EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 38
CA65/19

Lord Menzies
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD DRUMMOND YOUNG

in the cause

by

DICKIE & MOORE LIMITED

Pursuer and Respondent

against

RONALD JAMES McLEISH, MRS DIANE McLEISH AND CATRIONA WATT as Trustees of the Lauren McLeish Discretionary Trust

Defenders and Reclaimers

Pursuer and Respondent: Turner, Macfarlane Law Ltd
Defenders and Reclaimers: MacColl QC; Anderson Strathern LLP

_____

30 June 2020

[1] The pursuer has raised the present proceedings in order to enforce the decision of an adjudicator and to recover 50% of the adjudicator's fees and expenses. The parties entered into a building contract dated 26 May and 4 August 2016 for the construction of a large house on a site near Armadale. The contract was subject to the terms of the Standard

Building Contract with Quantities for use in Scotland (2011 Edition). The pursuer was the contractor under the contract and the defenders the employer. The contract contained standard adjudication provisions relating to any "dispute or difference" which arose under the contract. Article 7 of the contract provided that the scheme set out in Part 1 of The Scheme for Construction Contracts (Scotland) Regulations 1998 (as amended by The Scheme for Construction Contracts (Scotland) Amendment Regulations 2011) should apply, subject to modification.

[2] The pursuer constructed the house in the course of 2017 and 2018. A final adjustment statement was produced on behalf of the employer on 17 October 2018. It showed ascertained loss and expense of £22,934.10 and a works final account of £1,995,802.50, but included deductions for work not done by the contractor of £18,051 (heating), £4,470 (MVHR), £28,977.84 (ground retention), £58,430.32 (externals), and £2,768 (internals), and a deduction of £11,901.52 for work not in accordance with the contract (render to the main house). The net amount of the final adjustment statement was £1,894,186.92.

[3] On 24 October 2018 the pursuer wrote to the architect to challenge the final adjustment statement, on four grounds. First, estimated deductions had been included for defective work that had been remedied by the employer, but the pursuer maintained that actual costs of remedying the work should be vouched. Secondly, the employer had made deductions for remedial works which the pursuer was not obliged to carry out under the contract. Thirdly, deductions were included for remedial work where the defects had not been notified timeously in the schedule of defects. Fourthly, excessive deductions had been made in cases where the employer had instructed that defective work should remain. On

the same date, 24 October 2018, the architect issued a final certificate which reflected the calculations in the original Final Adjustment Statement.

[4] By letters dated 29 and 30 October 2018 the pursuer challenged the final certificate. On 19 December 2018 the pursuer served a notice of intention to refer a dispute to adjudication. It stated

> "… 5.2 The rejection of sums detailed in the Final Certificate, the Final Adjustment Statement, the Works Final Account and Architect's Instruction numbers 31 & 32, is sufficient to crystallize a dispute between the parties.
> …
> 9 ITEMS REFERRED IN THIS ADJUDICATION
>
> 9.1 At present there are a number of disputes between the parties, and the approximate scale of each dispute is as follows:
>
> 9.1.1 Further extension of time of 16.2 weeks and reimbursement of Loss and Expense of a further £116,000 due to matters related to groundworks.
>
> 9.1.2 An extension of time of 30.3 weeks and reimbursement of Loss and Expense of £174,000 due to matters related to the shells of the superstructures of the buildings and their finishes.
>
> 9.1.3 The Contractor recognizes that if the Adjudicator decides in favour of the Referring party with regard to the two submissions referred to above, then there needs to be consideration of a credit up to £73,000 to resolve the parallel delays included.
>
> 9.1.4 In addition a sum in the order of £15,000 is claimed for additional works to flat roofs of the building.
>
> 9.1.5 Increased valuation of Works Final Account in the sum of £261,000.
>
> 9.1.6 Reimbursement of sums withheld in respect of the embankment adjacent to the North Boundary in the sum of £29,000.
>
> 9.1.7 Reimbursement of deductions made under Clauses 2.38 and 3.18.2 of the Contract Conditions in the sum of £96,000 (excluding Section 9.1.6).
>
> 9.1.8 Reimbursement of some four Windows not in Bills of Quantities in Payless Notice in the sum of £19,000.
>
> 9.1.9 Reimbursement of Liquidated Damages in Payless Notice in the sum of £26,000".

[5] The parties agreed to appoint Mr Len CH Bunton as adjudicator, under reservation of certain objections by the defenders to jurisdiction. On 11 January 2019 the pursuer served a referral notice. The defenders submitted that the adjudicator had no jurisdiction. The adjudicator rejected the challenge, and proceeded with the adjudication, issuing his decision on 15 March 2019. He held that the pursuer was entitled to payment of £324,492.60, with interest of £16,733.59. He further found the pursuer entitled to an additional extension of time of 11 weeks, and in relation to that he allowed £63,093.47 by way of loss and expense. He held that the works final account should be higher by £181,607.17, that deductions for an alleged defect, liquidated damages, ground retention and render to the main house were not justified, and that certain other deductions that had been made were excessive.

