OUTER HOUSE, COURT OF SESSION

[2019] CSOH 71

CA65/19

OPINION OF LORD DOHERTY

in the cause

DICKIE & MOORE LIMITED

Pursuer

against

RONALD JAMES McLEISH, MRS DIANE McLEISH and CATRIONA WATT

as Trustees of The Lauren McLeish Discretionary Trust

Defenders

Pursuer: Turner; Macfarlane Law Limited
Defenders: MacColl, QC; Anderson Strathern LLP

12 September 2019

Introduction

[1] In this commercial action the pursuer seeks to enforce the decision of an adjudicator. It also seeks to recoup from the defenders 50% of the adjudicator's fees and expenses.

Background

[2] The defenders entered into a building contract with the pursuers dated 26 May and 4 August 2016 for the construction of a large house at plot 6, Craigengall, Westfield, near Armadale. The form of contract was the Standard Building Contract with Quantities for use

in Scotland (2011 Edition). In terms of the contract the pursuer was "the Contractor" and "Lauren McLeish Trust" was the "the Employer". In terms of paragraphs 10 and 11 of the Joint Minute entered into by the parties it is agreed:

> "10. Properly construed, the "Employer" under the Contract was Ronald James McLeish and Mrs Diane McLeish and Catriona Watt, acting in in their capacities as the trustees of the Lauren McLeish Discretionary Trust.
>
> 11. As at the date of the execution of the Contract, there was no trust in existence known as the "Lauren McLeish Trust"."

The contract made provision enabling either party to refer to adjudication any "dispute or difference" which arose under the contract. Article 7 and clause 9.2 (of the conditions) provided that the Scheme set out in Part 1 of the Schedule to The Scheme for Construction Contracts (Scotland) Regulations 1998 (as amended by The Scheme for Construction Contracts (Scotland) Amendment Regulations 2011) should apply (except in so far as modified by clause 9.2).

[3] During 2017 and 2018 the pursuer constructed the house. In October 2017 it submitted a claim for payment in relation to interim valuation no 17. Its submission was that the interim valuation should be £2,264,609.73.

[4] A Final Adjustment Statement was produced on behalf of the Employer on 17 October 2018. It showed ascertained loss and expense in the sum of £22,934.10 and a Works Final Account of £1,995,842.50; but it made deductions (for work not done by the contractor) of £18,051 (heating), £4,470 (MVHR), £28,977.84 (ground retention), £58,430.32 (externals), and £2,768 (internals); and a deduction of £11,901.52 for work not in accordance with the contract (render to the main house). The net amount of the Final Adjustment Statement was £1,894,186.92.

[5] On 24 October 2018 the pursuer wrote to the Architect challenging the Final Adjustment Statement. The challenges were (i) that estimated deductions had been included for defective work which had been remedied by the Employer whereas the pursuer maintained that the actual costs incurred remedying the work should be vouched; (ii) that in at least one case the Employer had deducted for the cost of remedial work when in fact the pursuer had not been obliged under the contract to carry out the work which was remedied; (iii) that deductions were included for remedial work where the defects concerned had not been timeously notified in a schedule of defects; (iv) that in cases where the Employer had instructed that items of defective work should remain, excessive deductions had been made from the sums which would have been due for those items had the work not been defective.

[6] Later on 24 October 2018 a Final Certificate was issued by the Architect. The Final Certificate reflected the calculations in the Final Adjustment Statement (with no adjustment made to the items which the pursuer had challenged in its letter of 24 October 2018).

[7] On 29 and 30 October 2018 the pursuer wrote to the Architect protesting the issue of the Final Certificate and challenging its content. The letter of 29 October stated:

> "…
>
> We are astounded at your issuing the Final Certificate when you were already aware of the issue of our letter of even date pointing out the fundamental errors you had made in the Final Adjustment Statement and the principles you had employed in the calculations you had appended.
>
> To issue the Final Certificate in circumstances where there was a clear duty for you to investigate was unprofessional at best and in our opinion malicious.
>
> Kindly withdraw it and undertake your duty to correct the Final Adjustment Statement.
>
> …"

The letter of 30 October stated:

> "…
>
> Further to your issue of the Final Certificate we record that we don't concur with your assessment and indicate that your financial assessment is circa £416,000 short of the figure we are pursuing.
>
> In respect of the wrongful deductions, please refer to our letters of 24th and 29th October ...
>
> …"

The adjudication

[8] On 19 December 2018 the pursuer served a Notice of Intention to Refer a Dispute to Adjudication (the "Notice of Adjudication"). It stated:

