV point (on the hypothesis that he considered it). It was impossible for the parties to understand, in the context of the adjudication procedure, what it was that he had decided in relation to the Subcontract/JV point and why: *c/f NKT Cables A/S* v *SP Power Systems Ltd*, per Lady Wolffe at [115], referring to *Thermal Energy Construction Ltd* v *AE & E Lentjes UK Ltd* [2009] EWHC 408 at [21]. In other words, the adjudicator's reasons were not sufficient to show that he had dealt with the Subcontract/JV point and to show what his conclusions on that point were: *c/f Gillies Ramsay Diamond* v *PJW Enterprises* at [31]. Again, the court was invited to adopt a similar approach to that adopted by Lord Doherty in *DC Community Partnerships Ltd* v *Renfrewshire Council*.

Issue 2: Severability

[29] The decision in *Dickie & Moore* v *McLeish (No. 2)* relied upon by the pursuer is the subject of a reclaiming motion, but in any event should not be followed in the present case. It runs counter to the orthodox approach which has hitherto been taken in Scotland to issues of severability: see e.g. *Carillion Utility Services Limited* v *SP Power Systems Limited* 2012 SLT

119, per Lord Hodge at [39]; *CSC Braehead Leisure Limited* v *Laing O'Rourke Scotland Limited* [2008] CSOH 119, per Lord Menzies at [38] to [40]; *Highlands & Islands Airports Limited* v *Shetland Islands Council* [2012] CSOH 12 per Lord Menzies at [41] to [47]; *Whyte & Mackay Limited* v *Blyth & Blyth Consulting Engineers Limited* 2013 SLT 555, per Lord Malcolm at [69] to [71]; and *Bell Building Projects Limited* v *Arnold Clark Automobiles Limited* [2017] CSOH 55, per Lord Tyre at [33]. The orthodox approach should be followed. Parties have contracted to be bound by a complete decision from their adjudicator, not a part of that decision or a decision that has been re-written by the court. If the whole decision cannot stand, parties have not agreed to be bound by that which may be left over. Nor do the policy considerations underlying the adjudication process compel enforcement of only part of a decision, if the whole cannot stand. Moreover, the adjudicator's determination in relation to his fees and expenses may have been different had he addressed the Subcontract/JV point, and so his decision cannot safely stand.

Issue 3: The adjudicator's fees and expenses

[30] If the court held that the adjudicator had failed to exhaust his jurisdiction or to provide adequate reasons and his decision was set aside in its entirety, the defender would be under no obligation to pay a half-share of the adjudicator's fees and expenses, which arises by virtue of an obligation to comply with the adjudicator's decision: *PC Harrington Contractors Ltd* v *Systech International Ltd* [2012] EWCA Civ 1371; *Stork Technical Services (RBG)* v *Ross's Excecutor* 2015 SLT 160. On that basis, the defender would have no obligation to pay to the pursuer a one-half share of the adjudicator's fees and expenses. The pursuer would, however, be entitled to seek restitution from the adjudicator on the basis of the mutuality principle. If the court held that the offending parts of his decision could not be

severed, it could not be said that if the adjudicator had addressed the Subcontract/JV point, or provided adequate reasons, it was clear and obvious that his apportionment of fees and expenses would have been the same: *cf Dickie & Moore*, at [57].

Decision and reasons

Issue 1: Failure to exhaust jurisdiction and/or give adequate reasons

Deliberate failures and inadvertent failures

[31] The circumstances in which a failure by the adjudicator to consider an issue will result in his decision being successfully challenged (whether as a failure to exhaust jurisdiction or a breach of natural justice) are discussed in both the Scottish and English case law. In the present case, senior counsel for the pursuer relied upon the following comments by Coulson J in *Pilon Ltd* v *Breyer Group plc*:

> "22.2 If the adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his jurisdiction (and has, for example, failed even to consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice: see *Ballast*, *Broadwell*, and *Thermal Energy*.
>
> 22.3 However, for that result to obtain, the adjudicator's failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the decision unenforceable: see *Bouygues* and *Amec v TWUL*.
>
> 22.4 It goes without saying that any such failure must also be material: see *Cantillon v Urvasco* and *CJP Builders Ltd* v *William Verry Ltd* [2008] EWHC 2025 (TCC). In other words, the error must be shown to have had a potentially significant effect on the overall result of the adjudication: see *Keir Regional Ltd (trading as Wallis)* v *City & General (Holborn) Ltd* [2006] EWHC 848 (TCC)…"