[6] The pursuer raised proceedings for enforcement of the adjudicator's award. The first three conclusions were for declarators in relation to the identification of the defenders in the contract, contractual notices and court proceedings. The fourth and fifth conclusions were for declarator and payment of the adjudicator's award, and the sixth was for interest on the sums claimed from citation until payment. The action proceeded to proof before the commercial judge on four issues: whether the adjudicator had jurisdiction to entertain a claim advanced against "the Lauren McLeish Trust"; whether the adjudicator failed to exhaust his jurisdiction; whether there was a material breach of natural justice, and whether the dispute described in the notice of adjudication had crystallized before the notice was served. The commercial judge rejected the first three grounds of challenge, but held that a material part of the dispute described in the notice of adjudication had not crystallized before the notice was served. He accepted that in deciding whether a dispute had crystallized the court should adopt a robust, practical approach, analyzing the circumstances

in a manner that was commercial and not over-legalistic. Nevertheless, he held that comparison of the extension of time and loss and expense claims (heads 9.1.1, 9.1.2 and 9.1.3 of the notice) disclosed a marked discrepancy between the relevant valuation, valuation no 17, and the notice referring to adjudication. In the notice these amounted to a total net claim of £217,000, whereas in the valuation the corresponding claim was for £67,072.68. It followed that on these matters the dispute described in the notice had not fully crystallized before the notice was served. For that reason the adjudicator did not have jurisdiction to determine the parts that had not crystallized.

[7] The pursuer then claimed that, as the adjudicator had jurisdiction to determine the other parts of the claim, those parts of his decision could be enforced. The defender, in reply, contended that the decision of the adjudicator was a unity with the result that none of it could be enforced. The parties lodged supplementary written submissions, and the commercial judge heard further oral submissions on the question of severance. Thereafter he issued a second opinion, dated 8 November 2019, in which he held that the parts of the claim in which the adjudicator lacked jurisdiction could be severed from those where he had jurisdiction, and that the latter parts of the decision could accordingly be enforced. He issued a detailed opinion to that effect dated 8 November 2019. The defenders have now reclaimed against the commercial judge's decision of that date.

The statutory and contractual context

[8] The legislation governing adjudication is found in Part II of the Housing Grants, Construction and Regeneration Act 1996. A written construction contract must contain the right to refer a dispute for adjudication under a procedure complying with section 108 of the Act. If the contract does not contain a clause to that effect, the default provisions of the

Scheme for Construction Contracts apply. The relevant Scheme for Scotland is the Scheme for Construction Contracts (Scotland) Regulations 1998 (SI 1998/687), as amended by the Scheme for Construction Contracts (Scotland) Amendment Regulations 2011 (SSI 2011/371) (together "the Scheme"). Equivalent provisions apply in England and Wales.

[9] The parties' contract makes use of the Standard Building Contract with Quantities for use in Scotland (2011 Edition). The adjudication provisions of the Scheme are incorporated. Article 7 of the contract provides that, if any dispute or difference arises under the contract, either party may refer it to adjudication in accordance with clause 9.2 of the conditions in the contract. Clause 9.2 provides that, if a dispute or difference arises under the contract which either party wishes to refer to adjudication, the Scheme (as defined above) is to apply.

[10] The material parts of the Scheme are as follows. Under paragraph 1, any party to a construction contract may give written notice ("the notice of adjudication") of his intention to refer any dispute arising under the contract to adjudication; the notice of adjudication is to give a brief description of the dispute and details of how it arose and the nature of the remedies sought. Paragraph 20 of the Scheme provides that the adjudicator is to decide the matters in dispute, and is empowered to make a decision on different aspects of the dispute at different times. Paragraph 23(2), headed "Effects of the decision", provides as follows:

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

The commercial judge's decision

[11] The commercial judge began his consideration of the issues with a thorough and detailed review of all of the main authorities on the severability of parts of an adjudicator's

award. We refer subsequently to the more significant of these cases. For present purposes it is sufficient to note the principles that the commercial judge extracted from those cases, and his application of them to the facts of the case.

[12] The commercial judge began (paragraph [35]) by stating that it would be wrong to treat the statement of the law in an earlier decision of Aikenhead J dealing with severance, *Cantillon Ltd* v *Urvasco Ltd*, [2008] BLR 250, as laying down rigid rules. (The relevant passages are set out at paragraph [29] below). That case was rather concerned with articulating general principles or guidance. Furthermore, in deciding whether a single dispute had been decided at adjudication, it was necessary to look at substance rather than form. In the present case the claim set out in the notice of adjudication included a claim for extension of time and loss and expense which had not crystallized. On analysis, only the other parts of the dispute were referred to adjudication, and the adjudicator was entitled to adjudicate on the parts which had crystallized. Consequently his decision on the dispute which had crystallized should be enforced in so far as it was clear that it was not tainted by his decision and reasoning concerning the parts of the dispute which had not crystallized; in this respect the commercial judge followed *Bovis Lend Lease* v *The Trustees of the London Clinic*, [2009] EWHC 64 (TCC), at paragraph 53.

[13] The commercial judge accepted that the foregoing approach was inconsistent with the approach followed in *Cleveland Bridge UK Ltd* v *Whessoe-Volker Stevin Joint Venture*, [2010] BLR 415, and he expressed disagreement with the reasoning of Ramsey J in that case. The commercial judge considered that the Scheme contemplated that a "dispute" is a matter in respect of which the adjudicator has jurisdiction. Under paragraph 20(1) of the Scheme, the adjudicator was obliged to "decide the matters in dispute", and there was no power to decide other matters. Thus a "decision" given binding effect by paragraph 23(2) of the

Scheme must be upon matters within the adjudicator's jurisdiction. Where an adjudicator's decision was partly within and partly outwith his or her jurisdiction, only the part within that jurisdiction could be binding.