> "…
>
> 5.2 The rejection of sums detailed in the Final Certificate, the Final Adjustment Statement, the Works Final Account and Architect's Instruction numbers 31 & 32, is sufficient to crystallise a dispute between the parties.
>
> ...
>
> 9 ITEMS REFERRED IN THIS ADJUDICATION.
>
> 9.1 At present there are a number of disputes between the parties, and the approximate scale of each dispute is as follows:
>
> 9.1.1 Further extension of time of 16.2 weeks and reimbursement of Loss and Expense of a further £116,000 due to matters related to groundworks.
>
> 9.1.2 An extension of time of 30.3 weeks and reimbursement of Loss and Expense of £174,000 due to matters related to the shells of the superstructures of the buildings and their finishes.
>
> 9.1.3 The Contractor recognises that if the Adjudicator decides in favour of the Referring party with regard to the two submissions referred to above, then there needs to be consideration of a credit up to £73,000 to resolve the parallel delays included.
>
> 9.1.4 In addition a sum in the order of £15,000 is claimed for additional works to flat roofs of the building.

9.1.5 Increased valuation of Works Final Account in the sum of £261,000.

9.1.6 Reimbursement of sums withheld in respect of the embankment adjacent to the North Boundary in the sum of £29,000.

9.1.7 Reimbursement of deductions made under Clauses 2.38 and 3.18.2 of the Contract Conditions in the sum of £96,000 (excluding Section 9.1.6).

9.1.8 Reimbursement of sum for Windows not in Bills of Quantities in Payless Notice in the sum of £19,000.

9.1.9 Reimbursement of Liquidated Damages in Payless Notice in the sum of £26,000.

..."

[9] The parties agreed to appoint Mr Len C H Bunton as adjudicator, under reservation of the defenders' objections to jurisdiction. On 11 January 2019 the pursuer served a Referral Notice. The Notice of Adjudication and the Referral Notice were directed in the name "The Lauren McLeish Trust".

[10] During the adjudication the defenders submitted that the adjudicator had no jurisdiction (i) because the "Lauren McLeish Trust" was not the correct name of the contracting party; (ii) because, as a trust is not a legal person, legal rights cannot be enforced against it and orders which are to be enforceable by process of law cannot be made against it; and (iii) because the purported dispute or difference had not crystallised before the Notice of Adjudication. The adjudicator considered written and oral submissions from the parties in relation to the jurisdictional challenge. On 22 January 2019 he rejected the challenge and held that he had jurisdiction. He decided that he should not resign and that he should continue as adjudicator and determine the substantive issues in the adjudication. At a hearing on 19 February 2019 the defenders asked the adjudicator to reconsider his decision on their jurisdictional challenges. In terms of paragraph 20 of the joint minute the parties

agree that the adjudicator did reconsider his decision, but that on 20 February 2019 he decided to adhere to it.

[11] On 15 March 2019 the adjudicator issued his decision and his note of reasons. He held that the pursuers were entitled to payment of £324,492.60, with interest of £16,733.59. The adjudicator found the pursuer entitled to a further extension of time of 11 weeks; and in relation thereto he allowed a sum of £63,093.47 by way of loss and expense. He held that the Works Final Account should be £181,607.17 higher (ie the Bills of Quantities total was increased by £40,214.90, the total for Architect's Instructions by £62,726.64, and the total for other variations by £78,665.63). He found that the Employer had not been justified in deducting (i) £5,019.80 in respect of an alleged defect (per AI 29); (ii) liquidated damages of £26,000; (iii) £28,977 for ground retention; (iv) £11,901.52 for render to the main house. He determined that some of the other deductions which had been made were excessive: the appropriate deduction for externals ought to have been £25,000 rather than £58,430.32, and the deduction for MVHR ought to have been £1,950 rather than £4,470. He found the pursuer entitled to interest of £16,733.59. He found the parties jointly and severally liable for his fees and expenses, but also ordered that each party should pay half of them.

The enforcement action

[12] The pursuer seeks declarator (i) that the defenders are the party named in the contract as the Employer "Lauren McLeish Trust"; (ii) that the defenders are the party "named validly as "Lauren McLeish Trust"" in the Notice of Adjudication and the Referral Notice "each served by the pursuer pursuant and relative to" the contract; (iii) that the defenders are the party named the "Lauren McLeish Trust" and referred to as "the Trust" in the adjudicator's decision and note of reasons dated 15 March 2019; and that the pursuer is

entitled to payment from the defenders of the sums of (a) £324,492.60 and (b) £16,733.59 in terms of the decision and note of reasons, and that it is entitled to enforce the decision. It seeks payment of those sums. It also seeks to recoup from the defenders £19,530 (half of the adjudicator's fees and expenses: the defenders did not pay their share of the fees and expenses so the pursuer paid the whole sum). The pursuer seeks interest on each of the sums claimed at the legal rate from the date of citation until payment.

