



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 42  
CA45/20

Lord President  
Lord Malcolm  
Lord Woolman

OPINION OF LORD CARLOWAY, THE LORD PRESIDENT

in the reclaiming motion

in the cause

D McLAUGHLIN & SONS LTD

Pursuers and Respondents

against

EAST AYRSHIRE COUNCIL

Defenders and Reclaimers

**Pursuers and Respondents: Howie KC; DAC Beachcroft Scotland LLP  
Defenders and Reclaimers: DM Thomson KC; Shepherd & Wedderburn LLP**

16 September 2022

**Introduction**

[1] The terms of the contract between the parties incorporated the Standard Building Contract With Quantities for use in Scotland (SBC/Q/Scot (2011 Edition)). At the heart of this reclaiming motion (appeal) is a question of whether a Final Certificate ought to be treated as conclusive of the sums due to a contractor in an adjudication about an interim payment. That, in turn, raises whether an Adjudicator's decision, that the Final Certificate was not conclusive, can be reversed in these proceedings.

### **Payment under the contract**

[2] The contract provided (clause 4.9) for monthly interim payments. This process involved the defenders' architect issuing Interim Certificates which stated the sum which he considered due (4.10.1). If no Interim Certificate were issued, the pursuers could issue an Interim Payment Notice stating the sum which they considered due (4.11.2.2). That sum would become payable (4.12.3) unless a Pay Less Notice were timeously issued by the defenders (4.12.3, 4.12.5). The amount in the Interim Certificate was a gross valuation of the works less the amounts *payable* under previous Interim Certificates and any sums *paid* in respect of an Interim Payment Notices (4.9.2).

[3] The final payment (4.15) was due when the Final Certificate was issued by the architect (4.15.3). This Certificate stated the Contract Sum; that is the sums due under the contract Bills and any variations (4.15.2). It also stated the total of the sums *due* in Interim Certificates and any amounts *paid* in respect of any Interim Payment Notices. The final payment was the difference between those two amounts. It was to be shown on the Final Certificate as a balance due to one or other of the parties (4.15.2). It was issued "without affecting the rights of the [pursuers] in respect of any interim payment not paid in full by the [defenders]" (*ibid*). "Interim payment" was not defined, but the Interim Payment Notice regime is included in clause 4.12.1 under the heading "Interim-payments-final date and amount".

[4] The Final Certificate is, in any adjudication or court proceedings arising out of the contract, "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 ...” (1.9.1.2). However, if proceedings are commenced within 60 days of the Certificate, it is conclusive “save only in respect of the matters to which those proceedings relate”

(1.9.3). Where an adjudication has occurred and a party wishes to challenge the adjudication decision, legal proceedings must be initiated within 28 days (1.9.4).

## **Facts**

[5] On 10 August 2017, there having been no Interim Certificate issued by the defenders’ architect, the pursuers issued an Interim Payment Notice for £949,556.50; being the sum which they considered due as at 27 July 2017. This represented a gross valuation of £3,802,614.87 less a retention (£95,065.37) and previous payments (£2,757,993.00). The defenders did not issue a Pay Less Notice. The sum in the Interim Payment Notice (£949,556.50) thus fell due to be paid. Between then and July 2019, the defenders made certain payments to the pursuers, but they did not pay the full amount which was due under this Interim Payment Notice.

[6] On 17 July 2019 a Final Certificate was issued. This specified the Contract Sum (as adjusted) at £3,343,223.82. It stated the “total amount of all previously certified or authorised to the Contractor” (*sic*) as £3,341,794.83. The amount due as a balance to the pursuers was £1,428.99. The defenders paid that sum. The pursuers disputed the Final Certificate. In particular, on 12 September 2019, within the 60 days period which was required for a timeous challenge, they served an Initial Writ on the defenders, in which they contend that the Contract Sum in the Final Certificate does not reflect the work done, including variations. This first action, which has been remitted to the Court of Session, is still pending. In it, the pursuers seek £368,018.98. This is calculated on the basis of a

Contract Sum of £3,711,242.80 (adjusted down from the gross valuation in the Interim Payment Notice) less the sums which the defenders have paid (£3,343,223.82).

[7] On 23 March 2020, the pursuers served a notice of referral to adjudication. They sought a determination that they were entitled to £438,317.68, being the balance which was due under the 2017 Interim Payment Notice (£949,556.50, less sums paid of £511,238.82). This figure was subsequently adjusted to £427,578.75, to which interest required to be applied. There was no challenge to the jurisdiction of the Adjudicator (*Adjudicator's 2<sup>nd</sup> Decision (corrected) on an Interim Payment Entitlement* at para 9). The defenders' response to the claim was that, first, the Interim Payment Notice was invalid because, *inter alia*, it did not state the correct "relevant due date" (4.11.2.2). It should have been 28 and not 27 June. Secondly, the Final Certificate was conclusive evidence of "the sum of [the pursuers'] entitlement in respect of all payments under the contract" (*Adjudicator's 2<sup>nd</sup> Adjudication Decision* at para 24). The sum specified in the Final Certificate had been paid and therefore the adjudicator had to find that nothing further was due. The pursuers countered that, until the effect of the Final Certificate had been determined in the first court action and the Contract Sum duly adjusted, they were entitled to enforce their existing contractual right to payment under the unchallenged Interim Payment Notice.

[8] The Adjudicator noted (para 31) that the adjudication "specifically excluded" any dispute about the true value of the work done and claimed under the Interim Payment Notice; a matter which would, if necessary, be the subject of another process. On 6 (corrected on 11) May 2020, the Adjudicator found in favour of the pursuers. He noted that the parties had agreed a "site start date" of 30 May 2016, but the "march in" meeting had happened on the following day because of a public holiday. On this basis, the relevant due

date for the monthly interim payment had been correctly stated on the Interim Payment Notice as 27 July 2017. This was based on the contractual provision whereby the first date for payment was to be four weeks after the works were to commence on site (para 44).

[9] On the conclusivity of the Final Certificate, the Adjudicator reasoned (para 60) as follows:

“The disputed matter in the Final Certificate concerns the true value of the Contract Sum ... whereas the dispute in this adjudication concerns a legal technicality (a so-called ‘smash and grab’) in respect of [the] interim payment ... The *Marc Gilbard* case [*Marc Gilbard’s 2009 Settlement Trustees v OD Developments and Projects* [2015] EWHC 70 (TCC)] is distinguished from the present circumstances on the basis that the adjudication there concerned the same matter that was disputed in the Final Certificate, which is different to that in the present matter. I accept the purposive intent of clause 1.9 is to limit disputes arising under the contract to those relating to matter[s] to which, in the present case, court proceedings have commenced. The court proceedings relate to the adjustment of the Contract Sum and, in particular, to a sum allegedly due in respect of an Interim Payment Notice, dated 21 May 2019, and [a related] Interim certificate ... I take this to mean the adjustment of the Contract Sum is not yet concluded and evidenced by the Final Certificate. Therefore, I find the Final Certificate is not ‘conclusive evidence that any necessary effect has been given to all terms of [the] 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’, per clause 1.9.1.2.”

The Adjudicator found the defenders liable to pay to the pursuers £427,578.75 plus VAT (£513,094.50) with interest of £78,361.18 to the date of his decision and continuing at the rate of £61.46 per day.

