



SHERIFF APPEAL COURT

**2021 SAC (Civ) 24
ABE-CA14-20**

Sheriff Principal A Y Anwar
Appeal Sheriff W H Holligan
Appeal Sheriff L A Drummond QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL A Y ANWAR

in

Appeal by

MICHAEL DUTHIE WILSON

in the cause

GRAEME W CHEYNE (BUILDERS) LIMITED

Pursuer and Respondent

against

MICHAEL DUTHIE WILSON

Defender and Appellant

**Pursuer and Respondent: Logan, Advocate; Woodward Lawson Solicitors
Defender and Appellant: Young, Advocate; Levy & McRae Solicitors LLP**

3 August 2021

Introduction

[1] In March 2016, the respondent contracted to build a dwelling house for the appellant in Cults, Aberdeen.

[2] The contract provided a mechanism by which the respondent could make interim applications for payment. Interim applications required to be submitted to the “Architect/Contract Administrator” as defined in the contract. Article 3 of the contract specified “WCP Architects (the William Cowie Partnership) Ltd” (“WCP”) as the Architect/Contract Administrator.

[3] On 21 February 2020, the respondent issued interim application for payment number 14 (“interim application 14”) by email to WCP. The final date for payment of interim application 14 was 15 March 2020. The appellant contended that as WCP had resigned from office, interim application 14 was not validly served. The appellant refused to make payment.

[4] WCP had terminated its appointment in writing to the appellant in July 2019. The appellant accepts that he did not communicate this to the respondent at that time. It is a matter of agreement that the appellant had not formally notified the respondent that WCP had ceased acting and that the appellant did not nominate another Architect/Contract Administrator.

The contract

[5] The contract is the standard form “Scottish Building Contracts Committee: Minor Works Building Contract with Contractor’s Design for use in Scotland (MWD/Scot 2016)”. The appellant is defined as the “Employer” and the respondent as the “Contractor”.

[6] Article 3 of the contract deals with the identity of the Architect/Contract Administrator and is in the following terms:

“For the purposes of this Contract the Architect/Contract Administrator is WCP Architects (the William Cowie Partnership Ltd.) of 6 Albyn Lane, Aberdeen AB10 6SZ or, if he ceases to be the Architect/Administrator, such other person as the

Employer nominates (such nomination to be made within 14 days of the cessation). No replacement appointee as Architect and/or Contract Administrator shall be entitled to disregard or overrule any certificate, opinion, decision, approval or instruction given by any predecessor in that post, save to the extent that that predecessor, if still in the post, would then have had power under the Contract to do so.”

[7] A footnote to Article 3 reads:

“Unless the person appointed by or under Article 3 is entitled to use the title ‘Architect’ under the Architects Act 1997, the term ‘Architect’ shall, so long as that person holds that post, be deemed deleted throughout this Contract. Any appointee as Contract Administrator should be suitably experienced for the role. Irrespective of experience or qualifications. The Employer should not at any time appoint himself to the role without the Contractor’s prior agreement.”

[8] Section 5 of the contract deals with payment. The provisions are lengthy. There is no need to repeat them here at length. In short, the mechanism for interim payments under the contract were as follows: the respondent was able to make an interim application for payment from time to time stating the sums the respondent considered to be due and the basis upon which that sum had been calculated (clause 5.4.1); an interim application required to be served upon the Architect/Contract Administrator (clause 5.4.1); the Architect/Contract Administrator was responsible for issuing an interim certificate setting out the sums due to be paid by the appellant and the basis upon which that sum had been calculated (clause 5.3); if no such interim certificate was issued by the Architect/Contract Administrator, the interim payment application acquired the status of a “payment notice” (clause 5.4.2.1); if the appellant intended to pay less than the sum certified by the Architect/Contract Administrator or the sum stated in the respondent’s payment notice, the appellant was required to issue a “pay less notice” setting out the sum, if any, considered to be due to the respondent and the basis upon which that sum had been calculated (clause 5.5.4); if neither an interim certificate in terms of clause 5.3 nor a pay less notice in

terms of clause 5.5.4 was issued, the appellant became liable to pay the sum claimed in the respondent's interim application with interest (clause 5.5.2 and 5.6.1).

[9] In the period up to December 2018, the respondent had submitted 13 prior interim applications to WCP as the Architect/Contract Administrator, in terms of clause 5.4.1 of the contact.

[10] It is a matter of agreement that no interim certificate was issued by WCP (in terms of clause 5.3) and no pay less notice was issued by the appellant (in terms of clause 5.5.4.1). As a result, the respondent contends that the appellant became liable to pay the sums specified in interim application 14 with interest on 15 March 2020.

Adjudication

[11] The dispute regarding payment of interim application 14 was referred to adjudication by the respondent pursuant to the Housing Grants, Construction and Regeneration Act 1996 (as amended) and the Scheme for Construction Contracts (Scotland) Regulations 1998 (as amended).

