OUTER HOUSE, COURT OF SESSION

[2017] CSOH 143

CA85/17

OPINION OF LORD DOHERTY

In the cause

DC COMMUNITY PARTNERSHIPS LIMITED

Pursuer

against

RENFREWSHIRE COUNCIL

Defender

Pursuer: Broome; Pinsent Masons LLP
Defender: MacColl QC; Burness Paull LLP

22 November 2017

Introduction

[1] The main issue in this case is whether an adjudicator failed to exhaust his jurisdiction.

Background

[2] On 14 April 2014 the defender contracted with the pursuer for the construction of a new special needs school at Linwood. The contract is a construction contract in terms of s104 of the Housing Grants, Construction and Regeneration Act 1996, and it incorporates the provisions of the NEC3 Engineering and Construction Contract (June 2005) Option C (as

amended in June 2006 and September 2011, and as further amended by the parties). The amendments to Option C include the Employer's Amendments (Revision 1) (contained in Annex A), Option Z Additional Conditions of Contract (contained in Annex G), Option W2, and Options Y(UK)2 and Y(UK)3. Option W2.1(1) and clause Z6 of the contract terms apply the adjudication provisions in Part 1 of the Schedule to the Scheme for Construction Contracts (Scotland) Regulations 1998 (as amended), subject to certain adjustments.

[3] A dispute arose between the parties as to the sum the defender was liable to pay the pursuer in respect of payment certificate number 33. The pursuer's application for payment no 33 claimed a Price for Work Done to Date ("PWDD") of £18,971,857.23. However, in payment certificate no 33 dated 28 April 2017 the project manager assessed the PWDD at £15,608,788.70. After deduction of previous payments of £15,059,227.92 and the retention of £200,000, the amount due was £287,075.07. The defender did not serve a pay less notice claiming that the sum due was less than the sum certified. It paid the pursuer the £287,075.07 notified as due in terms of the certificate.

[4] On 6 June 2017 the pursuer served a notice of adjudication intimating an intention to refer three aspects of its dispute with payment certificate no. 33 to adjudication, *viz* (i) the preliminaries costs of Central Building Contractors under work Package WP0 (ii) the preliminaries costs of SSE Contracting Limited under work Package WP0; and (iii) the costs associated with CEJ Joinery Limited's work in respect of compensation event 363 under work package WP0.

[5] On 8 June 2017 the adjudicator was nominated and accepted his nomination. By referral dated 13 June 2017 the pursuer referred the dispute to adjudication. The defender submitted a response dated 21 June 2017. The pursuer submitted a reply dated 29 June 2017. The defender submitted a rejoinder dated 6 July 2017. The pursuer submitted a sur-rejoinder

dated 12 July 2017. The defender submitted a reply to the sur-rejoinder dated 18 July 2017. A meeting of the parties and the adjudicator took place on 20 July 2017. The pursuer submitted a correction dated 20 July 2017 and a rebuttal dated 25 July 2017. The defender submitted a reply to the rebuttal dated 28 July 2017.

[6] The project manager had assessed item (i) at £254,693.76, and items (ii) and (iii) at nil. In the adjudication the pursuer's ultimate position was that the three items had been under-assessed in the amount of £821,750.04.

[7] The adjudicator issued his decision on 18 August 2017. He decided that payment certificate no. 33 should be opened up, reviewed and revised so as to increase the amount due by the defender to the pursuer by £820,425.76. The adjudicator also made ancillary orders relating to payment of VAT, interest, and his fees and expenses.

[8] The pursuer has brought the present action in order to enforce the adjudicator's decision. It seeks payment of the sums which the adjudicator has found to be due. The defence to the action is that the decision is a nullity and should be reduced *ope exceptionis* because the adjudicator failed to exhaust his jurisdiction. The matter came before me for (i) disposal of the pursuer's motion for summary decree; and (ii) a debate on the commercial roll.