[13] The defenders defend the action on a number of grounds. They maintain that the adjudicator's decision does not contain any orders against them and that accordingly the action should be dismissed. They further maintain that the decision falls to be reduced *ope exceptionis* (i) because the adjudicator lacked jurisdiction; (ii) because if he had jurisdiction he failed to exhaust it *et separatim* he acted in breach of natural justice.

[14] I heard a proof before answer on 1 and 2 August 2019. Counsel agreed a substantial joint minute. The only witnesses who gave evidence were Mr Bunton and Torquil Murray. The witnesses had given signed witness statements in advance of the proof and these were supplemented by their oral evidence. The evidence was almost entirely directed to the natural justice issue.

Decision and reasons

[15] I find it convenient to discuss the issues in the following order:

(i) Did the adjudicator have jurisdiction to entertain a claim advanced against "the Lauren McLeish Trust"?

(ii) Did the adjudicator fail to exhaust his jurisdiction?

(iii) Was there a material breach of natural justice?

(iv) Had the dispute described in the notice of adjudication crystallised before the notice was served?

(i) Did the adjudicator have jurisdiction to entertain a claim advanced against "the Lauren McLeish Trust"?

Counsel's submissions

[16] It was common ground that a trust has no legal capacity and that it has no *persona* separate from its trustees: Menzies, *Trustees* (2nd ed), s353; Scottish Law Commission Discussion Paper no 133, *Discussion Paper on the Nature and Constitution of Trusts*, para 2.39ff. The trustees are the persons who may vindicate rights on behalf of the trust estate, and they are the persons against whom trust liabilities should be enforced: *Bell* v *Trotter's Trustees* (1841) 3D 380 and *Allen* v *McCombie's Trustees* 1909 SC 710. It was also common ground that the parties to the contract are the pursuer and the defenders, that the contract is valid, and that it is enforceable by each of the contracting parties.

[17] However, Mr MacColl submitted that the adjudication was a nullity because the Notice of Adjudication purported to convene a trust. The Notice had not convened the defenders and the award was not enforceable against them. The Notice had not complied with paragraph 1(2) of Part 1 of the Schedule to the Scheme - which required that a notice of adjudication should be given to every other party to the contract. Moreover, paragraph 24 envisaged that the adjudicator's award should be capable of being registered for enforcement in the Books of Council and Session. Since the award here bore to be in favour of the Lauren McLeish Trust rather than the defenders it could not be registered. The adjudicator had not had jurisdiction. His purported decision was *ultra vires*.

[18] Mr Turner submitted that on a proper construction of the contract the references to the Lauren McLeish Trust were to be understood as references to the defenders, ie the Trustees of the Lauren McLeish Discretionary Trust. That was the intention of the contracting parties. It was what a reasonable observer aware of all the relevant surrounding circumstances at the time of contracting would have understood those words to connote. Reference was made *to Rainy Sky SA* v *Kookmin Bank SA* [2011] 1 WLR 2900, per Lord Clarke of Stone-cum-Ebony at para 14. Similarly, the reasonable recipient of the Notice of Adjudication, aware of the relevant surrounding circumstances, would have understood that the references in it to the Lauren McLeish Trust referred to the defenders (*Mannai Investment Co Ltd* v *Eagle Star life Assurance Co Ltd* [1997] AC 749, per Lord Steyn at p 767G-H). Nothing in paragraphs 1(2) or 24 of Part 1 of the Schedule to the Scheme precluded that construction. In particular, the terms of paragraph 24 were permissive. Neither the pursuer nor the adjudicator was obliged to resort to that method of enforcement. No-one had ever been in any doubt that the defenders were the Employer. They had described themselves in the contract as the Lauren McLeish Trust. They were bound by the terms of the contract. They had agreed that disputes or differences could be referred by either party to adjudication; and in the whole circumstances they also must be taken to have agreed that contractual notices which referred to the defenders as the Lauren McLeish Trust would be valid and effective. Of course, when it came to enforcing the award the defenders required to be described by their correct *nomen juris*: but that was neither here nor there. The defenders were bound contractually by the adjudicator's award.

