



OUTER HOUSE, COURT OF SESSION

[2019] CSOH 87

CA65/19

OPINION (NO 2) 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**

8 November 2019

**Introduction**

[1] The background to this dispute is set out in my opinion of 12 September 2019 ([2019] CSOH 71). In that opinion I held that part of the claim which the pursuer made in a notice of adjudication - namely the claim for an extension of time and loss and expense - had not crystallised before the service of the notice. I found that the adjudicator did not have jurisdiction to determine that aspect of the claim.

[2] The pursuer now maintains that since the adjudicator had jurisdiction to decide the remainder of the claim, part of his decision may be enforced. The defenders argue that the

decision was a unity and that therefore none of it may be enforced. Both parties lodged supplementary written submissions which developed their arguments for and against severance, and I heard oral submissions on 27 September 2019.

### **Adjudication of construction disputes - the relevant statutory context**

[3] One of the recommendations of the Latham Report ('Constructing the Team', Final Report of the Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry, July 1994) was that legislation should provide for the speedy resolution of construction contract disputes by, *inter alia*, adjudication. This recommendation resulted in Part II of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"). Every written construction contract has to contain the right to refer disputes to adjudication under a procedure which complies with section 108. If the contract contains provisions for such a right, those provisions apply. If and to the extent that it does not, the adjudication provisions of the Scheme for Construction Contracts apply. Section 114 provides for the minister to make a Scheme by regulations. Where any provisions of the Scheme apply by virtue of Part II of the Act in default of contractual provisions agreed by the parties, they have effect as implied terms of the contract (s114(4)). The regulations for Scotland are the Scheme for Construction Contracts (Scotland) Regulations 1998 (SI 1998/687)(as amended by The Scheme for Construction Contracts (Scotland) Amendment Regulations 2011 (SSI 2011/371). The equivalent provisions for England and Wales are the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649)(as amended by the Scheme for Construction Contracts (England and Wales) Amendment Regulations 2011 (SI 1998/2333). In each case the adjudication provisions of the Scheme are set out in Part I of the Schedule to the regulations.

### **The adjudication provisions in the contract**

[4] The form of the building contract between the parties was the Standard Building Contract with Quantities for use in Scotland (2011 Edition). The parties incorporated the adjudication provisions of the Scheme as terms of the contract. Article 7 provides:

#### **“Article 7: Adjudication**

If any dispute or difference arises under this Contract, either Party may refer it to adjudication in accordance with clause 9.2 of the Conditions.”

Clause 9.2 of the conditions provides:

#### **“Adjudication**

9.2 If a dispute or difference arises under this Contract which either Party wishes to refer to adjudication, the Scheme shall apply...”

In terms of clause 1.1 of the conditions “the Scheme” is defined as:

“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).”

Part 1 of the Schedule provides:

#### **“Part I ADJUDICATION**

##### **Notice of intention to seek adjudication**

1.—

(1) Any party to a construction contract (“the referring party”) may give written notice (“the notice of adjudication”) of his intention to refer any dispute arising under the contract to adjudication.

(2) The notice of adjudication shall be given to every other party to the contract.

(3) The notice of adjudication shall set out briefly—

(a) the nature and a brief description of the dispute and of the parties involved;

(b) details of where and when the dispute has arisen;

(c) the nature of the redress which is sought; and

...

### **Adjudicator's decision**

20.—

(1) The adjudicator shall decide the matters in dispute and may make a decision on different aspects of the dispute at different times.

...

### **Effects of the decision**

23.—

(1) In his decision, the adjudicator may, if he thinks fit, order any of the parties to comply peremptorily with his decision or any part of it.

(2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it, until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties.

...

25.—

(1) The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses incurred by him and the parties shall be jointly and severally liable to pay that amount to the adjudicator.

(2) Without prejudice to the right of the adjudicator to effect recovery from any party in accordance with sub-paragraph (1), the adjudicator may determine the apportionment between the parties of liability for the payment of his fees and expenses and such determination shall be binding upon the parties unless any effective contractual provision in terms of section 108A(2) of the Act applies.

...”

### **Clause 1.9 of the contract conditions**

[5] Clause 1.9 of the contract conditions provided:

### **“Effect of Final Certificate**

1.9.1 Except as provided in clauses 1.9.2, 1.9.3 and 1.9.4 (and save in respect of fraud), the Final Certificate shall have effect in any proceedings under or arising out of or in connection with this Contract (whether by adjudication, arbitration or legal proceedings) as:

.1 conclusive evidence that where and to the extent that any of the particular qualities of any materials or goods or any particular standard of an item of workmanship was described expressly in the Contract Drawings or the Contract Bills, or in any instruction issued by the Architect/Contract Administrator under these Conditions or in any drawings or documents issued by the Architect/Contract Administrator under any of clauses 2.9 to 2.12, to be for the approval of the Architect/Contract Administrator, the particular quality or standard was to the reasonable satisfaction of the Architect/Contract Administrator, but the Final Certificate shall not be conclusive evidence that they or any other materials or goods or workmanship comply with any other requirement or term of this Contract;

.2 conclusive evidence that any necessary effect has been given to all the terms of this Contract which require that an amount be added to or deducted from the Contract Sum or that an adjustment be made to the Contract Sum save where there has been any accidental inclusion or exclusion of any work, materials, goods or figure in any computation or any arithmetical error in any computation, in which event the Final Certificate shall have effect as conclusive evidence as to all other computations;

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

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

... .

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

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

### **The adjudicator's terms and conditions of appointment**

[6] The parties accepted the adjudicator's terms and conditions of appointment. Those terms provided:

"...

5. The parties will be jointly and severally liable for my fees, expenses and outlays and those of other advisors.

6. Notwithstanding the joint and several liability of the parties or any Decision I make with regard to the apportionment of fees, my policy is to split the fees equally between the parties during the process, and in my Decision my fees will be apportioned.

..."

### **Joint Minute**

[7] In terms of the Joint Minute no 28 of process the parties agreed:

"...

43. The parties are jointly and severally liable to pay the adjudicator's fees and expenses in terms of clause 3 of the adjudicator's terms of appointment accepted by them ...

44. The adjudicator rendered Fee Accounts dated 15 March 2019 addressed to each of the parties hereto ...

45. The Fee Accounts detailed the total amount of the adjudicator's fees and expenses.

46. The pursuer has paid the entirety of the adjudicator's fees and expenses in the amount of £32,550 plus VAT.

47. If the adjudicator had jurisdiction and issued an enforceable decision, the pursuer is entitled to relief from the defenders in respect of half the adjudicator's fees and expenses in the sum of £19,530 (without prejudice to the pursuer's contention that it is entitled to relief from the defender regardless of the determination on other issues)."

### **Counsel for the pursuer's submissions**

[8] Mr Turner submitted that while the court had found that the adjudicator did not have jurisdiction to deal with part of the dispute because it had not crystallised at the date of the notice of adjudication, the remainder of the dispute had crystallised and the adjudicator had had jurisdiction to deal with it. In principle, severance should be available in such circumstances provided that the court was satisfied that the parts of the decision which were enforced were not dependent upon, and had not been affected by the reasoning in, the part of the decision dealing with extension of time and related loss and expense. In support of that proposition Mr Turner relied in particular upon *Homer Burgess Ltd v Chirex (Annan) Ltd* 2000 SLT 277, per Lord Macfadyen at p 287D; *Bovis Lend Lease Limited v The Trustees of the London Clinic*, (2009) 123 Con LR 15, [2009] EWHC 64 (TCC), per Akenhead J at paragraphs 69 - 70; *Pilon Limited v Breyer Group plc* [2010] BLR 452, [2010] EWHC 837 (TCC), per Coulson J at paragraphs 39-40; *Carillion Utility Services Ltd v SP Power Systems Ltd* 2012 SLT 119, per Lord Hodge at paragraph 39; *Working Environments Ltd v Greencoat Construction Ltd* (2012) 142 Con LR 149 (TCC), [2012] EWHC 1039 (TCC), per Akenhead J at paragraphs 25 and 32 - 35; *Lidl UK GmbH v RG Carter Colchester Limited* [2012] EWHC 3138 (TCC) per Edwards-Stuart J at paragraphs 57-61; *Beck Interiors Limited v UK Flooring Contractors Limited* [2012] BLR 417, [2012] EWHC 1808 (TCC), per Akenhead J at paragraphs 32 - 34; *Paice & Ors v Matthew J Harding (trading as MJ Harding Contractors)* [2016] BLR 582, [2016] EWHC 2945 (TCC), per Deputy High Court Judge Ms Finola Farrell QC (as she then was) at paragraphs 68, 70-71; and *Willow Corp SARL v MTD Contractors Limited* [2019] EWHC 1591 (TCC), per Pepperall J at paragraphs 67-74. If and in so far as observations in *Cantillon Limited v Uroasco Limited* [2008] BLR 250, (2008) 117 Con LR 1, [2008] EWHC 282 (TCC), *CSC Braehead Leisure Ltd v Laing O'Rourke Scotland Limited* 2009 SLT

454, *Cleveland Bridge (UK) Limited v Whessoe-Volker Stevin Joint Venture* [2010] BLR 415, [2010] EWHC 1076 (TCC), *Carillion Utility Services Ltd v SP Power Systems Ltd*, *supra*, or *Highlands and Islands Airports Ltd v Shetland Islands Council* [2012] CSOH 12 might be suggested to be to contrary effect, those cases were distinguishable. If the cases were not distinguishable, in so far as the observations were at odds with the proposition which Mr Turner advanced they should not be followed. On a proper analysis of the claims here for the purposes of considering whether severance was available there was in substance more than one dispute. Another way of approaching matters would be to treat the matters within jurisdiction and the matters for which there was no jurisdiction as being two separate disputes for the purposes of severance. The present circumstances were therefore distinguishable from the cases where on such analysis there was a single dispute. In any case, it could not be correct that it was all or nothing - that in terms of the Scheme the obligation to comply with any part of a decision was always conditional upon the entirety of the matters decided having been within jurisdiction. If that was the position there would never be severance where part of a dispute had not crystallised, even if it was a tiny and discreet part of the dispute.