The Contract Terms

[9] Clause 50 of the contract provides that the project manager assesses the amount due at each assessment date on receipt of an application for payment by the contractor. Clause 51.1 provides for the project manager certifying payment, for the due date of payment being seven days after the assessment date, and that the project manager's

certificate is the notice of payment from the employer to the contractor. Clause 51.2 provides:

> "Subject to the *Employer's* rights of set-off in law and the requirements of the Construction Industry Scheme (or equivalent legislation), each certified payment is made on or before the final date for payment. The final date for payment is [twenty one] days after the date of issue of the *Project Manager's* certificate pursuant to clause 51.1…"

Clause 55 states:

> "**Clause 55 Withholding payment**
>
> 55.1 If the *Employer* intends to pay less than the notified sum, he notifies the *Contractor* not later than 7 days (the prescribed period) before the final date for payment specifying:
> - the amount considered to be due; and
> - the basis on which that sum is calculated."

[10] Option W2 contains the dispute resolution procedure. In terms of clause W2.3(4) the adjudicator may, *inter alia*, review and revise any action or inaction of the project manager. Clause W2.3(7) states:

> "(7) If the *Adjudicator's* decision includes assessment of additional cost or delay caused to the *Contractor*, he makes his assessment in the same way as a compensation event is assessed. If the *Adjudicator's* decision changes an amount notified as due, payment of the sum decided by the *Adjudicator* is due not later than seven days from the date of the decision or the final date for payment of the notified amount, whichever is the later."

In terms of clause W2.3(11) the adjudicator's decision is binding on the parties unless and until revised by the nominated tribunal (which in terms of the contract data is arbitration), and is enforceable as a matter of contractual obligation between the parties.

[11] Option X7 provides for the contractor paying the employer delay damages in the event of delay following the completion date. Option Y(UK)2 (as amended) provides:

"**Option Y(UK)2: The Housing Grants, Construction and Regeneration Act 1996**

Definitions	**YUK2**	
	Y2.1	(1) The Act is The Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009.

…

Dates for payment	**Y2.2**	The date on which a payment becomes due is seven days after the assessment date. The final date for payment is fourteen days or a different period for payment if stated in the Contract Data after the date on which payment becomes due. The *Project Manager's* certificate is the notice of payment to the *Contractor* specifying the amount due at the payment due date (the notified sum) and stating the basis on which the amount was calculated.
Notice of intention to withhold payment	**Y2.3**	If either Party intends to pay less than the notified sum, he notifies the other Party not later than seven days (the prescribed period) before the final date for payment by stating the amount considered to be due and the basis on which that sum is calculated. A Party does not withhold payment of an amount due under this contract unless he has notified his intention to pay less than the notified sum as required by this contract."

The 1996 Act

[12] Sections 110A, 110B and 111 of the Housing Grants, Construction and Regeneration Act 1996 (as amended by the Local Democracy, Economic Development and Construction Act 2009 ("the 2009 Act")) provide:

> **"110A Payment notices: contractual requirements**
> (1) A construction contract shall, in relation to every payment provided for by the contract—
> (a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date…
> (2) A notice complies with this subsection if it specifies—
> …

(b) in a case where the notice is given by a specified person—
(i) the sum that the payer or the specified person considers to be or to have been due at the payment due date in respect of the payment, and
(ii) the basis on which that sum is calculated.
…
(4) For the purposes of this section, it is immaterial that the sum referred to in subsection (2) …(b) … may be zero.
(5) If or to the extent that a contract does not comply with subsection (1), the relevant provisions of the Scheme for Construction Contracts apply.
(6) In this and the following sections, in relation to any payment provided for by a construction contract—
"payee" means the person to whom the payment is due;
"payer" means the person from whom the payment is due;
"payment due date" means the date provided for by the contract as the date on which the payment is due;
"specified person" means a person specified in or determined in accordance with the provisions of the contract.

111 Requirement to pay notified sum
(1) Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.
(2) For the purposes of this section, the *"notified sum"* in relation to any payment provided for by a construction contract means—
(a) in a case where a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;
…
(3) The payer or a specified person may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum.
(4) A notice under subsection (3) must specify—
(a) the sum that the payer considers to be due on the date the notice is served, and
(b) the basis on which that sum is calculated.
It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.
(5) A notice under subsection (3)—
(a) must be given not later than the prescribed period before the final date for payment,
…
(6) Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a).
(7) In subsection (5), *"prescribed period"* means—
(a) such period as the parties may agree, or
(b) in the absence of such agreement, the period provided by the Scheme for Construction Contracts.
(8) Subsection (9) applies where in respect of a payment—

