SL Timber Systems Ltd v Carillon Construction Ltd [2001] Adj.L.R. 06/27

OPINION OF Lord MacFadyen : Outer House Court of Session : 27th June 2001

[1] **Introduction :** In this action the pursuers conclude for payment by the defenders of three sums allegedly due by virtue of decisions made by an adjudicator in terms of the Scheme for Construction Contracts (Scotland) Regulations 1998 ("the Scheme"). The three claims relate to contracts described as (i) the Whinhill Contract, (ii) the North Castlemilk Contract and (iii) the East Keppoch Contract.

[2] Each of the three contracts related to the supply by the pursuers to the defenders and the erection by the pursuers for the defenders of structural timber kits. In each case the contract did not comply with the requirements of subsections (2) and (4) of section 108 of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"), and consequently the adjudication provisions of the Scheme applied. In the course of each contract the pursuers made certain applications for payment. The defenders refused to pay the sums sought. The disputes were referred to adjudication in pursuance of the pursuers' right under section 108(1) of the 1996 Act. The same adjudicator was appointed in respect of each of the three contracts. The same procedural timetable was followed in each of the adjudications. The notice of adjudication was dated 1 February 2001, the referral notice was dated 7 February, the defenders' response was dated 21 February, the pursuers' further submissions were dated 8 March, the defenders' further response was dated 16 March and the adjudicator's decision was issued on 26 March 2001.

[3] When the case called before me for a preliminary hearing on 15 May 2001, I allowed a short period of adjustment to enable the pursuers to respond to the terms of the defences, and appointed the case to debate on 24 May.

[4] The defenders initially put forward three grounds on which they submitted that the adjudicator's awards should not be enforced. One of these was that they were interpelled from paying the sums awarded by the adjudicator since all sums due by them to the pursuers had been arrested in their hands. By the date of the debate, however, the arrestments had been loosed, and Mr Howie for the defenders accepted that he could no longer rely on that line of defence.

[5] The first of the two remaining grounds on which the defenders seek to resist enforcement of the adjudicator's awards turns upon whether the adjudicator correctly understood the effect of sections 110 and 111 of the 1996 Act. The defenders' position is that he fell into error, which led him to mistake the true scope of his jurisdiction. On that basis they maintain that his decisions are reducible *ope exceptionis*. The second remaining ground relates to the financial standing of the pursuers. The defenders claim that there is reasonable ground for apprehending that, in the event of their succeeding in showing in litigation or arbitration that the sums awarded by the adjudicator were not properly due, the pursuers will be unable to make repayment. In these circumstances they maintain that it would be unjust to enforce the adjudicator's decisions.

[6] **The Section 110 and Section 111 Issue** : In answer 11 the defenders aver that the adjudicator's decisions are erroneous in that they award sums to which the pursuers are not in law entitled. The averments specify the basis of that contention, and go on:

"In the submissions made to the adjudicator, the defenders challenged the valuations made by the pursuer in its applications arguing that, irrespective of issues anent timeous sending of notices, the pursuer was yet unentitled to the monies of which it sought payment at the adjudicator's hand, because the pursuer's claims to those monies had no basis in contractual entitlement, and the pursuer had failed to show any basis in contractual entitlement for its three applications (it not being so entitled), restricting itself to arguing about notice and demanding payment in terms of the application without further justification even when the valuation point was raised in the adjudication. ... In these circumstances it was incumbent upon the adjudicator to embark upon an investigation into, and determination of, the true gross valuation of the sub-contract work done by the pursuer [in terms] of the contracts in order to decide whether or not the sum claimed by the pursuer and contested by the defender was properly payable under the contract. But he did not carry out that investigation or determination because he conceived himself barred from doing so, albeit he was sympathetic to the defender's argument on the point, because to undertake such an investigation or determination would undermine the adjudication system set up under the [1996 Act]. Accordingly the adjudicator having refrained from addressing matters before him in his adjudication, his awards ought to be reduced ope exceptionis."