### **The principal action**

[10] The defenders did not pay the sum found due by the Adjudicator. On 8 June 2020, the pursuers raised this, second, action seeking enforcement of the Adjudicator’s award (ie for payment). On 17 July 2020, the defenders counterclaimed. The counterclaim was the first challenge by the defenders to the Adjudicator’s decision. It was not raised within

28 days of the award (1.9.4), but 72 days after the uncorrected decision of 6 May. In the counterclaim, the defenders sought declarator that: (1) the Final Certificate was conclusive evidence in the adjudication, because the adjudication had not been commenced within 60 days of the Certificate's issue; and (2) the Interim Payment Notice was invalid. The defenders principal contention remained that, since they had paid the balance due, according to the Final Certificate, no award ought to have been made by the Adjudicator.

[11] In his decision on the enforcement of the Adjudicator's decision (2021 SLT 1427), the commercial judge referred (at para [24]) to the binding nature of an adjudication until such time as a final decision is reached (Housing Grants, Construction and Regeneration Act 1996 s 108(3)). The policy behind the adjudication regime was "pay now, argue later" (*Michael J Lonsdale (Electrical) v Bresco Electrical Services* [2020] Bus LR 1140 at para 12). The scope of available defences in England and Wales, in an application for enforcement, was restricted to grounds of admitted error or the timing, categorisation or description of the payment notice (*Hutton Construction v Wilson Properties (London)* [2018] 1 All ER (Comm) 524). There was a limited exception where the court could make a final decision on the merits of a dispute, because the point was short and self-contained, at the same time as it was considering enforcement. An example would be if an Adjudicator's interpretation of a contractual provision was "beyond any rational justification" (*Hutton Construction* at para 18).

[12] The commercial judge held that this test was not met. The defenders had been allowed, unopposed, to lodge a counterclaim to the enforcement proceedings, based upon Final Certificate conclusivity. The use of a counterclaim to stymie enforcement was to be discouraged. The counterclaim did not seek to resolve the dispute between the parties on

the correctness of the Final Certificate. Rather, the Final Certificate argument in the counterclaim was presented as a challenge to the Adjudicator's decision. The correctness or otherwise of the Final Certificate would depend on the resolution of the first court action. On this basis, decree for enforcement of the award was granted on 30 December 2020. The defenders paid the sum found due by the Adjudicator.

### **The Counterclaim**

[13] The commercial judge heard a subsequent debate on the relevancy of the counterclaim ([2021] CSOH 122). He revisited the effect of Interim Certificates; holding that sequential certificates were re-valuations of the works, each in turn superseding the others (*Scottish Equitable v Miller Construction* 2002 SCLR 10 at para [29]). These were not conclusive. If there had been an over-valuation, that could be remedied by the issue of later Interim Certificates or the Final Certificate; the latter being subject to any challenge to its correctness. The judge continued (at para [21]):

“...if the sum specified in an Interim Payment Notice which is held to be valid is not paid, subsequent interim payments [? certificates] ...will not absolve the party who was due to pay from the contractual obligation to make payment in terms of the Interim Payment Notice ... If the sum is paid, then subsequent Interim Certificates can take that payment into account and thus seek to put interim payments back in order. Alternatively, the party who has made payment ... is free to commence adjudication proceedings (or arbitration or a legal action) to dispute that the sum paid was the true value of the works ...”.

The counterclaim was a free standing claim for the recovery of an alleged over payment and not a challenge to the Adjudicator's decision. The fundamental question was whether the defenders were entitled, by way of a counterclaim, to pursue the Final Certificate point, pending the outcome of the first court action.

[14] The commercial judge considered the key issue was whether *Marc Gilbard's 2009 Settlement Trustees v OD Developments and Projects* was correct. He determined that it was; ie that the Final Certificate (1.9.3) would be conclusive "only in respect of the particular matters and those proceedings" (para [28]). This meant, in the context of this case, that the Final Certificate was not conclusive only in the first (timeous) action. It was conclusive in any later (non-timeous) process (ie the adjudication). If, as here, there was an Adjudicator's award after the issue of the Final Certificate, and that Final Certificate were challenged by adjudication within 60 days, legal proceedings could be raised within a further 28 days and the Final Certificate would not be conclusive in those proceedings.

[15] However, as "a twist in the tale", in terms of *Jerram Falkus Construction v Fenice Investments No 4* [2011] 138 Con LR 21, the Adjudicator's determination was final (ie until a final determination of the merits of the dispute) if it were not challenged within 28 days (1.9.4). The challenge to it in the counterclaim failed on that basis (para [33]). It also failed because (para [36]), during the period when the Final Certificate was under challenge, the defenders should not be permitted to found upon it on an *interim* basis.

[16] The validity of the Interim Payment Notice had been determined in the adjudication. The 28 day limit applied to it too. Otherwise, the commercial judge considered that a proof would have been required to determine the correct relevant due date relative to the start of the works (para [40]). If the counterclaim had resulted in a final determination of the dispute in the defenders' favour, the judge would have allowed them to recover the interest which they had paid to the pursuers.

**Decision**

[17] The contract envisages a system of monthly interim payments up until the final payment. Obviously, were the contract terms to have been regularly performed, the former should precede the latter. Each Interim Certificate states that a sum is payable as at the “due date” (4.10.1). It does so by specifying the gross valuation of the work and deducting from it, *inter alia*, sums *due* under earlier Interim Certificates and sums *paid* under an Interim Payment Notice (4.9.2.4). Each Certificate involves a revaluation of the gross amount which the defenders’ architect considers to be due under the contract from time to time. In that limited sense, a later Interim Certificate will supersede an earlier one. However, the sum certified as due for payment in one Interim Certificate does not supersede that in an earlier one; each Interim Certificate certifying, as due for payment, a different amount. On this basis, some of the *dicta* in *Scottish Equitable v Miller Construction* 2002 SCLR 10 (Lord Prosser, delivering the opinion of the court, at para [29]) may not be entirely accurate. In order to secure payment, a contractor would require to rely on each sequential certified sum; not just that in the most up-to-date Interim Certificate.

[18] Similarly, the Final Certificate does not certify for payment all the sums due under the contract. It states the Contract Sum and then the amounts *due* in the earlier Interim Certificates and any sums *paid* under an Interim Payment Notice (4.15.2). The sum certified as due is a balance due to or by the contractor; being the Contract Sum less the Interim Certificate figures due and the Interim Payment Notice sums actually paid. The Final Certificate does not supersede the Interim Certificates, other than in respect of the Contract Sum, as valued at the end of the contract. The Interim Certificates remain both extant and important. Should a contractor be seeking payment, the Final Certificate will only provide

an entitlement to a balance. Certificates of the *interim* amounts provide the necessary vouching for what are likely to be more substantial sums.

[19] If the terms of the contract were to be followed as intended, all interim payments should be made before the Final Certificate determines, in the absence of a valid challenge, the final payment. The Final Certificate provides an end point to any disputes in relation to the final payment. It does not invalidate the interim payment regime whereby sums, which are already certified to be due or appear due in an unchallenged Interim Payment Notice, are payable even if enforcement of such payments may ultimately constitute a Pyrrhic victory. Put another way, the conclusivity of the Contract Sum in a challenged Final Certificate has no bearing on what should have been paid in the *interim*. In due course, the first action will determine the correctness of the Final Certificate. Depending upon how the pleadings are developed, it may result in the pursuers requiring to repay the defenders some of what was paid after the adjudication, or it may not.