[9] Here, it was clear that the issues of extension of time and loss and expense had been dealt with separately from most of the other issues. The court could be confident that the adjudicator's approach to the sums awarded in the Works Final Account (for Bill of Quantity items, Architect's Instructions and other variations) were all unaffected by the jurisdictional error. The position was the same in relation to sums which the adjudicator had found that the architect had been wrong to deduct from the pursuers (for heating, mechanical ventilation with heat recovery ("MVHR"), ground retention, externals and internals). He had dealt with all of these items separately and independently from his consideration of extension of time and loss and expense. The sum which he awarded for Architect's

Instruction 25 ("AI 25") was simply the cost of the work caused by that instruction - it had not depended in any way upon his conclusions in relation to extension of time and loss and expense. Only two other aspects of his decision had been influenced by the extension of time award. Both were matters where the extension of time awarded had a direct bearing on the calculation. First, since he found the pursuer entitled to a 13 week extension of time, he held that the architect had been wrong to deduct £26,000 liquidated damages (13 weeks at £2,000 per week) from the pursuer because the works were not completed by the contractual completion date. Second, whereas the architect had deducted £3,741.36 from the pursuer for gas supplied by the defenders and consumed by the pursuer, the adjudicator found that only £935.32 ought to have been deducted because the pursuer was not liable for gas consumed during the extension of time period. Neither of those aspects of the decision could be enforced, with the result that the deductions of £26,000 and £3,741.36 made by the architect ought to stand.

[10] Mr Turner's primary position was that there was no good reason not to enforce the award of fees and expenses, since in terms of the contract it was agreed that there should be joint and several liability. Properly read, paragraph 283 of the decision was merely a statement by the adjudicator of that agreed position. It had not been a considered allocation of liability. If it had been, and if the court was not clear that the adjudicator would have allocated fees and expenses in the same way if his decision had only dealt with the matters which were within jurisdiction, the award of fees and expenses should not be enforced, but the parts of the decision which were not affected by the excess of jurisdiction should be severed and enforced (*Bovis Lend Lease Limited v The Trustees of the London Clinic, supra*, per Akenhead J at paragraph 70).

[11] So far as interest was concerned, the adjudicator (paragraph 282) had awarded simple interest at the rate of 5 % above the base rate from 18 April 2018 (the date of Valuation Number 17) until the date of his decision. That approach was unaffected by his jurisdictional error. Interest at that rate and for that period should be applied to those parts of the principal sum awarded by the adjudicator which could be severed and enforced. That was all of the principal sum apart from the £63,093.47 for loss and expense, the reimbursement of £26,000 liquidated damages, and the reimbursement of £2,806.04 of the deduction for client gas. The balance of the principal sum recoverable was therefore £232,593.09. The interest on that sum from 18 April 2008 to the date of the adjudicator's decision was £11,994.47.

#### **Counsel for the defenders' submissions**

[12] Mr MacColl submitted that the adjudicator's decision should be reduced *ope exceptionis* and that the defenders should be assoilzied from the conclusions of the summons.

[13] First, a single dispute had been referred to adjudication. However, the adjudicator had not had jurisdiction to determine that single dispute because part of it had not crystallised. The logical consequence was that the single dispute had not crystallised, and that the adjudicator had not had jurisdiction to determine any of it. He ought to have declined jurisdiction.

[14] Second, on a proper construction of the contract the parties had contracted to be bound by "the decision" of the adjudicator (paragraph 23(2) of the Scheme). They had not agreed to be bound by part of the decision where the adjudicator had lacked jurisdiction in relation to another part. In that regard reliance was placed upon the observations of *Cleveland Bridge (UK) Limited v Whessoe-Volker Stevin Joint Venture, supra*, per Ramsey J at

paragraphs 11ff and *CSC Braehead Leisure Limited v Laing O'Rourke Scotland Limited, supra*, per Lord Menzies at paragraphs 38 - 40. As Akenhead J had observed in *Cantillon Limited v Urvasco Limited* ([2008] EWHC 282 (TCC) and (2008) 117 Con LR 1 at paragraph 63, ([2008] BLR 250 at paragraph 65):

“... (f) In all cases where there is a decision on one dispute or difference, and the adjudicator acts, materially, in excess of jurisdiction or in breach of the rules of natural justice, the decision will not be enforced by the Court.”

That was the conventional approach, as could be seen from cases such as *Highlands and Islands Airports Limited v Shetland Islands Council, supra*, per Lord Menzies at paragraphs 41 - 47; *Carillion Utility Services Ltd v SP Power Systems Ltd, supra*, per Lord Hodge at paragraph 39; *Whyte and Mackay Ltd v Blyth & Blyth Consulting Engineers Ltd* 2013 SLT 555, per Lord Malcolm at paragraphs 69 - 71; *Bell Building Projects Limited v Arnold Clark Automobiles Limited* [2017] CSOH 55, per Lord Tyre at paragraphs 33 - 35; and *DC Community Partnerships Limited v Renfrewshire Council* [2017] CSOH 143, per Lord Doherty at paragraph 32.

[15] Third, Mr MacColl accepted that there were now a number of first instance decisions in England and Wales (*Beck Interiors Limited v UK Flooring Contractors Limited, Lidl UK GmbH v RG Carter Colchester Limited, Paice & Ors v Matthew J Harding (trading as MJ Harding Contractors)*, and *Willow Corp SARL v MTD Contractors Limited*) where, notwithstanding what had been said in *Cantillon* and subsequent cases, courts had been willing to sever and enforce parts of an adjudicator's decision which were clearly and obviously untainted by the nullity of another part of the decision. However, even if that were the test, the pursuer failed on the facts here. There were no parts of the decision where it could be said that it was clear and obvious that the reasoning had been untainted by the adjudicator's decision on extension of time and related loss and expense. The findings that 13 weeks liquidated

damages (£26,000) ought not to have been deducted, and that the architect's deduction of £3,741.36 for client gas ought only to have been £935.32 were consequences of the adjudicator's decision to grant the extension of time. The terms of paragraph 323 of the decision suggested there may be some link between the sum awarded for work done in response to AI 25 and the extension of time which the adjudicator granted. Similarly, the terms of paragraph 333 might suggest that there may be a link between the extension of time and the deduction which the architect made for ground retention works to the northern embankment. It was sufficient for the defenders' purposes that it was not clear that there were no such links. More generally, the court simply ought not to be satisfied that it was clear and obvious from the adjudicator's decision that other aspects of the award had been completely discrete from and had not been influenced by his decision and reasoning concerning the extension of time and loss and expense. In any case, what the pursuer proposed was not merely severance, but the rewriting of the decision. The adjudicator had awarded a lump sum for interest (calculated at 5% over base rate from 18.4.18, the date of valuation 17). The court should be slow to conclude that the calculation of interest on severable parts of the award would merely be a matter of arithmetic and that the adjudicator's conclusions on extension of time and loss and expense had had no bearing on the date chosen as the starting point for interest.

### **Decision and reasons**

[16] I find it convenient to begin by considering some of the authorities which were referred to.

[17] *Homer Burgess Ltd v Chirex (Annan) Ltd* was decided on 18 November 1999. It provides some support for the proposition that severance of an adjudicator's decision may

be competent and appropriate even in a single dispute case. It was a case where part of what the adjudicator decided (the lesser part) was within jurisdiction, but part (the greater part) was not. Lord Macfadyen considered that it would have been open to him to investigate the extent to which the decision was *intra vires* and valid and could properly be given the statutory temporary binding effect which paragraph 23(2) of the Scheme provided for (2000 SLT 277 at p 287D). However, practical considerations led him to conclude that in the circumstances reduction of the whole decision was the preferable course. The primary consideration was that that way the matter could return to the adjudicator, which would be likely to result in quicker enforcement than the court dealing with the question. Had there been any doubt about the competency of returning to the adjudicator he would have preferred to deal with the outstanding issue himself.

[18] *Cantillon Limited v Urvasco Limited* was decided on 27 February 2008. The building contract was a JCT Standard Form of Building Contract, Private Without Quantities (1998 Edition), which contained the standard adjudication clause providing that the Part 1 of the Schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998 applied. Akenhead J described the dispute which had been referred to adjudication as a “compendious dispute” encompassing two claims by contractors for extensions of time, one for 16 weeks and the other for 13 weeks, and for related loss and expense (paragraph 3). The 16 weeks claim related to events in 2005 and the 13 weeks claim related to events in 2006. The architect had granted an extension of time of 13 weeks in relation to the 13 week claim, but he did not grant any extension for the 16 weeks claim. The adjudicator awarded a total of £391,565.60 plus VAT. About one-fifth of that sum related to the 13 weeks claim. He decided that the 13 weeks extension of time ought only to entitle the contractor to 9.71 weeks prolongation. He dealt with prolongation loss and expense for each claim separately, and he

awarded sums in respect of each claim. He ordered that 70% of his fees be paid by the employer and 30% by the contractors. When the contractors sought to enforce the decision the employer argued that, in relation to the 13 weeks claim, the adjudicator had exceeded his jurisdiction and had failed to comply with natural justice. Ultimately, Akenhead J decided that neither complaint was well founded, and he enforced the decision in its entirety.

However, he considered the issue of severance, beginning at paragraph 58:

“58 During the course of argument the question arose as to whether parts of an Adjudicator's decision could be enforced and other parts not, in circumstances where the Adjudicator's want of jurisdiction or failure to follow the rules of natural justice only and obviously related to one part of the decision. There has been surprisingly little authority directly on the point ...”

He went on to discuss the case law (including *Homer Burgess*) and he made extensive reference to a review of that case law in an article by Sheridan and Heeps, *Construction Act Review*, [2004] Const. LJ 71. He then opined ([2008] EWHC 282 (TCC) and (2008) 117 Con LR 1 at paragraph 63, and [2008] BLR 250 at paragraph 65):

“63 On the severability issue, I conclude, albeit obiter in the result, as follows:

- (a) The first step must be to ascertain what dispute or disputes has or have been referred to adjudication. One needs to see whether in fact or in effect there is in substance only one dispute or two and what any such dispute comprises.
- (b) It is open to a party to an adjudication agreement as here to seek to refer more than one dispute or difference to an adjudicator. If there is no objection to that by the other party or if the contract permits it, the adjudicator will have to resolve all referred disputes and differences. If there is objection, the adjudicator can only proceed with resolving more than one dispute or difference if the contract permits him to do so.
- (c) If the decision properly addresses more than one dispute or difference, a successful jurisdictional challenge on that part of the decision which deals with one such dispute or difference will not undermine the validity and enforceability of that part of the decision which deals with the other(s).