[14] The effect of paragraph 23(2) of the Scheme, construed in context, was that the "decision" which binds parties is the decision in its entirety where all of the decision is valid, or such part of it as is valid and severable where part of the decision is affected by invalidity. That construction better advanced the policy and aims of the adjudication provisions of the 1996 Act than the construction put forward in *Cleveland Bridge*. The primary intention was to enable construction disputes to be settled on an interim basis, pending final resolution by litigation, arbitration or otherwise, and to ensure that such decisions could be enforced. It was highly unlikely that the intention underlying either the 1996 Act for the Schemes for adjudication was to make the enforcement of such decisions more difficult than it had been before the 1996 Act. At that time, English applications for summary judgment were routinely decided on the basis that severance could properly be considered, and that was so even if a single dispute was under consideration: paragraph [44].

[15] The commercial judge further thought that, regardless of the analysis in *Cantillon*, it was a mistake to think that severance ought never to be available where an adjudicator's decision involved a single dispute. He considered that that type of approach was likely to produce disproportionate and unjust results. It was also likely to encourage unsuccessful parties in single dispute adjudications to search for relatively minor grounds to resist enforcement, because success on any ground, even if relatively small, would be sufficient to invalidate the whole of the decision. It was possible that in single dispute cases it would be more difficult to show that the reasoning in the invalid part of the decision had no impact on the other parts. If, however, there was no such impact, severance should be possible. The

critical question (following *Willow Corp SARL* v *MTD Constructors Ltd*, [2019] EWHC 1591 (TCC), at paragraph 74) should not be whether there was a single dispute or difference in the adjudication, but whether it was clear that there was a core nucleus of the decision that could safely be enforced. Previous Scottish decisions (which are discussed subsequently) were consistent with that approach.

[16] On the facts of the present case, the extension of time award and associated loss and expense award of £63,093.47 could not stand. The adjudicator's decision that the defender should repay £26,000 in liquidated damages followed inevitably from his decision that there should be an extension of time for 13 weeks. A further minor deduction of £3,741.36 had to be made, is that represented gas usage during the 13 weeks' extension. Apart from these matters, however, the commercial judge was satisfied that it could be said with confidence that all other parts of the decision were untainted by the decision and reasoning in relation to extension of time and loss and expense. The commercial judge analyzed the particular items in respect of which claims were made, and concluded that they were independent of the extension of time, and therefore amounted to a core nucleus which might safely be enforced.

The defenders' challenge to the commercial judge's decision

[17] The defenders have reclaimed against the commercial judge's decision. First, they submit that he failed to follow established authority. It was agreed that this was a "single dispute" adjudication, and the established and orthodox approach rejected the possibility of severance in a single dispute adjudication, on the authority of *Cantillon Ltd* v *Urvasco Ltd*, *supra*, at paragraph 63 (which we quote below). Counsel submitted that in the Scottish case law that approach had been generally adopted. Furthermore, it was submitted that the

single dispute that had been referred to adjudication had not crystallized. The result was that the whole of the adjudication process was a nullity; the adjudicator lacked jurisdiction to determine the single dispute referred to him.

[18] Secondly, the defenders submitted that the commercial judge had erred in failing to hold that the parties had contracted only to be bound by a decision of the adjudicator, and not by a decision of an adjudicator subsequently rewritten by the court. He erred in particular in holding that the parties had contracted to be bound by any parts of an adjudicator's decision in respect of which a dispute had crystallized, putting aside the non-crystallized areas of dispute. Reliance was placed in particular on the analysis in *Cleveland Bridge UK Ltd* v *Whessoe-Volker Stevin Joint Venture*, *supra*. Thirdly, the commercial judge was said to be in error in adopting a policy-driven approach to the issue of severance. The policy considerations founded on by the commercial judge were inconsistent with the underlying contractual position of the parties and the established law in this area. The court should adhere to established authority rather than considerations of policy.

[19] Fourthly, it was contended that the commercial judge erred in holding that the sum in respect of which he pronounced decree reflected parts of the determination which were not tainted by the jurisdictional challenge. There was no basis for holding that the final works account was to be treated as a matter that was separable from the issues found not to have crystallized; the commercial judge had pronounced decree for the sum brought out in the final works account. There was, it was submitted, an unexplained increase of £73,000 in the sum brought out in the final works account following one valuation, Valuation 17. Moreover, the extension of time was linked to the question of liquidated damages, and the two could not be separated from each other. The same related to a claim relating to architect's instruction 25.

Enforcement of adjudicators' awards

[20] The critical question in the present proceedings is the extent to which and the basis on which a court may enforce an adjudicator's award where part of that award is outside the adjudicator's jurisdiction because the dispute purportedly considered in that part had not crystallized. On this matter, we are in agreement with both the commercial judge's decision and the reasons that he gives for reaching that decision. We propose first to discuss the policy considerations that underlie adjudication, and their bearing on the enforcement of adjudicators' awards that are partially invalid. Secondly, we will consider the case law, which is extensive and discussed at length by the commercial judge. Thirdly, we will attempt to set out the principles that a court should apply when it considers the enforcement of adjudicators' decisions that are partially valid and partially invalid. Fourthly, we will consider the application of those principles to the facts of the present case, as found by the commercial judge.

The general policy framework

[21] The commercial judge's decision was based on a number of policy considerations, and one of the major grounds of challenge by the defender is related to his reliance on such factors, rather than a strict adherence to established authority. In our opinion the commercial judge was correct to take account of policy considerations. Indeed, in the authorities that were founded on by both parties there are repeated references to the policy that underlies the legislation governing adjudication.