[20] The ratio of *Marc Gilbard's 2009 Settlement Trustees v OD Developments and Projects* [2015] EWHC 70 (TCC) is that, when a Final Certificate has been timeously challenged in one process (eg court action), it cannot be challenged in a later non-timeous process (eg adjudication), simply because the latter would be out of time. The "foot in the door" approach, whereby the earlier challenge would be sufficient to permit later challenges, was contrary to the conclusivity intended in the contract. There is no difficulty in accepting this ratio as correct. If the adjudication in this case had been a challenge to the Final Certificate, it ought not to have been entertained by the Adjudicator as it was raised too late. However, the circumstances here are different. The enforcement of the Adjudicator's award, and the award itself, do not challenge the conclusivity of the Contract Sum in the Final Certificate.

The latter's validity nevertheless remains, and ought to remain, dependent on the outcome of the first court action. Until it is resolved (and following *Marc Gilbard*, it ought only to be resolved in the action), its conclusivity remains *in limbo*.

[21] Clause 4.15.2 makes it clear that the sum shown on the Final Certificate does not affect the pursuers' right to receive any interim payment which is due under the contract. That is not confined to sums which are certified as due under an Interim Certificate. It must also apply to sums payable *ad interim* following an Interim Payment Notice, which has not been challenged by a Pay Less Notice. As the wording of the Notice demonstrates, in terms of the clause, an interim payment must include a sum in an *Interim Payment* Notice.

[22] If this analysis is incorrect, and the statement of balance in a Final Certificate supersedes the Interim Payment Notice regime, the Adjudication based on the latter must have been incompetent; it could have served no useful purpose. The problem is that the parties were content that the adjudication should proceed on the basis of the general principle that parties are free to adjudicate "at any time" (Housing Grants, Construction and Regeneration Act s 108(2)(a)). Having done so, they must be taken as bound by the Adjudicator's decision, except in so far as it is challengeable under the contract. The terms of clause 1.9.4 are straightforward and clear. Any decision, which is issued by an Adjudicator after the date of issue of the Final Certificate, can only be challenged within 28 days. In this case it was not. The effect of that is that the defenders are bound by it. They must pay the sum awarded by the Adjudicator, which they have done. They must await the outcome of the first action on the correctness of the Final Certificate. That approach is the only one which is consistent with the adjudication regime. The defenders must "pay now,

argue later" (*Michael J Lonsdale (Electrical) v Bresco Electrical Services* [2020] Bus LR 1140, Lord Briggs at para 12).

[23] Similar considerations apply in relation to the defenders' subsidiary argument that the Interim Payment Notice was invalid because it sought payment of the amount due on 28 June 2017, when the correct "relevant due date" was one day earlier. The commercial judge determined (para [40]) that, if this was in error, there would have to be a proof on the issue of when the works had commenced; clause 4.11.2.2 requiring the notice to specify a date which is the same in a particular month as that four weeks after that commencement. This is a matter which will not arise, once the first action is resolved. It is one upon which the court should reserve its view.

[24] For these reasons, the reclaiming motion should be refused. The pursuers accepted that their grounds in the cross appeal would only arise if the reclaiming motion were to be allowed. They do not therefore require to be considered. The court should adhere to the commercial judge's interlocutor of 7 December 2021. The focus should now be upon expediting the progress of the first action to enable this dispute to be brought to a conclusion.



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 42  
CA45/20

Lord President  
Lord Malcolm  
Lord Woolman

OPINION of LORD MALCOLM

in the cause

D McLAUGHLIN & SONS LTD

Pursuers and Respondents

against

EAST AYRSHIRE COUNCIL

Defenders and Reclaimers

**Pursuers and Respondents: Howie KC; DAC Beachcroft Scotland LLP**  
**Defenders and Reclaimers: DM Thomson KC; Shepherd & Wedderburn LLP**

16 September 2022

**Introduction**

[25] This reclaiming motion (appeal) concerns a matter of importance to the construction industry, namely when and by what means is it possible to challenge the conclusive effect of a final certificate? The dispute turns on the proper interpretation of clause 1.9 of the Joint Contracts Tribunal Standard Building Contract With Quantities for use in Scotland (2011) the wording of which is common to all 2011 versions of the JCT standard building contracts. (The provisions of clause 1.9 are set out in an appendix to this opinion.) There is a related issue as to the interplay between interim and final payments.

[26] The commentary on *Trustees of the Marc Gilbard 2009 Settlement Trust v OD*

*Developments and Projects Ltd* in [2015] BLR 213 at 214 states:

“In the JCT suite of contracts, the issue of the Final Certificate expressly is deemed to be final and conclusive evidence that every financial and time adjustment has been correctly done and that in effect there can be no other claims by the contractor. This has been a feature of the standard form since the 1930s and it might be thought to be here to stay. The only way to challenge this conclusive effect is either by way of a fraud challenge or if proceedings are started within 28 days of the issue of the Certificate” (in the present contract the period is 60 days).

In the decision itself at paragraph 1 of his judgment Coulson J (as he then was) observed that all standard form building contracts seek to ensure that after completion outstanding disputes can be swiftly and finally resolved. Hence, in the absence of a timeous challenge, the final certificate becomes conclusive evidence in respect of a wide range of matters, including all remaining financial disputes. At para 9 he cited authority that conclusive evidence clauses are designed to draw a line on enquiries into outstandings on running accounts and to provide clarity as to the parties’ obligations once a project is completed.

[27] In *Jerram Falkus Construction Ltd v Fenice Investments Inc (No. 4)* [2011] BLR 644 at para 30 the same judge commented that conclusivity provisions allow for challenges to the final account but also ensure that that this must be done within a restricted time period to provide at least a measure of finality.

[28] Facing a similar situation to the present case, in *Marc Gilbard’s Trustees* Coulson J held that the terms of clause 1.9.3, which provide for an exception to the conclusive nature of the final certificate, do not allow the certificate to be challenged in late proceedings. It matters not that there is an ongoing timeous challenge, and this even where the two proceedings raise exactly the same matters. (He recognised that where applicable, and subject to a strict time limit, clause 1.9.4 provides an exception to this rule.)

**The circumstances of the present case**

[29] In March 2016 East Ayrshire Council (the employer) and D McLaughlin & Sons Limited (the contractor) entered into a contract for an extension to Hurlford Primary School at a price of slightly over £2m. Shortly after practical completion, on 10 August 2017 a contractor's interim payment notice to 27 July 2017 was issued for just under £950,000. It stated works done to a value of approximately £3.8m. Reference was made to the retention and previous payments of almost £2.76m. The employer did not issue a pay less notice. The sum claimed in the contractor's notice was neither paid nor enforced.

[30] Subsequently payments to an aggregate amount of £511,238.82 were made. On 17 July 2019 the final certificate was issued adjusting the contract sum to £3,343,223.82. This included a valuation of the works covered by the interim payment notice. The total amount previously certified or authorised to the contractor was stated at £3,341,794.83. The amount owing was the small balance between the two sums, and subsequently it was paid to the contractor.

[31] The contractor challenged the final certificate in court proceedings raised within the 60 day period allowed for in clause 1.9, and this on the basis that the contract sum should include the full amount claimed in the interim payment notice. Separately, and well beyond the said period, in March 2020 the contractor raised an adjudication relying on the employer's failure to pay the sum stated in the interim payment notice. The adjudicator upheld the claim and made an award of £427,578.75 plus interest.