(d) The same in logic must apply to the case where there is a non-compliance with the rules of natural justice which only affects the disposal of one dispute or difference.

(e) There is a proviso to (c) and (d) above which is that, if the decision as drafted is simply not severable in practice, for instance on the wording, or if the breach of the rules of natural justice is so severe or all pervading that the remainder of the decision is tainted, the decision will not be enforced.

(f) In all cases where there is a decision on one dispute or difference, and the adjudicator acts, materially, in excess of jurisdiction or in breach of the rules of natural justice, the decision will not be enforced by the Court."

[19] Given Akenhead J's decision in *Cantillon* no issue of severance arose, but the judge thought it appropriate to make clear what he would have done had the issue arisen (the emphasis has been added by me):

"76. [but 78 in [2008] BLR 250] ... Since the point of severability was raised and it is an issue of some importance and interest to the construction industry and professions, I will comment upon what I would have done if I had found that there had been a more than peripheral breach of the rules of natural justice by the Adjudicator. *I would have given judgment in favour of Cantillon in respect of all other parts of the decision which could be said with confidence were unrelated to and untainted by any such breaches.* The reasons are as follows:

(a) *On analysis*, there were at least two disputes submitted here, namely that related to the 16 Weeks and to the 13 Weeks Claims. They were presented separately both before and in the Notice of Adjudication and the Referral. They were, logically and time-wise, separable claims relating to differing years and different factors said to have been causative of delay and cost. The quantum as presented by Cantillon was divisible into that relating to the two claims.

(b) The Adjudicator dealt with them separately in his decision.

(c) In this case, if there was a breach of natural justice even if more than peripheral, it was or would have been more of the inadvertent type rather than one which wholly undermined the decision and reliability of the Adjudicator. There was no hint or suggestion that his decision on all other matters was not anything other than fair, competent and reliable.

(d) The decision is in fact arithmetically divisible. The sums due in respect of the 16 weeks claim are:

(i) Prolongation (Appendix 1 to decision as amended by the Adjudicator): £125,825.04.

(ii) Head Office Overheads (see Paragraph 8.28 of decision): £304,739.65.

(iii) Finance on retention (13/29ths of £3,702.14): £1,659.58

(iv) Finance on loss and expense: one could either “pro-rata” this (16/25.71 of £22,978.03 = £14,299.82) or do a more detailed calculation by reference to the fact that the financing for the 16 weeks which occurred earlier will probably have attracted a larger share than that: if in doubt, one would allow the lower figure.

So far as the deduction of “less amounts paid [to Cantillon] to date” identified by the Adjudicator, I would have called for more argument on this from the parties; this has been forthcoming in writing since the oral argument. I would probably have decided that there should be a deduction for the amount paid. Although the evidence before me and the Adjudicator was that the sum paid (of £260,000) was for the 13 Weeks Claim, it would be wrong to second guess the Adjudicator as to what he would have done with regard to this sum if he had allowed nothing for the 13 Weeks Claim. Thus, the minimum to be enforced separately would have been the sum of the figures set out above less the Adjudicator's sum paid figure of £192,971, namely £253,553.09. It would be unnecessary to deal with the Adjudicator's fees as they have been paid by the parties.”

[20] *Bovis Lend Lease Limited v The Trustees of the London Clinic* was decided on 28 January 2009. Contractors (“BLL”) referred a dispute to adjudication. The building contract was the JCT Standard Form of Building Contract (1998 Edition). The notice of adjudication stated (see paragraph 20 of the judgment):

“The dispute comprises the following inter-related issues:

- (1) Whether and to what extent delay and/or disruption was caused by BLL's Contract works by reason of matters for which the Clinic was responsible;
- (2) The period of any Extension of Time to which BLL is entitled;
- (3) BLL's entitlement to reimbursement of Liquidated and Ascertained Damages deducted during the period of this Extension of Time in the sum of £40,000 per week;
- (4) The losses and expenses incurred by BLL by reason of the delay and disruption to the Contract Works.”

The remedies sought included an extension of time of 44.2 weeks (including four weeks already awarded by the architect), together with recovery of £1,608,000 for liquidated damages deducted and £3,287,245.44 for loss and expense arising from delay and disruption. The adjudicator decided (i) that BLL was entitled to the full extension of time claimed; (ii) that the Clinic should reimburse the £1,608,000 liquidated damages; (iii) that the Clinic should pay £1,878,257.09 in respect of loss and expense; (iv) that the Clinic should pay the adjudicator's fees and expenses. The Clinic resisted enforcement of the award on two grounds. First, that at the time of the notice of adjudication the loss and expense claim had not been a crystallised dispute: the adjudicator had not had jurisdiction to determine it. Second, that the Clinic had not had a fair or effective opportunity to respond to the new case made for loss and expense: there had been a material breach of natural justice. In the result Akenhead J rejected both of these contentions, but in the course of his judgment he considered whether or not it would have been legally and practically possible to sever the adjudicator's decision if the adjudicator had jurisdiction to address the dispute relating to delay, extension of time and the recovery of liquidated damages but did not have jurisdiction to address the loss and expense claim.

**"The Law**

...

52. So far as "severability" is concerned, I addressed this matter in *Cantillon Ltd v Urovasco Ltd* [2008] BLR 250 at paragraph 63 ...

53. The starting point is the analysis of what is the referred dispute (or disputes). If there is a disputed claim A and there is another claim B which has not yet got to a stage of being disputed, and the claiming party refers A and B to adjudication, there is on analysis only one dispute being referred, namely A because that is all that is in dispute. Even if, mistakenly, the adjudicator adjudicates on A and B, that part of his decision which addresses dispute A will be enforced unless it is simply not possible verbally or mathematically to identify what his decision on A alone is.

...

### Discussion – Severability

69. It follows from the above that, since the Adjudicator had jurisdiction and there has been no breach of the rules of natural justice, the question of severability simply does not arise. If I had had to decide the point, I would only have done so on the basis that the Clinic had established its jurisdictional argument in relation to the loss and expense claim (which it has not). If I had formed the view that the Adjudicator had simply, consciously, not given the Clinic sufficient time to respond (within the constraints of the adjudication timetable available in this case), this would probably not have been a case which would have led to severance. However, on a jurisdictional basis, if I had formed the view that the crystallised dispute did not include the claim for loss and expense, I would have been of the view that that part of the decision which demonstrably related to the extension of time claim and the recovery of liquidated damages could be recovered. The Award was one which was eminently severable. The Adjudicator indicated clearly what “redress” he was granting with regard to the extension and liquidated damages issues. He allowed Bovis a declaration of entitlement to an extension of 44.2 weeks and directed that the Clinic reimburse Bovis liquidated damages in respect of the extension of time together with interest up to 10 June 2008.

70. The only difficulty would have come with regard to the question of the Adjudicator's fees and expenses which were not apportioned as between the two parts of the claim. If that had proved an insuperable difficulty, leave to enforce that part of the decision would simply not have been made.”

[21] *CSC Braehead Leisure Limited v Laing O'Rourke Scotland Limited* was decided on 19 August 2008. A dispute arose between employers and contractors as to whether or not the contractors had, by defective work in breach of contract, caused damage to the employers; and if so, to what damages the employers were entitled. The employers referred the dispute to adjudication. The adjudicator made an award in the employers' favour. The contractors resisted enforcement of the award on several grounds, none of which was upheld by the court. However, in the course of his Opinion Lord Menzies considered whether the decision might be severed if there was a successful challenge to one part of it. He noted (paragraph 35) senior counsel for the contractors' acceptance “that a dispute might include several sub-disputes, and whether parts of an adjudicator's award might be saved if other parts were invalid depended on the circumstances and the nature of the challenge.”

The submission for the contractors was that there was a single dispute - a declarator of causation of damage was not a separate dispute from the damages sought (paragraph 36).

Lord Menzies' conclusions on severability were set out in paragraphs 38-40:

"[38] In considering this issue, I have found most assistance from Akenhead J's review of the authorities in *Cantillon Ltd v Urvasco Ltd*, and I respectfully agree with the approach which he sets out (albeit *obiter*) at paragraph 63. In the present case I agree with senior counsel for the defenders that the contractual mechanism for adjudication envisages (at least in the first instance) that a single dispute or difference shall be referred to adjudication. Clause 39A.4.1 provides that the adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on more than one dispute under the same contract. Looking to the notice of adjudication... [it] refers throughout to "the Dispute" or "a Dispute" in the singular. Section 4 of the notice summarises "the Dispute", and paragraph 4.3 states *inter alia* in short, the defenders' failures can be summarised as a failure to design and/or construct works to each of the 12 auditoria, which form part of the cinema in accordance with the terms of the building contract. Those failures caused or materially contributed to a ceiling collapse in one of the auditoria and caused or materially contributed to the defenders' works in the other 11 auditoria being defective and/or unsafe and/or necessitating extensive remedial works to be undertaken in each of the other 11 auditoria. The notice goes on to state that the pursuers have suffered loss and expense and/or damages as a result of these failures and contends that the defenders are liable to the pursuers in respect thereof ...

[39] The pursuers do not aver that the defenders have consented to the adjudicator adjudicating at the same time on more than one dispute in terms of cl 39A.4.1. The language of the pursuers' notice of adjudication is strongly suggestive of the pursuers regarding this truly as one dispute. I am in no doubt that a single dispute may contain sub-disputes or heads of claim which may themselves be the subject of dispute, but this does not necessarily result in more than one dispute being referred to the arbiter (*sic*). To take a simple example of a personal injuries action arising from an accident at an employee's workplace, the pursuer may rely on breaches of variety of statutory and common law duties, and may seek several heads of damages including solatium, past and future loss of earnings, loss of employability, personal services, loss of pension rights etc. Each of these may be disputed, but these may be described as incidental disputes or "sub-disputes" - there is truly only one dispute, which is whether the employer is liable to make reparation to the employee, and if so, in what sum. No doubt this is an over simplistic analogy when considering the present case. However, having regard to the terms of the contract and to the notice of adjudication, I am satisfied that in substance only one dispute was referred to adjudication.