[7] In the Whinhill adjudication, the adjudicator dealt with the point in paragraphs 12 to 16 of his decision in the following terms:

12. *"... Applying that logic to valuation 7 the due date for payment was 20 October 2000, the final date for payment was 8 November and the date for serving a notice of withholding a payment in terms of Section 111 of the Act was 1 November 2000.*

13. *The Responding Party did not serve a notice for the purposes of Section 110(2) of the Act. The notice to withhold payment was dated and sent on 6 November 2000 and the copy produced to me is stamped as having been received on 8 November 2000. The Responding Party did not seek to explain the basis on which they contended the notice was ... timeous. [The text in fact reads "... was not timeous ...", but that is plainly a misprint.] Based upon the analysis set out above, I do not consider that a timeous notice has been given in terms of Section 111 of the Act.*

14. *It is obviously necessary to consider the effect of a failure to give notice in terms of Section 110(2) and to give a timeous notice in terms of Section 111. The Referring Party [sic; the reference should plainly be to 'the Responding Party'] contends that even in the absence of these notices there is no obligation to make payment unless and to the extent that the Referring Party had demonstrated a contractual entitlement in terms of Clause 21 to payment. I am not required (or indeed entitled) to look at the substance of the applications made. Prima facie they appear to be made in terms of the contract. I also note from the documentation produced to me that certain payments have been made by the Responding Party apparently in response to applications made by the Referring Party. While again I am not required (or entitled) to look at the merits of these payments it does seem to me to suggest that the Responding Party was satisfied that work had been carried out in terms of the contract and that payment was accordingly due.*

15. *However the position of the Responding Party raises an issue in principle which, as I understand it, is that notwithstanding the failure to serve the requisite notices (at all or timeously) the Referring Party is not entitled to payment unless they have established a contractual entitlement to payment. I have some sympathy with those views given the terms of Section 110 and Section 111 both of which refer to payment 'due under the contract'. I also accept that in extreme circumstances the failure to serve notices could lead to significant sums becoming due which have no basis in the contract. I observe that that in fact does not appear to be the position here. However having given the matter careful consideration I have come to the view that the principle put forward by the Responding Party is not correct because if it were the intention behind the Act would, in my view, be rendered largely ineffective. The clear intention of the Act is to ensure that regular payments are made under construction contracts subject to the procedures required by the Act. It should be relatively straightforward for a party in the position of the Responding Party to ensure that notices are given with a view to ensuring that payment of sums which they do not consider due under the contract do not require to be made. In any event, I do not consider that failure to serve a requisite notice or notices extinguishes the right to argue at a later stage that sums paid are not in fact due. Rather in my view as a result of the statute, payment has to be made on an interim basis but the party making payment in such circumstances would, I believe, be entitled to seek repayment on the basis that there was no entitlement in terms of the contract to payment of those sums and the interim payment was only brought about by virtue of the operation of the Act.*

16. *Applying all of that logic to the circumstances of this contract I therefore consider that the Referring Party is entitled to payment of the sum sought in terms of Application 7. ..."*

Similar reasoning was expressed in the decisions in the adjudications in relation to the North Castlemilk and the East Keppoch Contracts.

[8] Before turning to the submissions made by counsel on this issue it is convenient to set out in full the terms of sections 110 and 111 of the 1996 Act. Section 110 provides as follows:

"(1) Every construction contract shall—

(a) provide an adequate mechanism for determining what payments become due under the contract, and when, and

(b) provide for a final date for payment in relation to any sum which becomes due.

The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

(2) Every construction contract shall provide for the giving of notice by a party not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if —

(a) the other party had carried out his obligations under the contract, and

(b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts, specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated.

(3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) or (2), the relevant provisions of the Scheme for Construction Contracts apply."

[9] Section 111 provides *inter alia* as follows:

"(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.

The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.

(2) To be effective such a notice must specify—

(a) the amount proposed to be withheld and the ground for withholding payment, or

(b) If there is more than one ground, each ground and the amount attributable to it,

and must be given not later than the prescribed period before the final date for payment.

(3) The parties are free to agree what that prescribed period is to be.

In the absence of such agreement, the period shall be that provided by the Scheme for Construction Contracts.