Decision: jurisdiction

[19] I begin by setting out some of the matters which the parties agreed in the joint minute:

> "6. The defenders, as trustees of the Lauren McLeish Discretionary Trust entered into a building contract with the pursuer dated 26 May and 4 August 2016 … ('the Contract').
>
> …
>
> 9. The Contract defines 'the Employer' as 'Lauren McLeish Trust'.
>
> 10. Properly construed, the 'Employer' under the Contract was Ronald James McLeish and Mrs Diane McLeish and Catriona Watt, acting in in their capacities as the trustees of the Lauren McLeish Discretionary Trust.
>
> …
>
> 28. At no time have the defenders contended that the Contract was invalid for uncertainty of party or otherwise.
>
> 29. At no time prior to service of a Jurisdictional Challenge dated 16 January 2019 did the defenders notify the pursuer that their designation in the contract was incorrect.
>
> 30. Contractual notices, certificates, requests and other documents were issued in the name of the Lauren McLeish Trust by or on behalf of the defenders, including: the Final Certificate (JB11); Certificate of Making Good Defects dated 17 October 2018 (JB8); Final Adjustment Statement (including Works Final Account) (JB6); and Architect Instruction No. 32 dated 15 October 2018 (JB4 of process).
>
> 31. Agents (including the Architect/Contract Administrator) on behalf of the defenders issued certificates and Architects instructions relative to the Contract in the name of the 'Lauren McLeish Trust'. They also issued certain statements, accounts, notices, correspondence and other documents on behalf of the defenders in that name …"

[20] It is agreed that on a proper construction of the contract the references therein to the Lauren McLeish Trust are to be read as referring to the defenders. During the execution of the contract the defenders and their representatives used that designation to describe the defenders. That is the context against which the references to the Lauren McLeish Trust in

the Notice of Adjudication and the Referral Notice require to be construed. In my opinion in the whole circumstances the reasonable recipient of each of the notices would have understood them (and the defenders did in fact understand them) to be directed to the defenders. They were sent to the defenders' address and were received by them there. In my view Mr Turner's submissions on this point are well founded.

(ii) Did the adjudicator fail to exhaust his jurisdiction?

Counsel's submissions

[21] The defenders' averments in relation to this defence are contained in Answer 5.1:

> "5.1 Failure to exhaust jurisdiction
>
> As well as maintaining that no order might be sought against the 'Lauren McLeish Trust' as it was not a juristic person as a matter of jurisdiction, this was also a material line of defence to the claim of the pursuer. The adjudicator failed to address this in his Purported Decision. Reference is made to paragraphs [288] to [293] of the Purported Decision."

[22] Mr MacColl submitted that where a defence to a claim was raised an adjudicator had to deal with it, and that a failure to do so would be a failure to exhaust jurisdiction (*Connaught Partnerships Limited* v *Perth & Kinross Council* 2014 SLT 608, per Lord Malcolm at paras 18-21; *Pilon Limited* v *Breyer Group plc* [2010] BLR 452, per Coulson J at para 22*; NKT Cables A/S* v *SP Power Systems Limited* 2017 SLT 494, per Lady Wolffe at paras 112-114 ; *DC Community Partnerships Limited* v *Renfrewshire Council* [2007] CSOH 143, per Lord Doherty at para 24). Here, the fact that the "Lauren McLeish Trust" was not a juristic person had not only been an objection to the jurisdiction of the adjudicator, it had also been a material line of defence to the pursuer's claim. Any award which the adjudicator made against the "Lauren McLeish Trust" (or the "Lauren McLeish Discretionary Trust") would be unenforceable. The adjudicator had addressed the challenge to jurisdiction, but he had not

dealt with the other aspect of the defence. In so failing he had failed to exhaust his jurisdiction.

[23] Mr Turner maintained that there had been no such failing on the part of the adjudicator. He reminded the court that it should be assumed that the adjudicator had considered and dealt with all the arguments put before him unless his decision and reasons suggested otherwise (cf *Diamond* v *PJW Enterprises Ltd* 2004 SC 430, per Lord Justice Clerk Gill at para 28). Here there was nothing to suggest that the adjudicator had failed to consider the arguments put before him. Paragraphs 292-3 of his reasons adequately explained his position in relation to all of the submissions which had been made on this topic. Moreover, in evidence Mr Bunton had been very clear that he had had regard to all of the parties' submissions.

Decision: failure to exhaust jurisdiction?

[24] I observe at the outset that in the defenders' written jurisdictional challenge the complaint made was presented as being one which went to jurisdiction. There was no suggestion in that document that a further, separate complaint was also being put forward. If such a submission was made, it seems that it must have been done during oral submissions to the adjudicator. There was no suggestion in the evidence of Mr Bunton or Mr Murray that there was in fact an oral submission along the lines which Mr MacColl advanced to the court.