[22] Perhaps more fundamentally, it appears to us that a scheme such as that found in Part II of the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (Scotland) Regulations 1998 (as amended) is based on clearly

identifiable policy considerations. When the Scheme is applied to the facts of any particular case, those policy considerations must be important, as they provide its fundamental rationale. The wording of the Scheme is the basic legal text that must be applied but, as with the application of any legal text, the context in which it operates and the purposes that it seeks to achieve are factors of obvious importance in determining how it applies. That approach is, intellectually, more satisfactory than a slavish reliance on the terms of established authorities. It is, moreover, more consistent with the traditional Scottish approach of basing legal reasoning on principle rather than mere adherence to precedent. For these reasons we reject counsel's contention that the commercial judge should have confined himself to the statements of the law contained in earlier cases, without considering the underlying policy of the Scheme.

[23] A further practical reason exists for rejecting the defenders' contention. Examination of the case law demonstrates that the statements of the law in different cases are frequently inconsistent: for example, the decision of Ramsey J in *Cleveland Bridge UK Ltd* v *Whessoe-Volker Stevin Joint Venture*, *supra*, is expressly inconsistent with the previous Scottish decision in *Homer Burgess Ltd* v *Chirex (Annan) Ltd*, 2000 SLT 277 (see *Cleveland Bridge* at paragraphs 117-118), and it also appears to us to be inconsistent with the approach taken in other cases, for example Akenhead J in *Working Environments Ltd* v *Greencoat Construction Ltd*, [2012] EWHC 1039 (TCC), and Pepperall J in *Willow Corp SARL* v *MTD Constructors Ltd*, [2019] EWHC 1591 (TCC). Those inconsistencies can best be resolved by having regard to the underlying purpose and policy of the Scheme.

[24] The reasons for the passing of the 1996 Act and the enactment of the Scheme are well known to all those with experience of the law governing construction contracts; they are set out in the Latham Report ("Constructing the Team", Final Report of the Joint Review of

Procurement and Contractual Arrangements in the United Kingdom Construction Industry, July 1994). In the period before 1996, it had become apparent that contractors and subcontractors were experiencing considerable difficulty in enforcing prompt payment of sums to which they had been found due in architects' awards. When proceedings were taken to enforce an award, lengthy dispute resolution procedures caused substantial delay. This caused serious difficulties for contractors' cash flow. The importance of cash flow to any business should be obvious; it is essential to enable a trader to pay its debts. In the construction industry the elaborate system of subcontracting that is normally used made the problems of late payment particularly serious, because contractors and many subcontractors require liquid funds to pay subcontractors further down the contractual chain. Cash flow is essential to the survival of these businesses. Consequently it was important that sums to which a contractor or subcontractor was found due should be enforceable without lengthy or complicated dispute-resolution procedures. Adjudication seeks to avoid that problem.

[25] For these reasons we are of opinion that the provisions of the Scheme should be interpreted in such a way that they achieve its fundamental purpose, which is to enable contractors and subcontractors to obtain payment of sums to which they have been found due without undue delay. In particular, the intention is to avoid delay caused by lengthy dispute-resolution procedure. It is also significant that adjudicators' awards are made on an interim and provisional basis; clause 23(2) of the Scheme expressly provides that the adjudicator's decision is to be binding "until the dispute is finally determined by legal proceedings, by arbitration… or by agreement between the parties". Thus there is some protection against the risk of an erroneous award, although obviously if insolvency supervenes the unravelling of such an award may prove difficult or impossible. Nevertheless, the fundamental point is that the procedures used are intended to be simple,

straightforward and immediately effective. Those considerations should in our view guide the approach to interpretation of the Scheme. In relation to an adjudicator's award that is partially valid and partially invalid, the valid part should in our opinion be enforced if that is realistically practicable. That will depend on whether the valid and invalid parts of the award can be severed from each other, but in approaching severance we consider that the court should adopt a practical and flexible approach that seeks to enforce the valid parts of the decision unless they are significantly tainted by the adjudicator's reasoning in relation to the invalid parts.

The case law

[26] The critical question in cases such as the present is the extent to which an adjudicator's award may be enforced when it is apparent that the adjudicator has acted outside his jurisdiction in respect of part of the total claim. In the present case, the problem with the adjudicator's award is that certain parts of the dispute between the parties were held not to have crystallized by the time of the adjudicator's appointment, in the sense that there was no underlying dispute capable of being referred to adjudication at that time. That meant that the adjudicator lacked jurisdiction to deal with those parts of the claim. The fundamental issue is accordingly whether the valid parts of the adjudicator's decision can be severed from the *ultra vires* parts, and enforced independently.

[27] There have been considerable differences of judicial opinion on this question, especially in the Technology and Construction Court in England and Wales. One major issue is whether, if a single dispute is referred to adjudication and the adjudicator makes an error that taints part only of that dispute, the remaining parts can be enforced. Initially there was considerable resistance to the idea that a single dispute reference could be enforced in this way, but more recent cases have moved towards a flexible approach that concentrates

on whether severance is possible at a practical level. The latter type of approach clearly requires the development of a test, other than the simplistic single dispute test, as to when severance may be effected. Moreover, it is accepted in the case law that the existence or otherwise of a single dispute is a factor that is relevant to whether or not severance is possible in practice.