(a) a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract (and no notice under subsection (3) is given), or
(b) a notice under subsection (3) is given in accordance with this section,
but on the matter being referred to adjudication the adjudicator decides that more than the sum specified in the notice should be paid.
(9) In a case where this subsection applies, the decision of the adjudicator referred to in subsection (8) shall be construed as requiring payment of the additional amount not later than—
(a) seven days from the date of the decision, or
(b) the date which apart from the notice would have been the final date for payment, whichever is the later.
…"

The Reply to the Sur-rejoinder

[13] Paragraph 6.12 of the defender's reply to the sur-rejoinder was in the following terms:

"6.12 The revised Completion Date under the contract is 18 November 2016. No further CEs [Compensation Events] have been awarded to update this. The Referring Party are therefore in delay. Under X7 of the contract, the Responding Party are entitled to deduct delay damages from the Referring Party. If the PM's [Project Manager's] assessment had included the claims being sought under this adjudication, the Responding Party would have exercised its right to issue a pay less notice to limit the payment to the Referring Party. However, if the Adjudicator opens up the PM's assessment and decides that further sums are due in respect of the three items claimed (which is denied), the Responding Party rely upon their right of set-off. The delay damages are £468,666.00 (162 days (from 18 November 2016 to the due date) x £2,893) and should be offset against any sums which might become payable to the Referring Party."

Paragraphs 7 and 8 stated:

"**7 CONCLUSION**

7.1 It remains the Responding Party's position that the Project Manager has not under-assessed Application No. 33. Therefore no further sums are due to the Referring Party.

8 RELIEF AND REMEDIES SOUGHT

8.1 The Responding Party seeks:

8.1.1 Decisions and/or declarations from the Adjudicator that:

(a) The Project Manager correctly assessed the Referring Party's Application No. 33 and Payment Certificate No. 33 should not be opened up, reviewed and revised.

(b) The Referring Party is not entitled to be paid the sum of £868,654.45 or such other sum.

(c) The Referring Party is not entitled to interest on the sum of £868,654.45 (or such other sum).

(d) The Referring Party shall pay the Adjudicator's fees and/or expenses and shall reimburse the Responding Party for any fees and/or expenses that it may have paid to the Adjudicator.

8.1.2 An order that no sums are due to the Referring Party.

An order that the Responding Party's delay damages should be offset from any sums awarded to the Referring Party.

8.2 The Responding Party respectfully requests that the Adjudicator provide reasons for his decision in writing."

The Adjudicator's Decision

[14] In section 3 of his decision the adjudicator listed the submission documents which he had received. In paragraph 3.5 he stated:

> "I have considered all the submissions and their accompanying documents, but have not found it necessary to refer to all of the material provided to me in explaining the reasons for my decision."

In section 4 he described the dispute. In paragraph 4.5 he set out the relief which the defender sought at paragraph 10.1 of its response dated 21 June 2017. Section 5 was headed "Structure of decision". The adjudicator did not make any reference in section 4 or section 5 to the defender's claim for delay damages to be offset. In section 6 he considered whether there was any contractual bar to opening up, reviewing and revising payment certificate no 33. He decided that there was no such bar. In section 7 he considered whether to open up,

review or revise the certificate. He determined that he ought to, and that the pursuer was entitled to payment under the contract for additional sums in respect of the disputed items. Section 8 was headed "Conclusion":

> "8.1 I have found.
>
> | | |
> |---|---|
> | 1. CBC preliminaries | £463,338.42 |
> | 2. SSE preliminaries | £250,000.00 |
> | 3. CEJ costs | £ 79,343.47 |
> | Tallying to: | £792,681.89 |
>
> 8.2 Adding the Fee (3.5%, £27,743.87) obtains a total amount due of £820,425.76.
>
> 8.3 The Council's relief sought is declined."