[32] It is clear that Coulson J views the distinction between a deliberate failure and an inadvertent failure as significant. In that case, he concluded that the adjudicator deliberately restricted his own jurisdiction. However, having stated that the failure "must be deliberate"

rather than inadvertent, he does qualify that by stating that an inadvertent failure will not "ordinarily" render the decision unenforceable. In *Amec*, Coulson J referred to the decision of the Inner House in *Ballast plc* v *The Burrell Co (Construction Management)* [2001] BLR 529 (also referred to in *Pilon)* as one where the adjudicator "wholly failed" to deal with the issue that had been referred to him, and that it was a deliberate failure. Thus, in *AWG Construction Services Ltd* v *Rockingham Motor Speedway Ltd* [2004] EWHC 888 (TCC) (at para 128), HHJ Toulmin referred to *Ballast* as a case where "the adjudicator did not reach a decision which was responsive to the issues referred in the adjudication." In his textbook, *Coulson on Construction Adjudication* (4th ed., at para 13.51), the author states that it is relatively easy to see why a deliberate failure to consider an issue (particularly a defence) which the adjudicator should have considered may well amount to a breach of natural justice. He then refers to the Scottish case of *Whyte and Mackay* v *Blyth and Blyth Consulting Engineers*, describing the adjudicator's error as inadvertent and certainly not appearing to be deliberate. He states that this case "took the matter considerably further". The author then states that this decision is perfectly understandable on its own facts but it might be regarded as "something of an inroad into the general principle that an adjudicator can make errors of law and fact without affecting the validity of his decision". He suggests that the case should be considered as a case on its own facts, in particular because the point raised by the defenders was so important and the adjudicator's failure to deal with it was so complete that in these unusual circumstances a breach of natural justice was made out. He goes on to say that in the ordinary case, a search for points not addressed will be unsuccessful because, as per Lord Glennie's analysis in *Atholl Developments (Slackbuie) Ltd* [2010] CSOH 94, even where the decision shows clear mistakes, the court will not usually allow "any inference [to be] properly drawn that [the adjudicator] consciously or unconsciously disregarded" one

party's submissions or a document which they put before him. The author then goes on (at para 13.55, under reference to *Dawnus Construction Holdings Ltd v Marsh Life Ltd* [2017] EWHC 1066 (TCC)) to state:

> "*Dawnus Construction* is a clear example of the court's approach: the judge will not put a fine tooth comb through the adjudicator's decision, seeking to ensure that every single point has somehow been addressed. The court's approach is broad-based, looking first at the dispute referred, and then second as to what the result was. It is not a breach of the rule of natural justice if one particular sub-issue is not specifically referred to in the adjudicator's decision."

[33] There has been some development in the discussion in England of when an inadvertent failure, even though "ordinarily" not causing the decision to be unenforceable, will indeed suffice for that purpose. In *RGB P&C Limited* v *Victory House General Partner Limited* [2019] EWHC 1188 (TCC), the rarity of such situations is discussed. Jefford J stated:

> "53. Where the adjudicator has deliberately but wrongly declined to address an issue, particularly a crucial defence, it may well be that he has not decided the dispute referred to him. Where he has not expressly taken such a deliberate decision but may appear not to have addressed every issue, the more likely conclusion is that the issue is subsumed within his consideration of the dispute as a whole…
>
> The analysis in *Pilon* v *Breyer* left open the possibility that an inadvertent failure to consider one of a number of issues might render a decision in breach of natural justice, but it would not ordinarily do so and it is difficult to identify any case in which a decision has not been enforced for such a reason. The only example identified in *Construction Adjudication* is the decision of the Outer House in *Whyte and Mackay* v *Blyth and Blyth Consulting Engineers* [2013] CSOH 54. The rarity of such cases seems to me to be for two reasons. Firstly, an inadvertent failure to address a particular issue is in the nature of an error within the adjudicator's jurisdiction rather than a breach of the rules of natural justice. Secondly, and if that is wrong, it would be an unusual case where the court would both draw the inference that an issue had not been addressed and conclude that the failure to address the issue was so significant that it meant that the adjudicator had not decided the dispute referred to him and/or that the conduct of the adjudication was so unfair that the decision should not [be] enforced. The more significant the issue, the less likely it is to be inadvertently overlooked; the less significant it is, the more likely it is that it has been taken account of in the round."