[28] In an early decision following the 1996 Act, *Homer Burgess Ltd* v *Chirex (Annan) Ltd*, *supra*, Lord Macfadyen held that an adjudicator's decision was to a substantial extent beyond his jurisdiction as a result of a misconstruction of the word "plant" in section 105 of the 1996 Act. Lord Macfadyen then considered the question of whether he should give effect to that decision by reducing the adjudicator's award in its entirety or should consider the extent to which the decision was *intra vires* and therefore temporarily binding in terms of paragraph 23(2) of the Scheme. He held that it was competent to adopt the latter course, although he did not do so on the facts of the case. In choosing between the two possible courses of action Lord Macfadyen considered that he ought to give weight to practical considerations, in particular enabling the contractor to obtain enforcement of the part of the decision that was *intra vires* (page 287B-F).

[29] *Cantillon Ltd* v *Urvasco Ltd*, [2008] BLR 250, is a decision of Akenhead J that has been repeatedly relied on in later cases. We should note, however, that the law has developed since that case was decided, and we agree with the commercial judge that the case cannot be regarded as laying down immutable rules relating to severance. The approach to severance was stated, albeit on an obiter basis, in the following terms (paragraph 63):

> "(a) The first step must be to ascertain what dispute or disputes has or have been referred to adjudication. One needs to see whether in fact or in effect there is in substance only one dispute or two and what any such dispute comprises.

> (b) It is open to a party to an adjudication agreement as here to seek to refer more than one dispute or difference to an adjudicator.…
> (c) If the decision properly addresses more than one dispute or difference, a successful jurisdictional challenge on that part of the decision which deals with one such dispute or difference will not undermine the validity and enforceability of that part of the decision which deals with the other(s).
>
> …
>
> (e) There is a proviso to (c) … which is that, if the decision as drafted is simply not separable in practice, for example on the wording, … the decision will not be enforced…".

On the issue of severance, Akenhead J added (at paragraph 78) that, had severance been necessary on the ground of a breach of natural justice by the adjudicator, he would have given judgment in favour of the contractor "in respect of all other parts of the decision which could be said with confidence were unrelated to and untainted by any such breaches".

[30] Akenhead J commented on the last case in *Bovis Lend Lease Ltd* v *Trustees of the London Clinic*, [2009] EWHC 64 (TCC). Although his decision on the merits of the case did not rely on severance, he commented (at paragraph 53) on the correct approach that should be taken to questions of severance. In that paragraph, he stated:

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

[31] *Cantillon Ltd* v *Urvasco Ltd* was followed by Lord Menzies in *CSC Braehead Leisure Ltd* v *Laing O'Rourke Scotland Ltd*, 2009 SLT 454, at paragraphs [38]-[40]. The adjudication in that case involved a single dispute, relating to the design and construction by contractors of auditoria within the cinema, and following analysis of the dispute Lord Menzies concluded

that "having regard to the terms of the contract and to the notice of adjudication, … in substance only one dispute was referred to adjudication". Thus the critical question does not turn on niceties of form but rather on the underlying substance of a dispute. On the facts of the case, it was held accordingly that if there were a successful challenge to one part of the decision the whole decision should be reduced.

[32] In *Cleveland Bridge UK Ltd* v *Whessoe-Volker Stevin Joint Venture*, *supra*, Ramsey J held that, if any part of an adjudicator's jurisdiction was outside his jurisdiction, the whole decision was not enforceable and the contractual agreement to be bound by the decision does not apply (paragraphs 117-118):

> "I do not think that in the context of the agreement to be bound by a temporary decision, the decision can be dissected to impose a separate and separable obligation to be bound by the adjudicator's decision on each of the component issues on which the adjudicator based that decision. Otherwise, the process of adjudication enforcement could be diverted into satellite litigation which is not appropriate when the court is concerned with the enforcement of a decision which has temporarily binding effect".

Ramsey J thus rejected the possibility of severance. He expressly disagreed with the decision of Lord Macfadyen in *Homer Burgess Ltd* v *Chirex (Annan) Ltd*, *supra*; and rejected the suggestion made in that case that a court might enforce a decision restricted to the sum reflecting the part of the decision for which the adjudicator had jurisdiction. On this issue, we prefer the approach taken by Lord Macfadyen. Ramsey J's approach, which is based on the supposed construction of a contract containing an adjudication provision, would have the result that any significant flaw in a decision led to its total invalidity. That, it seems to us, is contrary to the fundamental purposes of the Scheme, which envisages the rapid and effective enforcement of sums due under a construction contract, without the delays caused by lengthy dispute-resolution procedures.

[33] In *Carillion Utility Services Ltd* v *SP Power Systems Ltd*, 2012 SLT 119, Lord Hodge considered similar issues, and concluded (at paragraphs [39]-[40]) that it was "clear that the fact that parties have contracted for a decision by an adjudicator does not prevent the court severing parts of his decision if he has determined separate disputes in the one decision". It was unnecessary to consider severance in that case, however, because the adjudicator had acted in breach of the principles of natural justice, and that tainted his whole decision. Lord Hodge further observed that at present the case law had set its face against allowing the severance of parts of a decision in one dispute, but he noted doubts that Coulson J had expressed on that matter. The policy of encouraging the speedy provisional resolution of construction disputes might support pragmatic arguments in particular cases in favour of separating liability and quantum in an adjudicator's decision where he has fallen into error in relation to quantum alone. That could support Coulson J's approach. It was not necessary, however, to reach a final decision on that matter. Coulson J's views are set out in *AMEC Group Ltd* v *Thames Water Utilities Ltd*, [2010] EWHC 419 (TCC), and *Pilon Ltd* v *Breyer Group Ltd*, [2010] BLR 452, at paragraphs 40-42.