The adjudicator concluded with section 11, headed "Decision":

> "11.1 For the reasons set out above, I … decide as adjudicator in this matter that:
>
> 1. Payment Certificate No. 33 should be opened up, reviewed and revised, in respect of the three parts referred, so as to increase the amount due to DC by £820,425.76;
>
> 2. DC is entitled to payment of £820,425.76, which payment is overdue and is to be made by the Council no later than seven days from the date of this decision (per para. 20(2)(b) of the Scheme);
>
> 3. DC is entitled to interest in the amount of £13,208.16 up to the date of this decision, increasing at a daily rate of £117.93 until payment is made; and
>
> 4. The Council shall pay my fees and shall reimburse DC for any fees and/or expenses that it may have paid in that respect. Notwithstanding this, the parties remain jointly and severally liable for payment of my fees.
>
> 11.2 I have provided reasons for my decision."

Submissions for the Pursuer

[15] Mr Broome's primary motion was for summary decree, failing which for decree *de plano.* The advantage of obtaining summary decree would be that the defender would need leave to reclaim (appeal). That was a legitimate consideration where a party sought to

enforce the decision of an adjudicator (*Pihl UK Ltd* v *Ramboll UK Ltd* [2012] CSOH 139, per Lord Malcolm at paragraphs 35 to 39).

[16] The only defence disclosed in the defences was that the adjudicator had failed to exhaust his jurisdiction. Those averments were irrelevant, and the defence was bound to fail. On a proper reading of the adjudicator's decision he had not failed to consider the defender's submission that it was entitled to set off delay damages against any additional sum which the adjudicator might assess as being due. He had considered the submission, but rejected it. His reasons for doing so were intelligible and adequate. Reference was made in particular to paragraphs 3.5, 8.1 and 8.3 of the decision. The court should not be overly critical of the adjudicator's reasons. He had not been obliged to deal with the set off claim at any length. Where, as here, the defence had been raised at a very late stage, it was legitimate to bear that in mind. Where it was alleged that an adjudicator had failed to exhaust his jurisdiction, the court should only interfere in the plainest of cases (*Atholl Developments (Slackbuie) Ltd, Petitioners* [2010] CSOH 94, per Lord Glennie at paragraph 17). There was a presumption of regularity (*SW Global Resourcing Ltd* v *Morris & Spottiswood Ltd* [2012] CSOH 200, per Lord Hodge at paragraphs 15 to 17). The facts in the present case were readily distinguishable from those in *NKT Cables A/S* v *SP Power Systems Ltd* 2017 SLT 494.

[17] In any case, even if, contrary to the pursuer's primary submission, the adjudicator had failed to deal with the delay damages defence, the court should conclude that it had not been a material line of defence, and it should enforce the adjudicator's decision (cf *Pilon Ltd* v *Breyer Group Plc* [2010] BLR 452, per Coulson J at paragraph 22.4). The defence had been advanced only at a late stage. It had not been a defence to payment which the defender had been entitled to take because it had not issued a pay less notice in response to payment certificate no 33. It could have done so, and could have thereby sought to set off delay

damages against the sum due under the certificate. However, that course had not been followed. In those circumstances it had not been open to the defender to seek set off in the adjudication. Reliance was placed on *Northern Developments (Cumbria) Ltd* v *J&J Nichol* [2000] BLR 158, per HHJ Bowsher QC at paragraphs 29 and 31. That case had turned on the terms of s111 of the 1996 Act before its amendment by s144(1) of the 2009 Act, but the same reasoning ought to be applied *mutatis mutandis* to the current amended provision. Counsel submitted that while "the notified sum" referred to in the section had been the sum certified as due in the payment certificate, s111 should be construed purposively so as to prevent a payer such as the defender, who had not given a pay less notice, from seeking to set off delay damages against any additional sum claimed in an adjudication.

[18] At the conclusion of his submissions I raised with Mr Broome whether, if the adjudicator had failed to exhaust his jurisdiction, any part of the decision might be severable. Mr Broome indicated he thought not. The decision was a unity and it would stand or fall in its entirety. However, he submitted that that consequence should make the court very slow to find that there had been a failure to exhaust jurisdiction or a failure to give adequate reasons.