[40] That being so, I am satisfied that if there is a successful challenge to one part of the adjudicator's decision (which challenge cannot, of course, relate to an *intra vires* error of law, but may relate to something such as breach of natural justice or

excess of jurisdiction or failure to exercise jurisdiction) then the whole decision will fall to be reduced.”

[22] *Cleveland Bridge (UK) Limited v Whessoe-Volker Stevin Joint Venture* was decided on 13 May 2010. Works done under a subcontract were only partly construction operations in terms of Part II of the 1996 Act. Consequently, only part of a dispute referred to an adjudicator had been within her jurisdiction. The issue of jurisdiction was contentious during the adjudication and the subcontractors requested the adjudicator to set out her decision on the basis of two alternatives: first, on the basis that she had jurisdiction to award the whole amount claimed; and secondly, on the basis that she was only entitled to consider the proportion of the outstanding amount which related to construction operations under the Act. However, she decided that she had jurisdiction to deal with the whole claim and she did not provide an alternative decision. Ramsey J opined:

“100 ...[T]he dispute between the parties to the Subcontract was, in my judgment, one dispute. That dispute was whether the sum of £317,500 plus VAT agreed in the final account was due and payable to Cleveland Bridge from the Joint Venture. That depended on the resolution of the issues on the effect of the settlement agreement on the payment due to Cleveland Bridge. The effect of section 104(5) is that the whole of that dispute cannot be referred to adjudication. I do not consider that this converts the single dispute into two disputes, rather only part of the dispute is referable to adjudication; the other part is not.

...

103 I therefore conclude that what Cleveland Bridge did by the Notice of Adjudication was to refer one dispute to the Adjudicator who only had jurisdiction to deal with that dispute insofar as it arose under the part of the Subcontract which related to construction operations ...

104 As a result I consider that the effect of section 104(5) was that the Adjudicator did not have jurisdiction to deal with the whole of the dispute referred to her but did have jurisdiction in relation to that part of the dispute which related to construction operations under the Subcontract.

105 Where a party refers a dispute to an adjudicator who only has jurisdiction in respect of part of that dispute, I do not consider that there is anything, in principle, which prevents the adjudicator from making a decision as to that part of the dispute

which is within his or her jurisdiction. In other words, the fact that part of the dispute relates to matters over which an adjudicator has no jurisdiction does not prevent the adjudicator from exercising the jurisdiction that he or she has.”

As to severance, Ramsey J opined (at paragraph 113) that paragraph 23(2) of the (English) Scheme did not bind the parties to comply with anything less than all of a valid decision:

“113 As a matter of interpretation of that statutory implied term I do not consider that... that provision imposes an obligation on the parties to comply with the part of any decision, which was within the adjudicator’s jurisdiction where part is made without jurisdiction. Neither do I consider that there can be a further implied term that the parties will comply with that part of a decision.

114 In *Cantillon v Urvasco* at [65(f)] Akenhead J summarised the position in this way: “*In all cases where there is a decision on one dispute or difference, and the adjudicator acts, materially, in excess of jurisdiction ... the decision will not be enforced by the Court.*”

Ramsey J disagreed with Lord Macfadyen’s view in *Homer Burgess* that where a decision is made, part of which is outside the adjudicator’s jurisdiction, it was open to the court to enforce the part which was *intra vires*:

“118...The whole of the decision is not enforceable and the contractual agreement to be bound by that decision does not apply. I do not think that in the context of the agreement to be bound by a temporary decision, the decision can be dissected to impose a separate and severable obligation to be bound by the adjudicator’s decision on each of the component issues on which the adjudicator based that decision. Otherwise, the process of adjudication enforcement could be diverted into satellite litigation which is not appropriate when the court is concerned with the enforcement of a decision which has temporarily binding effect. In this case the decision related to the whole sum of £317,500 plus VAT. I do not consider that the court can or should intervene and say what the Adjudicator may have found to be the value of the work relating to the element of the Subcontract within her jurisdiction.”

He went on to conclude that, in any event, it was not clear how the award would be divided between the part of the decision which was *intra vires* and the part which was *ultra vires*.

However, he would have been likely to find that the sum of £100,747.20 represented a minimum due (paragraph 123).

[23] *Pilon Ltd v Breyer Group plc* was decided on 23 April 2010. Coulson J found that an adjudicator had deliberately placed an erroneous restriction on his own jurisdiction in

relation to an overpayment defence, which amounted to a breach of natural justice. He considered whether the remainder of the decision was severable. He took as his starting point propositions (a) to (f) set out by Akenhead J at paragraph 63 [65] of *Cantillon*. He continued:

“40. This is a case where there was said to be one dispute: namely what, if anything, was due as a result of the interim application of September 2009. Therefore, on the basis of the approach in *Cantillon*, it is difficult to see how the decision could sensibly be regarded as severable. On the contrary, in accordance with paragraph 65 of the judgment of Akenhead J in *Cantillon*, it seems to me that the adjudicator's decision is not severable. I acknowledge that it may soon be time for the TCC to review whether, where there is a single dispute, if it can be shown that a jurisdiction/natural justice point is worth a fixed amount which is significantly less than the overall sum awarded by the adjudicator, severance could properly be considered. That was, after all, the basis on which summary judgment applications were routinely decided before the *HGCRA*. However, as a result of my other findings, this is not the place to consider that issue further.

41. In part, this is because I have already accepted that there is some force in Mr Bowling's suggestion that the adjudicator's failure to address the over-payment point may well have affected other aspects of his decision, such as his acceptance of Pilon's case as to the value of the cross-contract set-off. Thus, even if the decision was severable in principle, there is the risk that the decision as a whole was tainted by the material error (see paragraph 65(e) of Akenhead J's judgment) which would be another reason not to sever in practice.

42. If I was wrong as to severance, then the overpayment defence, worth £147,774, would be stripped out of the claim to enforce the adjudicator's decision, leaving some £60,000 odd, together with VAT and interest, due and payable to Pilon.”

[24] *Carillion Utility Services Ltd v SP Power Systems Ltd* was decided on 18 August 2011.

Lord Hodge found that an adjudicator had breached the rules of natural justice by applying a commercial rate from his own experience without giving the parties an opportunity to comment upon it. The breach affected only part of the adjudicator's award. Lord Hodge refused to sever the award:

“[39] It is clear that the fact that parties have contracted for a decision by an adjudicator does not prevent the court severing parts of his decision if he has determined separate disputes in the one decision. See *Cantillon Ltd*, Akenhead J at

para. 65. At present, subject to Coulson J's doubts [*Pilon Ltd v Breyer Group Plc* (at paras 39 and 40) and *AMEC Group Ltd v Thames Water Utilities Ltd* (at paras 99 and 100)], the case law, to which counsel referred, has set its face against allowing the severance of parts of a decision in one dispute.

[40] I can see that the policy of encouraging the speedy provisional resolution of construction disputes might support pragmatic arguments in particular cases in favour of separating liability and quantum in an adjudicator's decision where he has fallen into error in relation to quantum alone. The same considerations may support the approach which Coulson J has advocated. But it is not necessary for me to decide on the competency of the severance of part of a single dispute in this case as I have formed the view that a partial enforcement of Dr Hunter's award would be likely to create complexities which are better avoided.

[41] In this case the decision which Dr Hunter reached on the merits may have influenced his decision on expenses. He held that SP were to pay 60 per cent of his fees and expenses. It may be that, in so doing, he took account of the relative degrees of success of the parties' submissions. I cannot conclude that if he had decided that SP was wrong to say that nothing was due for lamping and guarding but that it was correct in its fallback position that, if the item 26 rate applied, that rate exhausted the claim, he would necessarily have divided the liability in expenses in the same way. Thus I do not see how I can sever the decision on expenses from the decision on the merits or alter the decision on the merits while leaving the expenses decision in place.

[42] I note that in *Homer Burgess Ltd* Lord Macfadyen (at 2000 SLT, p.287) declined to pronounce a partial reduction of the adjudicator's decision because a reduction of the decision would allow the parties to obtain a fresh decision from the adjudicator ...

[43] Carillion, if it accepts my decision, can seek reduction of the unenforceable decision and thereby open the path to a new decision if it wishes a valid provisional decision from the adjudicator..."

[25] *Highlands and Islands Airports Ltd v Shetland Islands Council* was decided on 20 January 2012. A dispute arose between the parties in relation to construction of runway extensions. The pursuer claimed that the defender was in breach of contract and sought damages for the breaches. It referred the dispute to adjudication. The adjudicator found that the defender was in breach and he awarded the pursuer in excess of £2 million. The defender opposed enforcement and sought reduction *ope exceptionis* on the ground that the decision was a nullity because the adjudicator had acted in breach of natural justice by

seeking advice from senior counsel on the construction of the contract without disclosing that fact or the advice to the parties. Lord Menzies held that there had been a material breach of natural justice, but the pursuer maintained that part of the decision was unaffected by the breach and could be severed. Lord Menzies decided that the whole decision was a nullity:

“41 It is not disputed that partial reduction is a competent remedy in an appropriate case. Lord Macfadyen's remarks in *Homer Burgess Ltd v Cirex (Annan) Ltd* support this proposition, and I do not suggest that partial reduction is an incompetent remedy. However, it is worthy of note that no Court has granted this remedy in relation to the decision of an adjudicator in a single dispute case. It is not disputed that the present case is a single dispute case.”

Lord Menzies referred to the discussions on severability in *KNS Industrial Services (Birmingham) Ltd v Sindall Ltd* (2001) 75 Con LR 71, *Cantillon*, and *Cleveland Bridge* and concluded:

“46 I find the reasoning above to be persuasive. It is also consistent with the views which I expressed in *CSC Braehead Leisure Ltd* (at paragraphs [38] to [40]). No authority has been put before me to suggest that any Court has taken a different view in a single dispute case. While (*sic*) I have some sympathy with the views expressed by Coulson J in *Pilon Ltd v Breyer Group plc* and *Amec Group Ltd v Thames Water Utilities Ltd* that, in light of the intention of the 1996 Act, it may be appropriate to review whether severance could properly be considered in an appropriate single dispute case. However, I do not consider that this is such a case. As Mr MacColl observed, what the parties have contracted to be bound by is the adjudicator's decision, not a part of that decision nor the decision after the Court has rewritten it. The concerns expressed by Lord Hodge in *Carillion Utility Services Ltd* with regard to expenses also apply in the present case. It is far from clear to me that the adjudicator would have found the pursuer substantially successful in a situation in which the large majority of the adjudicator's award was tainted, and the pursuer only received a sum which was less than one-sixth of the total awarded.