[34] There is some articulation of the test for unenforceability based on an inadvertent failure in *KNN Coburn LLP* v *GD Holdings Ltd* 2013 EWHC 2879 (TCC), where Stuart-Smith J said:

> "49. It will be noted that an inadvertent failure to consider one of a number of issues will "ordinarily" not render the decision unenforceable. This qualification admits the possibility that an inadvertent failure may in an extraordinary case bring the principle into play. No clear guidance is available about when an inadvertent failure will render the decision unenforceable. Since the essence of the adjudication process is that the real dispute between the parties should be resolved, it seems to me that the touchstone should be whether the inadvertent failure means that the adjudicator has not effectively addressed the major issues raised on either side. Clearly, as [22.4] of Pilon makes clear, the failure must be material in the sense of having had a potentially significant effect on the overall result of the adjudication. The burden of showing materiality must rest on [the defendant], which asserts it."

I note that Stuart-Smith J makes these observations under a sub-heading of whether the adjudicator "did not consider a material line of defence". This is the language used by Lord Doherty in *DC Community Partnerships Ltd* v *Renfrewshire Council* at [24], under reference *inter alia* to *NKT Cables A/S* v *SP Power Systems Ltd* per Lady Wolffe at [113]-[114]. It seems to me that these cases apply the same test as that adopted by Stuart-Smith J to inadvertent failures. Nonetheless, it is of interest to note that, at least on the authorities to which I was referred, there appears to be no example from the very large number of cases in England of a challenge (whether based on a failure to exhaust jurisdiction or a breach of natural justice) succeeding on the ground of an inadvertent, rather than deliberate, failure.

Application to the present case

[35] I deal with matters in the following order: whether the adjudicator failed to consider the Subcontract/JV point; whether he gave any reasons, or adequate reasons, on that matter; and whether, in any event, the point was a material line of defence. The burden of

establishing a failure to address the Subcontract/JV issue, and in showing that it was a material line of defence, lies with the defender.

[36] It is correct that in the adjudicator's decision there is no clear or discrete reference to the Subcontract/JV point, but on the question of whether it was implicitly taken into account it is fair to say that there are certain pointers in both directions. On the one hand (pointing to it having not been considered), when dealing with the issues the adjudicator sets out the submissions of the parties in summary form, identifying the source document, but he only goes as far as the points made up to and including the Surrejoinder and makes no reference to the further submissions on the Subcontract/JV point. Also, there is nothing in the detailed reasoning on the specific issues which supports the view that he considered the matter. The points in the adjudicator's decision identified by the pursuer (in paras 357-360 and 454) do not, when read and understood in context, show that he did so (although this is less clear in respect of para 109, for the reasons given below). Further, when he comes to discuss Issues 6 and 7 he identifies the difference in valuation and appears to deal only with the respective submissions as to the validity of the deductions based on the arguments and the material presented prior to the Subcontract/JV issue being raised. On the other hand (in support of the view that he did consider the point), there is at least some force in the pursuer's position that the adjudicator did in fact answer the overarching question put to him, by deciding the valuations on the basis of Table 19.2 (and, it could be said, implicitly refusing to do so based on Table 19.3). He lists the documents presented to him (including making express mention of the defender's submissions on 18 September 2019, which concerned the Subcontract/JV point) and states that he has given careful consideration to all of them. He also makes reference to the contract terms, which set out how the valuation process is to be carried out.

These include clause 41.4 of the parties' contract, which provides, in relation to the defender's certification of sums due, that:

> "… The certificate shall show the sum which the Contract Manager considers to be due at the payment due date determined in accordance with Sub-clause 41.5, and the basis on which it has been calculated."

The adjudicator also referred to clause 19.4 of the Supplementary Agreement:

> "… All Third-Party Supplies and Services provided for the completion of the Works shall be on based on actual costs substantiated by invoices. The applicable percentage profit and overhead rates as stated in Table 19.3 below shall be applied to the cost. The Subcontract Price shall be amended accordingly.
>
> The total of all sums previously certified by the Contract Manager for payment. The Subcontractor's requests for payment shall be supported by all relevant documentary evidence appropriately itemised".