[12] The appellant raised two lines of defence in its response to the referral notice. He argued that interim application 14 was (a) invalid as it had been served upon WCP who had resigned and (b) invalid in terms of its content and substance as it failed to set out the basis upon which the respondent had calculated the sums claimed. In reply, the respondent argued that being aware that WCP had resigned, having failed to appoint a replacement and having "facilitated" both the respondent's attendance on site and its performance of works after the resignation of WCP, the appellant was personally barred from asserting that interim application 14 was improperly served.

[13] On 7 May 2020, the adjudicator found in favour of the respondent. She decided interim application 14 was valid both in terms of service and in terms of its content and substance.

[14] She decided that the appellant should pay the respondent the sums claimed in interim application 14 being £263,357.53 with interest. The adjudicator also found the appellant liable for her fees and expenses, amounting to £13,413.

Sheriff Court Proceedings

[15] The appellant did not pay the principal sum nor the adjudicator's fees and expenses. The respondent raised the present commercial action seeking enforcement of the adjudicator's awards.

[16] The appellant advances a number of defences. He argues (a) that the adjudicator failed to deal with the appellant's principal line of defence that interim application 14 was invalid as it had been served upon WCP who were no longer in office; (b) the adjudicator failed to provide adequate reasons for her decision; and (c) interim application 14 was tainted by fraud as it included sums for landscaping works which it was alleged had involved the dumping of illegal and hazardous waste on site.

[17] The appellant has counterclaimed and seeks a declarator that interim application 14 is invalid and of no legal effect. In its defence to the counterclaim, the respondent argues that interim application 14 was submitted in accordance with the terms of the contract and that the appellant is personally barred from arguing it is invalid.

[18] On 5 October 2020, the sheriff granted summary decree in terms of each of the respondent's craves in the principal action. He refused the appellant's motion for summary

decree in respect of the crave of the counterclaim. The appellant appeals the interlocutor of 5 October 2020.

The grounds of appeal

[19] The appellant contends that in refusing his motion for summary decree in respect of the counterclaim, the sheriff erred in law *et separatim* was plainly wrong to conclude that;

1. the respondent's defence to the counterclaim namely, that interim application 14 was validly served, was not one which had no real prospects of success and was not bound to fail (ground of appeal 5.1);
2. the respondent's defence to the counterclaim namely, that the appellant was personally barred from disputing the validity of interim application 14, was not one which had no real prospects of success and was not bound to fail (ground of appeal 5.2);
3. that the question of the validity of interim application 14 was not a short, self-contained point which was not suitable for determination in a counterclaim in proceedings for enforcement of an adjudication award (ground of appeal 5.3).

[20] The appellant contends that in granting the respondent's motion for summary decree the sheriff erred in law *et separatim* was plainly wrong to conclude that:

1. The adjudicator had exhausted her jurisdiction in dealing with a material line of defence advanced by the appellant, namely that interim application 14 was invalid (ground of appeal 6.1);
2. that the adjudicator had provided sufficient reasoning on this material line of defence (ground of appeal 6.2);

3. that the appellant's case on contamination was a factual dispute that could not amount to fraud and thereby provide a basis for refusing to enforce the adjudicator's award (ground of appeal 6.3).

Submissions for the appellant

[21] Mr Young adopted his note of argument. He submitted that the core point of the appeal related to the validity of interim application 14. If a contractual notice provision requires the service on a specified person, then a notice served on someone else is not valid (*HOE International Ltd v Andersen* 2017 SC 313, Lord Drummond Young at para 35). While it is a general rule that if a debtor is bound under a certain condition and has at its own hand impeded or prevented the condition from being purified, the condition is then treated as being purified (Bell, *Principles of the Law of Scotland*, 4th ed, 1839 at para 50 and *MacKay v Dick and Stevenson* (1881) 8 R (HL) 37 at p45), in order to be relevant, there requires to be a deliberate act on the part of the debtor to seek to prevent the condition from being purified, such as a deliberate refusal to re-appoint an architect or engineer despite the issue being brought to their attention by the contractor (*Al-Waddan Hotel Ltd v MAN Enterprise SAL (Offshore)* [2014] EWHC 4796). The respondent had averred no relevant act of prevention or hindrance on the part of the appellant. The respondent had simply sought to take advantage of the lack of any Architect/Contract Administrator in a manner which prejudices the appellant.

[22] In relation to ground of appeal 5.2, the fundamental requirements of a plea of personal bar included inconsistent conduct by one party which it intended to induce the other party to act in a certain way to his prejudice (*Ben Cleuch Estates Ltd v Scottish Enterprise* 2008 SC 252; *William Grant & Sons Ltd v Glen Catrine Bonded Warehouse Ltd* 2001 SC 901). The

respondent relies upon the appellant's failure to advise that WCP Architects had ceased to act as Architect/Contract Administrator and his failure to nominate a replacement.