47 For these reasons I do not consider that the adjudicator's decision in this case is severable.”

[26] *Working Environments Ltd v Greencoat Construction Ltd* was decided on 17 April 2012.

Working were mechanical subcontractors of Greencoat, who were the main contractors.

Working issued interim application No. 10, and Greencoat issued a payment certificate and

notice of withholding payment in response. The interim certificate certified lower sums for measured work and variations than Working claimed. The payment withholding notice sought to set off a total of £67,412.93 for nine items of defective or omitted work, and it stated that liquidated damages in a sum to be confirmed also required to be set off. Working served a notice of adjudication which identified the dispute as being over interim application no 10, interim certificate no 10, and the payment withholding notice. 22 days later Greencoat sent Working a letter purporting to supersede “the costs withheld in Payment Certificate 10”. The letter listed the previous nine items of defective or omitted work, but it also stated that two further items were to be set off (£9,629 for defective work to pumps and £11,520 for failure to perform work related to BREEAM (Building Research Establishment Environmental Assessment Method) obligations) and that the liquidated damages to be set off were £120,000. Greencoat submitted to the adjudicator that at the date of the notice of adjudication there had been no crystallised dispute because payment was not yet due; and that if he had jurisdiction over a dispute that dispute did not extend to the two further items and the liquidated damages of £120,000. The adjudicator decided that he had jurisdiction to adjudicate upon all of the matters referred. He held that the net sum due to Working was £250,860. He rejected Greencoat’s set off of liquidate damages and the two further items on the basis that “no supporting evidence was adduced”. He ordered that Greencoat pay 65% of his fee. Working sought to enforce the award. Greencoat maintained the same jurisdictional challenge as had been advanced before the adjudicator. Akenhead J held that at the time of the notice of adjudication there had been a crystallised dispute and that the scope of the dispute included the issue of liquidated damages, but not the two further items:

“32. ... These two items were not part of or within the confines of the dispute as it had crystallised as they had not been mentioned before they emerged 22 days into the adjudication process ... The adjudicator therefore had no right to adjudicate upon those two items because he had no jurisdiction to do so.

33. The question therefore arises as to whether the remainder of his decision can be enforced. Items 11 and 12 were put forward in the sums of £9,629 and £11,520, which total £21,149, to which, based on the adjudicator's accounting approach, VAT of 20% should be added, bringing the final total to £25,378.80.”

Earlier in the judgement Akenhead J had observed:

**“The Law**

...

25. In relation to severance, that is whether parts of an adjudicator's decision may be enforced and others not, the Court in Cantillon v Urvasco, gave some guidance:

[paragraph 63 of the judgment in *Cantillon* was then was set out].

In my view, this reflects the policy of the 1996 Act in that adjudication decisions are to be binding on the parties pending final resolution of the given disputes.”

His decision and reasons on the severance in the instant case were set out at paragraphs 34-

36:

“34. I see no good reason why the substance of the adjudicator's decision should not be enforced albeit that the amended decision relating to the sum of £250,860 plus VAT should be reduced by £21,149 plus VAT which would produce a net sum of £229,711 plus VAT which remains as the figure due at 14 January 2012. Since he did not have jurisdiction to reject or accept Items 11 and 12, he had no jurisdiction to produce a decision which adjudicated upon them. It follows that in principle Greencoat was entitled to put forward as at 14 January 2012 set offs in respect of Items 11 and 12. Effectively, what the adjudicator did was, doubtless with good intentions, to decide upon two further disputes (Items 11 and 12) which were not within his jurisdiction. The Court is therefore enforcing the large bulk of the adjudicator's decision; to do so is consistent with the authorities set out in the Cantillon v Urvasco case

35. Given the impact of Paragraph 23 (2) of the Scheme, accepted to be applicable here, the decision of the adjudicator effectively declaring what was payable as at 14 January 2012 was binding on the parties as from 29 February 2012 and Greencoat was therefore required to comply with that decision by paying all such amounts as were within the jurisdiction of the adjudicator to decide. It follows therefore that

Greencoat is required now to pay £229,711 plus VAT, totalling £275,653.20 plus 65% of the adjudicator's fee, namely £15,678. This totals £291,331.20.

### **Decision**

36. There will be judgement in favour of WE against Greencoat in the sum of £291,331.20..."

[27] *Beck Interiors Limited v UK Flooring Contractors Limited* was decided on 4 July 2012.

UK Flooring were flooring subcontractors. Beck were the main contractors. Beck served a notice of adjudication. The notice described the dispute as being whether Beck had been entitled to terminate the subcontract; and whether Beck's claim for £67,148.97 plus VAT and interest was justified. That sum was made up of £31,148.97 for the costs of completion of the subcontract works and £36,000 liquidated damages. The adjudicator decided that Beck had been entitled to terminate the subcontract because of UK Flooring's breach; and that it was entitled to completion costs of £19,763.41 plus VAT and liquidated damages of £33,600 plus VAT with interest (including £100 under the Late Payment of Commercial Debts (Interest) Act 1990). The adjudicator found UK Flooring "primarily liable" for the entirety of his fees and expenses. When Beck sought to enforce the decision UK Flooring argued that the liquidated damages claim had not been a crystallised dispute when the notice of adjudication was served. Akenhead J agreed. He held that the adjudicator had not had jurisdiction in relation to that claim (paragraph 31). He required to decide whether the adjudicator's decision could be severed. Earlier in the judgment he had discussed the law on severance:

#### **"The Law**

...

20. The next legal issue is whether or not the Court can enforce part of an adjudicator's decision. In the *Cantillon* case, the Court looked at this "severability" issue and concluded:

[para 63 of the judgment in *Cantillon* was set out]

21. The Court needs to bear in mind that there are many different types of jurisdictional challenge. They include issues as to whether a dispute has crystallised, whether two disputes have been referred to adjudication, whether the adjudicator has been properly appointed, whether there is an effective adjudication provision, whether there is a contract at all between the parties, whether the subject matter of the contract is exempt from the statutory provisions for adjudication and numerous others. Different considerations as to severability may arise in relation to different jurisdictional challenges.

...

### **Discussion**

...

32. The next question which arises is therefore whether it is legitimate for the Court to sever the decision and in effect enforce that part of the decision which relates to that which was generally in dispute before the Notice of Adjudication was dispatched. In my judgement, this is a case in which the Court can and should do that. In reality, there was only one crystallised dispute which was referable to adjudication and that related only to the claim (as slightly adjusted) for £31,148.97 for the increased costs of completing the carpeting work. It is clear from the body of the Notice of Adjudication that the presented claim is made up essentially of two parts, £31,148.97 and the £36,000 for the new liquidated damages claim. They are presented in effect as two separate arguments with separable evidence supporting them, albeit that the losses flow from the failure to complete on time or indeed at all.

33. There is no difficulty in identifying clearly what the adjudicator decided in relation to each claim: £19,763.41 for the increased costs of completion and £33,600 for liquidated damages. It was rightly accepted that the claim for the fixed sum of £100 under the Commercial Late Payment of Debts (Interest) Act could not be enforced because it related most obviously to the liquidated damages claim which is the only element which could be said to give rise to a debt, the other claim relating simply to common law damages. It is also difficult for the Court to apportion the adjudicator's fee which he ordered (primarily) UKFCL to pay; this is because, although one could arithmetically apportion it in relation to sums recovered and others not jurisdictionally recoverable, one can not second guess what the adjudicator would have done. For instance, he might have said that each party should pay half or that Beck should pay the costs of his time relating to the jurisdictional issue and some different proportion of his costs for the balance.

## Decision

34. It follows that this is a case in which “severance” can take place and the adjudicator's decision in relation to that for which he did have jurisdiction (£19,763.41 for increased costs of completion) should be enforced to that extent. Interest referable to that sum should also be allowed ...”

[28] *Lidl UK GmbH v RG Carter Colchester Limited* was decided on 8 November 2012. The contract between the parties was for the design and construction of a new Lidl store. RG Carter were the design and build contractors. Lidl claimed substantial liquidated damages. RG Carter served a notice of adjudication referring parts of the liquidated damages claim to adjudication. Following the issuing of the adjudicator’s decision both parties agreed that the adjudicator had decided one question which had not been referred to him. He had exceeded his jurisdiction in that regard. The question involved liquidated damages of £125,000. Lidl argued that the remainder of the decision could be enforced. Edwards-Stuart J agreed:

### **“Can the adjudicator's finding in excess of his jurisdiction be severed?”**

57. The criteria that are relevant when considering when an adjudicator's decision can be severed were summarised by Akenhead J in *Cantillon Ltd v Urvasco Ltd* (2008) 117 Con LR 1, where he said at paragraph 65 [63]:

[the paragraph was set out]

58. In *Working Environments Ltd v Greencoat Construction Ltd* (2012) 142 Con LR 149 (TCC), Akenhead J again had to consider the question of whether part of an adjudicator's Decision could be severed. In that case, the adjudicator purported to decide two issues which were outside his jurisdiction. The answer was that the part of the decision dealing with those two issues was severed, and the remainder enforced. Akenhead J said, at paragraph 34:

[para 34 of *Working* was set out]

59. As Akenhead J put it, at paragraph 32 of his judgment:

‘These two items were not part of or within the confines of the dispute as it had crystallised as they had not been mentioned before they emerged 22 days into the adjudication process.’

60. In the same way, it seems to me, the two items of liquidated damages that totalled £125,000 were clearly not part of or within the confines of the dispute. The reasoning which underpinned them (as advanced by Lidl) had no bearing on the issues before the adjudicator. I conclude, therefore, that the rest of the Decision can be severed from them so that - subject to the natural justice point relied on by RGC - it remains enforceable.