[32] The employer refused to pay. The contractor raised the present proceedings seeking enforcement of the award. The employer counterclaimed for declarators that the interim payment notice was invalid and that in any event the final certificate was conclusive

evidence as to the contract sum payable to the contractor. After a debate the commercial judge enforced the award ([2020] CSOH 109; 2021 SLT 1427). The employer paid the award and amended its counterclaim to seek repayment from the contractor.

[33] After another debate the commercial judge essentially upheld the arguments presented by the employer in support of the counterclaim, including those based on the decision in *Marc Gilbard's Trustees*. However when pondering his judgment he noticed clause 1.9.4 of the standard form contract and sought supplementary submissions thereon from the parties. In the event, and relying on its terms, he dismissed the counterclaim because it had not been raised within 28 days of the adjudicator's award ([2021] CSOH 122). The employer asks this court to reverse that decision and grant decree in terms of the counterclaim. The contractor cross appeals in respect of the rejection of some of its submissions.

### **The payment regime**

[34] At this stage it is worth noticing the relevant payment provisions in part 4 of the contract (set out in the appendix). They can be summarised as follows. Interim payments are due monthly on the dates specified in the contract particulars until expiry of the rectification period. Broadly an interim payment is based on the gross valuation of the works executed so far, less the aggregate of the retention, sums stated in previous interim certificates, and any monies paid in response to an interim payment notice issued since the last interim certificate.

[35] Following on valuations made by the quantity surveyor the monthly amount due will be stated in interim certificates issued by the architect/contract administrator not later

than 5 days after the due date. If no interim certificate is forthcoming the contractor can give an interim payment notice to the quantity surveyor stating the sum considered to be due and how it is calculated. The employer can issue a pay less notice in respect of either an interim certificate or an interim payment notice. Failing such, the sum in the interim certificate, or the interim payment notice as the case may be, is payable.

[36] With regard to the contractor's interim payment notice issued in August 2017 there was no pay less notice thus the sum stated was more or less immediately payable. If that sum had been paid it would have been taken into account in subsequent certificates, including the final certificate. It was neither paid nor enforced at the time. The works involved in the interim payment notice were included in the final certificate. The contractor's valuation of those works is considerably greater than that reflected in the final certificate.

[37] As per clause 4.15 a final certificate specifies two sums. The first is the adjusted contract sum; the second is the amount stated as due in interim certificates (not interim payment notices) plus any advance payments made and any sums paid in response to an interim payment notice issued since the last interim certificate. If the former is greater than the latter the contractor will be entitled to the difference; if *vice versa* a sum is due to the employer. The passage in parenthesis in clause 4.15.2 referring to "any interim payment" recognises that the employer might not have paid the full sum due under the interim certificates, hence it is provided that the contractor's right to such is preserved. Thus by way of illustration; if on the face of it a final certificate shows a balance due to the employer of £30,000 but £50,00 is unpaid in respect of interim certified sums, the practical outcome is a debt of £20,000 owed to the contractor. To insist on payment from the employer is consistent

with the terms of the final certificate. It does not challenge the adjusted contract sum nor raise issues as to the conclusive nature of the final certificate.

[38] It is asserted that the passage in brackets in clause 4.15.2 also preserves the unpaid balance of the contractor's notice of August 2017 as a debt which can be enforced without involving any challenge to the conclusive nature of the final certificate and thus unaffected by the time limits in clause 1.9. In construing clause 4.15.2 it is important that it balances against the adjusted contract sum only the total sum due as stated in interim certificates plus any advance payments and any sums paid in response to an interim payment notice issued since the latest interim certificate. In these circumstances it is natural to make it clear that debts due under interim certificates are preserved, but having regard to the structure of the final certificate it would be odd to include a reference to any debts arising from contractors' notices. A contractor's interim valuation is superseded, sometimes said corrected, by those in subsequent interim certificates and that in the final certificate. A contractor's insistence on a debt due under an interim payment notice jars with the terms of the final certificate. One is then in the realms of balancing finality with allowing scope for the resolution of continuing disputes. This is the territory covered by the conclusive evidence provisions and the time limits in clause 1.9. If the debt created by the absence of a pay less notice is pursued in order to obtain more than is due as per the final account, the conclusive status of the final certificate is being challenged, in which case clause 1.9 comes into play. (There is further discussion of this issue below.) On the specific issue concerning the passage in brackets in clause 4.15.2, having regard to the context and the structure of the relevant provisions, "any interim payment" refers to those mandated by an interim certificate, not to debts created by a failure to serve a pay less notice in response to a contractor's interim payment notice.

**The contractor's timeous challenge**

[39] A final certificate can be challenged if this is done in terms of clause 1.9. As mentioned earlier, a court action was raised by the contractor timeously, that is within 60 days from the date of the final certificate. It seeks declarator that the final certificate should have valued the contract works at £3,711,242.80 and also payment from the employer of £441,622.78. It narrates that in the first half of 2019 the parties tried to reach agreement as to the true value of the adjusted contract sum. In May 2019 the contractor's submission was assessed by the quantity surveyor. This resulted in an interim payment certificate dated 17 June 2019, the validity of which is challenged on grounds of timing. In any event the sum certified was replicated in the final certificate issued the next month, the terms of which have already been stated. The contractor avers that the certified adjusted contract sum undervalues both variations in the contract works and the measured works. The action is defended and remains unresolved.

**The adjudication**

[40] In March 2020 the contractor gave notice of the intention to refer the matter of the unpaid interim payment notice issued in August 2017 to adjudication. This was several months after the expiry of the 60 day period set down in clause 1.9. The claim was for the adjusted balance due thereunder of £427,578.75 plus interest to 16 March 2020 of £100,650.93 accruing at a daily rate of £63.05.

[41] In defence it was argued unsuccessfully that the notice was not valid. The employer failed in an attempt to establish that the dispute had been settled. It was also contended that

the final certificate was conclusive evidence in the adjudication as to the contractor's entitlement. All sums due thereunder having been paid it followed that the adjudicator should have found that nothing was payable.

[42] As to the conclusive evidence submission, the adjudicator noted that the employer relied on clause 1.9 and the decision in *Marc Gilbard's Trustees*. He stated that the contractor had provided an opinion of senior counsel, though nothing is said as to its terms. At para 60 he observed that the disputed matter regarding the final certificate was as to the true value of the contract sum, whereas the dispute in the adjudication concerned "a legal technicality (a so-called 'smash and grab')" in respect of an interim payment. He distinguished *Marc Gilbard's Trustees* in that there the adjudication involved the same matter as that disputed in respect of the final certificate. The adjudicator considered that the "purposive intent of clause 1.9 is to limit disputes arising under the contract to those relating to matter (*sic*) to which, in the present case, court proceedings have commenced".

[43] The adjudicator continued:

"The court proceedings relate to the adjustment of the Contract Sum and, in particular, to a sum allegedly due in respect of an Interim Payment Notice, dated 21 May 2019, and Interim Certificate 26. I take this to mean the adjustment of the Contract Sum is not yet concluded and evidenced by the Final Certificate. Therefore, I find that the Final Certificate is not 'conclusive evidence that any necessary effect has been given to all terms of [the] 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', per clause 1.9.1.2."