However, there was no obligation upon the appellant to advise the respondent that WCP Architects had ceased to act and the respondent had not alerted the appellant to their intention to issue interim application 14. Further, there is no prejudice to the respondent; upon learning that WCP Architects were no longer acting, they could have simply demanded that a new Architect/Contract Administrator be appointed. The only prejudice consists of the respondent being unable to retain a windfall that treats interim application 14 as automatically due for payment. The sheriff ought to have concluded that the respondent's averments relating to personal bar had no real prospects of success.

[23] The counterclaim was apt to defeat proceedings for the enforcement of an adjudicator's award; the question of the validity of interim application 14 was a narrow and self-contained point which did not require evidence to be led (*D McLaughlin & Sons Ltd v East Ayrshire Council* [2020] CSOH 109).

[24] In relation to ground of appeal 6.1, it was submitted that the adjudicator had simply failed to deal with the material line of defence advanced before her, namely that interim application 14 was invalid. The sheriff has required to conclude that the adjudicator's decision was "implicit in her reasoning". That is insufficient. The sheriff had erred in his analysis that this line of defence was a subsidiary one or affected a minor part of the dispute (*Field Systems Designs Ltd v MW High Tech Projects UK Ltd* [2020] CSOH 17, *DC Community Partnerships Ltd v Renfrewshire Council* [2017] CSOH 143 and *Barhale Ltd v SP Transmission Plc* [2021] CSOH 2). *Esto*, the adjudicator did deal with this line of defence, the sheriff ought to have concluded that her reasons were insufficient. The sheriff does not explain why he concluded that the reasons were sufficient.

[25] In relation to ground of appeal 6.3, it was accepted that this only fell to be considered in the event that all other grounds of appeal were unsuccessful and this court took the view that the sheriff had correctly concluded that the adjudicator's decision was enforceable. Fraud is a relevant ground of defence to an action for the enforcement of an adjudication award, if the fraudulent behaviour was not and could not reasonably have been raised during the adjudication and impacts directly upon the subject matter of the adjudicator's decision (*PBS Energo AS v Bester Generacion UK Ltd* [2020] EWCA Civ 404). In the present case, the appellant averred that interim application 14 included sums for landscaping works. It has subsequently transpired that the fill material used in the landscaping works consists of hazardous material. The appellant will require to remove these materials and undertake remedial works. The appellant offers to prove that the respondent dumped this material on the appellant's property and that the respondent can have no genuine or honest belief that the sums claimed for landscaping in interim application 14 were due. The respondent avers that this material was not introduced to the property by them. While it was conceded that this was a factual dispute, the relevant question for the sheriff was whether the appellant had demonstrated that the averments of fraud had a real prospect of success such as to defeat the respondent's motion for summary decree. The appellant had lodged an expert report which provided clear evidence of the existence and scale of the waste. The sheriff appeared to suggest that this issue had been known to the appellant prior to the adjudication. While it was conceded that the correspondence between the parties tended to demonstrate that the appellant had noticed an odour and had asked the respondent to confirm exactly what material had been put in the ground, these were generalised concerns. The scale or nature of the issue was not apparent until the appellant had instructed an expert report.

Submissions for the respondent

[26] On behalf of the respondent, Mr Logan invited the court to adhere to the sheriff's interlocutor and refuse the appeal.

[27] The sheriff had correctly identified that courts will enforce adjudication awards in all but exceptional cases (*Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358).

[28] Referring to the tests for summary decree as set out in Ordinary Cause Rule 17.2 and to the dicta in *Maclay Murray & Spens LLP v Andrew Orr* [2014] CSIH 107, it was submitted that this court should only interfere with the exercise of the sheriff's discretion in the event that there was clearly identifiable error of law. There was none.

[29] The appellant sought to isolate the factual position regarding the resignation of WCP Architects from any context or circumstance; he relied solely upon the fact that there was no Architect/Contract Administrator in post at the time of the service of interim application 14 and chose to ignore that the respondent followed and complied with the terms of the contract payment mechanism. The appellant has offered no authority to support his approach. The sheriff had been correct to consider the wider circumstances and to consider that the respondent's defence to the counterclaim, namely that interim application 14 was valid, did have a prospect of success. It is noteworthy that in *Ben Cleuch Estates Ltd*, the court had emphasised the need to consider all of the circumstances when considering the validity of a break notice and that the opinion of the Lord Ordinary had been delivered after a proof before answer. The respondent's defence to the counterclaim was very likely to succeed.