61. I would add only this. At first sight it may appear that the decision in *Greencoat* conflicts with the general principle that a decision cannot be severed where only one dispute or difference has been referred. The rationale underlying this principle is, I think, that where a single dispute or difference has been referred it will generally be difficult to show that the reasoning in relation to the part of the decision that it is being sought to sever had no impact on the reasoning leading to the decision actually reached, or that the actual outcome would still have been the same. If this is the case, the part cannot safely be severed from the whole. However, where, in the case of the referral of a single dispute additional questions are brought in and adjudicated upon, whether by oversight or error, there should be no reason in principle why any decision on those additional questions should not be severed provided that the reasoning giving rise to it does not form an integral part of the decision as a whole. However, failing this, the entire decision will be unenforceable."

[29] *Whyte and Mackay Ltd v Blyth & Blyth Consulting Engineers Ltd* was decided on 9 April 2013. The defenders designed the structure of a bottling plant. The pursuers maintained that the foundations were defective. They claimed damages from the defenders for breach of contract. The dispute was referred to adjudication. The adjudicator awarded the pursuers £2.987 million. The defenders resisted enforcement of the award on the ground that the adjudicator had not dealt with an important line of defence which had potentially been a complete answer to the claim. Lord Malcolm held that there had been a breach of natural justice and that the award should be reduced. However, he also addressed a discrete issue of severability. The adjudicator made a finding that the remedial cost of reinstatement of the main production area floor slab would be £1,885,227, which was more than the sum claimed in this respect by the pursuers, namely £1,816,860.10. He gave no explanation for the difference. The defenders submitted that this problem vitiated the whole

award. The pursuers maintained that if this was the only problem with the award the offending part could be severed. Lord Malcolm disagreed:

“[71] In the present case there was only one dispute or difference before the adjudicator, namely what damages, if any, are due in respect of loss or damage sustained by the pursuers as a result of any negligence on the part of the defenders? While the adjudicator’s single award was made up of separate constituent elements, it remained one award. In agreement with the approach of the learned judge in *Pilon*, I see no way to sever the offending part of the award from the rest.”

[30] *Paice* was decided on 5 August 2016. The defendant contracted with the claimants to construct and fit out two residential houses. The claimants served the relevant notice of adjudication in respect of a dispute as to the proper value of the contract works and repayment of any balance due from the defendant. On 27 April 2016 the adjudicator ordered the defendant to pay the claimants £296,006.44 in respect of sums overpaid in respect of the works. The claimants brought proceedings to enforce the award, but the court held that the adjudicator had not had jurisdiction to determine the claimants’ entitlement to deduct the sum of £6,049.60 from the amount otherwise due to the defendant for design fees. The Deputy Judge (as she then was) decided that the offending part of the award could be severed:

“70. However, that part of the adjudication decision can be severed from the other parts of the decision: *Cantillon v Urvasco Ltd* [2008] EWHC 2218 per Akenhead J at paragraphs 65 and 78. The defendant relies on the decision in *Cleveland Bridge v Whessoe-Volker* [2010] EWHC 1076 to submit that the design fees issue cannot be severed but *Cleveland* can be distinguished on its facts. In that case, the adjudicator did not identify an alternative decision so as to identify the proportion that would survive any excess of jurisdiction. In this case, the adjudicator identified and valued the design fees claim separately, so that there is no difficulty in severing that part of the award from the rest of the decision.

71. Accordingly, paragraphs 3.245 to 3.263 of the adjudication decision are in excess of jurisdiction and are not enforceable but can be severed from the remainder of the decision.

## Conclusion

72. For the reasons that I have given, I uphold the challenge in respect of the design fees and the award is reduced by £6,049.60. I reject the other challenges raised by the defendant.

73. It follows that the claimants are entitled to have the adjudicator's decision enforced. Summary judgment should be entered for the claimants in the sum of £301,678.44, interest to 9 August 2016 in the sum of £6,101.01 (continuing at the daily rate of £63.55 until payment) plus the adjudicator's fees in the sum of £11,721.60..."

[31] *Bell Building Projects Limited v Arnold Clark Automobiles Limited* was decided on 29 March 2017. The pursuer contracted with the defender to design, supply and erect a car showroom. The pursuer sought damages for a repudiatory breach of contract by the defender. It referred that dispute to adjudication. The adjudicator found the pursuer entitled to payment of damages of in excess of £1 million. The defender resisted enforcement and sought reduction *ope exceptionis* of the award on the ground that the decision was arrived at in breach of the rules of natural justice. The suggested breach had involved the acceptance by the adjudicator of a loss and expense claim for £28,751.09 which formed part of the pursuer's claim, and the rejection of a claim by the defender for set off of rectification costs of £217,588.89. Lord Tyre held that there had been no material breach of natural justice. Nevertheless in the course of brief *obiter* observations he indicated that had a breach been established he would not have severed the award because, as Lord Hodge had observed in *Carillion Utility*, the case law had set its face against allowing the severance of part of a decision in a single dispute case.

[32] I decided *DC Community Partnerships Limited v Renfrewshire Council* on 22 November 2017. I held that the adjudicator had not exhausted his jurisdiction because he had failed to address a set-off defence. The defence had a substantial potential value - equivalent to more than half of the principal sum which the adjudicator awarded to the pursuer (paragraph 27).

In a third speech, after counsel for both parties had made their principal submissions, counsel for the pursuer tentatively submitted for the first time that it would be open to the court to sever the adjudicator's decision. However, his position (paragraph 22) was that it had been a single dispute adjudication and that the observations of Lord Menzies in *Highlands and Islands Airports Limited* at paragraphs 41-47 were "an accurate statement of the current law". The only cases on severance I was referred to were *Highlands and Islands Airports Limited* and *Carillion Utility*. I held (paragraph 32) that it had been for the pursuer to raise the issue of severance and satisfy me that it would be practicable and appropriate; and that on the basis of the pleadings and the (very limited) submissions which were made I was not persuaded that it would be.

[33] *Willow* was decided on 25 June 2019. Willow engaged the defendant contractors to design and build a hotel. A dispute arose as to the balance which was payable for work done under the contract once there were deducted any liabilities for defects, Willow's professional fees and loss of profits, and liquidated damages. The adjudicator concluded that on a proper construction of the contract Willow was not entitled to claim liquidated damages of £715,000. He ordered that Willow should pay £1,174,854.92 plus VAT comprising the balance which he found to be due under the contract less the defendant's liability to Willow of £841,245.08 in respect of defects, professional fees and loss of profits. Pepperall J held that the adjudicator had erred in law in his construction of the contract with the result that he had erred in dismissing Willow's liquidated damages claim. He decided that severance was appropriate:

"68. In *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC), Akenhead J reviewed the question of severability. As he expressly recognised, his remarks were strictly obiter. He said, at [63]:

[The judge then set out the terms of paragraph 63].

69. In *Pilon Ltd v. Breyer Group plc* [2010] EWHC 837 (TCC), Coulson J remarked, at [40]:

‘... it may soon be time for the TCC to review whether, where there is a single dispute, if it can be shown that a jurisdiction/natural justice point is worth a fixed amount which is significantly less than the overall sum awarded by the adjudicator, severance could properly be considered. That was, after all, the basis on which summary judgment applications were routinely decided before the *HGCR* Act 1996.’

70. As Sir Peter remarked in the Fourth Edition of his work, Coulson on Construction Adjudication at para. 15.32, that challenge has subsequently been taken up, principally by Akenhead J in *Working Environments Ltd v Greencoat Construction Ltd* [2012] EWHC 1039 (TCC); [2012] B.L.R. 309 and *Beck Interiors Ltd v. UK Flooring Contractors Ltd* [2012] EWHC 1808 (TCC) and by Edwards-Stuart J in *Lidl UK GmbH v RG Carter Colchester Ltd* [2012] EWHC 3138 (TCC).

71. In *Greencoat* Akenhead J held that the adjudicator did not have jurisdiction to decide two heads of claim worth some £21,149 plus VAT. Nevertheless, he enforced the adjudicator's decision as to the balance of the other ten heads of claim totalling circa £230,000 plus VAT.

72. In *Lidl*, Edwards-Stuart J severed two claims for liquidated damages worth £125,000. He said, at [61]:

[paragraph 61 was set out]

73. Commenting on these recent developments, Sir Peter observed at para. 15-32 of his book:

‘Accordingly, even where there is a single dispute, it appears that the court may, in the right circumstances, be prepared to enforce a part of the decision of the adjudicator, if that part is clearly and obviously untainted by the jurisdictional or natural justice problem, and can be readily identifiable.’

74. I agree with Edwards-Stuart J that in the context of a single dispute or difference it can often be difficult to divorce any significant flaw in the adjudication from the balance of the decision. Indeed, significant breaches of natural justice are particularly prone to infect and therefore undermine the entire decision. In my judgment, the proper question is not, however, to focus on whether there was a single dispute or difference but upon whether it is clear that there is anything left that can be safely enforced once one disregards that part of the adjudicator's reasoning that has been found to be obviously flawed. Such analysis need not be detailed and, in many cases, it may remain the position that the entire enforcement application should fail. It would, however, further the statutory aim of supporting the enforcement of adjudication decisions pending final resolution by litigation or

arbitration if the TCC were rather more willing to order severance where one can clearly identify a core nucleus of the decision that can be safely enforced.

75. In this case, I am satisfied that the effect of the error of law on the issue of contractual construction was limited to Mr Molloy's dismissal of the claim for liquidated damages and that such error did not infect the balance of the decision. I therefore consider that the good can and should be severed from the bad. The value of the claim for liquidated damages was £715,000. Accordingly, I enforce the balance of the decision."

[34] Having set out the case law, I propose to make some observations on it and to consider the correct approach in the present case.

[35] In my opinion it would be wrong to treat paragraph 63 of *Cantillon* as laying down rigid rules. I do not believe that was Akenhead J's intention. Rather, I think that he was seeking to articulate general principles or guidance which would be likely to provide assistance in perhaps the majority of cases. In my view that is clear from a close reading of *Cantillon* and from Akenhead J's approach in subsequent cases.

