Scottish Court of Session Decisions

OUTER HOUSE, COURT OF SESSION

[2017] CSOH 38

CA100/16

OPINION OF LADY WOLFFE

In the cause

NKT CABLES A/S

Pursuer

against

SP POWER SYSTEMS LIMITED

Defender

Pursuer: MacColl; Burness Paull LLP
Defender: Borland QC; Shepherd & Wedderburn LLP

8 March 2017

[1] In this action the pursuer seeks to enforce an award in its favour following an adjudication under the Housing Grants, Construction and Regeneration Act 1996 ("the Act") in the principal sum of £2,143,712.28, together with ancillary claims for VAT and interest at a specified daily rate. The principal sum was the figure specified in an amended decision of the Adjudicator ("the Amended Decision", see paragraph [11], below). In the alternative, the pursuer seeks decree in the amount

of £1,851,408.53, being the amount specified in the Adjudicator's original decision, together with VAT and interest ("the Original Decision", see paragraph [8], below). Where it is not necessary to distinguish between the Amended and Original Decisions or where there is no material difference, I shall simply refer to "the Decision".

[2] The defender resists the pursuer's action on several grounds. In brief, it contends that the Adjudicator had no power to amend his Original Decision and that in any event, the correction was not within the scope of any slip rule that might apply (whether by implication or under statutory instrument). The defender further contends that the Adjudicator's purported correction was in breach of natural justice. Finally, the defender contends that the Adjudicator failed to exhaust his jurisdiction in that he failed to address substantive lines of defence or the defender's alternative valuations and, further, that his reasons were wholly inadequate.

Background

[3] By a contract dated 25 November 2010 the defender engaged the pursuer to supply and install certain 132/33 kV electricity and pilot cables and accessories in Glasgow ("the Contract"). The purpose of the project, which was associated with the 2014 Commonwealth Games, was to reinforce the pre-existing electricity supply for a newly-built athletes' village. The work was substantially, but not entirely, completed by the time the Contract was first suspended and then terminated. While there are disputes about those events, they do not feature as part of this action. However, a dispute arose between the pursuer and the defender regarding the amount of any outstanding balance under the Contract.

Referral to Adjudication

[4] By notice dated 6 May 2016 ("the Notice"), the pursuer intimated its intention to refer the dispute to adjudication. In particular, the pursuer sought a determination of the gross value of its entitlement under the Contract, which it stated to be £12,722,192.36, and certification of the sum outstanding, that is after deductions for sums already paid. The Notice provided the date of the Contract. (This date is potentially relevant to the argument about whether the statutory scheme in its amended form could apply to an adjudication in respect of a contract entered into prior to that amendment. The statutory instrument is set out in paragraph [32], below.) The Notice did not make express reference to the statutory instrument governing adjudications in Scotland. Thereafter, on 10 May 2016, the parties appointed Alan Joseph Turner as Adjudicator ("the Adjudicator").

[5] The pursuer served the Referral Document ("the Referral") and supporting documents on 13 May 2016. The defender replied to this in their response dated 26 May 2016 ("the Response"). There were further exchanges between the parties, including the pursuer's reply dated 31 May 2016 to the defender's response ("the Pursuer's Reply") with appendix, and the defender's further response dated 3 June 2016 to the Pursuer's Reply ("the Second Response").

The Agreement

[6] The parties and the Adjudicator entered into an agreement dated 24 May 2016 ("the Agreement") to govern the conduct of the adjudication, which narrated:

> "A Dispute has arisen between the Parties under a Contract between them dated on or about **2th November 2010** in connection with: **electricity supply for the 2014 Commonwealth Games in Glasgow,** which has been referred to adjudication in accordance with the Adjudication Rules set out in **The Scheme for Construction Contracts (Scotland) Regulations 1998 (Sl1998/687))** (the Procedure) and the Adjudicator has been requested to act." (Emphasis in original).

The Agreement provided that the adjudication "shall be conducted in accordance with the Procedure". While the Procedure was defined by reference to SI 1998/697) ("the Scheme"), it did not expressly specify whether this was to the Scheme in its amended or unamended form. After sundry further procedure, the Adjudicator issued his decision. Part of the challenge concerns the procedure followed by the Adjudicator and his issue of the Amended Decision. It is necessary first to set out the calculation in

his Original Decision.

The Calculation in the Original Decision

[7] The calculation of the award in the Original Decision was set out, as follows, with line numbers inserted for ease of reference:

TABLE 7-SUMMARY

DESCRIPTION SUMS
1.Value of works (as provided) £ 6,799,908.00
2.
3.Variation and claims £2,122,950.84
4.
5.Interest (to 01/07/16) £124,531.69
6.
7.TOTAL £9,047,390.53
8.
9.Sum certified/paid (this sum excludes interest yet to be certified but acknowledged by the Engineer) £7,195,982.00
10.**Sum to pay £1,851,408.53**

[8] Unfortunately, the figure representing the gross value of the Contract the Adjudicator had calculated at line 7 was not correctly carried over into his formal award and decision on the last page of his Original Decision. While the figure for the net balance outstanding remained the same (at £1,851,408.53), the Adjudicator had mistakenly inserted a different figure as the gross value of the Contract, namely of £9,376,220.72. Counsel who appeared at the debate before me were agreed that this was a "rogue" figure and could not be derived from any of part of the Adjudicator's prior workings.

Email Exchanges between the Pursuer and the Adjudicator

[9] The Adjudicator issued his decision on the afternoon of 1 July 2016 ("the Original Decision"). By email sent on 4 July, and timed at 19:33, the pursuer's agents queried the calculation of the total outstanding balance, as follows:

> "Thank you for your Decision of 1 July2016. Our client has reviewed the Decision and has identified an apparent slip in the calculation of the total outstanding balance, which therefore impacts upon the sum that has been directed as being payable.
>
> We are unable to reconcile the sum of £9,376,220.72 at the top of page 41 of the Decision but assume it is intended to be a sum to reflect the agreed contract price, plus the amount for variations and claims as decided in the adjudication (as set out in table 7) plus the amount of agreed "VO's" (£288,520.82 as set out at page 1 of the 'Guidance Notes to the evaluation of variations and claims' in the 'Complementary Document to submission of ten volumes of supporting information for the purposes of an adjudication between nkt and SPPS' at Appendix 3 to the Referral and as totaled [sic] in cell L17 of the "Agreed and withdrawn" tab of nkt's 'master spreadsheet' (See Appendix 9.3 of the Referral)), plus the sum of £3,782.93 allowed by the Engineer for interest on already certified sums pursuant to his clause 50 assessment in April 2016.
>
> This therefore leads to a figure of £9,339,694.28 (£6,799,908 + £288,520.82 + £3,782.93 + £2,122,950.84 + £124,531.69}, being slightly lower than the figure of £9,376,220.72 at the top of page 41 of the Decision. However, once the agreed sum certified and paid is deducted, being £7,195,982, this leads to an amount of £2,143,712.28 outstanding (including interest). The total of £1,726,876.84 halfway down page 41 of the Decision should therefore read £2,019,180.59. The interest amount remains the same.

Nkt would therefore be grateful if you could investigate this matter and issue a Decision amended accordingly to correct this apparent slip."

The Revised Calculation in the Amended Decision

[10] The Adjudicator responded the same evening, by email timed at 23:44, in the following terms:

"Thank you for your e-mail.

The figure of £9,376,220.72 was indeed an error.

I have also included both the agreed sum of £288,520.82 and the agreed interest of £3,782.93.

This gives a total figure for the complete value of the Works as £9,339,694.28. As £7,195,982.00 has been paid this leaves £2,143,712.28 outstanding.

I have added the £3,782.93 agreed interest to the interest that I have found is due so that sums attracting VAT are kept separate from those that do not.

I attach a complete electronic amended Decision however I have only sent the amended pages by post. "

[11] The amended calculation in Table 7 was as follows. For ease of reference, the additional text (at lines 2 and 4) and the changed figures (in lines 7 and 10) are indicated by italics.

DESCRIPTION SUMS
1.Value of works (as provided) £ 6,799,908.00
2.*Agreed Claims (as provided) £ 288,520.82*
3.Variation and claims £ 2,122,950.84
4.*Agreed Interest (as provided) £ 3,782.93*
5.Interest (to 01/07/16) £ 124,531.69
6.
7.TOTAL £ *9,339,694.28*
8.
9.Sum certified/paid (this sum excludes interest yet to be certified but acknowledged by the Engineer) £7,195,982.00
10.**Sum to pay *£2,143,712.28***

For completeness I should record that the figure in line 3 of each calculation included the amounts determined by the Adjudicator to be due in respect of the claims for variation under clause 31 (£1,200,538.24) and for additional payment under clause 34 (£605,678.64), as well as his determinations of VO129 (£27,305.04) and VO39 (£289,428.92). There is no dispute in relation to his determination of claims VO129 or VO39.

What the Adjudicator was Endeavouring to do by Amending the Original Decision

[12] The Adjudicator's calculation of his award entailed first taking the value of the works (which was not a disputed figure and which had been provided to him) and adding to it:

(i) the total additional amount he had found to be due to the pursuer by way of variation orders ("VOs") or additional payments ("APs"), which was comprised within the figure at line 3 in each calculation, and

(ii) the interest he had calculated (see line 5 in each of the calculations).

This brought a total contract price, in line 7, and from which there fell to be deducted the value of payments already made. The calculation brought out in line 7 of the Original Decision is mathematically correct, as being the aggregate of the preceding figures from lines 1, 3 and 5. However, as already noted,

the line 7 figure was not carried over into the final page comprising the formal award. The figure that was carried over to the last page, and which was intended to express the outcome of the calculation of the gross value of the contract after taking into account the claims accepted by the Adjudicator, was the figure of £9,376,220.72.

[13] The pursuer's query, raised in its email of 4 July 2016 (set out in paragraph [9], above) was in relation to its inability to reconcile the figure of £ 9,376,220.72. It was suggested – "presumed" – that this figure was intended to include two agreed figures, and reworked figures were provided in the email, including the figure of £9,339,694.28 as the total value of the Contract. The two omitted matters said to have been agreed were:

(i) the agreed claims in the sum of £288,520.82 ("the Agreed Claims"), and

(ii) the agreed interest of £3,782.93 ("the Agreed Interest").

There is no mention in the Original Decision of either of these items or that their quantification was agreed. In its pleadings the defender admits that the Agreed Claims were, in fact, agreed and in the amount stated but that this sum had previously been paid. A like admission is made in respect of the Agreed Interest but it is averred that the pursuer did not agree that interest in the sum of £3,789.93 was due. I note that this was referred to in paragraph 10 of the Referral as having been assessed by the Engineer as due and which the defender appeared to accept (at paragraph 70) of its Response to the Referral. As I understood the defender's position, it contends that there is double-counting between the Agreed Interest and the interest awarded by the Adjudicator (and recorded at line 5 of his calculation).