Further, the adjudicator explained that under the Supplementary Agreement, the initial contract was revised to include a new clause 3a which allowed the defender to exercise its "Audit Privileges". The clause provides:

> "For the purposes of validating costs to be reimbursed to the Subcontractor from the period commencing 4 December 2017 are [*sic*] properly due in accordance with Schedule 19, the Subcontractor shall grant the Contractor supervised access to its accounting systems, timesheet records, payroll and purchase ledger in order that the Contractor can satisfy himself that the costs are being correctly claimed and that any "Disallowed Costs" are being correctly identified. Access will be provided at the request of the Contractor and will be no more frequent than once a month following the Subcontractors submissions of a request for payment."

The adjudicator further stated that:

> "[The pursuer] alleges to have maintained open access for [the defender] to inspect its accounts and records; and further alleged that [the defender] has availed of this opportunity only once, on 15 August 2018. At that audit [the defender] did not, according to [the pursuer], dispute or raise any query on the records being maintained [the pursuer]."

Under the heading "Common Ground" the adjudicator notes that "£1,075,328.34 is in dispute" and that "Pursuant to Cl. 3a … the [defender] had the opportunity to audit and validate costs incurred by [the pursuer]". Thereafter, when he comes to deal with the individual issues, it is reasonable to conclude that he took into account that (i) both parties were aware of the difference between Tables 19.2 and 19.3 and that each of them had calculated the sums relied upon in Issues 6 and 7 on the basis of Table 19.2; (ii) the pursuer's request for payment had to be supported by all relevant documentary evidence appropriately itemised, and by implication the defender had accepted that to be so in reaching its valuation based on Table 19.2; and (iii) the defender had the audit privilege of access to relevant information about the basis of the pursuer's claim and had availed itself of that opportunity but had not queried the pursuer's position. There is also the intriguing submission in the defender's Response that "the actual costings incurred by CEPHA [*sic*] were not issued, rather they appear to be [the pursuer's] inflated rates", which the adjudicator narrates (at para 109) but appears to reject. As Lord Doherty observed in *DC Community Partnership Ltd* v *Renfrewshire Council* a court should hold that there has been a failure to exhaust jurisdiction in only the plainest of cases. The point is very finely balanced here, but overall I conclude that consideration of the Subcontract/JV argument was at least to some extent implicit in the findings that the adjudicator made and that the defender has not established that the adjudicator failed to address the point. However, that leaves the issue of whether the adjudicator gave reasons, or adequate reasons, for any view he reached on the Subcontract/JV point. It is clear that he did not do so.

[37] Turning, then, to the issue of the materiality of this line of defence, I reject the defender's contention that any failure by the adjudicator had a potentially significant effect on the overall result of the adjudication. I do so for two reasons: firstly, on an objective and

reasonable understanding of the Subcontract/JVpoint, it could only affect the agreed difference between the parties on their valuations on Issues 6 and 7; secondly, it was a point that was so lacking in substance or evidence that it could have had no material impact.

[38] Dealing with the first point, the battle lines between the parties were very clearly drawn, primarily in the Notice of Adjudication and in the Referral and the Response, as being the validity or otherwise of the deductions and valuation decisions made by the defender in respect of each one of the twenty-five issues. On Issues 6 and 7, the amount deducted was £26,470.35. As noted earlier, the pursuer accepted that £14,476.29 should be deducted, leaving a difference of £11,994.06. Otherwise, on those issues the sums claimed had been certified by the defender and were due for payment. This was against the background of the parties having in previous valuations, after the Supplementary Agreement, proceeded on the basis that Table 19.2 applied for valuation purposes on these matters. Moreover, as the adjudicator noted, the parties agreed that the sum of £1,075,328.34 was what was in dispute. Importantly, the defender did not suggest that to be incorrect. In arriving at its valuation, the defender had the opportunity to audit and validate costs incurred by the pursuer. That disputed sum, and the grounds upon which the elements of it were disputed, were the matters identified in the Notice of Adjudication, the Referral and the Response and the further submissions. Those were the matters referred to the adjudicator, comprising the twenty five issues addressed by the parties.