[36] In *Cantillon* Akenhead J was careful to emphasise at paragraph 63(a) that, in this context, it is substance rather than form which is important when determining whether or not there is a single dispute: "...One needs to see whether in fact or in effect there is in substance only one dispute or two...". Paragraph 63(f) has to be read in light of and consistently with the rest of paragraph 63. Something which may be one "dispute" in terms of the Scheme and which may be referred to an adjudicator as such, may on analysis fall to be treated as being more than one dispute when it comes to determining whether severance is possible (*cf* the approach in paragraph 39 of *CSC Braehead Leisure* where the focus appears to be upon the subjective intention of the referring party and whether what was referred was formally a single dispute in terms of the adjudication provisions of the contract). In my opinion it is illuminating to consider Akenhead J's explanation (at paragraph 76 (78 in the

BLR report)) of how he would have approached the question of severance had a more than peripheral breach of natural justice been established:

“I would have given judgment in favour of Cantillon in respect of all other parts of the decision which could be said with confidence were unrelated to and untainted by any such breaches.”

Notwithstanding the fact that, strictly speaking, only one dispute had been referred to adjudication, he concluded that on analysis there were at least two disputes (one relating to the 13 weeks claim and one relating to the 16 weeks claim) which the adjudicator had dealt with separately and which would have been severable.

[37] Akenhead J’s subsequent decisions were *Bovis*, *Working*, and *Beck*. His observations at paragraph 53 of *Bovis* have particular resonance in the present case:

“The starting point is the analysis of what is the referred dispute (or disputes). If there is a disputed claim A and there is another claim B which has not yet got to a stage of being disputed, and the claiming party refers A and B to adjudication, there is on analysis only one dispute being referred, namely A because that is all that is in dispute. Even if, mistakenly, the adjudicator adjudicates on A and B, that part of his decision which addresses dispute A will be enforced unless it is simply not possible verbally or mathematically to identify what his decision on A alone is.”

In *Bovis* Akenhead J concluded that such identification would have been possible (paragraph 69). By parity of reasoning, here the claim set out in the notice of adjudication included a claim for extension of time and loss and expense which had not crystallised. On analysis only the other parts of the dispute were referred to adjudication. The adjudicator was entitled to adjudicate on the parts which had crystallised. He was not entitled to adjudicate on the parts which had not crystallised, but he did so, mistakenly. His decision on the dispute which had crystallised should be enforced in so far as it is clear it is not tainted by his decision and reasoning concerning the parts of the dispute which had not crystallised.

[38] In *Working* Akenhead J held that the adjudicator had no jurisdiction to decide part of the dispute which he adjudicated upon. The court required therefore to decide whether severance was possible. Akenhead J applied the same reasoning as in *Bovis* and he concluded that the part of the decision which was within jurisdiction could be enforced.

[39] In *Beck* Akenhead J provided a salient reminder at paragraph 21 that different considerations as to severability may arise in relation to different jurisdictional challenges. The relevant facts were similar to *Bovis* and to *Working*. The adjudicator had not had jurisdiction to adjudicate upon part of the dispute. Once again, the reality was that the dispute was the crystallised dispute. The liquidated damages claim was a separate dispute which had yet to crystallise when the adjudication was commenced. There was no difficulty in identifying what the adjudicator had decided in relation to each claim.

[40] It seems to me that the judges in *Lidl*, *Paice* and *Willow* all applied essentially the same approach (i) as Akenhead J outlined he would have taken in *Cantillon* and *Bovis* had the relevant objections to what the adjudicator did been sound; and (ii) as Akenhead J took in *Working* and *Beck*.

[41] Of course, it is difficult to reconcile the approach in these cases with the approach of Ramsey J in *Cleveland Bridge* (which Lord Menzies followed in *Highlands and Islands Airports*). However, I find the approach which I have described in the cases discussed in the preceding paragraph to be more persuasive, and I prefer it. In my respectful opinion Ramsey J appears to have treated paragraph 63(f) of *Cantillon* as being determinative on the issue of severance rather than being merely a guide or starting point. In my view it is wrong, on a proper reading of *Cantillon*, to treat paragraph 63(f) as a blanket ban on severance in single dispute cases. I respectfully suggest that on a proper analysis, applying the guidance as it was intended to be applied, the conclusion ought to have been that the dispute in respect of

which the adjudicator had jurisdiction and the dispute in respect of which he did not have jurisdiction were separate disputes.

[42] I differ from Ramsey J in relation to the proper construction of paragraph 23(2) of the Scheme. He concluded that the effect of that provision was that the parties had not agreed to give provisionally binding effect to anything other than the entirety of an adjudicator's decision. He acknowledged, however, that the adjudicator could have issued a decision which only adjudicated upon the matters which were within jurisdiction, and that such a decision would have bound the parties.

[43] In my opinion the Scheme contemplates that a "dispute" is a matter in respect of which the adjudicator has jurisdiction. He or she is obliged in terms of paragraph 20(1) to "decide the matters in dispute": there is neither the obligation nor the power to decide other matters except where such specific power is conferred by agreement and/or by the Scheme (eg paragraph 20(2)). In my view paragraph 20(1) compels an adjudicator to decide matters in dispute which are within jurisdiction. A "decision" which is given binding effect by paragraph 23(2) must be upon matters within jurisdiction. Where an adjudicator's decision is partly within and partly outwith jurisdiction only the part within jurisdiction can be binding. It is noteworthy that the Scheme envisages, and makes at least some provision for, decisions being made (and enforced) where the decisions involve partial resolution of the (within jurisdiction) matters in issue. Paragraph 20(1) empowers the adjudicator to make a decision on different aspects of the dispute at different times. Paragraph 23(1) enables him to order a party to comply peremptorily with the decision or any part of it.

[44] In my view the preferable construction of paragraph 23(2), having regard to the natural and ordinary meaning of the word "decision" and to the other provisions of the

Scheme, is that the “decision” which binds parties is the decision in its entirety where all of it is a valid decision, or such part of it as is valid and severable where part of the decision is affected by invalidity. In my opinion that construction is more in keeping with, and serves better to advance, the policy and aims of the adjudication provisions in the 1996 Act and the Scheme than the construction suggested by Ramsey J. I think that these purposive considerations weigh heavily in favour of the provision being given the construction which I favour. As Lord Reed observed in *Ballast plc v Burrell Co (Construction Management) Ltd* 2001 SLT 1039, [2001] BLR 529, 2001 SCLR 837, at paragraph 32:

“32. ... In the present context, the provisions of the scheme have to be interpreted in the light of the intention of Parliament in enacting the 1996 Act, and more particularly the intention of the minister in making the scheme: an intention which has to be imputed to the parties to the contract, given the incorporation of the scheme provisions as implied contractual terms. That general intention was aptly summarised by Dyson J in *Macob Civil Engineering Ltd v Morrison Construction Ltd*, at [1999] BLR, p 97:

‘It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement.’”

In my view very similar considerations apply where, as here, the Scheme has been expressly incorporated in the contract (*cf* Lord Reed at paras 28 and 29). (Lord Reed’s decision in *Ballast* was reclaimed (appealed), but the Inner House refused the reclaiming motion and affirmed his decision: 2003 SC 279, 2003 SLT 137). Moreover, I think it highly unlikely that it was an aim of Parliament in enacting the 1996 Act, or the ministers in making the Schemes, that partial enforcement of an adjudicator’s award should be made more difficult than it had been before those changes in the law. In *Pilon* (at paragraph 45) Coulson J reminds us that before the legislative change summary judgment applications in England

and Wales were routinely decided on the basis that severance could properly be considered in single dispute cases.

[45] In most of the cases where severance has been permitted (*Working, Beck, Lidl, Paice, and Willow*), or would have been had the relevant challenge been a good one (*Cantillon and Bovis*), and in *Homer Burgess*, paragraph 23(2) of the Scheme will have been an express or implied term of the contract (*cf CSC Braehead Leisure* where it seems that the contract may have contained equivalent provisions). In each of those cases where paragraph 23(2) applied it is implicit that the court considered that the parties were bound by the severed decision (or would have been had the decision been severed).

[46] Whether or not my analysis of *Cantillon* is correct, in my opinion it is a mistake to think that severance ought never to be available where a decision involves a single dispute. A blanket ban on severance in single dispute cases is likely to be productive of disproportionate and unjust results in a not insignificant number of cases. In my opinion it is also likely to encourage unsuccessful parties in single dispute adjudications to scabble around for grounds to resist enforcement, because success on any ground (even if it relates only to a relatively small part of the decision) will suffice to invalidate the entirety of the decision. I agree with Edwards-Stuarts J (at paragraph 61 of *Lidl*) that the rationale underlying the general principle that severance will not be available in a single dispute adjudication is that in such cases it may be more difficult to show that the reasoning in the invalid part of the decision had no impact on the other parts of the decision. On the other hand, if it is possible to show that there was no such impact then the valid part may safely be severed. I also concur with Pepperall J's observations in *Willow* (at paragraph 74) that the critical question ought not to be whether there is a single dispute or difference, but whether it is clear that there is a core nucleus of the decision that can safely be enforced; and that it

would further the statutory aim of supporting the enforcement of adjudication decisions if the courts were more willing to order severance where there is such a core nucleus. A commentary on *Willow* in *Building Law Monthly*, vol 36, Issue 7 (July 2019) (edited by Professor Ewan McKendrick QC), pp 5-7 observes (p7):

“This more flexible and pragmatic approach to severance is to be welcomed, although it will require the courts to make difficult assessments as to whether it is possible to identify a “core nucleus” of the decision of the adjudicator that “can be safely enforced”. While it will on occasion give rise to difficulty it is preferable to a blanket approach which simply denies the possibility of severance.”

I agree. I would add that in my view it would be both unfortunate and surprising if on questions of severance the policy and aims of the 1996 Act and the Scheme were given less weight by this court than by courts in England and Wales; and if that resulted in it being harder to sever awards here in appropriate cases than it is with similar cases south of the border. The relevant provisions of the 1996 Act apply equally to Scotland and England and Wales. The making of the Schemes for each jurisdiction was empowered by s. 114 of the Act, and the Schemes are in substantially the same terms.