[14] As the email from the Adjudicator disclosed, he agreed that he had made an error in respect of the carryover of the incorrect figure and that he had also omitted to include the figures representing the Agreed Claims and Agreed Interest in the Original Decision. In the Amended Decision, the Adjudicator included these figures in his revised calculation (at lines 2 and 4, see paragraph [11], above) and he replaced the rogue figure on the last page with the new total brought out by his recalculation. In the apportionment between the outstanding balance and interest, stated further down on the last page of his Amended Decision, he deducted the Agreed Interest figure from that balance and added it to the additional interest he had found to be due.

[15] While the pursuer's agent's email of 4 July was copied to the defender and its agents, as was the Adjudicator's reply and his Amended Decision, all of this took place in the space of about four hours in the course of an evening, and after conventional business hours. The Adjudicator sent his Amended Decision shortly before midnight. The defender did not respond to either of these email communications until the following day, by which point the Amended Decision had been issued.

[16] The defender contends that the Adjudicator had no power to amend his Original Decision and, in any event, that what was done was in breach of natural justice.

[17] The defender also challenges the Adjudicator's Decisions on the basis of his failure to exhaust his jurisdiction, by failing to have regard to various defences (either its substantive grounds or its alternative quantification) and by failing to provide adequate reasons. It is necessary to summarise the defender's position in the adjudication and to set out how the Adjudicator dealt with these matters in his Decisions. There is no difference as to how these were addressed in the Original and Amended Decisions, and I shall therefore simply set out the relevant passages.

The Defender's Stated Defences in the Adjudication

[18] The sum in dispute in the adjudication derived from 136 discrete claims by the pursuer for further payment. While these were initially all presented as claims for variations, the Adjudicator formed the view that some of these were properly claims for APs under clause 34 of the Contract and some were VOs under clause 31. In response to the Adjudicator's request, parties produced separate schedules for VO and AP claims. In general, an entitlement to payment for a VO was following a variation instructed by the defender and an additional payment was for work carried out but where the risks of difficulties and additional expense were to be borne by the defender, rather than by the pursuer. Of the 136 claims, the Adjudicator dealt with three claims (VOs 129, 39 and 136) separately, and there is no challenge to his

determination of these three claims.

[19] The defender stated several defences to the pursuer's claims. The defender contended that the vast majority of the pursuer's claims were time-barred by reason of the pursuer' failure, it was said, to comply with the requirements of clause 34. Separately, even if that defence was not upheld, the defender also disputed the majority of these claims "in principle", meaning that substantive defences were advanced as well as the time-bar one. These seven substantive defences were articulated as "Key Point 5" in the defender's Response to the Referral (No 4 in the joint bundle) and were attributed to each of the claims in schedule format in its Explanation Document (No 18 in the joint bundle) ("the Explanation Document"). In summary, the substantive defences were referred to as follows: "SAP" (the pursuer was alleged to have failed to give advance requisite notice that a 'senior authorizing person', hence "SAP", was required on site for certain purposes); "Cable" (the alleged failure to carry out approval tests for an alternative form of cable or that any problems claimed arose from the pursuer's use of a cable design not authorised by the Contract); "Delay" (the delays claimed for were said to be at the pursuer's risk, including Weekend Working, traffic management and so on, and for which provision was said already to have been made in the Contract); "Weekend Working" (Weekend Working was said already to be included within the scope of the Contract); "No instruction to accelerate" (there was no such instruction, rather the pursuer was being requested to comply with existing contractual timeframes); "No instruction for additional works" (either there were no instructions or the work claimed was within the scope of works); and "Other" (encompassing a miscellany of substantive disputes on other grounds). These substantive defences were asserted in respect of both the VO claims and the AP claims. These would have afforded a complete defence to the claim to which they related.

[20] While the Explanation Document does not relate to all of the pursuer's claims, it did set out the defender's position in relation to 95 of these. The defender's challenge on the grounds of the Adjudicator's alleged failure to exhaust his jurisdiction was advanced in broad terms, that is without particularly ascertaining how this might have affected the different categories of claims. However, in understanding the scope of the defender's challenges to the Adjudicator's Decision, it may assist to analyse that document. All 95 of these claims were resisted on the basis of time-bar. The Adjudicator dealt with claims numbered 39 and 129 separately in his Decision, and there is no challenge to how he addressed these two claims. Of the 93 remaining claims listed in the Explanation Document, 53 were subsequently characterised as VO claims and 40 were characterised as AP claims. (The Explanation Document does not classify the claims in this way, but an analysis of the tables in the Decision discloses that this was this classification subsequently made.) Of these 93 claims, the defender disputed 78 these in principle, that is, it advanced one of the substantive defences identified above. In particular, 39 (of a total of 53) VO claims and 37 (of a total of 40) AP claims were disputed in principle. As the Adjudicator commented specifically on the issue about cables in his discussion of the background, it should be noted that, so far as the Explanation Document discloses, the cable defence was asserted in respect of 15 AP claims and 4 VO claims. Accordingly, substantive defences (other than 'Cables") was asserted in respect of 35 VO claims and 22 AP claims. If the defender is correct in its challenge on the basis of a failure to exhaust jurisdiction by reason of the Adjudicator not addressing its substantive defences, it would affect the determination of the quantification of the sums found due for both the VO and AP claims.

[21] Turning to the issue of alternative valuations advanced by the defender, it should be noted that in respect of some 15 claims, other than for the time-bar defence, the defender did not dispute these in principle. Rather, it advanced an alternative, lesser quantification. All but one of these 15 claims were VO claims. Only one of these (claim no. 110) fell to be treated as an AP under clause 34. These alternative valuations were set out in the Explanation Document already referred to. In addition, there were a further five VO claims that were disputed only on quantum, and not disputed either on time-bar or in principle. As I understood it, the defender only challenges the Adjudicator's alleged failure to address its quantification in respect of the VO claims. It should be noted that where the defender did dispute the claim in principle, it attributed a nil value. Accordingly, any failure to engage with the defender's alternative valuation was almost wholly confined to the Adjudicator's consideration of the VO claims, and concerned only 19 or so of these claims.

The Adjudicator's Consideration of the Defender's Stated Defences

[22] After setting out the terms of the Notice and the Contract, and detailing the procedural timetable and witness statements considered, the Adjudicator set out the "background" to the dispute. In that context he dealt with the issue of cables. He formed the view that while the defender had stipulated a specific kind of aluminium sheathed cable, this was done in the knowledge that such a cable was not generally available in the UK (where lead-sheathed cables were used), and accordingly both parties were aware from the outset that approvals would be needed for the kind of cable used: see paragraph 24 of the Decision. He recorded (at paragraph 25) that the pursuer used a cable with a corrugated sheath design which, while making it easier to bend, resulted in a slightly larger overall diameter; that the majority of the problems encountered by the pursuer related to the installation or threading of the cable (see paragraph 26, but note that the reference to the Referring Party in the last sentence of paragraph 26 cannot be correct and must, in fact, be a reference to the Responding Party); and that the pursuer contended that the defects present in the ducting were not ascertainable from the pre-contract pull-through tests (see paragraph 27).

[23] From all of this the Adjudicator concluded (at paragraph 28) that, while there was pre-contract testing of the existing ducts by pulling through sample cables, the majority of problems encountered by the pursuer in the course of the Contract works was not as a result of the allegedly non-compliant cable used, but due to characteristics of the ducts and which were not identifiable by the kind of pull-through pre-contract testing undertaken.

[24] Having set out the background, the Adjudicator then set out the scope of the dispute referred to him, as follows:

> "30. Before me for my Decision is the valuation of the Works and in particular the **validity and value** of the "VOs" that have been rejected by the Employer's Representative/Engineer. Some £7,195,982.00 has been agreed between the Parties but a sum of £5,922,284.36 (£5,033,341.27 together with interest on the claimed sum of £888,943.09) remains in dispute and it is this sum that has been put to me to make a Decision on its value. " (Emphasis added.)

[25] It is perhaps here convenient to note the Adjudicator's reference to valuations placed upon some of the claims by the Engineer under clause 50:

> "32. Following rejection of a substantial number of "VOs" by the Employer's Representative they were put before the Engineer for consideration under Clause 50 and the Engineer provided his conclusions in a document titled "Engineer's Decision" dated 14 April 2016. Suffice to say the conclusions of the Engineer with regard to the value of the matters placed before him have been rejected by the Referring Party."

While the Adjudicator referred to the Engineer's valuations of the pursuer's claims, and which it rejected, there is no reference at any point in the Decision to the defender's alternative valuations advanced in the course of the adjudication.

[26] As noted, the Adjudicator disagreed with the initial characterization of all of the pursuer's claims as falling under clause 34 and he explained his understanding of the distinction between the procedures under clause 31 and 34. He then turned to deal with the 52 claims that fell to be considered as VOs under clause 31, which he set out at Table 1. The two right-hand columns of this table contained, respectively, the pursuer's valuation and that of the Employer's Representative, Iberdrola Engineering & Construction (referred to as "IEC"). In submissions, the defender's Senior Counsel, Mr Borland, makes the point that there is no third column in the table detailing the defender's alternative valuations of 19 of these VO claims.

[27] In the following paragraphs of the Decision the Adjudicator addressed himself to the time-bar issue. He began by setting out in detail (in paragraph 38) the procedure provided for in clause 31, and the rejection by the Employer's Representative of all but three of the pursuer's claims as out of time:

paragraph 39. He noted that the Employer's Representative did not operate the procedure provided for in clause 31 but instead invoked, wrongly in his view, the procedure under Clause 34 and which imposed a timetable. The defender's position was that the pursuer's non-compliance with the clause 34 procedure resulted in the pursuer's claims being time-barred. The defender sought to support this approach by reference to a guidance note associated with the standard form which had formed the template for the Contract. The Adjudicator expressed the view that these guidance notes were wrong.

[28] In the light of all of this, including what he understood to be the Employer's Representative's duty to determine the value of a VO, the Adjudicator decided that time had not begun to run, with the consequence that he rejected the defender's time-bar defence. In passing he noted, at paragraph 41, that under clause 31 the Employer's Representative had the onus of valuing any variation but that he had failed to do so. Instead, by reason of this misreading of clause 31 or of the misapplication of the procedure in clause 34 to what were properly clause 31 claims, this "has caused the Contractor to keep a record of his costs" with the consequence, as the Adjudicator saw it, of "the valuation being undertaken by the [pursuer] keeping a record of costs": paragraph 50. As the Adjudicator put it (at paragraph 46), the pursuer was obliged to make "all of the running" and to keep a record of all of his costs. From these he concluded:

> "53. Having examined the matters in detail in this category I conclude that the values placed upon them by the [pursuer] would in reality be those values which would have been derived by the Employer's Representative/Engineer had the Employer's Representative/Engineer applied the procedure required of him as set out in clause 31.3.
>
> 54. I therefore adopt the values of the Referring Party as my values where the Employer's Representative/Engineer has not valued the Variations and I Decide accordingly. For those Variations where the Employer's Representative/Engineer bas provided a valuation I have considered that valuation and I record my assessment and Decision on the following table 2 where I set out my conclusions with regards to the value of these items."