At para 61 the adjudicator concluded this chapter of his decision by stating: "Interim Payment Notice 13 was clearly disputed and remains so. I find in favour of (the contractor's) position that I am not obliged to award nil."

[44] In summary the reasoning was that the subject matter of the adjudication is different from that in the court action, thus the decision in *Marc Gilbard's Trustees* does not apply. The

court proceedings seek an adjustment of the final certificate contract sum, and that remains unresolved. According to the adjudicator it followed that the final certificate had no ongoing conclusive effect in respect of the contract sum.

### **The dismissal of the counterclaim by the commercial judge**

[45] The commercial judge addressed three issues, namely (i) the effect of the final certificate, (ii) the adjudicator's decision that the interim notice was valid, and (iii) whether even if otherwise unsuccessful the contractor was nonetheless entitled to retain interest arising after the date of the adjudicator's award.

[46] On the first issue the judge agreed with the reasoning of Coulson J in *Marc Gilbard's Trustees*, the effect of which is that the terms of the final certificate are conclusive in proceedings raised outside the period allowed in the contract. However he held that clause 1.9.4 barred any challenge to the outcome of the adjudication if none was raised within 28 days of the decision. The counterclaim was not lodged within that period thus it came too late. Furthermore the employer was wrongfully using the conclusive nature of the final certificate to obtain interim relief pending resolution of the timeous court proceedings.

[47] As to issue (ii) this turned on whether an incorrect relevant due date was specified in the interim payment notice, a factual matter in respect of which the parties were in dispute. The judge rejected the contractor's argument that the notice would remain valid even if the wrong date had been used. However clause 1.9.4 again intervened to render the adjudicator's decision on this issue inviolable 28 days after its issue.

[48] Issue (iii) became academic but the judge favoured the view that had repayment been ordered it would include all interest payments (*Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2015] 1 WLR 2961).

### **The submissions to this court**

[49] The court was favoured with detailed submissions from the parties both in writing and orally at the hearing. What follows is but a brief outline of them.

#### *Clause 1.9.4*

[50] The employer submitted that in relation to clause 1.9.4 the judge erred in relying on the reasoning of Coulson J in *Jerram Falkus Construction Ltd v Fenice Investments Inc (No. 4)* [2011] EWHC 1935 (TCC), it being distinguishable on the facts. The sub-clause had to be construed purposively in the context of the clause as a whole. An overly strict or literal approach had been adopted.

[51] The contractor contended that the sub-clause clearly required any challenge to the adjudicator's award to be made within 28 days. Here it came too late and the judge correctly dismissed it on that basis.

#### *The effect of the final certificate*

[52] The employer submitted that the adjudication came outside the period allowed by clause 1.9 therefore, as per *Marc Gilbard's Trustees*, in the adjudication the final certificate was conclusive as to the contract sum. The amount due under it having been paid, the adjudicator should have issued a nil award. The purpose of the Housing Grants, Construction and Regeneration Act 1996 Act and the relevant standard contract terms is to

facilitate prompt and cost-effective resolution of disputes. The adjudicator's view is at odds with the difference between interim and final certificates (as explained in *Scottish Equitable plc v Miller Construction Ltd* 2002 SCLR 10 and *Castle Inns (Stirling) Ltd (t/a Castle Leisure Group) v Clark Contracts Ltd* 2006 SCLR 663).

[53] The contractor submitted that the adjudication was an enforcement of the sum due under the August 2017 interim payment notice, not a challenge to the final certificate, thus the time limit in clause 1.9 had no application. If that was wrong, the timeous court challenge removed the certificate's conclusive effect in relation to the contract sum not only in those proceedings but also for the adjudication. The 1996 Act allowed an adjudication "at any time". *Marc Gilbard's Trustees* was wrongly decided and should not be followed.

#### *The validity of the interim payment notice*

[54] The employer offered to prove that the wrong due date in terms of clause 4.11.2.2 had been specified in the interim payment notice which would render the notice invalid.

[55] The contractor asserted that the correct date was used. In any event where the notice was otherwise clear, a minor non-prejudicial error in this regard would not invalidate it. In the absence of a pay less notice the sum claimed became due as per clause 4.12.3.

#### *Repayment of interest*

[56] The employer submitted that it was a necessary consequence of the adjudication regime laid down in the 1996 Act that an employer can recover overpayments caused by an adjudicator's decision (*Aspect Contracts*). That would include interest payments.

[57] The contractor contended that interest accruing between the period allowed by the adjudicator for payment and actual payment falls into a different category akin to an

adjudicator's fees. The additional interest payments were caused by the employer's delay in payment. They were not part of the dispute. The implied term as to repayment had no application. Even if unsuccessful on everything else the contractor should be allowed to retain these monies.

**Was the claim in the adjudication a challenge to the final certificate?**

[58] Many decisions in recent years concern the implications of a failure to issue a pay less notice in response to a contractor's interim payment notice and attempts to avoid the perceived injustice, even hardship, of having to handover whatever was claimed pending resolution of the correct position. No case has been cited where long after the final certificate an attempt is made to obtain further monies by enforcing a contractor's interim payment notice.

[59] The commercial judge made reference to *Grove Developments Ltd v S&T (UK) Ltd* [2018] EWCA Civ 2448; [2019] BLR 1 and *J&B Hopkins Ltd v Trant Engineering Ltd* [2020] EWHC 1305 (TCC). In the former the court was understanding of the difficulty in reconciling first instance decisions: "We are all trying to hack out a pathway through a dense thicket of amended legislation, burgeoning case law and ever-changing standard form contracts" (para 102). The Court of Appeal's decision illustrates the following. The statutory payment regime is designed to provide enforceable immediate interim payments to contractors and sub-contractors. In terms of section 111(1) of the 1996 Act, the notified sum must be paid on or before the final date for payment. However, and even in the absence of a payment notice or a pay less notice, the necessarily "ball park" figures can be adjusted and overpayments corrected either in subsequent certificates or by way of "true

value” adjudications or other proceedings. Given the longer time period allowed for the preparation of a final certificate it is more likely to be accurate. While the sum stated therein is due and payable, as with interim applications its terms are also challengeable.

[60] *J&B Hopkins Ltd* is a decision of Fraser J. It concerned an attempt to resist summary judgment of an adjudicator’s decision on the basis that the relevant interim application for payment had been superseded by subsequent interim payment cycles in which the contractor had participated and which had corrected the sum payable under the contract. The judge cited authority to the effect that adjudication is all about interim cash flow. It was true that an interim payment could be corrected, but that did not mean that an adjudicator’s decision that the notified sum was due because there had been no pay less notice could not be enforced. While the case before him concerned a technical issue as to the validity of a notice, an adjudicator may well have determined a substantive matter, for example a dispute as to the valuation of particular elements of the works or the quality of the works. And it would be next to impossible for a claimant to react to non-payment of an application before the next interim cycle. To allow it to prevent an adjudication would undermine the statutory adjudication regime.

[61] This did not cause manifest injustice such as would justify a stay of execution. To have to pay a sum, only for it to be repayable shortly thereafter, was in accord with the statutory scheme; indeed another adjudication was pending. No question as to the financial stability of the claimant had been raised. The importance of complying with pay less and payment notice procedures was emphasised.

[62] It is not difficult to understand why the commercial judge cited these decisions. However they both concerned interim cash flow issues. Neither involved the effect, if any, of

a final certificate and the associated time limits in clause 1.9 on the contractor's right to pursue the non-payment of a sum due in an interim payment notice.