[30] In relation to ground of appeal 5.2, it was not disputed that the appellant had failed to appoint a replacement Architect/Contract Administrator for a period of over 7 months prior to the service of interim application 14. The appellant seeks to plead his own breach of contract in his favour. Any party seeking to do so will be personally barred. The argument that there was any form of onus upon the respondent to require the appellant to make good his breach of contract of which the respondent was ignorant was absurd.

[31] The sheriff was correct to conclude with reference to *Caledonian Modular Ltd v City Mar City Developments Ltd* [2015] EWHC 1855 that the issue of the validity of interim application 14 was not a “short point”; to consider the merits of the appellant’s crave for declarator, the court would require to consider in detail the terms of the contract, the significance of the appellant’s contractual obligation to appoint a replacement Architect/Contract Administrator, the significance of any implied obligation upon the appellant to notify the respondent of any resignation and replacement of the Architect/Contract Administrator, the state of knowledge of the parties and the issue of personal bar.

[32] In relation to the grounds of appeal directed at the sheriff’s decision to grant the respondent’s motions for summary decree, the appellant’s defence to the principal action had no prospects of success and was bound to fail. The sheriff had carefully analysed the adjudicator’s decision. The sheriff correctly concluded that the adjudicator has noted, considered and given reasons for rejecting the respondent’s material line of defence.

[33] The sheriff’s conclusion regarding whether adequate and intelligible reasons had been provided by the adjudicator was amply justified by the terms of the adjudicator’s decision. The reasonable reader was able to make sense of those reasons.

[34] In relation to the respondent's averments of fraud, the decision in *PBS Energo AS* represented a very cautious and qualified approach to the circumstances in which fraud might be asserted to prevent the enforcement of an adjudicator's award. The circumstances of that case were distinguishable. The question is not whether the appellant was aware of the scale or the nature of the issue prior to adjudication, but rather whether they were aware of the issue at all. Moreover, it was not part of the adjudicator's function to examine or determine the merits or otherwise of the various elements of the sums claimed in interim application 14. Her function had been to decide whether the interim application had been validly served. Fraud had no bearing on the matters before the adjudicator. The decision of the adjudicator could not be said to have been "procured by fraud".

Discussion

[35] Paragraph 17.2 of the Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 ("OCR") insofar as relevant, provides:

"17.2.— Applications for summary decree

- (1) Subject to paragraphs (2) to (4), a party to an action may, at any time after defences have been lodged, apply by motion for summary decree ...
- (2) An application may only be made on the grounds that—
 - (a) an opposing party's case (or any part of it) has no real prospect of success; and
 - (b) there exists no other compelling reason why summary decree should not be granted at that stage.
- ...
- (4) The sheriff may—
 - (a) grant the motion in whole or in part, if satisfied that the conditions in subparagraph (2) are met ..."

[36] Accordingly, the questions which the sheriff required to address in respect of the motions before him were (a) whether he was satisfied that the defence to the principal action and/or the defence to the counterclaim had no real prospect of success; and (b) if so, whether he should exercise his discretion and grant either motion in whole or in part. In doing so, the sheriff requires to analyse all of the material and assess what, fairly, can be taken from it; it is a task which involves the exercise of judgment (*Maclay Murray & Spens LLP* para 17). There was no suggestion that in the event of the sheriff finding that the defence to the principal action or the counterclaim had no real prospect of success, there was any other compelling reason not to grant summary decree.

[37] The question before this court is whether the sheriff erred in law in the exercise of his discretion and in the application of OCR 17.2 to the material placed before him.

The defence to the counterclaim

[38] The Architect/Contract Administrator performs a pivotal role in the operation of the standard form Minor Works Building Contract. He is the professional appointed by the employer to advise on and administer the contract (para 10 of the Guidance Notes to the contract). He is responsible *inter alia* for issuing instructions and directions to the contractor, issuing certificates, granting extensions of time for completion of the building works and for certifying when those works have reached practical completion. He plays a significant role in relation to the mechanism for payments to the contractor. Many of the provisions require him to act as a quasi-independent and impartial decision maker as between the employer and the contractor. The identity of the Architect/Contract Administrator and the manner in which notices are to be served upon him is thus not surprisingly the subject of express

provision in the standard form contract. It is however, somewhat surprising that Article 3 does not require a formal notice of cessation or nomination to be served upon a contractor in the event that the Architect/Contract Administrator ceases to act. Having clarity and precision in relation to this matter is plainly in the interests of both the employer and the contractor.

[39] The respondent asserts, as a defence to the counterclaim, that it has complied with clause 5.4.1 by serving interim application 14 upon the Architect/Contract Administrator. The appellant asserts that this defence has no real prospects of success as at the time of service of interim application no 14, as a matter of fact, there was no Architect/Contract Administrator in post.