[29] Table 2 was the same as Table 1, other than that the column detailing the IEC values was removed. In other words, the Adjudicator accepted the pursuer's valuation for every single one of the VOs claimed and which totalled £1,200,538.24. The defender points to the absence of any reference to, or determination of, any of the other substantive defences it had advanced.

[30] From this point in his Decision (from paragraph 56ff), the Adjudicator turned to consider the AP claims properly arising under clause 34. Clause 34 did have a procedure and which the Adjudicator considered at length (from paragraphs 59 to 80), summarising his finding (at paragraph 76) as regards the correct approach to be followed by the Employers Representative and Engineer. Of the 43 or so AP claims made by the pursuer (set out in Table 3), the Adjudicator determined (at paragraph 81) that 32 of these claims, which he set out in Table 4, had not been submitted within the timescale and so fell to be excluded. The tenor of the next paragraph (being paragraph 82), was that, having excluded the claims in Table 4, the remainder fell to be considered. While that would have left 11 AP claims to be considered, the Adjudicator recorded only 9 of these (as set out in Table 5). He does not explain this discrepancy which, for present purposes, I ignore. The passage of the Decision setting out his determination of the non-excluded AP claims is as follows:

> "83. I have considered both the evidence advanced by the [pursuer] in support of these claims and also **the arguments advanced by the [defender]** against the claims, where there was **a dispute in principle** (i.e. other than the "time-bar" argument). I have set out in table 5 the claims that I consider should be accepted. The [pursuer] has provided supporting evidence of the costs and I accept the values advanced by the [pursuer].
>
> 84. The timetable of the Adjudication, and recognising that some of the claimed sums are individually relatively small, **precludes me from setting out here a detailed consideration of each individual VO**.

85. Nevertheless claim VOs 16, 30, 33 and 34 I find should accepted for the reasons that I provide in paragraph 28 of this narrative.

86. Consequently having examined the matters in detail in this category I provide my determination of their value in the final column of Table 5. My total valuation of these claims is £605,678.64." (Emphasis added.)

Again, the valuations recorded in Table 5 are those advanced by the pursuer. In point of fact, there was no competing valuation submitted by the defender, as it had attributed nil values to each of these claims. In paragraph 85 of this passage the Adjudicator refers back to paragraph 28 of his "narrative" (see paragraph [23], above), and which contained his conclusion that cabling issues were attributable to defects in the ducts not the use of an unapproved type of cable.

The Statutory Instrument Governing Scottish Adjudications under the Act

[31] As noted above, in the Agreement reference was made to the Scottish Statutory Instrument governing adjudications, namely, The Scheme for Construction Contracts (Scotland) Regulations 1998 (SI 1998/687)) ("the Scheme"). Parties are agreed that the Scheme for construction contracts contained in the 1998 SI applied to the adjudication. They differ as to whether the Scheme applied in its amended or unamended form.

[32] As originally enacted the Scheme did not provide an adjudicator with a power to amend clerical or typographical errors in his decision. The power to do so is often referred to as "the slip rule". As amended by regulation 3(3) of the Construction Contracts (Scotland) Amendment Regulations SI 2011/371 ("the 2011 SI"), the Scheme now contains a power in regulation 22A enabling the Adjudicator to correct certain clerical and other errors. The amended Scheme was in force at the time of the adjudication. Regulation 22A provides as follows:-

"22A.—

(1) The adjudicator may on his own initiative or on the request of a party correct his decision so as to remove a clerical or typographical error arising by accident or omission.

(2) Any correction of a decision shall be made within 5 days of the date upon which the adjudicator's decision was delivered to the parties.

(3) Any correction of a decision shall form part of the decision."

However, regulation 1(2) of the 2011 SI provided that the amended regulations "only apply to construction contracts entered into on or after 1st November 2011". There were no transitional provisions in the 2011 SI.

[33] The Contract was entered into before the 2011 SI was brought into force. Accordingly, and in the absence of agreement between the parties, by reason of the date of the Contract, the Scheme in its unamended form would apply to the adjudication. The only reference to the Scheme contained in the papers referred to at debate was that contained in the Agreement, produced by the Adjudicator and signed by the parties. The Agreement did not expressly stipulate that the Scheme was to apply in its amended form. The pursuer contends nonetheless that this follows as a matter of common sense. A reference to a legislative instrument is to the version in force at the material time. Nothing precluded the parties from agreeing that it apply. For its part, the defender argued that the date of the Contract was critical. There were no transitional provisions enabling the amended Scheme to apply to pre-amendment contracts, such as the Contract. In those circumstances, it was the Scheme in its unamended form that applied.

Legal Principles governing Challenges to Adjudicators' Decisions

[34] The parties were largely agreed as regards the legal principles that fell to be applied. They differed in the emphasis placed on some of these, and in how these principles were to be applied to the instant case. I summarise the principles and note such differences as there were between the parties.

General Principles of Enforceability of an Adjudicator's Decision

[35] In relation to the general principles of enforceability, the pursuer's position may be summarised as follows:

> 1. The process of adjudication required the court to respect and enforce the adjudicator's decision unless it was plain that the question which he has decided was not the question referred to him, or the manner in which he has gone about the task is obviously unfair. It should only be in rare circumstances that the courts will interfere with the decision of an adjudicator. See *Carillion Construction Limited* v *Devonport Royal Dockyard Limited* [2006] BLR 15 ("*Carillion*") at [85] to [87]; *Amec Group Limited* v *Thames Water Utilities Limited* [2010] EWHC 419 (TCC) ("*Amec*")at [21] and [54].
> 2. The correct conventional approach for the court to adopt in an adjudication enforcement action is simply to consider whether the Adjudicator was validly appointed and whether he acted within his jurisdiction and in accordance with the rules of natural justice. If these issues can be answered in the affirmative, the decision of the adjudicator should be enforced. See *Ground Developments Limited* v *FCC Construction and others* [2016] EWHC 1946 (TCC) ("*Ground Developments*") at [60].
> 3. Thus, if an adjudicator has not answered the question put to him, his decision will be unenforceable; if, however, he has answered the right question, even in the wrong way, his decision will be enforceable. See *Bouyges (UK) Limited* v *Dahl-Jensen (UK) Limited* [2000] BLR 49 ("*Bouyges*") at [14] and [27] to [28].

Circumstances in which the Court will not Enforce an Adjudicator's Award

[36] The defender accepted that, as a generality, the decisions of adjudicators will be enforced by the court. However, the court would not enforce an adjudicator's decisions in circumstances where an adjudicator:

1. has acted in excess of his jurisdiction;
2. has failed to exhaust his jurisdiction;
3. has acted in breach of the rules of natural justice; or
4. where his reasoning is non-existent or unintelligible.

Under reference to *Carillion* and *Gillies Ramsay Diamond* v *PJW Enterprises Ltd* 2004 SC 430 ("*Gillies Ramsay Diamond*"), the defender argued that the present case fell into the limited, plain class of case where the court should refuse to enforce an adjudicator's award.

The Slip Rule

[37] One of the issues in this case is whether the slip rule applied, either as part of the statutory Scheme or by implication, and whether the amendment made by the Adjudicator resulting in the Amended Decision was within the scope of that rule.

[38] The pursuer's position in relation to the scope of the slip rule was that where a mistake in an adjudicator's decision was brought to the attention of the adjudicator within a reasonable time of the publication of the decision, the adjudicator was entitled to correct that mistake so long as it has arisen from accidental error or omission. The court will then enforce that corrected decision. The adjudicator had jurisdiction to correct such errors on the basis of an implied term in the parties' bargain for adjudication. See Keating, Construction Contracts (10th ed), paragraph 18–045; and *Bloor Construction (UK) Limited* v *Bowmer & Kirkland (London) Limited* [2000] BLR 314 ("*Bloor*").

[39] The defender does not accept that the "slip rule" has any potential application in the present case.

Exhaustion of Jurisdiction

[40] Several of the issues in this case concerned whether the Adjudicator had failed to exhaust the jurisdiction conferred on him in a variety of ways. The pursuer's position was that the Adjudicator simply required to address the central issues in the dispute before him. However, if he has done so, but did so in the wrong manner, this will not bar enforcement of his decision. Reference was made to the principles set out by Coulson J in *Pilon Limited* v *Breyer Group plc* [2010] BLR 452 ("*Pilon*") at [22], where it was stated:

> "22.1. The adjudicator must attempt to answer the question referred to him. The question may consist of a number of separate sub-issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question then, whether right or wrong, his decision is enforceable: see *Carillion v Devonport*.
>
> 22.2. If the adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his jurisdiction (and has, for example, failed even to consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice: see *Ballast, Broadwell,* and *Thermal Energy*.
>
> 22.3. However, for that result to obtain, the adjudicator's failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the decision unenforceable: see *Bouygues* and *Amec v TWUL*.
>
> 22.4. It goes without saying that any such failure must also be material: see *Cantillon v Urvasco and CJP Builders Limited v William Verry Limited* [2008] EWHC 2025 (TCC). In other words, the error must be shown to have had a potentially significant effect on the overall result of the adjudication: see *Keir Regional Ltd v City and General (Holborn) Ltd* [2006] EWHC 848 (TCC).
>
> 22.5. A factor which may be relevant to the court's consideration of this topic in any given case is whether or not the claiming party has brought about the adjudicator's error by a misguided attempt to seek a tactical advantage. That was plainly a factor which, in my view rightly, Judge Davies took into account in *Quartzelec* when finding against the claiming party."

[41] The pursuer also submitted that the Adjudicator enjoyed a wide discretion as to the manner in which he might address the dispute before him. He was not obliged to include within his decision a specific commentary upon each and every point raised by a respondent in its submissions to the adjudication. See *Amec* at [78] to [90].

[42] The defender's position was as follows: the scope of an adjudication was defined by the relevant notice of adjudication, together with any ground founded upon by the responding party to justify its position in defence of the claim made. Reference was made to *Construction Centre Group Ltd* v *Highland Council*, 2002 SLT 1274 ("*Construction Centre Group"*), per Lord Macfadyen at paragraph [19]. Hence, if a responding party in adjudication proceedings raises a line of defence to a claim made against it, the adjudicator required to deal with it and cannot ignore it: *Connaught Partnerships Ltd (in administration)* v *Perth & Kinross Council*, 2014 SLT 608 ("*Connaught")*, per Lord Malcolm at paragraph [19].

Sufficiency of Reasons

[43] In relation to the sufficiency of an Adjudicator's reasons, the pursuer's position was that a challenge to the sufficiency of the reasons provided by an Adjudicator can succeed only if the reasons are so incoherent that it is impossible for the reasonable reader to make sense of them: *Gillies Ramsay Diamond* at [31]; *Carillion* at [53] (confirmed at [84]).

[44] The defender agreed that the reasons given by an adjudicator for his decision must make sense to a reasonable reader. If they did not, the purported decision was not supported by any reasons at all, and on that account it was invalid. It also followed that if there was an absence of reasoning in a material

respect, the decision will be invalid. He also referred to *Gillies Ramsay Diamond*, per the Lord Justice−Clerk at paragraph [31]; and *Connaught Partnerships* at paragraph [21].