[63] It seems clear that the commercial judge viewed the adjudication and its outcome as no more than legitimate skirmishing for a tactical advantage "on an interim basis" pending resolution of the challenge to the final certificate which was proceeding in the court action (para 19). That said, he did notice that, having received more than is sought in the court action, progressing it may have become "less attractive" for the contractor.

[64] Before this court it was submitted that conclusive effect is not conferred on the final certificate in relation to monies payable in respect of interim certificates. The adjudication concerned an interim payment issue in respect of which the terms of the final certificate are of no relevance. They have no evidential value in respect of the sum which should have been paid in July 2017 to account of the ultimate contract sum. In effect the contention is that the adjudication was not a challenge to the terms of the final certificate. Logically this is a preliminary issue which, if the proposition is correct, would elide the need to consider clause 1.9 and the competing submissions regarding *Marc Gilbard's Trustees*.

[65] In *Coulson on Construction Adjudication* 4<sup>th</sup> ed the author explains how the decision of Edwards-Stuart J in *ISG Construction Ltd v Seovic College* [2015] BLR 233 prompted contractors, as was done here, to make a large claim immediately after practical completion, see para 3.51. In the absence of a pay less notice, and even if it was disputed, the sum claimed could be enforced and retained for the usually lengthy period until the final account process was completed. ISG decided that there could be no true value second adjudication in the meantime because the absence of a pay less notice meant that the stated sum was taken as agreed, "right or wrong". In *Galliford Try Building Ltd v Estura Ltd* [2015] BLR 321 at

paras 18-20 the same judge clarified that this deemed agreement was for the purposes of the interim application in question and involved no agreement as to the value of the work at some other date. The result was that because of a failure to issue a pay less notice an employer could be forced to lay out a large sum over an extended period pending the final account even though it was confident that it would establish that the contractor's valuation was excessive. For present purposes it can be noted that at para 25 the judge drew a distinction between interim and final payments. There was "a fundamental difference" between the two situations. The latter stated the amount properly due in respect of the account. Subsequently these comments were endorsed in the Court of Appeal, see *Harding (t/a M J Harding Contractors) v Paice and Another* [2016] 1 WLR 4068 at para 70.

[66] These claims came to be known as "smash and grab" and have been described as having brought adjudication "into a certain amount of disrepute" (Coulson J in the first instance decision in *Grove Developments Ltd v S&T (UK) Ltd*, see [2018] BLR 173 at para 143). The tactic, if that is what it is, is less attractive for contractors at pre-completion interim stages because the matter will usually be quickly resolved at the next monthly payment cycle. For this reason employers rarely adjudicate the true value of such interim applications.

[67] The peculiarity in the present case is that having made the "smash" in August 2017 shortly after practical completion, the contractor delayed the "grab" until March 2020, many months after the final certificate. However it is claimed that the final certificate is of no relevance, and this notwithstanding that had the interim application been enforced much earlier, the sum paid by the employer would have been taken into account in the final certificate resulting in a large sum due by the contractor to the employer.

[68] The decisions in *ISG* and *Galliford* have been criticised and would not be followed today. In *Harding v Paice and Another*, cited earlier, the Court of Appeal followed the approach set out in its decision in *Rupert Morgan Building Services Ltd v Jervis* [2003] EWCA Civ 1563 (which had not been brought to the court's attention in *ISG*). There Jacob LJ observed that section 111 of the 1996 Act addressed cash flow during the works. It was not about making any certificate conclusive. Notwithstanding a failure to serve a notice in response, if an employer could show that he had overpaid that could be put right in subsequent certificates, otherwise the matter could be addressed in an adjudication or other proceedings, see para 67 in the judgment of Jackson LJ.

[69] As a result of more recent authority, and for the reasons explained in detail by Coulson J in the first instance decision in *Grove Developments Ltd v S&T (UK) Ltd*, cited earlier, and subsequently endorsed by the Court of Appeal, it is now settled that a failure to serve a pay less notice does not prevent a true value adjudication. It follows that aggrieved employers who fail to serve a pay less notice in response to a disputed post completion interim application are not forced to await the outcome of the final account process. Matters can be put right before then by an employer's adjudication. At paragraph 138 Coulson J observed that cash flow "must not be confused with the contractor retaining moneys to which he has no right". In the present context this can be translated to cash flow not allowing the contractor to obtain moneys to which he will be entitled only if the timeous court challenge to the final certificate is successful.

[70] Of course an employer could pay up, or be forced to pay up, and then choose to await the final certificate for redress. As already noticed the payment will be taken into account in the certificate. However here the contractor waited until long after the final

certificate and argues that, no matter what the correct valuation of the contract works might be, the certificate's terms have no relevance to the consequences of a failure to issue a pay less notice in response to an interim notice. The final certificate can of course be challenged by the contractor if done timeously as per clause 1.9, as was done here, but in the meantime, and unless and until such a challenge succeeds, the valuation in the interim application is to be treated as having been corrected by the terms of the final certificate. (Earlier the proposition that this conclusion is foreclosed by the terms of clause 4.15.2 was addressed.)

[71] Contrary to the argument at the interim position dealt with by Fraser J in *J&B Hopkins*, this analysis does no damage to the statutory payment and adjudication regime. It is supported by clause 1.9.1.2 of the standard form contract. It provides that the final certificate is "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" (subject only to a saving provision of no application here). On any view an interim application is an attempt to add a sum to the valuation of the contract works. If paid, that sum requires to be taken into account in the final certificate. The contractor's late attempt to enforce the interim payment notice application is not consistent with respect for the final certificate. It sets out what is properly due for the contract works, whereas interim provisional payments are aimed at cash flow as they progress.

[72] It is plain that the commercial judge envisaged that any overpayment now will be reversed in the court action. There can be no certainty on that, but even if there was, it would not justify the adjudicator's decision. The more obvious approach is to see the contractor's timeous challenge as the opportunity to address any alleged defect in the final

certificate as to the adjusted contract sum. Matters can be tested by asking – suppose there had been no court action and thus no timeous challenge to the certificate? Then there could be no question of seeing the adjudication or the counterclaim as doing no more than addressing interim relief pending resolution of the correct position with the conclusive evidence provisions being *in limbo*. Furthermore the view that the debt created by the absence of a pay less notice can be enforced unconstrained by the terms of the final certificate and clause 1.9 cannot turn on the happenstance of whether there has or has not been a timeous challenge to the final certificate in another process. If the proposition is correct it would apply in the absence of such and allow a contractor to obtain payment in terms of both the final certificate and an unpaid interim notice.

[73] It might be asked – if the above analysis is correct, why was the adjudication allowed to proceed? The answer is that a party has an unfettered and unqualified right to refer a dispute arising out of a construction contract to an adjudicator “at any time”, see section 108 of the 1996 Act. The adjudicator had jurisdiction to deal with the dispute put before him. The contractor wanted payment in terms of the interim notice and in response to one of the lines of defence presented an argument that the final certificate was either irrelevant or, having regard to the terms of cls 1.9.3, had no conclusive effect because a timeous court challenge had been made. It would be difficult to prevent such an argument from being heard and adjudicated upon. Indeed it was upheld by the adjudicator.