[10] Mr MacColl for the pursuers submitted that the defenders' averments in answer 11 (in part summarised and in part quoted in paragraph [6] above) did not constitute a relevant defence to the pursuers' conclusions for decree in implement of the adjudicator's decisions. He took as his starting point paragraph 23(2) of Part I of the Scheme, which provides that:

"the decision of the adjudicator shall be binding on the parties, and they shall comply with it, until the dispute is finally determined ...".

The circumstances in which the court could refuse to enforce an adjudicator's decision were, he submitted, very limited. He referred to **Watson Building Services Limited, Petitioners (**13 March 2001, unreported), per Lady Paton at paragraph [21], and **Northern Developments (Cumbria) Limited v J & J Nichol** [2000] BLR 158, per His Honour Judge Bowsher QC at paragraphs 24 and 25. Enforcement would not be withheld merely because the adjudicator had fallen into error of fact or law. On the other hand, enforcement would be withheld if the adjudicator had acted in excess of his jurisdiction. The defenders' averments in the present case did not amount to a relevant assertion that the adjudicator had acted in excess of his jurisdiction. The adjudicator gave a decision on the question which had been referred to him (see paragraph 18 of the Referral Notice). Any error he may have made was within his jurisdiction. In support of that proposition Mr MacColl referred to the following passage from the judgment of His Honour Judge Bowsher in **Northern Developments (Cumbria) Limited:**

"29. The [1996] Act by section 111 imposes on the parties a direct requirement that the paying party may not withhold a payment after the due date for payment unless he has given an effective Notice of Intention to Withhold Payment. That seems to me to have a direct bearing on the ambit of any dispute to be heard by an Adjudicator. Section 110 requires that the contract must require that within 5 days of any sum falling due under the contract, the paying party must give a statement of the amount due or of what would be due if the payee had performed the contract. Section 111 provides that no deduction can be made after the final date for payment unless the paying party has given notice of intention to withhold payment. The intention of the statute is clearly that if there is to be a dispute about the amount of the payment required by section 111, that dispute is to be mentioned in a notice of intention to withhold payment not later than 5 days after the due date for payment. Equally it is clear from the general scheme of the Act that this is a temporary arrangement which does not prevent the presentation of set-offs, abatements, or indeed counterclaims at a later date by litigation, arbitration or adjudication. For the temporary striking of balances which are contemplated by the Act, there is to be no dispute about any matter not raised in a notice of intention to withhold payment. Accordingly, in my view, the Adjudicator had no jurisdiction to consider any matter not raised in the notice of intention to withhold payment in this case".

The adjudicator in the present case had correctly applied that approach in holding that, in the absence of timeous notices, he could not entertain any dispute as to the amounts due. The defenders' averments summarised and quoted in paragraph [6] above were accordingly irrelevant, and should not be admitted to probation.

[11] Mr Howie, for the defenders, submitted that the question referred to the adjudicator (see for example paragraph 18(1) of the Referral Notice in the Whinhill adjudication) was whether the defenders had failed to give an effective notice of intention to withhold payment **and if so whether the defenders were obliged to pay certain sums**. Although the adjudicator held that there had been no timeous notice, he was in error in concluding that the effect of that finding was that the sums claimed were due. Section 111 applied only in respect of a "sum due under the contract". The defenders' contention was that the sum claimed was not due under the contract. It was for the pursuers to show that the sums claimed were contractually due. That issue remained for determination even if there was no timeous notice. The adjudicator, however, held that in the absence of a timeous notice it was not for him to address whether the sums claimed were due under the contract. He thus found for the pursuers, without addressing a relevant issue raised by the defenders. In so doing, he made an error as to the scope of his jurisdiction. His decision was therefore reducible.

[12] Mr Howie further submitted that on a sound construction of sections 110 and 111, they did not invert the *onus* of proof. The pursuers' claim for payment involved the assertion that the sum claimed was *"due under the contract"* - see section 111(1). That assertion was disputed by the defenders. In that situation it was for the pursuers to establish before the adjudicator that the sums claimed were indeed contractually due. The absence of a notice under section 111 did not establish that the disputed sum was due under the contract.