[40] We do not regard the authorities referred to by the appellant which deal with the formalities of contractual notices, to be particularly helpful. None of the decisions referred to by the appellant was concerned with the situation facing the parties here, where the notice was served on the party specified in the contract, but that party no longer held office and thus lacked authority to act. The appellant referred us to *Ben Cleuch Estates Ltd* and *Hoe International Limited*. In the former case, notice had been given to the wrong party, in the latter case, notice had been given to the correct party however some of the formalities of the notice provisions had not been complied with. The general principle to be derived from these decisions and which we accept applies in the present case, is that the question of whether a notice has been validly served will be determined by reference to the particular contractual provisions, applying the normal rules of contractual interpretation.

[41] On behalf of the appellant, particular reliance was placed upon paragraph [35] of the Opinion of the court, delivered by Lord Drummond Young in *HOE International*:

“... It is obviously of the utmost importance that any notice should arrive in the hands of someone with authority to act on behalf of the recipient; otherwise the purpose of the notice is frustrated. Provided that the notice arrives in the hands of such a person, however, other requirements may not be important, especially if they are of an essentially formal nature. The fundamental question is perhaps: if a particular formal requirement is not complied with, is the would-be recipient prejudiced, in a practical sense? If there is in fact no prejudice, the court should in our opinion be slow to hold that failure to comply with a formal requirement is fatal.”

[42] However, the comments of the Inner House require to be considered in context. At paragraphs [32] to [44] the court is setting out the underlying principles which govern the validity of contractual notices. At paragraph [35], Lord Drummond Young is drawing a distinction between the importance of service on the correct party and other formal requirements of contractual notice provisions which may serve no useful purpose. The reference to the need for a notice to arrive in the hands of someone with authority to act is, in our judgment, clearly a reference to the need for service upon the correct party as specified in the contractual notice provisions and should not be constructed as extending to the question of whether that party had the authority to act at any particular time.

[43] In the present case, clause 5.4.1 and Article 3 are clear in their terms. Absent a variation of the contract or the nomination of a replacement Architect/Contract Administrator, the party upon whom service of an interim application was required, was WCP. Interim application 14 was served upon WCP.

[44] We do not need to decide, as the appellant invited us to, whether an interim application served upon an Architect/Contract Administrator who had deceased or one served during the 14 day period when a replacement had not yet been appointed by the appellant, would be valid and effective. These are hypothetical situations. When considering a motion for summary decree, the court is concerned with analysing the material before it together with the averments made by the parties. As the sheriff points out

at paragraph [66] of his note, the respondent avers that the appellant had known since July 2019 that WCP had resigned; the appellant failed to appoint a replacement not only within the 14 day period specified in Article 3, but during the 7 month period between July 2019 and the submission by the respondent of interim application 14 in February 2020; the appellant admits in his pleadings that a replacement was not nominated for a “variety of reasons” and was not in post until June 2020; the appellant had not notified the respondent of WCP’s resignation nor sought to vary the contract; and the appellant was not in a position to disprove the respondent’s averment that it was unaware through no fault of its own, that WCP had resigned when interim application 14 was submitted. Having regard to the pivotal role performed by the Architect/Contract Administrator in the contractual arrangements between the parties, the risk of prejudice to the appellant’s position if he failed to nominate a replacement is evident and one to which, on the basis of the material before the sheriff, the appellant alone had exposed himself.

[45] Counsel for the respondent asserted that the appellant’s position on the validity of interim application 14 lead to an absurdity as the appellant could, at his own hand, prevent a valid payment application by refusing to appoint an Architect/Contract Administrator. In retort, Counsel for the appellant submitted that to advance that argument, the respondent must make averments of relevant acts of hindrance or prevention on the part of the appellant designed to frustrate the operation of the payment provisions in the contract. This argument does not appear to have been advanced before the sheriff however as we heard lengthy submissions on this issue, we will address it.

[46] Counsel for the appellant accepted that in failing to nominate a replacement to WCP within 14 days, the appellant was in breach of contract. In the absence of averments of acts of hindrance or prevention on the part of the appellant, he submitted the respondent ought

to have insisted upon the appellant performing his obligation by appointing a replacement to WCP or alternatively to have raised proceedings for damages arising from the appellant's breach of contract. Reliance was placed upon the decision of *Al-Waddan Hotel Ltd*.

[47] The appellant's submission is ill-founded. First, in *Al-Waddan Hotel Ltd*, the opinion of the court did not turn upon the question of whether the application for a decision had been validly served upon an engineer who was no longer acting; the question for the court was whether a decision of the engineer was a binding condition precedent to arbitration.

Secondly, in *Al-Waddan Hotel Ltd*, correspondence had ensued between the hotel owner and contractor after the engineer had intimated to the contractor his refusal to act.