Natural Justice Challenges

[45] There was also a challenge based on a breach of natural justice. The defender's position was that in Scots law, a challenge to an Adjudicator's decision based on a breach of the rules of natural justice will succeed if the party making the challenge can demonstrate that there was merely a possibility that the breach caused injustice: *Costain Ltd* v *Strathclyde Builders Ltd*, 2004 SLT 102 ("*Costain*"), per Lord Drummond Young at paragraphs [23] and [24].

[46] The pursuer accepted that the general principles in terms of which issues of natural justice will be applied in adjudication cases are discussed and summarised in *Costain*. However, it is only in the plainest of cases that a challenge might properly be mounted to an adjudicator's decision on the basis of a breach of the rules of natural justice: *Carillion* at [85] to [87].

Issues

[47] In the light of the foregoing, the following issues arise:

(1) Did the Adjudicator have power to correct a slip, as provided for in regulation 22A of the Scheme in its amended form, or was the adjudication subject to the Scheme in its unamended form;

(2) If regulation 22A was not available, because the Scheme in its unamended form applied, whether a like power was available to the Adjudicator by implication;

(3) On the hypothesis that a power to correct a slip applied (either under the Scheme or by implication), were the amendments made to produce the Amended Decision within the scope of the slip rule;

(4) In any event, did the Adjudicator act in breach of natural justice in the manner in which he produced the Amended Decision; and

(5) Separately, did the Adjudicator fail to exhaust his jurisdiction by reason of failing to consider the defender's substantive defences or its alternative quantifications, or by reason of failing to provide adequate reasons.

[48] It will be appreciated that the first four issues only affect the Amended Decision. If the Amended Decision is vitiated because the Adjudicator did not have power to amend his Original Decision, or because what he did was outwith the scope of the slip rule or was in breach of natural justice, the pursuer seeks in the alternative to rely on the Original Decision. Issue (5), if successful, would also vitiate the Original Decision. For convenience, I will refer to issues (1), (2) and (3) as "the slip rule issues".

Defender's Submissions

The Slip Rule Issues

[49] Mr Borland argued that the Scheme applied in its unamended form. This followed simply from the fact that the Contract pre-dated the amendment introduced by the 2011 SI and because there were no transitional provisions for the application of the 2011 SI amendments (ie Rule 22A) to be applied retrospectively. While parties could have agreed for the amended Scheme to apply, they had not done so. In support of this argument he relied on the reference to the date of the parties' Contract in the Agreement. This unequivocally brought into play the Scheme in its unamended form. He also relied of the reference to the Scheme in the Agreement. From this he argued that the parties had contracted on the basis that the adjudication was conducted under the Scheme in its unamended form. If that was correct, the Adjudicator was *functus officio* upon the issue of the Original Decision and the Amended Decision

was a nullity.

[50] Mr Borland then addressed the pursuer's fall-back position that, if the statutory slip rule in Regulation 22A was not available, nonetheless a power to amend was available by implication of law. Mr Borland urged me to reject that contention. In the first place, and under reference to the observation in *Gillies Ramsay Diamond* (at paragraph 20) and cited in *Richie Brothers (PWC) Ltd* v *David Philip (Commercials) Ltd* 2005 SC 384 ("*Richie"*) (at paragraph 8), it was well recognised that the scheme of adjudication under the Act was *sui generis*. As that observation made clear, it was unsafe to import into the scheme for adjudication the procedures or case-law from arbitrations. Further, Mr Borland pointed out that there was no Scottish authority cited in support of the implication as a matter of common law of any power of correction by an adjudicator in a Scottish adjudication, though he accepted that there were English cases.

[51] As support for his contention that there was no common law power to amend errors, Mr Borland referred to the consultation by the Scottish Government in 2003 ("Improving Adjudication in the Construction Industry"), and the observations at section 3.5 thereof, which was to the effect that there was neither statutory nor common law power to correct errors. That consultation also noted that the English Arbitration Act did not apply in Scotland (though parenthetically I note that the Arbitration (Scotland) Act 2010 has subsequently been enacted), and that clarification of the law was required. Mr Borland accepted that these comments were not binding on the court.

[52] Mr Borland also counselled against any read across from arbitration. Not only was adjudication *sui generis*, but the genesis of the slip rule in English law had to be noted with care. Under reference to *Bloor*, he argued that the implication of a slip rule in English law derived from a long-standing power in the English Arbitration Act of 1950. That Act did not apply in Scotland and, in any event, he relied on the judicial observations just noted as regards the *sui generis* character of Scottish adjudications.

[53] In *Bloor*, Toulmin J had also implied an obligation to afford the other party an opportunity to comment on any proposed correction. Mr Borland argued that section 57(3) from the English Arbitration Act 1996 now in force conferred a power "to remove ambiguity" but it also provided for parties to be given a reasonable opportunity to comment. The rules in the schedule to the Scottish arbitration act, the Arbitration (Scotland) Act 2010, contained a slip rule (in Rule 58) exercisable for a period of 28 days but it also required that the other party be given an opportunity to comment. One could contract out of that rule so, it was argued, it was clearly the case that a power of amendment was not essential in the context of arbitration.

[54] In any event, *Bloor* was distinguishable. The basis for implication of an implied term in *Bloor*, was that, on its facts, the parties in that case were agreed that there was a manifest error to be corrected and that there was no prejudice. Here, there was significant prejudice in that the award in the Amended Decision was £219,000 higher than that in the Original Decision. It was not agreed that an error had been made.

[55] Turning to the question of the form of any term to be implied, Mr Borland noted that if either section 57 of the English Act or Rule 58 of the 2010 Act were the benchmark, they differed from each other and the term the pursuer sought to imply corresponded with neither of these sections. Further, regulation 22A of the Scheme was not concerned with ambiguity and it provided only a very short time-frame. Looking at the test for implication, as for example set out in *Trollope & Colls Ltd* v *North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 ("*Trollope"*) at pages 613H to 614, if there were a number of ways any term to be implied could be expressed, this militated against implication. Here, Mr Borland argued, there were several extant formulations of the slip rule in other provisions but they had significant variations from each other such that there was insufficient certainty as to the form that any implied term would take. The pursuer should not, as he put it, be allowed to "dine a la carte". No term should be implied.

[56] Turning to the third of the slip issues, Mr Borland argued that, even if a slip rule in some form fell to be implied, what the Adjudicator purported to do was outwith the scope of the slip rule, whatever its source or formulation. The inclusion of figures representing the Agreed Claims and the Agreed Interest in the Amended Decision was not giving effect to the Adjudicator's first thoughts, as was required: see *Bloor* at page 319. Nor did this involve corrections to errors made in relation to these items in the Original Decision. This was a complete recalculation with new elements factored in. Even if there were a slip rule, what the Adjudicator purported to do was more than a correction or removal of a clerical

or typographical error.

Breach of Natural Justice

[57] In relation to beach of natural justice, Mr Borland argued that it was a common feature of the slip rule as embodied in the English Act, in the Scottish Arbitration rules and in the implied term under English law, that parties be given an opportunity to make representations in respect of the proposed exercise of the power. The term the pursuer sought to imply did not include such a qualification. This either militated against implication of a term without such a qualification, as the pursuer here sought to do, or founded a discrete ground of challenge for breach of natural justice. The defender had been prejudiced by the Adjudicator's conduct. There was double-counting in the calculation of interest. It sufficed to succeed on this ground to show that there was a mere possibility of prejudice: *Costain* at paragraphs 23 and 24.

[58] If the defender was correct in the foregoing grounds of challenge, the Amended Decision was void. This left the Original Decision. Mr Borland challenged the Original Decision on the grounds of the Adjudicator's failure to exhaust his jurisdiction in several respects. (As the reasoning in the Original Decision and the Amended Decision is the same, this ground of challenge, if successful, would also vitiate the Amended Decision.)

Failure to Exhaust Jurisdiction

[59] The defender contended that that the Adjudicator failed to exhaust his jurisdiction in three respects, corresponding with issue 5 above, at paragraph [47], above. Mr Borland accepted that, as a generality, it was only in the plainest of cases that the court refused to enforce an adjudicator's award. The import of cases such as *Construction Centre Group* or *Charles Henshaw & Sons Ltd* v *Stewart and Shield Ltd* [2014] CSIH 55 ("*Charles Henshaw & Sons Ltd*") was strongly to favour enforcement. Nonetheless, the courts recognised (eg in cases such as *RBG* v *SGL Carbon Fibres Ltd* [2010] CSOH 77) that in a limited class of cases the court refused to enforce an award because the adjudicator had failed to exhaust his jurisdiction. The scope of the dispute included what was set out in a notice to refer but it also included any relevant defence advanced by the responding party. There would be a failure to exhaust jurisdiction if the adjudicator did not address each issue and provide adequate reasons: *Connaught*.

[60] Mr Borland then turned to consider in detail the materials submitted by the defender in the adjudication. This included an explanation of the substantive defences I have set out above (at paragraph [19]). Mr Borland also referred to paragraphs 20, 28, 29, 32, 32 and 34 of the Referral; to the "key point 5" substantive defences (at pages 12 to 13); and alternative valuations (at paragraphs 24 to 26 and 60 to 69, at pages 17 and 24, respectively) in the Response; and to paragraphs 91 to 131 of the Pursuer's Reply. These were said to demonstrate that the parties were engaging with the matters put in issue by the defender. Mr Borland also referred in detail to the defender's Explanation Document which identified those claims in respect of which the defender took the time-bar point as well as the claims that were disputed in principle (meaning that it also advanced one of the substantive defences). The Explanation Document also summarised the key point defences and set out in table format the defender's position on, and where appropriate alternative valuation to, 95 of the pursuer's claims. One of these key point defences was that there were simply no instructions to vary under clause 31 whereas a variation order was necessary in terms of clause 31.1 of the Contract. Yet, no instructions were produced in the adjudication. This was a substantive defence.

[61] In relation to the Adjudicator's Decision and its determination of the VO claims under clause 31, Mr Borland argued that nowhere was there any mention of the key point substantive defences advanced by the defender nor of the alternative valuations offered by it. Mr Borland developed these criticisms as follows.

[62] The Adjudicator had failed to engage in any way with the key point defences. If accepted, these would have afforded a complete defence to the claims they related to. Nowhere did the Adjudicator set out why the defender's defences were wrong. Nor did the Adjudicator set out his reasons, which must make sense to the reasonable or informed reader, for rejecting these defences. The test in *Connaught*, *Construction Centre Group Ltd* and in *RBG* had not been met. The Adjudicator had, inexplicably, accepted all of the pursuers VO claims (under clause 31) as variations and, further, he had accepted the pursuer's valuations in every instance. There was no mention of the defender's alternative valuations at

any point in his Decision. Mr Borland illustrated these matters by comparing table 2 in the Decision with the schedule in the defender's Explanation Document and noting the omission to refer to any of the defender's alternative valuations. By way of further illustration, Mr Borland referred to claim 19 (which the defender's resisted on the basis of "no instructions" and to claim 20 (which the defender's defended on the basis of "delay"), and the supporting documentation (at tab 19 of the Joint Bundle). These demonstrated a complete failure of the Adjudicator to engage with the substantive defences. In respect of the VO claims, there was no consideration of the defences advanced relative to them. There was no engagement with any alternative valuation.