[34] In *Highlands and Islands Airports Ltd* v *Shetland Islands Council*, [2012] CSOH 12, Lord Menzies noted (at paragraphs [41]-[46]) that it was not disputed that partial reduction is a competent remedy in an appropriate case; *Homer Burgess* supported that view. Partial reduction had not been granted in any case. Nevertheless, in light of the view of Coulson J that severance would be possible in some cases, it might be appropriate to review whether severance could properly be considered in an appropriate single dispute case. In doing that, however, the court should not try to dismantle and reconstruct the adjudicator's decision in a manner that intruded on the adjudicator's area of decision-making. The case under consideration, however, was not one that was capable of severance.

[35] The commercial judge in his opinion also made reference to further decisions of Akenhead J in *Working Environments Ltd* v *Greencoat Construction Ltd*, *supra*, and *Beck Interiors Ltd* v *UK Flooring Corporation Ltd*, [2012] EWHC 1808 (TCC), and a decision by Edwards-Stuart J in *Lidl UK GmbH* v *RG Carter Colchester Ltd*, [2012] EWHC 3138 (TCC); in all of these cases parts of an adjudicator's decision were enforced, notwithstanding that he had exceeded his jurisdiction in respect of other parts of the decision. In each case it was held that it was possible to sever the decision into the valid parts and the parts that were *ultra vires*. In the last of these cases Edwards-Stuart J observed (at paragraph 61) that the decision in *Greencoat* might be regarded as conflicting with the general principle that the decision could not be severed where only one dispute or difference had been referred. The rationale underlying the principle, however, was that, where a single dispute or difference has been referred, it will generally be difficult to show that the reasoning in relation to part of the decision had no impact on the remainder of the decision, or that the actual outcome would have been the same. In some cases, however, even in a single-issue adjudication it may be possible to effect severance provided that the reasoning giving rise to a lack of jurisdiction did not form an integral part of the decision as a whole.

[36] Such an approach is supported by the reasoning in *Beck Interiors*, where Akenhead J stated (at paragraph 21), commenting on his earlier remarks in *Cantillon*:

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

In that case the decision was severed, on a practical basis. A subcontractor was sued for the increased cost of flooring works, and the claim as presented was made up of two parts, the cost of the work itself and a liquidated damages claim. Nevertheless both of those flowed from delay in completion. It was held that severance was possible, as the arguments in support of each element were separate (paragraphs 32-33).

[37] In *Whyte and Mackay Ltd* v *Blyth & Blyth Consulting Engineers Ltd*, 2013 SLT 555, Lord Malcolm held that there had been a breach of natural justice, in that the adjudicator had failed to deal with an important line of defence put forward by the engineers, and he accordingly reduced the award. He made reference to severability on an obiter basis, and concluded that even if the award had not been vitiated as a whole it would not have been a suitable case for severance. A single dispute had been referred to adjudication, and the adjudicator had produced a single financial award in relation to that dispute, albeit that it was made up of a number of separate constituent elements. Severance of the offending part of the award from the rest was impossible. There had, moreover, been a significant breach of the principles of natural justice; the adjudicator had failed to mention the most important part of the defence, which was central to the engineers' position.

[38] The commercial judge made reference to the decision of Lord Tyre in *Bell Building Projects Ltd* v *Arnold Clark Automobiles Ltd*, [2017] CSOH 55, and to his own decision in *DC Community Partnerships Ltd v Renfrewshire Council*, [2017] CSOH 143; in both of these cases it was decided that severance was not possible. Finally he referred to the decision of Pepperall J in *Willow Corp SARL* v *MTD Constructors Ltd*, *supra*. In that case it was held that the adjudicator had erred in law in his construction of the contract, which led to the dismissal of a liquidated damages claim. Nevertheless the judge decided that severance was

appropriate, and the remainder of the award was enforced. He expressed agreement with Edwards-Stuart J (at paragraph 74) that

> "… in the context of a single dispute or difference it can often be difficult to divorce any significant flaw in the adjudication from the balance of the decision. Indeed, significant breaches of natural justice are particularly prone to infect and therefore undermine the entire decision. In my judgment, the proper question is not, however, to focus on whether there was a single dispute or difference but upon whether it is clear that there is anything left that can be safely enforced once one disregards that part of the adjudicator's reasoning that has been found to be obviously flawed. Such analysis would not be detailed and, in many cases, it may remain the position that the entire enforcement application should fail. It would, however, further the statutory aim of supporting the enforcement of adjudication decisions pending final resolution by litigation or arbitration if the TCC were rather more willing to order severance where one can clearly identify a core nucleus of the decision that can be safely enforced".

In the case under consideration, applying the foregoing test, severance was held possible.

[39] It was on the basis of a very full analysis of the foregoing authorities that the commercial judge came to the conclusions that we have summarized at paragraphs [12]-[17] above. As we have already indicated, we consider that both his conclusions and his reasoning were correct

The current law on enforcement of adjudicators' awards

[40] In the foregoing authorities it is perhaps possible to discern a development in the attitude of courts to the possibility of severance and the manner in which it can be carried out. Initially, there is a potentially rigid distinction between "single dispute" cases and cases where more than one dispute is referred to adjudication. In the later cases, however, a more nuanced and flexible approach is taken. The distinction between single-dispute and other cases ceases to be decisive, but rather becomes a factor in a flexible and practical approach. The fact that the dispute is presented as a single dispute is clearly a matter of some relevance to the important question of whether severance is possible, but there may be cases where, as in *Beck Interiors*, what is presented as a single dispute flowing from a single cause can be

analyzed into component elements, in that case actual loss and liquidated damages, which are conceptually independent of each other. Consequently the existence or otherwise of a single dispute should not be conclusive.