Notwithstanding the contractor's insistence that an engineer be appointed, the hotel owner made no attempt to replace or re-appoint the engineer. In the present case the appellant is not in a position to disprove that the respondent was not aware of WCP's resignation. It is simply illogical to suggest that a party should act to address a state of affairs of which it is unaware. Moreover, for what purpose ought the appellant to have insisted upon a replacement to WCP? The contractual payment mechanism had operated and the interim application had become due for payment. Insisting upon a replacement would have been an entirely pointless exercise by that stage; either the interim application was served upon the correct party in terms of the contract or it was not. Thirdly, we are not persuaded that it is relevant to consider any act of hindrance or prevention; the respondent does not seek to establish that the appellant has, as a matter of fact, sought to thwart the contractual operation of the payment provisions. Even if we are wrong and it is necessary to identify a relevant act of hindrance or prevention designed to thwart the contractual payment mechanism, we note that on the basis of the material before the sheriff, the appellant chose not to appoint a replacement to WCP until June 2020. It is baldly averred that he "did so for

a variety of reasons". From the material before the sheriff it appeared that WCP had ceased to act because of a payment dispute with the appellant. Not unlike the position in *Al-Waddan Hotel Ltd* (where the engineer had ceased to act because the hotel owner had ended the engineer's retainer, a matter the hotel was aware of and had no intention of putting right promptly or at all) in the present case, the existence of the payment dispute which led to WCP's resignation was known to the appellant; from his own averments, he took a conscious decision not to appoint a replacement until almost a year later. We note also that in *Al-Waddan Hotel Ltd*, (at paragraph 71) the court did not require to form a conclusion upon whether the hotel owner's decision had been a deliberate one designed to thwart the operation of the contractual provisions before deciding that the hotel owner could not take advantage of a condition the performance of which has been hindered by himself (paragraph 62). Similarly, we do not find it necessary to do so. For present purposes, in order to assess whether the respondent's defence to the counterclaim on this issue has prospects of success, it is sufficient to observe that the decision not to replace WCP timeously was clearly a conscious and deliberate one. As a matter of general principle, a party is not entitled to take advantage of its own wrong in enforcing contractual obligations. The "wrong" in this case was the respondent's conscious and deliberate decision to take no steps to ensure that the contractual payment mechanism provided for by clause 5.4.1 was operable. Accordingly, we refuse ground of appeal 5.1.

[48] In relation to ground of appeal 5.2, we agree with the sheriff's analysis of the material placed before him. It could not be said that the respondent's plea of personal bar had no real prospects of success. There was an onus upon the appellant to nominate a replacement to WCP if WCP ceased to act. The respondent avers and offers to prove that the appellant facilitated the respondent to attend the site and to perform works which the

respondent would expect to be certified for payment by WCP, after WCP's resignation. The prejudice to the respondent while not expressly averred, is plain.

[49] Accordingly, we are satisfied that on the basis of the pleadings and the material before the sheriff, he was correct to conclude that it could not be said that the defence to the counterclaim had no real prospects of success.

[50] As we have refused grounds of appeal 5.1 and 5.2, it is not necessary for this court to address ground of appeal 5.3. We do however accept that there is some force in the appellant's criticism of the sheriff's decision in this regard. The question of the validity of interim application 14 appears to us to be exactly the type of short, self-contained point envisaged by Coulson J (as he then was) in *Caledonian Modular Ltd* (at paragraphs 11-13) as one which requires no oral evidence and was capable of being disposed of at a hearing of a motion for summary decree. However, the respondent's defence of personal bar does not readily fall into the same category.

The defence to the principal action

[51] The approach taken by the courts to the decisions of adjudicators is well established and well understood. In successive cases the applicable principles have been clearly enumerated (including *Gillies Ramsay Diamond v PJW Enterprises Ltd* 2004 SC 430; *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358; *Atholl Developments (Slackbuie) Ltd, Petitioners* 2011 SCLR 637). Most recently, those principles were succinctly summarised by Lord Woolman in *Hochtief Solutions AG and Others v Maspero Elevatori SpA* [2021] CSIH 19 at paragraph [22]:

- “• the court will only interfere in the plainest of cases
- it is chary of technical defences

- if the adjudicator has answered the right questions, his decision will be binding, even if he is wrong in fact or law
- The court will, however, intervene if the adjudicator: (a) was not validly appointed, (b) acted outside his jurisdiction, (c) did not comply with the rules of natural justice, or (d) provided inadequate reasoning.”

[52] Ground of appeal 6.1 is advanced with regard to part (c) of the final principle referred to by Lord Woolman. The appellant submitted that the adjudicator had not dealt with a material line of defence, namely that WCP having resigned, interim application 14 had not been validly served. We have little difficulty in concluding that this ground of appeal is without merit.