[13] Although the adjudicator had referred to both section 110 and section 111, Mr Howie submitted that they required to be considered separately. Section 110(2) requires the inclusion in every construction contract of a provision requiring notice to be given specifying the sum paid or to be paid at each due date for payment. Section 110(3) provides that if a contract does not contain such a provision, the relevant provision of the Scheme shall apply. The relevant provision of the Scheme is paragraph 9 of Part II. No sanction for failure to give such a notice is prescribed. In particular, there is nothing to suggest that failure to give a section 110(2) notice disables the defender from maintaining that a sum claimed is not due. The only connection between section 110 and section 111 is that, in terms of section 111(1), a section 110(2) notice may serve as a notice of intention to withhold payment if it complies with the requirements of section 111. That cannot, however, arise where there is no section 110(2) notice. Section 110(2) therefore affords no support for the position adopted by the adjudicator.

[14] It followed, Mr Howie submitted, that if there was any restriction on the defenders' entitlement to challenge before the adjudicator the assertion by the pursuers that the sums claimed were contractually due, it had to be found in section 111. Section 111(1), unlike section 110(2), did impose a sanction for failure to serve a notice. It imposed a prohibition on withholding payment of "a sum due under the contract" unless an effective notice of intention to withhold payment had been given. If, and to the extent that, a sum claimed was not "due under the contract", the prohibition on withholding imposed by section 111(1) did not apply. To hold, as the adjudicator had done, that failure to give a notice of intention to withhold debarred a defender from disputing that the sum claimed was due under the contract was inconsistent with the language of the section.

[15] Mr Howie recognised that in determining whether his submission was correct, it was necessary to examine what form of withholding **was** prohibited by section 111(1). He referred to the following passage in **Keating on Building Contracts**, 7th Edition, para.15-15H:

"There has been some debate as to the precise meaning of this section [section 111]. The problem arises because the section envisages that there is a 'sum due under the contract'. An equitable set-off amounts to a discharge of the sum due, to the extent of the set-off, and a common law abatement denies that moneys are due or owing. Thus, it is said, there is no sum due in those two instances and no need to serve the relevant notice. This would appear to leave the section largely devoid of content. It is submitted that a court would construe the section in a purposive manner to meet the mischief intended, so that, in the absence of notice, the payee would be entitled to

claim payment, ignoring any set-off or abatement. In the event that a withholding notice is given, this may be the subject of challenge by way of adjudication."

That, Mr Howie submitted, went too far. He submitted that a notice of intention to withhold was required if the defenders sought to withhold payment (a) in reliance on a right of retention in security of cross-claims under the contract, (b) in reliance on a contractual right to set off claims arising under another contract, and (c) by way of compensation under the Compensation Act 1592. There was therefore no difficulty in finding scope for application of the procedure by way of notice of intention to withhold. However, no such notice was required if the contention was that the value of the work should be abated or reduced on account of defective workmanship. Nor was such notice required if the dispute was directed to the soundness of the claim for the gross amount allegedly due under the contract, for example where it was disputed (i) that work claimed for had been done at all, (ii) that work claimed for had been properly done, or (iii) that work done had been correctly valued. In such instances the contention was that the sum claimed was not due under the contract, and the context was therefore not one in which the section required a notice of intention to withhold as a precondition to disputing liability. The proposition that section 111 applied only where there was a sum due under the contract was reinforced by section 112 which, in the same context, allowed suspension of performance.

[16] In support of his submissions Mr Howie referred to a number of authorities. First, he cited **VHE Construction plc v RBSTB Trust Co Limited** [2000] BLR 187 per His Honour Judge John Hicks QC at paragraphs 30 to 36. At paragraph 33 Judge Hicks noted that section 110(2) operated only to require that certain provisions be incorporated in construction contracts, and provided a default provision if the contract did not conform to the requirement. In paragraph 36 in relation to section 111, Judge Hicks said:

"The words 'may not withhold payment' are in my view ample in width to have the effect of excluding set-offs and there is no reason why they should not mean what they say."