[63] Furthermore, there was nothing in the Decision to show that the adjudicator had addressed all of the key point defences. Where, he asked, were the Adjudicator's reasons for rejecting these? It was not apparent from the face of the Decision that he had considered these or his basis for rejecting these, if that was a considered position. Mr Borland submitted that 38 of the claims characterised as VOs engaged key point defences 5 and 6 (no instructions to accelerate, no instructions for additional works) as set out, *inter alia*, in the Explanation Document. Despite this level of detail, the Adjudicator failed to engage with any of these defences.

[64] Finally, in relation to the criticisms of the Adjudicator's disposal of the VO claims under clause 31, Mr Borland argued that there was no apparent account taken of the defender's alternative valuations where these were advanced. Mr Borland referred to passages in the supporting material (lodged at tab 20 of the Joint Bundle) to demonstrate how the alternative valuation figures had been arrived at. Looking at table 1 and 2 of the Decision, the Adjudicator set out IEC's figures for only three of these claims (namely, numbers 15, 17 and 25), yet there was no reference to any of the defender's own valuations.

[65] Turning to the Adjudicator's treatment of the claims for AP under clause 34, Mr Borland examined paragraphs 83 to 85 of the Decision in detail (set out at paragraph [30], above). He allowed that, on a generous reading, the Adjudicator had engaged with the cable defence. The reference in paragraph 85 to claims "in this category" was confined to the clause 34 claims the Adjudicator was discussing. That covered claims 16, 30, 33 and 34. However, it remained the case, as with all of the clause 31 claims, that the Adjudicator had wholly failed to engage with the other substantive defences. It was not good enough to say (as he did at paragraph 80) that he had "considered the arguments advanced by… [the defender's]". In any event, Mr Borland noted in passing, there was no equivalent statement in that part of the Decision containing the Adjudicator's consideration of the clause 31 claims. Nor was it acceptable to elide the duty to give reasons simply because, as the Adjudicator stated at paragraph 84, the claims individually were relatively small. There was simply no consideration at all of any of the defences to claims 28, 35, 42, 85 and 95 and which alone totalled about £100,000 of his award.

[66] The court's approach was as set out in *Pilon* at paragraph 20. The scope of the jurisdiction included substantive defences invoked by the responding party as well as matter referred to in any notice of intention or referral by a referring party. Examples of successful challenges were found in the cases of *Construction Centre Group* and *RBG*.

[67] The last string to the defender's bow under this heading (of failure to exhaust jurisdiction) was the submission that the Adjudicator had failed to give adequate reasons in respect of significant lines of defence. Mr Borland accepted that, in the light of the comments in cases like *Gillies Ramsay Diamond* at paragraph 31, the test was a high one. The reasons had to be verging on incoherent. The courts deprecated the dissatisfied party from combing through a decision for fine flaws. However, the reasons had to show that the adjudicator had dealt with the matters submitted to him, and they must show his conclusions on each issue so that the informed reader can make sense of them: *Whyte and Mackay Ltd* v *Blythe & Blythe Consulting Engineering Ltd* 2013 SLT 555 ("*Whyte and Mackay Ltd*") at paragraph 30. Here, he said, one looked in vain for these features in the Decision concerning the defender's key point defences. Reference was also made to *Thermal Energy Construction Ltd* v *AE & E Lentjes UK Ltd* [2009] EWHC 408 (TCC) ("*Thermal Energy*") at paragraph 2.

[68] If this challenge was correct, then the Original Decision fell to be reduced *ope exceptiones*.

The Pursuer's Reply

[69] Mr MacColl began by inviting me to repel the defender's pleas-in-law, to uphold the pursuer's first and fourth pleas, being for the enforcement of the Amended Decision and for decree *de plano* on the

basis that the defender's pleading were irrelevant, and to grant decree as first and third concluded for. Mr MacColl adopted the submissions in his Note of Argument and he also helpfully supplied a fuller speaking note.

[70] Mr MacColl began by reminding the court as to the purpose of the scheme of adjudication introduced under the 1996 Act, which was to enable a rough and ready *interim* resolution of disputes in the construction industry and thereby assist in cashflow. For that reason, the grounds for challenge to an adjudicator's decision were restricted. Unless it was plain that the question which an adjudicator has decided was not the question referred to him or the manner in which he has gone about the task is obviously unfair, the court should enforce his decision. Under reference *Carillion* at [85] to [87] he stressed that it would only be in rare circumstances that the courts will interfere with the decision of an adjudicator. *Carillion* had regularly been followed by the Scottish courts: *Charles Henshaw & Sons Limited* v *Stewart & Shields Limited* [2014] CSIH 55 (at [17]); *Miller Construction UK Limited* v *Building Design Partnership Limited* [2014] CSOH 80 at [17], where *Carillion* is adopted and applied by Lord Malcolm in the Commercial Court, and *Amec Group Limited* v *Thames Water Utilities Limited* [2010] EWHC 419 (TCC) at [21] and [54], and also see [78] to [90] for the discussion of the general tests to be applied in relation to enforceability).

[71] In the light of these authorities he argued that the correct conventional approach for the court to adopt in an adjudication enforcement action was simply to consider whether the adjudicator was validly appointed and whether he acted within his jurisdiction and in accordance with the rules of natural justice. If these issues can be answered in the affirmative, the decision of the adjudicator should be enforced: *Ground Developments Limited* at [60]. Accordingly, it was only if an adjudicator has not answered the question put to him, that his decision will be unenforceable. If, however, he has answered the right question, even in the wrong way, his decision will be enforceable. The leading case was *Bouyges* at [23] to [25].

[72] These features of adjudication informed the question of the adequacy of an adjudicator's reasons. An adjudicator's decision was not a judicial decision which invited close scrutiny. It was produced for the benefit of the parties, under a tight timescale. The duty was simply to give reasons intelligible to the informed reader, not to set out his full reasoning.

The Slip Rule Issues

[73] In relation to the slip rule, Mr MacColl's primary position was that the Scheme in its amended form applied. Properly construed, the reference in the Agreement to the Statutory Instrument was to the Scheme as it then stood at the time the Agreement to adjudicate was entered into.

[74] In the event that the statutory slip rule in regulation 22A was not available, as a fall−back Mr MacColl contended that a power of correction should be implied as a matter of common law, namely: that "where a dispute had been referred to adjudication and the adjudicator had made an accidental error or omission, that the adjudicator had the power to correct that accidental error or omission. Such a term fell to be implied by well-established operation of law. The pursuer offered to prove that such a term falls to be implied on the basis that no reasonable person in the position of either of the parties would have refused to accede to such a term being implied and that, without this implied term, the parties' contract would operate in a way which would not be the way in which practical business people, in the construction industry, on both sides of the transaction, would reasonably expect it to operate". Furthermore, notwithstanding the defender's criticisms, the term to be implied had been properly (and sufficiently) identified by the pursuer in its pleading. The pursuer did not have to go beyond the term it pled.

[75] Mr MacColl accepted that, in order to determine the argument on this basis, evidence would require to be heard by the court. He referred to Keating, *Construction Contracts* (10th ed), para 18-045 and *Bloor* for support for implication of such a term. He also noted that, at the time that the parties entered into the Contract, the statutory background in relation to arbitration in Scotland was materially the same as that in England at the time of the contract in *Bloor*. The position of the pursuer, however, is that *Bloor* did not seek to apply the English arbitration statutes to adjudication – rather it considered what terms fell to be implied into the statutory adjudication scheme then live in England (which was, for all material purposes, the same as that in Scotland). Furthermore, there was no reason to apply a different approach in Scotland to that in England. It would be strange to adopt a different approach to the same

statutory scheme. There was nothing in the two consultation papers founded upon by the defender to gainsay that position.

[76] On the hypothesis that a slip rule applied, Mr MacColl turned to consider whether the Amended Decision fell within it. In his submission, it did. Part of the task the Adjudicator had to undertake was to take into account the total value of the works under the Contract. This was clear from the terms of the Notice (at paragraph 33), and which was agreed at pages 18 and 25 of the Response, and from the Referral (at paragraphs 71 and 73). This was necessary before the Adjudicator could then work out the value of the balancing outstanding. The Adjudicator simply omitted to include the Agreed Interest and Agreed Claims in error. This omission was correctable within the terms of the slip rule. The Amended Decision was *intra vires*.

[77] Turning to *Richie*, which the defender founded on, Mr MacColl argued that this case was beside the point. That case concerned whether or not an adjudicator's jurisdiction fell where the date for the issue of a decision had passed without a decision being made. The jurisdiction to issue a decision is different and distinct from a power to correct an error in a decision which has already been issued. Here, the Adjudicator was not *functus* for so long as he could apply the slip rule.

[78] In respect of the alleged double-counting, Mr MacColl's position was that this appeared to relate only to the figure for Agreed Interest. This was *de minimus* in the light of the overall sum in dispute. In any event, the defender did not specify to what extent there was any double-counting.

Breach of Natural Justice

[79] Mr MacColl then turned to the argument that the Adjudicator had acted in breach of natural justice. The adjudicator was correcting what he understood and had accepted was a slip in his decision (that decision having been made on the basis of the full representations already made to him by the parties). In any event, Mr MacColl argued, the defender was fully aware of the correspondence between the pursuer's solicitors and the adjudicator. It was open to the defender to respond as it saw fit. The defender chose not to respond. Indeed, he argued that the defender had never responded with any meaningful criticism of what the Adjudicator has done. In Answer 5 the defender asserted that the defender "would have made submissions that could have affected the amendments" to the decision - however, the defender was unable to explain or specify what these are. Similarly, the defender asserted that there was a "significant element of double counting" in relation to interest, without quantifying this. On any view, the figure of £3,782.93 could not be regarded as "significant" for the purpose of any double counting. This had not been addressed in submissions. It cannot be prejudicial for the defender to be obliged to pay the correct sum, that is, one that took into account the Agreed Claims and the Agreed Interest. For these reasons, there is no truly identifiable prejudice to the defender in the manner in which the Adjudicator has corrected the Decision. In any event, as cases such as *Costian* and *Carillion* made clear, it was only in the plainest of cases that a challenge on the basis of a breach of natural justice could be made. There was not the requites unfairness in this case. This ground of challenge should be refused.