[53] If an adjudicator fails to deal with a material line of defence that will render her decision unenforceable, either on the grounds that she has failed to exhaust her jurisdiction or has failed to comply with the rules of natural justice (*Gillies Ramsay Diamond* per Lord Justice Clerk Gill at paragraph 25; *Pilon Ltd v Breyer Group plc* [2010] EWHC 837, per Coulson J at paragraph 22; *NKT Cables A/S v SP Power Systems Ltd* [2017] CSOH 38 per Lady Wolffe at paragraphs 113-114 and *DC Community Partnerships Ltd v Renfrewshire Council* [2017] CSOH 143 per Lord Docherty at paragraph 24).

[54] The sheriff was correct to conclude that the adjudicator had neither failed to exhaust her jurisdiction nor breached the rules of natural justice. In particular, at paragraphs 6.01.1 to 6.01.23 and 7.02.1 to 7.02.33 of her decision, the adjudicator provided a detailed summary of the arguments presented to her in relation to the appellant’s line of defence. She set out fully the relevant terms of the contract (paragraphs 5.01.1 to 5.01.14). Having done so, she correctly identified the issues referred to her (paragraph 7.01.1 of her decision). As the sheriff notes, she clearly understood the appellant’s position that WCP having resigned,

there was, as a matter of fact, no Architect/Contractor Administrator in post (paragraph 107 of the sheriff's note and paragraphs 6.01.07 and 7.02.19 of the adjudicator's decision). The battle lines on that matter had been very clearly drawn between the parties in their submissions to the adjudicator.

[55] At paragraph [113] of his note, the sheriff describes the adjudicator's decision on the question of whether interim application 14 had been validly served notwithstanding the resignation of WCP as "implicit in her reasoning". The appellant criticised that as "simply insufficient". The present case is not in our judgment one in which there are "pointers in both directions" as to whether a material line of defence has been considered (*Field Systems Designs Ltd* per Lord Clark at paragraph 36) nor one in which there is no explicit reference to a line of defence beyond a general statement that the adjudicator had "considered all of the submissions" (*DC Community Partnerships Ltd*). In our judgment, on a proper reading of the adjudicator's decision, it is clear that she deals directly with the defence advanced by the appellant. At paragraph 8.01.1, the adjudicator poses the question: "Was the [respondent's] payment application 14 validly served?" At paragraph 8.01.2 she answers this question in categorical terms:

"I find that the [respondent's] payment application 14 was validly served to WCP Architects as **Architect/Contract Administrator** by email dated 21 February 2020." (emphasis added)

At paragraph 8.01.4 she notes that 13 prior interim applications were issued to WCP and states:

"Therefore, it follows that payment application 14 ought to be issued to WCP Architects as the Architect/Contract Administrator, unless the [respondent] had been formally alerted to the fact that the current Architect/Contract Administrator (i.e. WCP Architects) had terminated its appointment, which the [appellant] had not done."

Similarly at paragraph 7.02.38 she states:

“From the submissions provided, I find that all payment applications (including payment application 14) were issued to WCP Architects **in its role as Architect/Contract Administrator, as the [respondent] was required to do under the Building Contract.**” (emphasis added).

[56] Her findings must be read in context. They follow a detailed narration of the terms of the contract. She refers repeatedly to the resignation of WCP. She refers to the “duty” upon the appellant to appoint a new Architect/Contract Administrator (paragraph 7.02.34). She notes the failure of the appellant to issue a formal notice to the respondent confirming that WCP were no longer appointed (paragraph 7.02.35). It is manifestly clear that she has concluded that notwithstanding its resignation, WCP remained the Architect/Contract Administrator in terms of the contract and on that basis, interim application 14 was validly served. The argument that the adjudicator has failed to deal with a material line of defence is unsound and untenable.

[57] On behalf of the appellant, it was submitted that the adjudicator’s discussion on this line of defence started and finished with an analysis of the respondent’s awareness of WCP’s resignation. While we do not accept that this description accurately reflects the adjudicator’s discussions, it is not surprising that the adjudicator had devoted a great deal of her discussion to this issue. Before the adjudicator, the appellant had maintained that the respondents were aware of WCP’s resignation and that payment application 14 had been made in bad faith. Voluminous correspondence between the parties was referred to and required to be considered by the adjudicator. That argument was not however advanced as a defence to the present proceedings.

[58] Similarly, we are not persuaded that there is any substance in ground of appeal 6.2. At paragraph [114] of his note, the sheriff correctly identified the test to be applied. It is only in the plainest of cases that the court will decline to enforce an otherwise valid adjudicator’s

decision because of the inadequacy of the reasons given; the appellant would require to show that the reasons were absent or unintelligible or that the reasons were so incoherent that it is impossible for the reasonable reader to understand them (*Carillion Construction Ltd*). Adjudicator's decisions enjoy a presumption of regularity (*SW Global Resourcing Ltd v Morris & Spottiswood Ltd* [2012] CSOH 200).