[41] In our opinion the more recent approach is correct. It is in large measure anticipated by the remarks of Akenhead J in *Bovis Lend Lease Ltd* v *Trustees of the London Clinic*, *supra*, which we have quoted at paragraph [30] above. Under that formulation of the relevant principle, if an adjudicator erroneously adjudicates on one dispute and validly adjudicates on another dispute, the latter will be enforced "unless it is simply not possible verbally or mathematically to identify what his decision" on the other matter is. That points to a strong practical test. A generally similar approach is followed in later decisions, notably *Working Environments Ltd* v *Greencoat Construction Ltd*, *Beck Interiors Ltd* v *UK Flooring Corporation Ltd, and Lidl UK GmbH* v *RG Carter Colchester Ltd*, all referred to at paragraphs [35]-[36] above. In all these cases the court had regard to the substance of the underlying dispute, rather than the question of whether, formally, it could be classified as a "single dispute" case or a case involving multiple disputes. In Scotland, in *CSC Braehead Leisure Ltd* v *Laing O'Rourke Scotland Ltd*, referred to at paragraph [31], Lord Menzies examined the substance of the dispute rather than its form in deciding whether severance is possible. In our opinion that is clearly correct; indeed the distinction between a single dispute and more than one dispute frequently turns on how claims are classified rather than anything going to their underlying substance.

[42] If the single/multiple dispute test is rejected, it is important to determine the test for severability. In *Willow Corp SARL* v *MTD Constructors Ltd*, *supra,* Pepperall J suggested that the best approach was to ignore the parts of the adjudicator's jurisdiction where he lacked jurisdiction, to focus on the remainder and to ask "whether it is clear that there is anything

left that can be safely enforced". While the test of whether a particular conclusion is "safe" has never attracted support in Scotland, we are of opinion that a test along these lines is appropriate. In considering whether a decision which is partially *ultra vires* of the adjudicator can be severed and the valid part enforced, the correct approach in our opinion is that the court should make the assumption that the parts of the decision that are invalid, for example because the dispute had not crystallized, did not exist. On that basis, it should then consider whether the remainder of the decision can be enforced without its being tainted by the invalid part of the decision.

[43] The subject matter of the *intra vires* and *ultra vires* parts of the decision will normally differ substantially, but there may be some overlap, either in the facts or in the process of legal reasoning – applying the provisions of the contract and the general law to those facts. To the extent that there is overlap, the court must consider whether the adjudicator's reasoning in the *ultra vires* part of his decision affects his conclusions in the *intra vires* part to any material extent. Obviously, the greater the overlap, the more likely it is that there will be an influence. If there is a significant influence, the *ex facie intra vires* part of the decision will be tainted, and cannot be enforced. That might happen, for example, because inferences of fact drawn in the uncrystallized part of the dispute are relevant to the remainder, or because reasoning on the application of the law developed in the uncrystallized part is treated as relevant to the remainder.

[44] In this connection it is pertinent to bear in mind the remarks of Akenhead J in *Beck Interiors*, *supra*, at paragraph 21, quoted at paragraph [36] above, to the effect that many different types of jurisdictional challenge can exist, in addition to non-crystallization, and that different considerations as to severability may apply to each of them. For example, in the case of a breach of the principles of natural justice (which is not in Akenhead J's list), it is

much more likely that the whole of the award will be tainted than in the case of a straightforward non-crystallization. The decisions of Lord Hodge in *Carillion Utility Services Ltd* v *SP Power Systems Ltd* and of Lord Malcolm in *Whyte and Mackay Ltd* v *Blyth & Blyth Consulting Engineers Ltd*, discussed at paragraphs [33] and [37] above, are pertinent; these were cases where the adjudicator acted in breach of the principles of natural justice. Breach of the principles of natural justice inevitably casts an element of doubt over the whole of the adjudicator's reasoning.

[45] Acting outwith jurisdiction in respect of one aspect of the dispute, however, does not necessarily taint the remainder. The whole relationship of the *intra vires* and *ultra vires* parts of the decision must be examined, to determine how far the reasoning in the latter has influenced the former. Influence may take a range of forms. Some of the evidence of primary fact may be the same, although it must be borne in mind that primary facts such as the terms of the contract will almost inevitably be relevant to both the *intra vires* and *ultra vires* parts, and should not taint the *intra vires* part. Inferences of fact, based on the primary facts, are perhaps more liable to taint the reasoning in the *intra vires* part of a decision if they are adopted in the *ultra vires* part, although that is not inevitable if the inference appears to have been drawn independently in each part. The application of the law to the facts is a separate area where influence is possible, and here again each case must be considered on its merits. "Law" for these purposes includes the terms of the parties' contract. The critical question is whether the adjudicator's reasoning in the invalid part of his decision has had a significant effect on his reasoning in the *ex facie* valid part. If there is a significant influence, it is likely that severance will be impossible, with the result that the whole decision must fall. We should add, in agreement with the views of Edwards-Stuart J in *Lidl*, quoted at paragraph [38] above, that the existence of a single dispute or difference is relevant in that it

may make it more difficult to show that the reasoning in the invalid part of the decision had no effect on the reasoning in the *ex facie* valid part.