Failure to Exhaust Jurisdiction

[80] Mr MacColl responded to the defender's arguments that the Adjudicator had failed to exhaust his jurisdiction in the three ways specified. He referred to his position in relation to the general legal principles, set out above at paragraphs [35] and [36]. It was enough for the Adjudicator to address the core dispute before him; if he did so, but in the wrong manner, that did not preclude enforcement of his decision. He cited *Pilon* at paragraph 22. An adjudicator enjoyed a wide discretion as to how he addressed the dispute before him. He was not obliged to include a specific commentary on every point: *Amec* at paragraphs 78 to 90. Mr MacColl noted that in all of the cases founded upon by the defender the adjudicator had specifically said that there was a matter he was not going to consider. See *RGB* (at paragraphs 27 and 28) and *Connaught* (at paragraph 18). That was not the case here. In his Decision, the Adjudicator had addressed the issues referred to him for determination and he had exhausted his

jurisdiction in respect of those issues.

[81] Mr MacColl went through the Decision. I have set this out above, at paragraphs [22] to [30]. Mr MacColl laid stress on the statement, at paragraph 14 of the Decision, where, after listing the six witness statements received, the Decision stated "[a]ll of which I have considered when reaching my Decision". He noted that the pursuer did not criticise this sentence. At paragraph 15 of the Decision, the Adjudicator had correctly identified what he had to address. From paragraphs 16 to 29, the Adjudicator discussed the Contract and the background to the dispute. Mr MacColl noted that at paragraphs 23 to 28 the Adjudicator specifically addressed himself to the issue of cables and which was one of the key point 5 defences. The Adjudicator reiterated the core dispute, at paragraph 30. From the content of paragraph 34 it could reasonably be inferred that the Adjudicator had taken into account the matters produced to him. He discussed the VO claims at paragraphs 36 to 55. It sufficed for him to address the generality of matters, which he did at paragraphs 50 to 55, and he was not obliged "to engage in the sort of detailed, nit-picking analysis" the defender demands. He had indicated, at paragraph 54, that he had considered matters. It must be inferred that the Adjudicator had considered everything. He did not expressly disavow dealing with any particular matter. It was not a tick box exercise. It was not good enough to say that, because he had addressed the cable defence in a particular way, that he could be criticised for not dealing with the other defences in a similar manner. At paragraph 54 of the Decision the Adjudicator had clearly accepted the pursuer's approach. He had implicitly rejected the defender's. This was not the same thing as not considering the defender's defences at all. This case was therefore distinguishable from *Connaught* and *RGB*. The adjudicator had appropriately exhausted his jurisdiction in respect of the VO claims.

[82] In relation to his consideration of the AP claims under clause 34, Mr MacColl relied on paragraphs 84 and 85 of the Decision, set out at paragraph [30], above. At paragraph 83 of the decision, the Adjudicator recorded that:

> "I have considered both the evidence advanced by the [pursuer] in support of these claims and also the arguments advanced by the [defender] against the claims, where there was a dispute in principle (ie other than the 'time bar' argument)."

Mr MacColl noted that the defender did not challenge that factual statement, and indeed, had no has no basis for challenging it. This was a plain indication that the Adjudicator had addressed himself to the arguments of the defender and has decided not to accept them.

[83] Turning to the Adjudicator's treatment of the competing valuations, which the defender contended was the second way in which the Adjudicator had failed to exhaust his jurisdiction, Mr MacColl dealt with this shortly. In the context of the adjudication process, the Adjudicator has explained the basis upon which he has reached the valuations adopted by him in relation to the 23 claims in which the defender advanced alternative quantifications. The Adjudicator has observed specifically at paragraphs 51, 54 and 83 of the Decision that he had accepted the evidence and values advanced by the pursuer in the adjudication process. In these circumstances, there was no requirement for the Adjudicator to refer expressly to the defender's alternative valuations where they have not been accepted (and the basis upon which the approach to quantum of the pursuer has been accepted or the claims have been disallowed on other grounds). There is no material to suggest that the Adjudicator failed to take into account the submissions made by the defender in relation to alternative valuations in reaching his decision.

[84] Mr MacColl then turned to the argument that the Adjudicator had failed to give adequate reasons, being the third way in which it was contended that the Adjudicator had failed to exhaust his jurisdiction. The proper approach, set out in the parties' agreed Legal Principles, was that a challenge to the sufficiency of an Adjudicator's reasons could only succeed if they were so incoherent that it was impossible for the reasonable reader to make sense of them: see paragraph [43], above. See *Gillies Ramsay Diamond* at para 31 and *Carillion* at paragraph 84. Here, he argued, the Adjudicator's reasons were sufficient to show that the Adjudicator had dealt with the dispute referred to him for his determination and what his conclusions were on that dispute. There was no failure to exhaust his jurisdiction.

Discussion

The Slip Rule Issues

[85] I begin by considering the slip rule issues. In relation to whether regulation 22A was available to the Adjudicator, in my view, it was not. I accept that, as a generality, a reference to a statutory instrument or scheme will be to its terms as in force at that time. However, that cannot be assumed in this case. In the first place, the amended Scheme was prospective only. The 2011 SI contained no transitional provisions and it specifically provided that the amendments introduced to the Scheme did not apply to contracts which pre-dated it, such as the Contract between the parties. Further, the Adjudicator specified the date of the Contract in the Agreement he proposed to parties. As a specialist adjudicator, the significance of that date must have been apparent to him. While the issue is finely balanced, in the light of these features, I would not be prepared to construe the reference to the 1998 SI in the Agreement as including the amended Scheme and regulation 22A. Nothing would have precluded the Adjudicator stipulating in the Agreement he proposed that the adjudication be conducted under the Scheme as amended. He did not do so.

[86] The next question is whether a slip rule fell to be implied at common law. On the question of implication of a term at common law, Mr Borland founded on the fact that there is no Scottish case akin to *Bloor*, although he does not go so far as to suggest it would be incompetent to imply a term into the Scheme. In my view, the absence of a Scottish case implying a slip rule under the unamended Scheme means no more than the point has not arisen in this jurisdiction. I agree with Mr MacColl's submission that it would be unfortunate for there to be a divergence between the two jurisdictions as regards the power available to an adjudicator, given that the Act is of UK-wide application. Of course, this is of diminishing importance, given that the 1998 SI and the equivalent English statutory instrument has been amended to include a slip rule. On first blush, it may seem unusual to imply a term into a statutory scheme. However, it should be borne in mind that the Scheme is, by virtue of section 108(5) of the Act, implied into construction contracts which omit to make like provision for resolution of relevant disputes. Accordingly, the Scheme is itself a series of terms implied into the Contract between the parties. On that analysis, I see no principled reason to refuse to consider implication of a slip rule, if the test for implication is otherwise met. I turn to consider the test for implication.

[87] Mr Borland relied on Lord Pearson's formulation of the test for implication as articulated in *Trollope* where it was stated (at page 609B-C):

> "The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: **it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves**." (Emphasis added.)

Mr MacColl did not demure from that formulation. As is apparent from the passages I have highlighted, the formulation of the business efficacy test in *Trollope* has several elements. On the one hand, it is likely that parties who agree to go to adjudication would agree or find it useful that the adjudicator had power to correct slips. Such a power is, indeed, highly expedient. However, Mr Borland stressed the observation to the effect that the desirability or reasonableness of a term is not sufficient. Implication must be "necessary" to give business efficacy.

[88] Having regard to the pursuer's averments on this point (set out at paragraph [74], above) as regards the term it seeks to imply, Mr MacColl relies on the element from *Trollope* that "it must have been a term that went without saying". This formulation is reflected in Lord Sutherland's *dictum* in *Thomson v Thomas Muir (Waste Management) Ltd* 1995 SLT 403 ("*Thomson*") at 406 where, in considering the test for implication of a term, he said,

> "The basic requirement is that the term would have to be incorporated to give the contract business efficacy. This has been interpreted in a number of different ways including saying that the contract

would be unworkable without the incorporation of the implied term, **or** that the implied term was of such a nature that had the matter been considered by the parties at the time when the contract was entered into they would unhesitatingly have agreed to its incorporation, **or** that the absence of the implied term could lead to an absurdity or to the perpetration by one party of a dirty trick." (Emphasis added.)

It is, perhaps, more apparent from Lord Sutherland's formulation (and his use of the disjunctive) than the passage highlighted from *Trollope*, that insofar as the test for implication is business efficacy, this has been formulated in a variety of ways. In my view, it does not mean that every element or formulation of the "business efficacy" test must be satisfied before the desiderated term may be implied.

[89] There is a superficial attraction in Mr Borland's submission that as the unamended Scheme operated without a slip rule, then it could not be said that such a power was "necessary" to business efficacy to imply such a term. However, I do not regard that as conclusive. Mr Borland also counselled caution in following *Bloor* by reason of what was said to be the source of implication in that case, namely the English Arbitration Acts of 1996 and 1950: see *Bloor* at page 318, right column (foot). That may be so, but in *Bloor* Mr Toumlin J did not adopt the slip rule as embodied in the Arbitration Acts in all respects. He did not, for example, imply a term requiring that parties first be afforded an opportunity to make representations or that any power was exercisable for a period of 28 days, and which are features of the rule in section 57 of the Arbitration Act 1996. The basis of implication of a term in *Bloor* was expressed as follows: "Parties acting in good faith would be bound to agree at the start of the adjudication that the adjudicator could correct an obvious mistake of the sort which he made in this case." That, it seems to me, accords entirely with the *dicta* in *Trollope* or *Thomson* as a basis for implication.

[90] The rationale for the Scheme of adjudication is to provide a short and sharp, if rough and ready, means to obtain a binding determination, even if only a provisional one, of disputes in the construction industry. As Toumlin J said in *Bloor*, the purpose of adjudication is to do broad justice between the parties. By reason of the provisional character of an adjudicator's determination, *intra vires* errors are not a basis to disturb an adjudicator's award. However, given the speed with which adjudications are conducted, it is not unlikely that slips in expression will also be made. The efficacy of the Scheme for adjudication would, in my view, be substantially diminished if the adjudicator had no power to correct a slip, so long as this was done within a reasonably short space of time of the issue of the decision containing it. I accept the pursuer's submissions in principle on this point. On the authorities, there is scope for implication of a slip rule on the basis that "it must have been a term that went without saying" (as it was put by Lord Pearson in *Trollope*) or that the slip rule "was of such a nature that had the matter been considered by the parties at the time when the contract was entered into they would unhesitatingly have agreed to its incorporation" (*per* Lord Sutherland in *Thomson*).

[91] In coming to this view, I place no reliance on the passages Mr Borland cited from the Scottish Government consultation papers. Nor do I regard it as an insurmountable object to implication that the term to be implied might be formulated in different ways. For present purposes, it suffices to proceed on the basis that there may be scope for implication of a term without the qualification for prior notice to the parties, ie in terms similar to regulation 22A. This is for two reasons: the scope of the rule is to enable minor typographical or similar errors to be corrected. Secondly, if the power were restricted to these sorts of errors, in other words if in doing so the Adjudicator would be giving effect to his "first intentions" (as it was put in *Bloor*), then it is not essential to the operation of that rule that parties be afforded an opportunity to make representations. Natural justice is unlikely to require an opportunity to make representations in respect of so limited a power of correction. In the instant case, in my view, if parties had been asked at the time the Agreement was entered into whether the Adjudicator should have power to correct slips, they would have been bound to say yes and to have in mind regulation 22A or something in very similar terms.