[74] The key question now is - did the adjudicator reach the correct decision? In the meantime the overall conclusion from the above discussion is that interim issues and disputes are put in the past by the final certificate. The adjudication was not simply about enforcement of a historic debt. It was a challenge to the terms of the final certificate which

stated that the works being over and the contract sum adjusted, the contractor was entitled to payment of less than £1,500. The proposition that the certificate and the terms of clause 1.9 were of no relevance to the adjudication is not well-founded. In so far as the adjudicator adopted and applied it, he was in error.

[75] There remains controversy on two matters. First, did the raising of the timeous action have the effect of excluding the conclusive evidential status of the certificate as to sums due in the subsequent adjudication? Secondly, having held that the decision in *Marc Gilbard's Trustees* was applicable, did the commercial judge err in dismissing the counterclaim because of clause 1.9.4?

### **Some general propositions and their application**

[76] The following propositions can be derived from the cases cited to the court.

- 1 In order to promote finality and expedition in respect of the resolution of outstanding issues, in the absence of a timeous challenge (here within 60 days) the final certificate is intended to be conclusive on, amongst other things, all remaining financial disputes as to the sum due to the contractor: *Marc Gilbard's Trustees* paras 1 and 9; *Jerram Falkus* para 30.
- 2 Clause 1.9.3 excludes the conclusive nature of the final certificate in respect of the matters raised in timeous proceedings, not in respect of those raised in any late proceedings - and this remains true even if the matters at issue are the same in both proceedings: *Marc Gilbard's Trustees* paras 30, 32-33 and 47.
- 3 Clause 1.9.4 applies where there is a clause 1.9 compliant adjudication, the outcome of which is only temporarily binding and can be reversed. Expedition and finality is

achieved by providing that the adjudicator's determination becomes final if not timeously challenged (here within 28 days) in court or arbitration proceedings: *Marc Gilbard's Trustees* paras 13, 27, 34; *Jerram Falkus* paras 23-26; *Castle Inms* paras 37-38 and 41.

- 4 There is no fetter on an adjudication raised after the 60 day period, but the final certificate will be conclusive on the matters covered by it: *Marc Gilbard's Trustees* paras 37-40.
- 5 Unlike provisional interim valuations and cash flow questions, in respect of which each interim certificate supersedes its predecessor, a dispute concerning the final certificate raises the substantive and definitive merits of the parties' rights and obligations as to the sum due to the contractor and opens up all previous certificates: *Scottish Equitable plc* para 29; *Castle Inms* para 33; *Jerram Falkus* para 33.

[77] The commercial judge accepted almost all of the above. For example he noted that the final certificate "is conclusive evidence of the sum due, unless a challenge to it occurs in the period stated in the relevant provisions in the contract ..." (para 21). He rejected the submission that the decision in *Marc Gilbard's Trustees* was either wrong or distinguishable and stated that he agreed with the "careful reasoning of Coulson J" (para 27). It would follow that the adjudicator's reasoning at para 60 of his decision was flawed.

[78] At this point in the analysis the employer would have anticipated victory, or at least a considered decision as to whether the adjudicator erred by not making a nil award. However the judge then referred to "a twist in the tale". While preparing his opinion he came to consider clause 1.9.4. No mention had been made of it in the debate so he sought written submissions from the parties. For the first time the contractor argued that the

adjudicator's decision was final because the counterclaim was raised more than 28 days after the decision was issued and thus the challenge was time-barred. That submission was upheld (para 33).

[79] If clause 1.9.4 is considered in isolation the judge's decision is readily understandable. However it requires to be set in the context of the terms and purpose of clause 1.9 as a whole. In that regard it provides a time constraint on challenges to adjudications which are compliant with the rest of the provision. It makes little sense to apply clause 1.9.4 to adjudications raised long after the final certificate, most of which will have nothing to do with its terms.

[80] Clause 1.9 strikes a balance between the desire for swift finality as to the status of the final certificate and the resolution of disputes as to its terms. The clause envisages pre or post final certificate challenges by way of adjudication, arbitration or litigation (the post challenges being time limited). Unlike the others, the outcome of an adjudication, though binding, is temporary ("pay now – argue later"). Thus there has to be provision for a challenge to the outcome of a timeous adjudication; but it would run counter to the overall intention if that could occur at a time of the challenger's choosing, hence the imposition of a time cut-off. That is the context and purpose of clause 1.9.4. It is consistent with the general structure that unresolved disputes on valuations in interim certificates or applications are superseded by the final certificate which conclusively states the sum due for the contract works.

[81] Here the adjudication was not compliant with the terms of clause 1.9 thus sub-clause 4 was not in play. The commercial judge erred by dismissing the counterclaim because it was not raised within a 28 day period. He should have addressed its merits. The

logic of his acceptance of the decision in *Marc Gilbard's Trustees* is that the adjudicator erred in rejecting the argument that in the adjudication the final certificate was conclusive as to the sum due to the contractors for carrying out the contract works. Given that the adjudication was not raised within 60 days and the contractor has been paid all that was due in terms of the certificate, the adjudicator should have made a nil award.

[82] The commercial judge added additional reasoning (paras 34-36) culminating in:

“Accordingly, I am not persuaded that the Final Certificate must be treated as conclusive evidence for interim purposes, when there is nothing to support that as the contractual intention and in any event the accuracy of the certificate is currently under challenge in the other action.”

The reasoning is that timeous legal proceedings are pending which challenge the accuracy of the final certificate and there is nothing in the contract to allow the employer to obtain what is described as “interim relief”, namely repayment of the monies paid in satisfaction of the adjudicator’s award based on the final certificate being conclusive.

[83] As already mentioned this approach treats the adjudication and the challenge to the adjudicator’s decision as part and parcel of, or at least as preliminary tactical skirmishes in the lead up to the resolution of the court action. Thus while meantime thanks to the enforcement of a historic interim payment notice, the contractor will be in pocket in respect of a sum in excess of that specified in the final certificate, the view is that this can all be resolved in the court action and nothing can be done before then.

[84] There can be no certainty that matters will be resolved in the contractor’s court action, but even if there was, the interim phase ended after the final certificate was issued. Had there been interim enforcement of the interim payment notice, that would have had a significant effect on the terms of the final certificate, in particular there would have been a

large sum due to the employer. Neither the adjudication nor the counterclaim are properly described as matters concerning “interim relief” pending the outcome of another process.

[85] In addition the judge’s approach overlooks the consequence of his earlier acceptance of the decision in *Marc Gilbard’s Trustees* which confirms that notwithstanding the timeous challenge, the final certificate was conclusive in the adjudication in respect of what sums, if any, the contractor is due. It is not a matter of treating the adjudication as no more than an overdue enforcement of the interim payment notice issued early in the contract works pending a more substantive resolution of the parties’ rights and obligations in respect of the contract sum. All of that was superseded by the final certificate. The only valid challenge to its conclusive effect is the pending court action. And as discussed earlier, had there been no timeous court action there would be no room to treat these as interim issues which could be resolved finally in other proceedings. As to “pay now – argue later”, the counterclaim is the place for a reassessment of the correct status of the final certificate in the adjudication, not a process begun before the adjudication started.

#### **Decision on the reclaiming motion**

[86] The adjudicator’s view that the claim concerned a separate matter not involving the final certificate has been addressed above. The sum due in terms of the final certificate having been paid, the adjudicator erred in rejecting the employer’s argument that the only legitimate vehicle for extracting more money was the timeous court action. The reclaiming motion should be upheld and decree pronounced in terms of the first, third and fourth conclusions in the counterclaim, thereby requiring repayment of the adjudicator’s award.