Submissions for the Defender

[19] Mr MacColl moved the court to refuse the pursuer's motions for summary decree and decree *de plano*. He moved for reduction *ope exceptionis* of the adjudicator's decision. The scope of an adjudication was defined by the notice of adjudication together with any ground founded upon by the responding party to justify its position in defence of the claim made (*Construction Centre Group Limited* v *Highland Council* 2002 SLT 1274, per Lord Macfadyen at paragraph 19; *Connaught Partnerships Limited (in administration)* v *Perth and Kinross Council*

2014 SLT 608, per Lord Malcolm at paragraph 19; *Pilon Limited* v *Breyer Group Plc* [2010] BLR 452, per Coulson J at paragraph 25). A failure to address a material defence was a failure to exhaust jurisdiction (*Gillies Ramsay Diamond* v *PJW Enterprises Limited* 2004 SC 430, per Lord Justice-Clerk Gill at paragraph 25; *Carillion Construction Limited* v *Devonport Royal Dockyard Limited* [2006] BLR 15, per Chadwick LJ at paragraph 52; *Pilon Limited* v *Breyer Group plc* [2010] BLR 452, per Coulson J at paragraph 22; *NKT Cables A/S* v *SP Power Systems Limited*, *supra*, per Lady Wolffe at paragraphs 110-114). It was clear that the defence of set off of delay damages fell within the scope of the adjudication; that the adjudicator failed to address it; and that the omission was a failure to exhaust his jurisdiction. There was no discussion of set off in the decision. It simply would not do to place reliance upon the adjudicator's general statement in paragraph 3.5 (that he had considered all of the submissions) or the general statement in paragraph 8.3 (that the relief sought by the defender was declined). The adjudicator was under an obligation to provide adequate, intelligible reasons dealing with all material matters. If he had rejected the set off defence, he had not explained the basis upon which he had done so. In this connection reference was made to *AMEC Group Limited* v *Thames Water Utilities Limited* [2010] EWHC 419 (TCC), per Coulson J at paragraph 83; and *NKT Cables A/S* v *SP Power Systems Limited*, *supra*, per Lady Wolffe at paragraphs 113 -115. The present case was not one where reasons for rejection of the set off claim were clearly implicit in and a corollary of the reasons which the adjudicator had given for his decision. This was not the sort of case where the failure to deal explicitly with the set off claim could be treated as unimportant having regard to the presumption of regularity (*cf SW Global Resourcing Ltd* v *Morris & Spottiswood Ltd, supra*).

[20] Mr MacColl further submitted that it was plain that the failure to exhaust jurisdiction was material. The defender's claim for set off had been a very substantial claim - £468,666. It

was equivalent to more than half of the principal additional sum which the adjudicator had decided was due - £820,425.76. The suggestion that it had not been open to the defender to make the claim in the adjudication was ill-founded. In terms of the contract, the defender had not required to give a pay less notice as a precondition of advancing the set off claim which it made in the adjudication. Nor was it prevented by reason of s111 from making that claim. It had not intended to pay less than the notified sum *viz*. the sum notified as due in payment certificate no 33. On the contrary, it had been content to pay that sum, and it had done so. The defender's dispute was not with the notified sum, but with any additional sum being found to be payable. On a proper construction of the contract terms and of s111 of the 1996 Act, it had not been necessary for the defender to issue a pay less notice in response to the payment certificate in order to advance its claim to set off in the adjudication. The pursuer's suggested construction of s111 was untenable. On an ordinary reading of s111 a pay less notice was only required where the payer maintained that less than the notified sum was due. That also accorded with the observations of Edwards-Stuart J in *Urang Commercial Ltd* v *Century Investments Ltd* 138 Con LR 233, at paragraph 28, and with HHJ Bowsher QC's approach in *Northern Developments (Cumbria) Ltd* v *J&J Nichol, supra,* although in both cases the legislative provisions in issue had been sections 110 to 111 prior to their amendment by s144(1) of the 2009 Act.

[21] The failure to exhaust jurisdiction was not severable from the remainder of the decision. It was common ground that it had been a single dispute adjudication. Parties had agreed to be bound provisionally by a decision which exhausted the adjudicator's jurisdiction. They had not agreed to be bound by anything less. Reference was made to *Highland and Islands Airports Limited* v *Shetland Islands Council* [2012] CSOH 12, per Lord Menzies at paragraphs 41 to 47.

Reply for the Pursuer

[22] In a brief response Mr Broome confirmed that the adjudication had involved a single dispute, and that the observations of Lord Menzies on severance were an accurate statement of the current law. However, he tentatively suggested, although it would be "novel territory", that if the court found that the adjudicator had failed to exhaust his jurisdiction it would be open to it to enforce the decision under deduction of the sum the defender claimed to set off.