[92] In terms of the pursuer's pleadings, to the extent that it avers a basis of implication consistent with the foregoing (as it does in article 5 of condescendence, in the passage beginning "In any event, no reasonable person…." to the next sentence ending "…expect it to operate"), those averments are not irrelevant. It remains to be seen whether the particular term sought to be implied is relevantly pled. I turn to consider that, in the context of the third of the slip rule issues.

Were the changes made to produce the Amended Decision within the scope of the slip rule?

[93] What is the scope of the slip rule? Looking at regulation 22A of the Scheme as the likely formulation of the slip rule to be implied, the scope of the rule is relatively narrow: it enables the adjudicator "to correct his decision so as to remove a clerical or typographical error arising by accident or omission". Three features of this call for comment. First, the rule is not directed to pure omissions, ie something that an adjudicator meant to do but by some oversight he forgot to do. Secondly, the slip is in the nature of a "clerical or typographical" error. This betokens an error in *expression or calculation* of something contained within the decision, not an error going to the *reason or intention* forming the basis of that decision. Such slips might include an arithmetical error in adding or subtracting sums, mis-transposing parties' names, a slip in carrying over a calculation from one part of the decision to another or, as here, the mistaken insertion of a rogue number. Thirdly, it is this kind of slip (clerical or typographical) that is as a result of "accident or omission". This, too, points to correction of slips or mistakes in expression, rather than changes to the reasoned or intended basis of the decision. All three of these features are consistent with the observations in *Bloor* and the analysis of the cases referred to therein, about the slip rule essentially being confined to corrections of the adjudicator's "first thoughts and intention". Were the scope of the slip rule broader, ie to include corrections of pure omissions (as I have called them) or to give effect to second thoughts or intentions, it would have the potential seriously to undermine the *interim* finality which is a feature of adjudications under the Scheme.

[94] While *Bloor* is a case about the implication of a term at common law, it seems to me that the scope of regulation 22A in the Scheme is entirely consistent with the discussion in that case, about the purpose and scope of a slip rule. If that is correct, the scope of the slip rule is confined to correcting a typographical or clerical error of something expressed within the four corners of the decision and which is apparent on the face of the decision. It is not warrant to correct what are more substantive errors, in the sense of a mistake of fact or law. Nor, in my view, is it warrant to correct a pure omission, being something that the adjudicator intended to include or take account of but which he has wholly omitted to in reaching his decision.

[95] Turning to consider what the Adjudicator did in his Amended Decision, it should be noted that, in substance, two errors were brought to the Adjudicator's attention by the pursuer's email of 4 July 2016:

> (i) the inclusion of the "rogue" figure of £9,376,220.72 on the final page of the Original Decision (see above, at paragraph [12]) and which was not the figure produced by the Adjudicator's calculation at line 9 on the preceding page of "0,047,390.53) (see paragraph [7], above); and
>
> (ii) his omission to take into account the figures reflected in the Agreed Claims and the Agreed Interest.

The first mistake is clearly an error in carrying over the correct figure to the final part of his Decision. If a slip rule applies, in my view the correction made to replace this rogue figure was squarely within the scope of that rule. However, having been reminded by the pursuer's agents of the omission to include Agreed Claims and the Agreed Interest, the Adjudicator also sought to overcome the omission of the figures representing these two items. That this was an additional step is apparent from the language used in his cover email later that evening, when he wrote:

> "The figure of £9,376,220.72 was indeed an error.
>
> I have **also** included both the agreed sum of £288,520.82 and the agreed interest of £3,782.93." (Emphasis added.)

The parties joined issue on whether this change was within the scope of any slip rule (on the hypothesis it applied).

[96] In considering whether the amendment to include the Agreed Interest and the Agreed Claims was within the scope of the slip rule, I proceed on the basis that the Agreed Claims and the Agreed Interest were matters that were before the Adjudicator and had been referred to in the submissions or documentation considered by him. Neither party suggested otherwise. It would appear that parties expected him to take these two matters into account in any award. However, neither of these items was referred to in terms in the Original Decision or in the Adjudicator's calculation of the sum due to the

pursuer. Accordingly, while the Adjudicator accepted that there was an apparent error in omitting these from his calculation, and when reminded of these sought to include them in the Amended Decision, he was not giving effect to his first thought and intention. The fact that there was no intention to do so that may be discerned from the Original Decision. The omission was clearly an *intra vires* error but, in my view, that does not mean it falls within the slip rule. In other words, in his purported correction to include the Agreed Claims and the Agreed Interest, the Adjudicator was not bearing to be giving effect to his first thoughts and intention, as it was put in *Bloor* (at page 319). Rather, he was seeking to correct an error which was a true omission, in the sense that on the face of his Decision he had given no thought to these two matters at the time of undertaking his calculation or promulgating his Decision, and, therefore, treatment of these figures did not form part of his first intention when making the Original Decision. In my view, what the Adjudicator purported to do in redoing his calculation to include the figures for Agreed Claims and Agreed Interest in the Amended Decision was outwith the scope of the slip rule, whether as formulated in regulation 22A or as might be implied in like terms at common law.

[97] I am fortified in the view I have reached, that what the Adjudicator purported to do in the Amended Decision was outwith the scope of the slip rule, by the case *Bouygues* and in which the facts are broadly similar to those in the instant case. In *Bouygues,* Dyson J, as he then was, was considering (at page 54 right column) the distinction between an error that was within an adjudicator's jurisdiction (because it related to part of the dispute referred to him) and one that was outwith his jurisdiction (because he was purporting to decide a dispute that was not referred to him). While that distinction was in relation to a discussion about an excess of jurisdiction and the scope of the slip rule was not considered in *Bouygues*, the kind of mistake the adjudicator made in that case (which was accepted to be within his jurisdiction) was an error in calculation closely akin to that made in the instant case. In particular, in *Bouygues* it was a matter of agreement before the adjudicator that the retention was not yet due (see paragraph 30) and so was not part of the dispute referred to the adjudicator. Notwithstanding that, the adjudicator had wrongly used a gross sum (which had the effect of releasing the retention): see paragraph 31 of *Bouygues*. In that case, the adjudicator stood by his calculation as not containing a clerical error or mistake, and he declined to amend his award. There was no criticism in that case of the adjudicator's stance. In my view, the adjudicator in that case was correct in declining to do so. In *Bouygues,* the adjudicator had made an *intra vires* error and which parties simply had to accept as a risk inherent to adjudication. That is the mirror image, as it were, of the mistake here: which led to a lower (rather than a higher) contract price. In my view, that error was not susceptible to correction under the slip rule.

[98] Returning to the pursuer's averments, the pursuer seeks to imply a term "to correct an accidental error or omission". It is also averred that the kind of omission to include the Amended Claims and Amended Interest falls within the scope of this term. In my view, in the absence of some qualification as to the kind of error (such as "clerical or typographical") as opposed to how it arose (by "accident"), this is too broadly cast. Such a term is habile to permit amendments to substantive errors. Further, to the extent that in its averments the pursuer purports to extend its implied term to permit correction of the Adjudicator's omission to take into account the Agreed Claims and Agreed Interest, this is to extend it impermissibly beyond the accepted scope of the slip rule. Accordingly, these averments fall to be excluded as irrelevant.

Breach of natural justice

[99] The question of whether the Adjudicator has acted in breach of natural justice arises only if I had found that the changes in the Amended Decision were within the scope of the slip rule. I have found that the changes to include the Agreed Claims and the Agreed Interest were outwith its scope. If the slip rule applied, either as formulated under regulation 22A or as implied in similar terms, its scope is so confined that natural justice does not require that parties be given a reasonable opportunity to make representations. On that basis, I do not accept that this ground of challenge was well founded.

Has there been a failure to exhaust jurisdiction in respect of the defender's alternative quantification?

[100] In practical terms, this ground of challenge only applies to the pursuer's VO claims under Clause 31. As set out above, the defender advanced alternative valuations in respect of a minority of the pursuer's claims and only one of these related to an AP claim. I would not regard an omission to consider one alternative valuation in the context of all of the pursuer's AP claims under Clause 34 as constituting a

failure to exhaust jurisdiction in respect of this ground of challenge. What follows, therefore, is confined to the Adjudicator's treatment of the defender's alternative valuation of pursuer's VO claims under Clause 31.

[101] There is some force in the defender's criticism that the Adjudicator omitted to record its figures in a column to his Table 2. However, I do not regard that as, of itself, sufficient to demonstrate that the Adjudicator had failed to exhaust his jurisdiction on the question of competing valuations. It is important to note these features of the Decision and to place that Table in the context of this section of the Decision.

[102] First, the Adjudicator was seized of the valuation issue. He understood that the dispute included "the valuation" of the final payment under the Contract, including "the valuation of the Works and in particular the validity and value of the 'VOs' that have been rejected by the Employer's Representative/Engineer": see paragraphs 2 and 30, respectively, of the Decision. Second, he took care to note (at paragraphs 16 to 17) the variations introduced to the standard form contract and to record (at paragraph 32) the role played by the Employer's Representative (IEC) and thereafter by the Engineer in valuing the pursuer's VOs, and which valuations the pursuer had rejected. Accordingly, he clearly understood that the valuations by the Employer's Representative (and where applicable, the Engineer) were not accepted and formed part of the dispute before him. He then proceeded to deal with the time-bar point and which had led to the rejection of the pursuer's claims and an attribution of a nil valuation: see paragraphs 39 to 40.

[103] A particular feature of the dispute between the parties was the nil valuation attributed to the vast majority of the pursuer's claims. Nil valuations had been attributed to many of the pursuer's claims because IEC had concluded that the pursuer had not followed the correct procedure. The Adjudicator found that this was itself incorrect, leading him to reject the time-bar defence. It is significant to note, however, that having rejected the time-bar defence, the Adjudicator did not simply adopt the pursuer's valuation at that point. His Decision contains the following passage:

> "50. Of the three valuation options open to the Employer's Representative the predominant one (with a few exceptions) has been to cause the [pursuer] to keep a record of his costs. Whether that was meant or not the practical outcome of the Parties' procedures, adopted during the contract, resulted in the valuation being under taken by the [pursuer] keeping a record of costs.
>
> 51. The [pursuer] has advanced evidence of the costs involved in each of the items that fall in this category and I accept that evidence.
>
> 52. **The timetable of the Adjudication, and recognising that many of the claimed sums are individually relatively small, precludes me from setting out here a detailed consideration of each individual VO.**
>
> 53. **Having examined the matters in detail in this category** I conclude that the values placed upon them by the [pursuer] would in reality be those values which would have been derived by the Employer's Representative/Engineer had the Employer's Representative/Engineer applied the procedure required of him as set out in clause 31.3.
>
> 54. I therefore adopt the values of the [pursuer] as my values where the Employer's Representative/Engineer has not valued the Variations and I Decide accordingly. **For those Variations where the Employer's Representative/Engineer bas provided a valuation I have considered that valuation** and I record my assessment and Decision on the following table 2 where I set out my conclusions with regards to the value of these items.
>
> 55. I have set out my Decision as the final column of Table 2." (Emphasis added.)