[39] It is of course correct that in its final submission the defender requested that rather than simply adhere to the deductions applied to reach the value certified in the payment notice, a value of nil should be reached on the relevant aspects of Cepha and Anord support, resulting in a deduction of over £890,000. The defender's position on materiality founds upon the Subcontract/JV point having that potential financial outcome. However, when

properly viewed in the context of the nature and terms of the dispute remitted to the adjudicator, that was not a potential result of the submission. At best for the defender, it could have resulted in a finding that only the sum certified by the defender remained due. To result in a valuation of nil, the final submission made by the defender would require to be viewed as a radical alteration to the whole nature and previously agreed terms of the dispute referred to the adjudicator. In order for the submission to have the potential to eliminate significant sums accepted and certified by the defender as due and payable, the adjudicator would have required to override the agreed boundaries of the dispute and disregard the already certified valuation by the defender. That is neither a just nor an appropriate way to view the matters which the adjudicator was engaged to decide upon: in Issues 6 and 7 he was dealing with the validity of the defender's actual deductions. No basis was suggested as to how the adjudicator could set aside that certified valuation. Accordingly, viewed in context, the challenge raised in the Subcontract/JV point could, at best, only be an additional reason to support the actual deduction made by the defender, rather than a ground to negate the whole of the sums certified as due in respect of Cepha and Anord. I therefore conclude that the adjudicator was dealing with a dispute which fell within agreed boundaries and that the late Subcontract/JV point could impact only upon the sum of £26,470.35 initially in dispute, and latterly the sum of £14,476.29 left in dispute, on those two issues. For that reason alone, the inadvertent failure was not material as it had no potentially significant effect on the outcome of the adjudication.

[40] On the second matter, at the hearing before the adjudicator, it was explained on behalf of the pursuer that Cepha and Anord were part of a joint venture called CAF, the expression "FSD/CAF" being used in schedule 19 of the contract (FSD being the initials of the pursuer). The defender presented no actual evidence to show that Cepha and Anord

were not in fact part of a joint venture. The defender's position in its final submission was reached when the defender apparently latched on to comments made in two witness statements lodged for the pursuer at the adjudication which used the expression "subcontractor" to refer to Cepha and Anord. However, this occurred in the context of the defender having itself actually used that description of Cepha in its Response and in a witness statement it had lodged. In essence, the defender's final submission appeared to be somewhat opportunistic and made with no real supporting evidence. It was also made in the contractual context noted above of the difference between Tables 19.2 and 19.3, the calculations by each party being on the basis of Table 19.2, that the pursuer's request for payment had to be supported by all relevant documentary evidence, appropriately itemised, which the defender could scrutinise, and that the defender had the audit privilege which it had used but had not queried the pursuer's position. In my opinion, viewed in context, the Subcontract/JV point did not provide any proper substance or basis upon which the adjudicator could somehow undo the defender's own certification of value. On that ground also, the assertion of materiality must fail.

[41] For these reasons, I am not persuaded that the defender has discharged the burden of showing that the Subcontract/JV point was not addressed by the adjudicator, although I accept that if he did so he did not give any (or any adequate) reasons for a decision reached upon it; however, the Subcontract/JV point was not a material line of defence. Even if there was an inadvertent failure by the adjudicator to consider it, and a failure to give reasons, these do not result in his decision being unenforceable.

Issue 2: severability

[42] As a result of my conclusions on materiality, this matter does not now arise for determination. If, against those views, the test for materiality was somehow thought to be met in respect of the sum of £14,476.29, I would have concluded that the part of the adjudicator's decision dealing with Issues 6 and 7 was plainly severable. I would have enforced the remainder of his decision, allowing only the deductions in the payment notice certified by the defender. If, contrary to my decision, the defender's position that the Cepha and Anord elements of the claim should be valued at nil is correct, then I would again have enforced the remainder of the adjudicator's decision, as it applies does to discrete issues. The issue of severability is analysed in some detail by Lord Doherty in *Dickie & Moore Ltd* v *The Lauren McLeish Discretionary Trust*, which I understand is currently the subject of a reclaiming motion. I require to deal with the present case expeditiously and so it cannot await the outcome of the reclaiming motion, but I would merely say that I endorse Lord Doherty's views and in particular the grounds for a flexible and pragmatic approach to severability (para [46]) which in my opinion properly accords with the whole nature and purposes of adjudication and the interests of justice. Applying that approach here, I would have concluded that the core nucleus of the adjudicator's decision could safely be enforced.

Issue 3: the adjudicator's fees and expenses

[43] The defender's contentions on this point were founded upon its position that the adjudicator had failed to produce an enforceable decision. For the reasons I have given, I have rejected that contention. I therefore conclude that the parties are jointly and severally liable for the adjudicator's fees.

Conclusion

[44] For the reasons stated above, I conclude that the defender's arguments that the adjudicator's decision is unenforceable fall to be rejected. I shall therefore sustain the pursuer's first, second and third pleas-in-law, repel the defender's pleas-in-law and grant decree in terms of the conclusions of the summons.