The merits of the contractor's valuation of the contract works and the challenge to the final certificate can be resolved in the pending court action.

### **The cross appeal**

[87] The first matter raised in the cross appeal is dealt with in the above analysis. In the whole circumstances the other issues are academic and need not be addressed.

## Appendix

### Clause 1.9:

#### *“1.9 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:*

*... 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 ...;*

*.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.*

*1.9.2 If adjudication, arbitration or other proceedings have been commenced by either Party before the Final Certificate is issued, the Final Certificate shall have effect as conclusive evidence as provided in clause 1.9.1 upon and from the earlier of either:*

*.1 the conclusion of such proceedings, in which case the Final Certificate shall be subject to the terms of any decision, award of judgment in or settlement of such proceedings; or*

*.2 the expiry of any period of 12 months from or after the issue of the Final Certificate during which neither Party takes any further step in such proceedings, in which case the Final Certificate shall be subject to any terms agreed in settlement of any of the matters previously in issue in such proceedings.*

*1.9.3 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.*

*1.9.4 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.”*

Excerpts from part 4 of the contract:

*“Interim payments – due dates and amounts due*

4.9

*.1 For the period up to practical completion of the Works, the due dates for interim payments by the Employer shall be monthly dates specified in the Contract Particulars up to either the date of practical completion or the specified date within one month thereafter ...*

*...”*

*“Interim Certificates and Valuations*

4.10

*.1 The Architect/Contract Administrator shall not later than 5 days after each due date issue an Interim Certificate, stating the sum that he considers to be or have been due at the due date to the Contractor in respect of the interim payment, calculated in accordance with clause 4.9.2, and the basis on which that sum has been calculated.*

*...”*

*“Contractor’s Interim Applications and Payment Notices*

4.11

*...*

*.2 If an Interim Certificate is not issued in accordance with clause 4.10.1 then:*

*.1 where the Contractor has made an Interim Application in accordance with clause 4.11.1, that application is for the purposes of these Conditions an Interim Payment Notice; or*

*.2 where the Contractor has not made an Interim Application, he may at any time after the 5 day period referred to in clause 4.10.1 give an Interim Payment Notice to the Quantity Surveyor, stating the sum that the Contractor considers to be or to have been due to him at the relevant due date in accordance with clause 4.9.2 and the basis on which that sum has been calculated.”*

*“Interim - payments – final date and amount*

4.12

*.2 Subject to any Pay Less Notice given by the Employer under clause 4.12.5, the sum to be paid by the Employer on or before the final date for payment shall be the sum stated as due in the Interim Certificate.*

*...*

*.5 If the Employer intends to pay less than the sum stated as due from him in the Interim Certificate or Interim Payment Notice, as the case may be, he shall not later than 5 days before the final date for payment give the Contractor notice of that intention in accordance with clause 4.13.1 (a ‘Pay Less Notice’). Where a Pay Less*

*Notice is given, the payment to be made on or before the final date for payment shall not be less than the amount stated as due in the notice."*

*"Final Certificate and final payment*

*4.15*

*.2 The Final Certificate shall state:*

*.1 the Contract Sum as adjusted in accordance with clause 4.3; and*

*.2 the sum of amounts already stated as due in Interim Certificates plus the amount of any advance payment paid pursuant to clause 4.8 and (where relevant) any such sums as are referred to in clause 4.9.2.4,*

*and (without affecting the rights of the Contractor in respect of any interim payment not paid in full by the Employer by its final date for payment) the final payment shall be the difference (if any) between the two sums, which shall be shown in the Final Certificate as a balance due to the Contractor from the Employer or to the Employer from the Contractor, as the case may be. The Final Certificate shall state the basis on which that amount has been calculated."*



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 42  
CA45/20

Lord President  
Lord Malcolm  
Lord Woolman

OPINION OF LORD WOOLMAN

in the reclaiming motion

in the cause

D McLAUGHLIN & SONS LTD

Pursuers and Respondents

against

EAST AYRSHIRE COUNCIL

Defenders and Reclaimers

**Pursuers and Respondents: Howie KC; DAC Beachcroft Scotland LLP**  
**Defenders and Reclaimers: DM Thomson KC; Shepherd & Wedderburn LLP**

16 September 2022

**Introduction**

[88] Construction contracts contain three important regimes. One - interim certificates - promotes cash flow during the course of a contract. Another - the final certificate - facilitates the early and conclusive resolution of all outstanding claims. The third - adjudication - avoids the lengthy construction disputes of yore. Each regime has its own *cordon sanitaire*. Sometimes, however, the regimes mesh. Rarely, they clash. That has happened in this case. It throws a question into sharp relief, how final is a final certificate?

[89] The chronology is as follows. (1) The contractor raised a court action challenging the final certificate and seeking further payment. (2) Six months later, it initiated an adjudication based on an interim certificate, which resulted in an award in its favour. (3) The contractor raised an action to enforce the award. (4) In a counterclaim, the employer contended that the adjudicator had erred in law by not upholding the final certificate. (5) The commercial judge held that the adjudicator had erred, but the counterclaim failed because it had not been brought within the 28 day prescribed period. (6) The employer has paid all sums currently due to the contractor according to the final certificate.

[90] Two points require clarification. The first concerns the original payment action. Although it was raised within the prescribed sixty day period, no steps have been taken to progress matters. It has lain dormant. By contrast, the adjudication was raised well beyond the prescribed period, but has proceeded to a conclusion.

[91] The second point is that the dispute focussed in this appeal has a narrow bandwidth. Everyone acknowledges that there needs to be a final reckoning. That will most likely take place in the original payment action. At issue is what happens in the interim. The contractor contends that the adjudication award should stand meantime. The employer submits that it should be set aside, because the adjudicator should have made a nil award.

### **Clause 1.9.3**

[92] Clause 1.9.3 addresses the issue of conclusiveness:

“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.”

[93] In *Trustees of the Marc Gilbard Settlement Trust v OD Developments and Projects Ltd*

[2015] EWHC 70 (TCC) Coulson J (as he then was) explained that the term aims to provide certainty and clarity. It does so by limiting the matters in respect of which the final certificate is not conclusive to ones raised in proceedings begun within 60 days of its issue. Crucially, it does not envisage another set of proceedings starting months or years later.

[94] I accept that construction. It squares with the purposes of Part II of the Housing Grants, Construction and Regeneration Act 1996. As applied to this case, the original court action should have constituted the only proper vehicle to challenge the final certificate. The adjudicator erred in reaching a different conclusion. He should have made a nil award. The final certificate should have been final.

#### **Clause 1.9.4**

[95] That is not, however, the end of the matter. Clause 1.9.4 states:

“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.”

[96] The employer did not raise a timeous challenge to the award. It intimated its counterclaim to the enforcement action outside the prescribed time limit. I agree with the commercial judge that this led to a “twist in the tail”. The award can no longer be challenged. I reject the employer’s argument that clause 1.9.3 can somehow be construed as overriding clause 1.9.4.

**Conclusion**

[97] I would refuse the reclaiming motion. In doing so I express sympathy for the employer's position. But all issues in the dispute, including the ancillary matters raised in this reclaiming motion, should now be addressed and resolved in the original payment action. I encourage parties to expedite its progress.