Reply for the Defender

[23] Mr MacColl was taken by surprise by Mr Broome's apparent change of tack on severance. If the court was minded to explore the question further he would wish the opportunity to make full submissions under reference to the authorities. He emphasised that the decision was a unity. It was not for the court to rewrite it. Holding the parties bound by such a rewritten decision would be to innovate upon the contract. There were obvious practical problems in relation to other parts of the decision, eg payment of the adjudicator's fees and expenses.

Decision and Reasons

[24] The applicable general principles are not in doubt. The scope of an adjudication is defined by the notice of adjudication together with any ground founded upon by the responding party to justify its position in defence of the claim made (*Construction Centre Group Limited* v *Highland Council*, *supra,* per Lord Macfadyen at paragraph 19; *Connaught Partnerships Limited (in administration)* v *Perth and Kinross Council*, *supra*, per Lord Malcolm at

paragraph 19; *Pilon Limited* v *Breyer Group Plc*, *supra,* per Coulson J at paragraph 25; *RBG Ltd* v *SGL Carbon Fibers Ltd* [2010] BLR 631, per Lord Menzies at paragraph 25; *Keating on Construction Contracts* (10th ed), paragraph 18-083). A failure by an adjudicator to address a material defence which a party was entitled to state is a failure to exhaust jurisdiction (*Gillies Ramsay Diamond* v *PJW Enterprises Limited, supra,* per Lord Justice-Clerk Gill at paragraph 25; *Pilon Limited* v *Breyer Group plc*, *supra,* per Coulson J at paragraph 22; *Connaught Partnerships Limited (in administration)* v *Perth and Kinross Council*, supra, per Lord Malcolm at paragraph 21; *NKT Cables A/S* v *SP Power Systems Limited*, *supra*, per Lady Wolffe at paragraphs 113-114).

[25] There is no doubt that the defence of set off was raised by the defender in its reply to the sur-rejoinder. It would, of course, have been preferable if it had been advanced at an earlier stage in the adjudication; but it was clearly and squarely stated at the time it was put forward, and the pursuer had the opportunity to respond to it (though it appears that it did not avail itself of that opportunity).

[26] I am not persuaded that the adjudicator addressed the set off defence. He made no explicit reference to it in the decision. In my view the general statement in paragraph 3.5 that he had considered all of the submissions, and the conclusion at paragraph 8.3 that "The Council's relief sought is declined", fall far short of being sufficient to show that the defence was considered but was rejected for stated reasons. The adjudicator was obliged to give written reasons for his decision. It is well established that such reasons need not be elaborate or deal with every argument: but in my opinion the adjudicator required to give at least some brief, intelligible explanation of why the defence of set off was being rejected (see *Gillies Ramsay Diamond* v *PJW Enterprises Limited*, *supra,* per Lord Justice-Clerk Gill at paragraph 31; *Atholl Developments (Slackbuie) Ltd, Petitioners*, *supra,* per Lord Glennie at

paragraph 17). This is not a case where the rejection of the defence was implicit in, or a corollary of, the reasons which he did give (*cf SW Global Resourcing Ltd* v *Morris & Spottiswood Ltd, supra*). Nor, standing the obligation to give reasons, and the lack of any explicit reference to the defence or any explanation for its rejection, do I consider it appropriate to presume that the adjudicator addressed the defence but rejected it for proper reasons. I am conscious that a court should hold that there has been a failure to exhaust jurisdiction in only the plainest of cases: but I am satisfied that this is such a case.

[27] I am not persuaded by Mr Broome's submissions that the failure to address the set off defence is immaterial. First, the claim had a substantial potential value - £468,666. That is equivalent to more than half of the principal additional sum which the adjudicator decided was due. Second, in my opinion it was not a prerequisite of the defence being relied upon in the adjudication that a pay less notice should have been given in response to payment certificate 33. In my opinion, in the circumstances neither s111 of the 1996 Act nor the terms of the contract had that consequence.