[25] In any case, even on the assumption that such an oral submission was made, I am very far from satisfied that the adjudicator failed to exhaust his jurisdiction. On the contrary, in my opinion the reasons which he gave for rejecting the defender's submissions

on this topic are capable of being read as addressing the suggested submission. I am not persuaded that those reasons ought to be read more restrictively.

(iii) Was there a material breach of natural justice?

Introduction

[26] This complaint relates to Torquil Murray's involvement in the adjudication. Mr Murray is a quantity surveyor and claims consultant. With a view to obtaining adjudication experience he acted as Mr Bunton's pupil. The parties were made aware of this role at the time and neither objected to it. However, they were not informed until the adjudicator issued his fee-note that Mr Murray also provided other assistance to Mr Bunton during the adjudication, for which he was to be remunerated.

Matters agreed in the joint minute

[27] The following matters were agreed:

> "35. Mr Torquil Murray is a quantity surveyor who works as a claims consultant.
>
> 36. As the parties were aware at the time, Mr Murray participated in the adjudication as the adjudicator's pupil; he was seeking to gain experience of the adjudication process; he assisted with the administration of the adjudication.
>
> 37. Mr Murray also proof read the Decision before it was issued.
>
> 38. As part of his pupillage process, Mr Murray considered his own conclusions in relation to aspects of the adjudication.
>
> 39. Mr Murray produced his own conclusions on the crystallisation issue.
>
> 40. Mr Murray issued his conclusions on the jurisdiction issue to the adjudicator on 27 February and 5 March 2019.
>
> 41. The adjudicator asked Mr Murray to produce his (Mr Murray's) own conclusions on the Extension of Time elements of the claim.

42. Mr Murray reviewed and considered the relevant adjudication papers as part of his preparation of his own conclusions."

The evidence

[28] Mr Bunton is a very experienced adjudicator. He considered that he had a duty to assist those who wished to gain experience of adjudication (with a view to their acting as adjudicators in the future). To that end he had acted as a pupil master on several occasions. Mr Murray's involvement had been partly as a pupil. As such, he was given access to adjudication documents, he attended hearings, and Mr Bunton kept him advised of developments as the adjudication progressed. One such development had been that very late in the day - on the very day Mr Bunton proposed to issue his decision - the defenders had submitted a substantially revised submission. Mr Bunton had copied this to Mr Murray because he had wanted him to see it. Mr Bunton had not allowed the late submission to be received - but he had wanted to show Mr Murray that this was the sort of tactic which adjudicators had to beware of. In the course of Mr Murray's pupillage, and solely for Mr Murray's own benefit, Mr Bunton had encouraged him to set out his views in writing on certain of the issues in the adjudication. Mr Murray had set out his views in relation to the crystallisation aspect of the jurisdictional challenge and had sent them to Mr Bunton as an email attachment, but Mr Bunton had not opened up the attachment. That was because the time for reading a pupil's efforts was after the adjudication, not before a decision had been issued. He had also suggested to Mr Murray that he might wish to attempt setting out his views on the extension of time/prolongation claim, but Mr Murray had not in fact done that (although he had intended to). Mr Murray's other role in the adjudication had involved him providing Mr Bunton with assistance (i) populating the Scott Schedule; (ii) taking notes of

meetings and producing the action points which Mr Bunton had decided upon at those meetings; (iii) proof reading Mr Bunton's decision. These were not pupillage tasks. Mr Murray was to be paid for this work. The Scott Schedule had had to be updated as the adjudication progressed. Parties' positions altered, eg when concessions were made during hearings, and the Schedule had to be altered to reflect such changes, and to reflect decisions which Mr Bunton made on each of the items claimed. As a quantity surveyor Mr Murray was very familiar with the use of Scott Schedules and with the sort of subject-matter which comprised the dispute. At the meetings where Mr Murray kept notes (and on at least one occasion produced action points) these were in effect minutes of the meeting. Mr Bunton and the parties had also kept notes. The action points all reflected Mr Bunton's instructions at the meetings. Mr Murray's proof reading of the decision and reasons involved checking the grammar, looking for typographical errors, and seeing that the contents were consistent with the figures which Mr Bunton had instructed be inserted in the Scott Schedule. Mr Murray had checked Mr Bunton's arithmetic. On occasion he had asked Mr Bunton to clarify what might be interpreted as possible differences between the Schedule and the decision. In such instances Mr Bunton had either provided clarification or he had indicated that clarification was unnecessary. Mr Bunton had decided every issue which arose in the adjudication himself, without any oral or written advice from Mr Murray suggesting an answer to any issue. Nor had he used Mr Murray as a sounding board to test his own views. The entirety of the decision had been his own determinations and reasoning.