[47] I recognise that in *CSC Braehead Leisure, Carillion Utility, Highlands and Islands Airports, Whyte and Mackay, Bell Building* and *DC Community Partnerships Limited* the orthodox view was considered to be that severance could not be available in a single dispute case. Arguably, there are grounds for distinguishing several of those cases from the present case. For the most part they involved complaints of breaches of natural justice, rather than the adjudicator exceeding his jurisdiction. In some of them it does not appear to have been clear or obvious that there was a core nucleus of the decision which was unaffected by the complaint. In *Highlands and Islands Airports* (at paragraph 46) and in *Carillion Utility* (at paragraph 40) the Lords Ordinary acknowledged the force of the argument that, having regard to the aims of the 1996 Act and the Scheme, it may be appropriate to review whether

severance could properly be considered in an appropriate single dispute case. However, neither judge found it necessary to embark upon that exercise because each considered that the case before him was not an appropriate case. Each was also influenced (*Highlands and Islands Airports*, paragraph 46; *Carillion Utility*, paragraph 39) by the fact that no authority was cited where severance had been granted in a single dispute case. The jurisprudence has moved on since then. In several of these six Scottish cases there appears to have been very little in the way of submissions to assist the court (in *DC Community Partnerships* no real case was made for severance). In none of them did the court have the advantage of considering the English decisions where severance has been allowed (or would have been allowed had the complaint made been upheld), because the cases pre-dated the decisions or because the court was not referred to them. Moreover, in at least one of those cases - *Carillion Utility* - practical considerations (of the sort which led Lord Macfadyen in *Homer Burgess* to conclude that reduction was preferable to severance) played a part. Lord Macfadyen considered (p 287E-G) that swifter redress (by way of further adjudication) would be available to the pursuers if the award was reduced *in toto*. Likewise, a factor which Lord Hodge took into account in *Carillion Utility* (paragraphs 42 - 43) was that the pursuers could seek reduction of the decision and open up the path for a new decision of the adjudicator. Here, by contrast, I understand it to be common ground that a further adjudication would not be possible if the award was reduced because there would not have been a valid reference to adjudication within 60 days of the final certificate, with the result that the certificate would have the finality provided for by clauses 1.9.1 and 1.9.3 of the contract conditions. In any case, whether or not all of these cases can be distinguished, I respectfully decline to follow them in so far as they conflict with what I suggest is the correct approach.

[48] In the present case, whether on a proper analysis (a) the part of the decision within jurisdiction ought to be treated as involving a separate dispute from the part of the decision which was outwith jurisdiction (and for the reasons given, I think it should), or (b) the whole decision ought to be treated as involving a single dispute, severance is competent provided that a core nucleus of the decision can be safely enforced. I turn then to examine whether there is such a core nucleus of the decision.

[49] Plainly, the extension of time award, and the associated loss and expense award of £63,093.47, cannot stand. Similarly, the adjudicator's decision that the defender should repay £26,000 liquidated damages which it deducted from sums due to the pursuer (ie at the contract rate of £2,000 per week for 13 weeks) followed inexorably from his decision that there should be an extension of time of 13 weeks. There was a further, more minor, deduction of £3,741.36 which the defender made for client gas used by the pursuer, in respect of which the adjudicator concluded that £2,806.04 (75%) ought to be repaid to the pursuer because it represented gas used during the 13 weeks extension of time period. There can no longer be any entitlement to that repayment. However, apart from these matters, and leaving aside for the moment the questions of the adjudicator's fees and expenses and interest on the award, I am satisfied that it can be said with confidence that all other parts of the decision are untainted by adjudicator's decision and reasoning in relation to the extension of time and loss and expense which he awarded (*Cantillon*, paragraph 76).

[50] In my opinion it is clear from the adjudicator's decision and reasoning (see eg paragraph 303) and from the Scott Schedule, that, apart from the matters which I have already identified, the adjudicator's valuation of Bill of Quantity works, variations, and architect's instructions, and his decisions whether (and if so, to what extent) deductions made by the defender were justified, were made separately and independently from his

extension of time and loss and expense decisions; and that the former decisions and calculations were not in any way dependent upon or influenced by the latter.

[51] Mr MacColl submitted that paragraph 323 of the adjudicator's reasons suggested that there may be some unexplained interdependence between the extension of time granted and the adjudicator's valuation of £23,148.43 for work which the pursuer was instructed to carry out by AI 25; and that paragraph 333 raised the possibility of a further unexplained interdependence between the deduction of £28,977.84 which the architect made for remedial work to the northern embankment which he claimed was necessary because the pursuer had failed to fulfil its obligations. I disagree. I think it is clear that the items concerned were calculated independently of the decisions relating to extension of time and related loss and expense.

[52] The adjudicator's approach to the valuation of the external works done in response to AI 25 is set out in paragraphs 323 to 326 of his reasons and in line 50 of the Scott Schedule. The valuation represents the cost of measured work. In paragraph 323 the adjudicator explains that this work is also considered in the extension of time sections of his reasons. That is unsurprising, given that the extra work which AI 25 instructed was one of the factors which the pursuer claimed justified an extension of time, and the associated claim for loss and expense. No-one suggested that the reverse was the case, *viz.* that any extension of time ought also to increase the sum due for the work done under that instruction. In my opinion it is clear that was not a position which the pursuer advanced and it is clear it was not a conclusion which the adjudicator reached.

[53] The dispute in relation to the northern embankment works was whether the pursuer had been at fault. The sum which the architect had deducted was the sum the defenders said they incurred in remedying defects to the embankment which they maintained were the

pursuer's responsibility. The pursuer's claim for an extension of time and loss and expense had no bearing whatsoever upon the figure which the defenders claimed they had to expend to remedy defects. The adjudicator discussed this item in the section of his decision dealing with extension of time because where the responsibility for it lay was one of the factors relevant in determining whether an extension of time and related loss and expense were justified in respect of groundworks delay. No-one was suggesting that any extension of time increased the cost of the northern embankment remedial works.

[54] I am satisfied that it is clear that there is a core nucleus of the decision which may safely be enforced, and that the award for the work instructed by AI 25 and the award for reimbursement of the deduction for remedial work to the northern embankment form part of that core. If I had decided otherwise it would not have caused me to conclude that there should not be severance in respect of the other items making up the core nucleus. I would simply have added these two items (the respective sums being £23,148.43 and £28,977.84) to the other items which could not be safely enforced *viz.* the award of the extension of time, the award of £63,093.47 loss and expense, the reimbursement of £26,000 liquidated damages, and the reimbursement of £2,806.04 of the deduction for client gas. Leaving aside for the moment the question of fees and expenses and interest, I am satisfied that it is clear that the remaining parts of the decision could safely be enforced.

[55] I turn to consider the adjudicator's award of interest. The basis upon which he awarded interest and the sum upon which he awarded it are clear from his decision (paragraph 282). He awarded simple interest on the principal sum awarded at the rate of 5% over base rate from 18 April 2018 (the date of Valuation No 17) to the date of his decision. There is no reason whatsoever to think that any of these constituent elements were in any way influenced by the adjudicator's consideration of extension of time and loss and

expense. In my opinion there is no difficulty in applying interest on the same basis to the principal sum making up the core nucleus of the award. Such an award can safely be enforced (as indeed was done in *Beck* (paragraph 34), *Paice* (paragraph 73), and *Willow* (paras 1 and 75)).

[56] That brings me to the adjudicator's fees and expenses. It seems to me that there are two separate issues. The first is whether the adjudicator's award of expenses may safely be enforced. The second is whether, if it cannot safely be enforced, the defender is nevertheless bound to relieve the pursuer of half of the fees and expenses which the pursuer has paid the adjudicator.

[57] In my opinion, on an ordinary reading of paragraph 283 of the decision and paragraph 482 of the note of reasons, the adjudicator has exercised his power (paragraph 25(2) of the Scheme) to determine the apportionment between the parties of liability for payment of his fees and expenses. While I incline to the view that it is unlikely that he would have exercised that power differently if his award had been restricted to the sums which I have identified as making up the core nucleus of the decision which can safely be enforced, I do not think it can be said that it is clear or obvious that his apportionment would have been the same. It would not be right to second guess what he would have done (*Beck*, paragraph 33). Accordingly the apportionment of expenses is not a part of the core nucleus of the award which can safely be enforced (*Bovis*, paragraph 70; *Beck*, paragraphs 33 and 34). I note in passing that the commentary forming part of the report of *Bovis* in (2009) 123 Con LR 15 interprets paragraph 70 of the judgment as saying that if apportioning fees between the two parts of the claim had proved an insuperable difficulty the extension of time claim and the recovery of liquidated damages would not have been enforced. I think that is a misreading of what Akenhead J said. In my opinion the words "that part of the

decision" refer to the award of fees and expenses. That is the natural and ordinary reading of the text. It follows logically from Akenhead J's reasoning. Moreover, it is consistent with the course that he took three years later in *Beck*, at paragraphs 33 and 34.

[58] While the adjudicator's award of expenses cannot be enforced, the question remains whether the defenders are nevertheless obliged to relieve the pursuer in respect of half of the adjudicator's fees and expenses, standing the adjudicator's terms of appointment and paragraphs 43 - 47 of the Joint Minute. My understanding of Mr MacColl's ultimate position was that he accepted that if the decision was enforced to any extent then the defenders were bound to grant that relief. That accords with my own provisional view; but I recognise that I have not had the benefit of submissions advancing the opposite view.

### **Disposal**

[59] I shall put the case out by order to discuss an appropriate interlocutor to give effect to the decisions reached in this Opinion and in my Opinion of 12 September 2019. I am minded to pronounce declarator in terms of the first three conclusions of the summons; and decree in terms of the fourth and fifth conclusions (as modified to reflect my decision), and in terms of the sixth conclusion (if it is accepted, or otherwise established, that the pursuer is entitled to relief). At the hearing I expect the defenders to indicate whether they accept (i) the arithmetic of the pursuer's interest calculation (£11,994.47) (ii) that in light of my decision they are bound to relieve the pursuer to the extent of £19,530 in respect of adjudicator's fees and expenses; (iii) that interest should run at the legal rate (a) on the principal sum awarded, (b) on the interest (£11,994.47), and (c) on a half-share of the fees and expenses (£19,530), from the date of citation until payment. I will also hear any motion for expenses which may be made.