[59] Contrary to the position advanced on behalf of the appellant, we do not regard it appropriate to consider the adequacy of the reasons by examining Part 8 of the adjudicator's decision in isolation. Part 8 is headed "Decision With Reasons". It is a summary of the adjudicator's findings which are informed by her discussion of the information presented to her and her conclusions in relation to the each of the two issues she required to address, as set out in Parts 6 and 7 of her decision. On a fair reading of the decision as a whole, the reasonable reader can be left in no doubt that the adjudicator found that in the absence of any notice of WCP's resignation, payment application 14 fell to be issued to WCP as the Architect/Contract Administrator in terms of the contract. This is not, in our view a case where the rejection of a defence was implicit in, or a corollary of, the reasons which the adjudicator has provided (*cf SW Global Resourcing Ltd*). Much of what we have said in relation to ground of appeal 6.1 applies equally to ground of appeal 6.2.

[60] Turning to ground of appeal 6.3, the appellant sought to rely upon the decision of the Court of Appeal in *PBS Energo AS*. In an appropriate case, the enforcement of an adjudicator's decision can be resisted on the basis that it was "procured by fraud". As observed by Pepperall J at first instance in *PBS Energo AS v* (at paragraph 21), "the court will not allow its procedures to be used as a vehicle to facilitate fraud". However, the court must also guard against allegations of fraud which are deployed in an attempt to circumvent the temporary finality of an adjudication.

[61] An allegation of fraud which is asserted to prevent enforcement of a decision must be supported by clear and unambiguous evidence (*SG South Ltd v King's Head Cirencester LLP*, [2010] BLR 47, per Akenhead J at paragraph 20). Moreover, where allegations of fraud should have been made in the adjudication, those allegations will not be permitted to prevent the enforcement of the adjudicator's decision (*PSB Energo AS*). The sheriff correctly identified these legal principles.

[62] In the present case, the appellant avers that payment application 14 was fraudulent in its content. It sought payment in respect of groundworks. The appellant avers that these works had not been performed in accordance with the contract. He alleges that the respondent used the appellant's garden "for the illegal dumping of waste material". This argument was not advanced before the adjudicator. In these proceedings, a report from a consultant geotechnical engineer dated 20 August 2020 together with a cost schedule of the likely costs of remedial works has been lodged. It is averred that the appellant only became aware in July 2020, after receipt of the adjudicator's decision, that his garden may contain contaminated material. In its averments, the respondent asserts that the appellant raised this issue over a year prior to the adjudication and did not investigate the issue then.

[63] Correspondence lodged by the respondent, dated January and July 2019, appears to demonstrate discussions which took place in relation to sewage smells at the property and a request by the appellant for details of what material had been put in the grounds of the property.

[64] The parties are in dispute in relation to when the appellant became aware of the material in his grounds and who had been responsible for placing it there. The material placed before the sheriff could not properly be described as "clear and unambiguous". The sheriff was correct to conclude that there was a factual dispute between the parties as to the

circumstances in which any contamination on the site had occurred (paragraph 120 of the sheriff's note). We were informed that the appellant had referred the matter to a subsequent adjudication and had failed to satisfy the adjudicator that the respondent was responsible for the presence of contaminants on the site, in terms of a decision dated 18 December 2020.

[65] The sheriff was also correct to conclude that the correspondence indicated that the general subject matter which had given rise to an allegation of fraud may have been known to the appellant for a considerable period prior to the adjudication (paragraph 119 of the sheriff's note). Before us, it was submitted on behalf of the appellant that the correspondence did not support the inference that the appellant was aware of the scale and nature of the contaminated waste. The appellant had 'generalised concerns' only at that stage. However, it is accepted by the appellant that those generalised concerns are what led to the instruction of an expert in July 2020. During the hearing before us, we received no adequate explanation as to why such an instruction could not have been issued prior to, or even during, the adjudication nor why the allegation of fraud could not properly have been placed before the adjudicator for determination.

[66] The various defences asserted by the appellant in his defence to the principal action and in the submissions before us represent, in our judgment, the very type of contrived or technical defences which the Court of Appeal in *Carillion Construction Ltd* has cautioned the courts to examine with a degree of scepticism. The sheriff was correct to so examine the defences and to conclude that they had no real prospects of success. We are not persuaded that in granting the respondent's motion for summary decree the sheriff either erred in law or was plainly wrong.

Decision

[67] For the reasons stated, we refuse the appeal and adhere to the commercial sheriff's interlocutor of 5 October 2020. Parties were agreed that expenses should follow success and that sanction be granted for the employment of junior counsel. We shall award the expenses of the appeal in favour of the respondent with sanction for the employment of junior counsel.

[68] We were invited to sist the action pending the conclusion of a further adjudication between the parties. We will sist the action until the outcome of that adjudication process.