[29] Mr Murray carries on his own practice as a quantity surveyor and claims consultant. His account of his roles in the adjudication was, in all material respects, to the same effect as Mr Bunton's evidence. One matter I should record in relation to Mr Murray's note on the jurisdictional point is that in his witness statement of 20 June 2019 (para 20) he recalled:

> "… Mr Bunton saying (probably on 6th March) that I had approached it from a slightly different angle than he had done."

However, in his supplementary statement of 5 July 2019 (para 4) Mr Murray indicated that having thought about the matter further he recalled that the exchange with Mr Bunton had in fact taken place at the Crannog Hotel, Stirling on 20 February 2019 during a break in the hearing. It had been after Mr Bunton had informed the parties that, having reconsidered matters following the defenders' request that he do so, he was adhering to his decision on jurisdiction. Mr Murray further explained:

> "It may have been that the actual words were along the lines '*I may get you to do an exercise on the jurisdictional challenge … I will than look at it, it may be you have come at it from a different angle from me* '. I suppose grammatically, correctly he should have said '*will have come ...*'… It was the word 'have come at it from different angle' that stuck in my mind and to which I have previously referred. That was after he had told the parties that he wasn't changing his decision."

In oral evidence he adhered to what he said in that supplementary statement. The comment had been made on 20 February 2019 at the time when Mr Bunton had suggested that Mr Murray carry out the exercise.

Counsel's submissions

[30] It was common ground that in reaching his decision the adjudicator required to comply with the rules of natural justice (*Costain Limited* v *Strathclyde Builders Limited* 2004 SLT 102; *Carillion Utility Services Limited* v *SP Power Systems Limited* [2011] CSOH 139; *Highland and Islands Airports Limited* v *Shetland Islands Council* [2012] CSOH 12). The test is not "has an unjust result been reached?" but "Was there an opportunity afforded for injustice to be done?" (*Barrs* v *British Wool Marketing Board* 1957 SC 72, per Lord President Clyde at p82). Immaterial breaches of natural justice will not render a decision

unenforceable: the provisional nature of an adjudicator's decision justifies ignoring non-material breaches (*Balfour Beatty Construction Ltd* v *the Mayor and Burgesses of the Borough of Lambeth* [2002] EWHC 597 (TCC), [2002] BLR 288, per HH Judge Lloyd QC at para 27).

[31] Mr MacColl emphasized that the defenders did not suggest there was any question of the adjudicator not having acted in good faith in making use of Mr Murray. However, he submitted that there had been a material breach of natural justice - an opportunity had been afforded for injustice to be done. The adjudicator had obtained quantity surveying assistance and advice from Mr Murray on significant matters. The parties had not been told about the provision or terms of that assistance and advice, and they had had no opportunity to comment on it. The court should conclude on the evidence that the adjudicator had read Mr Murray's note on the jurisdictional issue before he issued his final decision on 15 March 2019.

[32] Mr Turner submitted that there had been no material breach of natural justice. The services which Mr Murray had provided had been of an administrative, secretarial, arithmetical and mechanical nature (cf the role of the adjudicator's assistant, Mr Hutchison (a quantity surveyor), in *John Sisk & Son Limited* v *Duro Felguera UK Limited* [2016] EWHC 81 (TCC), [2016] BLR 147, 165 Con LR 33). It was clear on the evidence that Mr Bunton had not read Mr Murray's note. It was also clear that Mr Murray had not provided advice on any of the issues in the adjudication, and that Mr Bunton had reached each and every determination himself.

Decision: natural justice

[33] Both Mr Bunton and Mr Murray appeared to me to be witnesses who were doing their best to assist the court. They gave their evidence with moderation. They conceded

matters where it was right to do so. Their evidence was mutually consistent. In my opinion it was also consistent with the documentary evidence. Both seemed to me to be credible and reliable witnesses. I accept their evidence. I am satisfied that the services which Mr Murray provided were essentially of an administrative and checking nature. They were not quantity surveying advice. Of course, Mr Murray's experience as a quantity surveyor made him well suited to performing the functions he did, and it facilitated the smooth running of the adjudication. He was very familiar with Scott Schedules, and it was much easier for him than it would have been for a layman to carry out many of the tasks which he performed (eg checking that the schedule properly recorded the positions of the parties (and, ultimately, the decision of the adjudicator); and following and noting discussions and action points at meetings). That was undoubtedly an advantage. However in my opinion, none of what he did involved Mr Murray giving Bunton quantity surveying advice on any material matter. I am satisfied that all of the material decisions on the matters in issue in the adjudication were taken by the adjudicator himself soley on the basis of the information which the parties put before him. Accordingly, while I think that the adjudicator ought to have told the parties what Mr Murray was doing, in my opinion in the whole circumstances his failure to do that was not a material breach of the requirements of natural justice.