[46] We agree with the commercial judge in his reasoning on this matter, which is generally along the lines that we have suggested. He commented (paragraph [46]):

> "A blanket ban on severance in single dispute cases is likely to be productive of disproportionate and unjust results in a not insignificant number of cases. In my opinion it is also likely to encourage unsuccessful parties in single dispute adjudications to scrabble around for grounds to resist enforcement, because success on any ground (even if it relates only to a relatively small part of the decision) will suffice to invalidate the entirety of the decision".

We agree with those observations. The commercial judge further referred to the underlying policy aims of the 1996 Act and the Schemes that had been provided under that Act, and expressed the view that it would be unfortunate if the courts' approach to the enforcement of adjudication awards made it more difficult to enforce such awards. We agree with that policy.

[47] We should note one further submission for the defenders. Their counsel submitted that the result of the commercial judge's decision was that the parties would be bound not by the decision of the adjudicator but by the decision of the adjudicator as rewritten by the court. They had not contracted to submit to such a decision. In our opinion this submission is misconceived. If parties have agreed to a particular dispute-resolution procedure, and under that procedure the court has power to review a decision, on legal or factual grounds, the parties have agreed to any decision as so reviewed. That is all that has happened in the present case. Moreover, the adjudication in this case is governed by the Scheme, which derives from a statutory instrument promulgated under the 1996 Act. A provision of that nature should be construed as analogous to legislation, rather than turning on niceties of what the parties have agreed.

Enforcement of the present adjudicator's award

[48] The commercial judge concluded that the question that he required to address was, following *Willow*, whether there existed a "core nucleus" of the adjudicator's decision that could safely be enforced. The adjudicator's extension of time award, of 13 weeks, and the associated award for loss and expense of £63,093.47 could not stand. A number of other elements, summarized at paragraph [17] above, followed from those conclusions. Otherwise, however, the commercial judge thought that the decision could properly be enforced, as they were untainted by the decision and reasoning in relation to extension of time and loss and expense. We are in agreement with that conclusion.

[49] The defenders' primary challenge to the commercial judge's reasoning on this issue was to the effect that the Final Works Account should not have been treated as a matter separable from the issues that had not crystallized, in particular the extension of time and resulting claim for loss and expense. This is ultimately a practical question, depending on the particular facts of the case. The commercial judge held that it could be said with confidence that all parts of the decision other than those founded on the claims for an extension of time and resulting loss and expense were untainted by the adjudicator's decision on those matters.

[50] The items that were held unenforceable by the commercial judge were all related to a claim for extension of time and the consequential loss and expense, and certain ancillary matters. Those matters were held not to have crystallized. It is not obvious why the treatment of a claim for extension of time and its consequences should have a bearing on other matters, such as payments for measured work or additional works. Those are for work actually performed, rather than the increase in costs caused by delay. The commercial

judge draws attention to paragraph 303 of the adjudicator's decision, when he states that he had decided to deal with issues of quantum first and then the issues relating to extension of time and the entitlement to recover loss and expense. That appears a sensible way to proceed, and indicates that the adjudicator considered basic issues of quantum, other than delay and its consequences, separately, and only then moved on to the extension of time and consequential loss and expense.

[51] Counsel for the defenders drew attention to particular features of the adjudicator's award. The first of these was paragraph 323, which dealt with the consequences of architect's instruction 25. The adjudicator stated that for completeness he mentioned that item in dealing with measured work, but he had also considered it in the extension of time sections of his decision. He describes this as a "major issue" on which the parties were diametrically opposed. The instruction related to certain landscaping works, and the adjudicator was satisfied that the pursuer had carried out certain works but found the quantification difficult to assess. He found, however, certain evidence to be credible, and on that basis he apportioned the costs in the Scott schedule. Delay in the landscaping works could clearly have an effect on request for extension of time, which would explain why the adjudicator had considered this item in that context, but additional landscaping works would in all probability be ordinary measured works, and that part of the claim would be independent of the extension of time. For this reason we cannot fault the approach taken by the adjudicator, which clearly separated those two aspects of this item.

[52] The defenders also founded on a reference made by the commercial judge (at paragraph [45] of his first opinion) to discrepancies in the pursuer's claim in relation to the works final account. In respect of valuation no 17; an unexplained increase of £73,447.81 occurred when the amount certified for the works final account was compared with the

notice of adjudication. The commercial judge notes, however, that the reasons for such a difference were not explored by counsel for the defenders, and he did not understand counsel to found upon the discrepancy. Furthermore, as the commercial judge noted, while the difference was a significant sum it did not necessarily follow that the disagreement prior to the notice of adjudication in relation to the works final account and the claim made in the notice were essentially different. It appears to us that, if such a matter is to be founded on as establishing non-crystallization, an explanation must be given as to the nature of the discrepancy and how it would prevent the claim from crystallizing. That was lacking.

[53] In these circumstances we are unable to discover any discrepancies in the claims made by the pursuer, other than the claim for extension of time and associated loss and expense and other elements, that would prevent the remainder of the dispute from crystallizing. We are accordingly of opinion that the commercial judge reached the correct decision on this matter.

Conclusion

[54] For the foregoing reasons we are of opinion that the commercial judge's decision and reasons are correct. We will accordingly refuse the reclaiming motion.