[28] The payer's obligation in terms of s111(1) is to pay "the notified sum" on or before the final date for payment. Where, as here, a payment notice complying with s110A(2) has been duly given, the notified sum is the amount specified in the notice. Section 111(3) to (7) make provision for the payee or specified person giving a pay less notice where the intention is to pay less than the notified sum. In the event of a pay less notice being given, the s111(1) obligation to pay the notified sum is modified so as to apply only in respect of the sum specified in the pay less notice. Where after a payment notice has been given an adjudicator decides that more than the sum specified in the notice should be paid, the adjudicator's decision is to be construed as requiring payment of the additional amount not later than the later of seven days from the date of the decision or the date which apart from

the notice would have been the final date for payment (s111(8), (9)). In my view it is clear on an ordinary reading of s111 that a pay less notice need only be given if the payer intends to pay less than the notified sum. If, on the other hand, the payer is content to pay the notified sum, there is no basis for a notice that he intends to pay less. In my opinion the words "the notified sum" in s111(3) cannot sensibly be construed as meaning the sum specified in the payment notice or such other sum as an adjudicator may eventually decide is due. The provisions of the section focus on the sum specified in the notice, and any pay less notice must specify the sum the payer considers to be due on the date that the notice is served (s111(4)(a)). The provisions clearly distinguish "the notified sum" and "the additional amount" which an adjudicator may decide is due; and, ordinarily, liability for payment of each of those sums will arise on different dates.

[29] In my view the pursuer derives no assistance from *Northern Developments.* That was, of course, a case which considered s111 prior to its amendment by the 2009 Act, rather than the current provision. More importantly, it was a case where a main contractor gave a subcontractor a notice of intention to withhold payment, and where, had it not done so, the sum in the subcontractor's application for payment would have become due under the contract. The scenario was analagous to an employer issuing a pay less notice in response to a project manager's payment certificate. The court indicated that any defence to the sum otherwise due had to be stated in the withholding notice. There are observations to similar effect in *Urang* (at paragraph 28). None of that appears to me to be controversial. However, in my opinion it does not provide any support for the pursuer's suggested interpretation of s111.

[30] The terms of the contract relating to payment and pay less notices reflect the requirements of s111 (see, in particular, clauses 55.1, W2.3(7), and Y(UK)2: Y2.2 and Y2.3).

On a proper construction of the contract terms there is no requirement to give a pay less notice unless the defender intends to pay less than a notified sum.

[31] Here, "the notified sum" was the sum specified in payment certificate no 33. The defender was content to pay that sum (and paid it). In those circumstances there was no reason for it to give a pay less notice in response to the certificate. By advancing the set off defence in the adjudication the defender did not alter its position in relation to the notified sum. Rather, it sought to set off delay damages against any additional sums that the adjudicator might decide were payable. In my opinion the defender was entitled to deploy that defence to the claim for additional sums.

[32] I come, finally, to the question of severance. This was not an issue which the pursuer raised in its pleadings or in its written Note of Argument. Rather, the invitation to the court to consider the issue was first made in Mr Broome's response to Mr MacColl's submissions. The invitation was made tentatively, with the caveat that the court would be breaking new ground, and Mr Broome made no submissions in support of it. Counsel were at one that the dispute referred to adjudication was a single dispute. It is clear that the failure to exhaust jurisdiction is not a failure which affects only one discrete aspect of the dispute. There would be obvious practical difficulties with severance, eg in relation to alteration of the ancillary aspects of the decision dealing with interest, fees and expenses (*Highland and Islands Airports Limited* v *Shetland Islands Council*, *supra,* per Lord Menzies at paragraphs 41 - 47; *Carillion Utility Services Ltd* v *SP Power Systems Ltd* 2012 SLT 119, [2012] BLR 186, per Lord Hodge at paragraphs 39 - 41). There is a real risk that by holding the defender bound by a modified decision the court may be innovating upon the parties' contract. In any case, in my opinion it was for the pursuer to raise the issue of severance and to satisfy the court that it would be

practicable and appropriate here. On the basis of the pleadings and the submissions which were made I am not persuaded that it would be.

Disposal

[33] I shall refuse the pursuer's motion for summary decree, repel the pursuer's pleas-in-law, sustain the defender's second to fourth pleas-in-law, reduce the adjudicator's decision *ope exceptionis*, and assoilzie the defender from the first to fifth conclusions of the summons. I shall reserve meantime all questions of expenses.