(iv) Had the dispute described in the notice of adjudication crystallised before the notice was served?

Introduction

[34] In terms of the joint minute the parties are agreed:

> "33. By letter dated 24 October 2018, the pursuer wrote to the defenders' Architect purporting to highlight errors within the Final Adjustment Statement (which informed the basis and content of the Final Certificate) and requesting their

> correction. No response was made thereto. The purported errors formed parts of the Final Certificate that was disputed in the adjudication. The purported errors were not all of the arguments advanced in the Final Certificate challenge in the adjudication.
>
> 34. The adjudication sought different sums of money to the scope of Valuation 17."

[35] Clause 1.9.1 of the contract conditions provides that the Final Certificate shall be conclusive evidence of certain matters. Clause 1.9.3 provides:

> "If adjudication, arbitration or other proceedings are commenced by either Party within 60 days after the Final Certificate has been issued, the Final Certificate shall have effect as conclusive evidence as provided in clause 1.9.1 save only in respect of the matters to which those proceedings relate."

Counsel's submissions

[36] Mr MacColl submitted that the claim made by the pursuers in the Notice of Adjudication had not crystallised as a difference or dispute prior to service of the Notice. He recognized that it was inappropriate to adopt an overly legalistic approach to the question of whether or not there was a dispute or difference. The matter should be assessed by looking at the circumstances in the round (*Coulson on Construction Adjudication* (4th ed), paras 7.105 - 7.106). He maintained that while it was not necessary that a fully worked up claim had been made prior to the Notice, it was essential that the heads of claim which were in issue had been identified. However here, looking at the claims which the pursuer put forward at the time of interim valuation no 17, the criticisms of the Final Adjustment Statement in the pursuer's letter of 24 October 2018, and the pursuer's criticism of the Final Certificate in the letters of 29 and 30 October 2018, it was clear that the dispute described in the Notice of Adjudication was very different from any dispute which had crystallised prior to the Notice. In particular, the very substantial claims for extension of time and for loss and

expense in the Notice of Adjudication could not be said to form part of any dispute which had crystallised.

[37] Mr Turner submitted that since the pursuer was challenging the Final Certificate it had not been necessary for the dispute to have crystallised prior to the Notice of Adjudication. That was because in order to prevent the Final Certificate becoming conclusive evidence of the matters stated in clause 1.9.1 the pursuers had to commence adjudication, arbitration or other proceedings within 60 days. Clause 1.9.3 contemplated that those were the ways in which a claim made in a Final Certificate could be challenged. The effect of the Notice of Adjudication was to dispute the Final Certificate in the respects set out in the Notice. Moreover, on a proper analysis the Final Certificate represented a claim made by the defenders. The bottom line was that it brought out a final certified sum which was lower than the payments which had already been paid to the pursuer in respect of interim valuations. It sought repayment of the excess and it included a payless notice. The pursuer was entitled to raise any defence it had to the claim which the defenders made in the Final Certificate. In any case, a dispute had existed before then, as was clear from the claims which the pursuer made in relation to interim valuation no 17 and the correspondence of 24, 29 and 30 October 2018. However, it was accepted that that dispute had not been as extensive as the dispute focused in the Notice; and that in particular the claims for extension of time and loss and expense as formulated in paras 9.1.1 and 9.1.2 of the Notice had not previously been advanced.

Decision: crystallisation

[38] The dispute described in the Notice of Adjudication is of the nature of a "final account" dispute (although in terms of the contract there was no obligation on the pursuer

to submit a final account). The claims set out in the Notice represent what the pursuer says ought to be the final accounting between the parties in respect of the contract.

[39] In my opinion the words "dispute or difference" where they occur in the contract mean a crystallised dispute or difference. A party is not entitled to instigate the adjudication provisions of the contract unless and until the dispute or difference has crystallised. In my view that is the position whether or not the dispute relates to a Final Certificate. A dispute or difference has to exist before a Notice of Adjudication can be served. If the dispute described in the Notice first arises at the moment the Notice is served then the Notice is premature. At the critical time that dispute is not a dispute which the referring party can insist goes to adjudication.

[40] It follows that I reject Mr Turner's suggestion that pre-Notice crystallisation is unnecessary where the dispute involves a challenge to the correctness of a Final Certificate.