[104] The comment the Adjudicator makes in paragraph 50 in relation to the valuation options open to the Employer's Representative is, in my view, a reference back to the Adjudicator's observation (at paragraph 41 of his Decision) that the onus of valuing each variation was on the Employer's Representative. However, by reason of the Employer's Representative's misapplication (as the Adjudicator would have it) of the clause 34 procedure to clause 31 variations, no value was placed on these claims. The Adjudicator was faced with the, perhaps unusual, situation of choosing between a specified value and a nil value for the majority of the claims in dispute.

[105] Notwithstanding this, the Adjudicator did not simply accept the pursuer's specified value. Had he done so, he would not have stated what he did in paragraph 52, that time precluded him setting out a detailed consideration. In other words, no consideration would be required, if the Adjudicator were

simply accepting the pursuer's valuations as a consequence of determining the time-bar issue in its favour. Rather, the Adjudicator stated that he accepted the pursuer's "evidence of costs involved" in each of the VO claims: see paragraph 51. His observations in paragraph 53 demonstrate that he was still engaging with the issue of valuation, and in particular, he was considering what the defender's valuation would have been had the Employer's Representative done what – in terms of the onus referred to- he believed it was incumbent upon the Employer's Representative to do. Rightly or wrongly, he was treating the IEC's valuations, or the valuations he presumed IEC would have reached, as possible valuations other than the pursuer's own valuations. The Adjudicator's view was that the pursuer's record of costs coincided with the valuation that the Employer's Representative would have made.

[106] On a fair reading of paragraphs 50 to 53 of the Decision, the Adjudicator was addressing in a considered way how to approach the question of valuation for those claims where the Employer's Representative had attributed a nil value. Indeed, that this was precisely what he was doing was made clear in the first sentence of paragraph 54: for those claims where the Employer's Representative attributed a nil value, he adopted the pursuer's figures. There is a discernible reasoning process and he has not simply adopted the pursuer's figures by default, as it were. The pursuer does not challenge the Adjudicator's decision as it applied to these nil valuation claims on the basis of a failure to exhaust to his jurisdiction in respect of the pursuer's alternative valuations. Nonetheless, it is helpful to set out the Adjudicator's reasoning up to this point, as it is in this part of the Decision that he deals with the alternative disputed (as opposed to nil) valuations for the VO claims.

[107] The focus of the defender's challenge on this ground is to the manner in which the Adjudicator dealt with those claims where the defender had submitted alternative valuations in the adjudication. The defender founds on the absence of any column in Table 2 recording its figures and on the paucity of any other references in the Adjudicator's Decision to these figures. While the defender is correct in these observations, I do not accept that these omissions necessarily demonstrate a failure to exhaust his jurisdiction. That might be the case, if the Adjudicator simply accepted the pursuer's figures and did not take into account any other figures. On a fair reading of the Adjudicator's Decision, that is not what he did. The Adjudicator has not omitted to take these into account *per se*; rather, it would seem he has erroneously had regard to the IEC figures in lieu of the defender's.

[108] Returning to paragraph 54 of the Decision, it continued with the sentence (which I have highlighted above) that begins: "For those Variations where the Employer's Representative/Engineer **has** provided a valuation I have considered **that** valuation…." (emphasis added). In other words, he was now unequivocally addressing himself to the minority of claims (totalling about 15 or so of a total of 126 claims) in which an alternative valuation had been advanced (where the Employer's Representative "**has** provided…"). As is clear from the words highlighted in the sentence I have just quoted, the Adjudicator considered the Employer's Representative's valuations (being "IEC" in the column in Table 2) and not those advanced by the defender in the course of the Adjudication. In about three of these claims (namely claims 17, 25 and 40), it would appear that the defender's valuations were the same as IEC's. However, for the remaining claims for which the defender had submitted a specified (as opposed to a nil) value, the Adjudicator appears to have proceeded on the basis of IEC's figures for these claims. This may be explicable in the light of his earlier comments about the role of IEC (*qua* the Employer's Representative) and the onus on them in providing a valuation. This may also explain the inclusion of IEC's figures in a separate column (alongside the column with the pursuer's figures) in table 2. The Adjudicator has in effect treated the IEC figures as, or conflated these with, the defender's own valuations. If that is an error, it is one made within his jurisdiction in respect of valuation.

[109] What is clear is that, in contrast to the nil valuation claims, the Adjudicator was considering and adjudicating between two competing quantifications (other than nil) for these claims. Whether that is in fact correct in terms of the proper interpretation of the Contract is, for present purposes, irrelevant. However brief that treatment may be, the Adjudicator has stated that he has considered these. This statement is supported by the fact that he did, at least, record a set of competing valuations, in the IEC column in table 2. Even if he has considered the wrong set of figures, in my view this was an *intra vires* error within his jurisdiction; not a failure to exhaust that jurisdiction.

Has there been a failure to exhaust jurisdiction in respect of the defender's substantive defences?

[110] The defender asserted substantive defences in respect of both types of claims, that is VOs as well

as APs. I have tried to analyse how many of these were stated in respect of the two types of claims: see paragraph [20], above. One of these defences was "Cables", and in terms of which the defender alleged that the pursuer had used the wrong cable design. As noted above, at paragraph [23], the Adjudicator found as part of the background that parties were aware that the type of cable stipulated in the Contract was not common in the UK and, separately, he concluded that the difficulties encountered were largely due to duct defects and not as a result of the use of an unauthorised type of cable. This is the only substantive ground of defence, of seven substantive defences, addressed by the Adjudicator in his Decision, albeit it is contained in that part dealing with the "background" and not specifically in relation to the VO claims. (In the context of the AP claims, the Adjudicator referred back to this discussion.)
When the Adjudicator first set out the scope of the dispute before him, at paragraph 30, he referred to "validity and valuation". The use of the former term appears to be directed toward the time-bar defence. There is, however, no reference whatsoever to any of the six other substantive defences advanced by the defender.

[111] As noted above, the Adjudicator first dealt with the VOs under clause 31. Having set out his understanding of the correct procedure under clause 31, the Adjudicator set out the scope of the dispute at paragraph 30 (see paragraph [24], above). However, there is again no mention of any of the substantive defences. And, while he considered the alternative valuations, albeit apparently those of IEC rather than those of the defender, he nowhere considered these other substantive defences in their application to the VO claims. Mr MacColl endeavoured to rely on the sentence (at paragraph 53, set out above at paragraph [28]) which began: "Having examined the matters in detail in this category…", ie as indicative of the Adjudicator having dealt with all of the defences to the VO claims under Clause 31. However, in my view, when that sentence is construed in context, it is only concerned with the valuation of these claims. This is put beyond doubt by the remainder of that sentence and the terms of paragraph 54 ("I therefore adopt the values of [the pursuer].").

[112] I turn to the Adjudicator's consideration of the substantive defences for the purposes of the clause 34 claims. Both parties referred to paragraphs 82 to 86 of the Decision, which I have set out above at paragraph [30]. Mr MacColl relies on those parts I have highlighted in bold in paragraphs 83, 84 and 86 to demonstrate that the Adjudicator did consider the substantive defences. Mr Borland argues that these paragraphs are wholly inadequate.

On a generous reading of paragraph 85, read together with paragraph 28, the Adjudicator has addressed himself to the "Cable" defence by reference to what he had said in his earlier treatment of the "background". However, that did not exhaust the other substantive defences, which were free-standing substantive defences. Apart from this, there is simply no mention of or, more fundamentally, any engagement with the other substantive defences. Of the nine claims set out in table 5, only 4 of these engaged the cable defence. Substantive defences are asserted for the remaining 5 claims. These represent about 25% of the value of the claims contained in table 5 (although the aggregate of these five claims may, perhaps, be closer to £125,000 rather than the £100,000 figure Mr Borland suggested).

[113] In my view, it will not suffice simply to state that time precludes a "detailed consideration" of each VO. It was incumbent upon the Adjudicator to address the other substantive defences, however briefly. Apart from this generic sentence, there is simply no indication that the Adjudicator addressed his mind to these defences, much less the basis for rejecting all of these out of hand. I accept Mr Borland's submissions on this issue. I accordingly find that the Adjudicator had failed to exhaust his jurisdiction in respect of all but one of the substantive defences advanced by the defenders to the clause 34 claims.

[114] In respect of the Adjudicator's failure to address all but one of the substantive defences, the Adjudicator did not, as it was put in *Amec* (at paragraph 183), "reach a decision which was responsive to the issues referred in the adjudication" and which included the relevant defences. He has failed to exhaust his jurisdiction in respect of these other substantive defences as they applied to the VO and AP claims. Further, in my view, this failure was material as each of these defences afforded a complete defence to the claims to which they related. This is sufficient to render the Decisions or, if these parts of it are severable, these parts of the Decisions, unenforceable.

Inadequacy of Reasons

[115] This ground adds little to the ground of challenge just discussed. The Adjudicator either failed to deal with most of the substantive defences or, if these were considered, the Adjudicator wholly failed to

state that he had done so or to explain why he had rejected them. I do not accept that the passages relied on by Mr MacColl do demonstrate that the Adjudicator had addressed himself to these substantive defences. Nor can the inadequacies of the Decision be saved, by arguing that the defender seeks to impose too high a standard to insist on "reasoning", and that "reasons" will suffice. Even on that approach, I accept Mr Borland's submissions that the Adjudicator gave no reasons or indeed any indication of why he rejected these defences (on the hypothesis that he had considered them). As it was put in *Thermal Energy* (at paragraph 21), an adjudicator "is obliged to give reasons so as to make it clear that he has decided all of the essential issues which he must decide as being issues properly put before him by the parties, and so that the parties can understand, in the context of the adjudication procedure, what it is that the [a]djudicator has decided and why". In my view, the Adjudicator had failed to discharge that obligation in respect of the substantive defences (apart from the cable defence) put in issue by the defender.

Disposal

[116] The effect of the foregoing is that the defender has succeeded in its challenge to the Amended Decision, on the basis that what the Adjudicator purported to do was outwith the scope of the slip rule. In the event of a successful challenge to the Amended Decision, the pursuer relied in the alternative on the sum identified as due in the Original Decision. I have, however, accepted the defender's challenge to some parts of that Decision. In practical terms, however, other parts of this Decision may be unaffected by the errors identified. Parties did not address me on the question of whether, or in what circumstances, those parts of the Decision which are not affected by a successful challenge might be severable. In other words, it may be a live issue as to whether in the whole circumstances there should be only partial reduction, *ope exceptiones*, of those parts of the Decision vitiated by the excess of jurisdiction (in the purported amendment to the Original Decision) or by the failure to exhaust it (in respect of the substantive defences and the provision of reasons), or whether the Amended and Original Decisions fall to be reduced in their entirety.

[117] I propose to put the case out By Order for discussion of that issue and the terms of any interlocutor. I shall reserve meantime all question of expenses.