[41] Nor am I persuaded that on a proper analysis the defenders should be treated as the party advancing the claim which gives rise to the dispute, with the pursuer's claims being treated as mere defences to that claim (with, so the argument ran, no requirement for a dispute in respect of those "defences" to have crystallised before the Notice of Adjudication). In my opinion this aspect of Mr Turner's analysis is artificial and unsound. The reality is that it was the pursuer who referred the dispute to adjudication. It asked the adjudicator to determine that its claims were well founded. The total sums which it claimed dwarfed the sum which the defenders maintained should be repaid.

[42] Mr Turner's fall-back position was that, in light of the interaction between the parties already mentioned, the court should conclude that a claim had crystallised before service of the Notice of Adjudication. I turn now to examine if that is correct.

[43] In my opinion, when a party resists enforcement of an adjudicator's award on the ground that the relevant dispute had not crystallised the court should adopt a robust, practical approach, analysing the circumstances prior to the notice of adjudication "with a commercial eye" (cf *Coulson on Construction Adjudication, supra*, para 7.111). An over-legalistic analysis should be avoided. The court should seek to determine in broad terms whether a claim or assertion was made and whether or not it was rejected (*Coulson, supra*, para 15.11). It should discourage nit-picking comparison between the dispute described in the notice and the controversy which pre-dated the notice.

[44] Here, the claims for reimbursement of deductions, liquidated damages and sums withheld (paras 9.1.6 to 9.19 of the Notice) all seem to be items which were in controversy before the Notice was served.

[45] Prior to the Notice there was undoubtedly a significant disagreement concerning the Works Final Account. In its submission for valuation no 17 the pursuer seems to have claimed £187,552.19 more than was certified for the Works Final Account (£4,632.06 more for Bill items, £96,831.96 more for Architect's Instructions, and £86,088.17 more for variations). By comparison, in the Notice the increased valuation of the Works Final Account sought was £261,000, a difference of £73,447.81. That is a significant sum, but it does not necessarily follow that the pre-Notice disagreement in relation to the Works Final Account and the claim concerning it in the Notice were essentially different. Mr MacColl did not explore the reasons for the difference, and I did not understand him to found upon it. What he focussed on were the extension of time and loss and expense claims.

[46] Comparison of the extension of time and loss and expense claims made by the pursuer in valuation no 17 and in the Notice discloses a very marked discrepancy. In the former claim the pursuer sought an extension of time of an additional 4 weeks (for weather)

with associated loss and expense of £20,390.22, and a prolongation claim of 13 weeks with associated loss and expense of £46,682.46. In the Notice the pursuer sought a further extension of time of 16.2 weeks and reimbursement of loss and expense of £116,000 due to groundworks (para 9.1.1), and an extension of time of 30.3 weeks and reimbursement of loss and expense of £174,000 due to matters related to the shells of the superstructure of the buildings and their finishes (para 9.1.2). It conceded (para 9.1.3) that to allow for parallel delays there should be a credit of up to £73,000, resulting in a total claim for loss and expense of £217,000.

[47] Even looking at the matter broadly, the claims in the Notice for extensions of time and loss and expense appear to me to be of a different nature and order of magnitude to the previous disagreements about extensions of time, prolongation and loss and expense. I do not think that a dispute in anything like those terms had crystallised before the Notice. In my opinion it follows that a very material part of the dispute described in the Notice had not crystallised before the Notice was served.

Conclusions

[48] In my opinion one of the defenders' four objections to enforcement is well founded. A material part of the dispute described in the Notice of Adjudication had not crystallised before the Notice was served.

Post-proof written submissions

[49] In their written and oral submissions at the proof neither counsel explored the possibility of severance of the adjudicator's decision. While the case was at avizandum I sought clarification from the parties in relation to certain documentation. I also asked:

> "If a dispute with the ambit described in the notice of adjudication had not crystallised at the time of the notice, had a dispute of narrower ambit crystallised? If so, is the part of the decision which deals with that narrower dispute severable, or is the decision a unity which stands or falls in its entirety?"

Counsel submitted brief supplementary written submissions in response to my inquiries. Both agreed that the matter referred to the adjudicator had been a single dispute, but they disagreed on the question of severance. The submissions on severance were made on a hypothetical basis and they were not fully developed.

Disposal

[50] I shall put the case out by order. In the event that the pursuer proposes to argue for severance that matter can be dealt with at the by order. If the pursuer does not seek severance I will hear parties on (i) the appropriate interlocutor to give effect to my decision; and (ii) any motion for expenses which may be made.