Mr Howie then referred to **Northern Developments (Cumbria) Limited.** He submitted that His Honour Judge Bowsher had, in paragraph 29, fallen into the error of conflating sections 110 and 111, and failing to recognise their distinct form and purpose. The references in that paragraph to section 111 requiring a notice of intention to withhold "if there is to be a dispute about the amount of the payment", and to the proposition that "there is to be no dispute about any matter not raised in a notice" gave rise to difficulty. They should not be construed as expressing the view that, without a section 111(1) notice, there could be no dispute about whether there was any contractual basis for the sum claimed. In **KNS Industrial Services (Birmingham) Limited v Sindall Limited** (17 July 2000, unreported) His Honour Judge Humphrey Lloyd QC said, at paragraph 17:

"The term withhold is ... used in section 111 to cover both the situation where in arriving at a valuation the contractor had not taken account of a countervailing factor as well as the situation where there is to be reduction in or deduction from an amount that had been declared or thought to be due. In the former case the word 'withhold' may not always be correct for one cannot withhold what is not due."

In **Woods Hardwick Ltd v Chiltern Air Conditioning Limited** [2001] BLR 23 His Honour Judge Thornton QC said:

"9. ... It was a significant feature of the adjudication that Chiltern had not served any appropriate notice under section 111 of the [1996 Act] and was therefore not entitled to withhold payment otherwise due to Woods Hardwick. However, although [Chiltern] put forward a set-off and cross-claim for damages, its principal grounds for resisting payment in the adjudication were that the monies claimed were not yet due because the project was incomplete, that any fees that were due for payment fell to be abated by virtue of Wood Hardwick's breaches of contract and that no additional work had in fact been carried out by [Woods Hardwick].

10. Any abatement, properly relied on by Chiltern, would not of course be caught by section 111 ..., so Chiltern's abatement defence could, in principal (sic), defeat or reduce Woods Hardwick's claim."

Finally Mr Howie referred to **Whiteways Contractors (Sussex) Limited v Impressa Castelli Construction (UK) Limited** (9 August 2000, unreported), where His Honour Judge Bowsher QC said (at paragraph 32):

"It is common for a party to a building contract to make deductions from sums claimed on the Final Account (or on earlier interim applications) on account of overpayments on previous applications and it makes no difference whether those deductions are by way of set-off or abatement. The scheme of the [1996 Act] is to provide that, for the temporary purposes of the Act, notice of such deductions is to be made in manner complying with the requirements of the Act. In making that requirement, the Act makes no distinction between set-offs and abatements. I see no reason why it should have done so, and I am not tempted to try to strain the language of the Act to find some fine distinction between its applicability to abatements as opposed to set-offs. Of course, in considering a dispute, an Adjudicator will make his own valuation of the claim before him and in doing so, he may abate the claim in respects not mentioned in the notice of intention to withhold payment. But he ought not to look into abatements outside the four corners of the claim unless they have been mentioned in a notice of intention to withhold payment."

A synthesis of those authorities, Mr Howie submitted, supported his submission that the adjudicator had fallen into error in declining to examine whether the sum claimed was due under the contract. As Mr Howie put it, top line matters do not require a notice of intention to withhold payment. In so far as some of the authorities might be read as contradicting that proposition, they went too far, and could not be reconciled with the language of the section. To hold otherwise would have drastic consequences. It was unlikely that the legislative intent was to treat the absence of a notice as giving rise, even on a provisional basis, to an entitlement for which there was no contractual foundation.

[17] Mr Howie submitted that there was referred to the adjudicator for decision the question whether the sums claimed were contractually due. That having been disputed by the defenders, it was the adjudicator's duty to make a determination on the point. His failure to do so, resulting from his erroneous view of the effect of section 111, meant that he had mistaken the extent of his jurisdiction. He had not simply made an erroneous decision on the question put to him. On the contrary, the error had led him to decline to exercise the jurisdiction that had been conferred on him. That error was of such a nature as to render his decision reducible and unenforceable. In order to enable me to give effect to that submission, Mr Howie sought leave to amend to add a plea for reduction *ope exceptionis*. In the absence of opposition, I allowed that formal amendment to be made.

[18] I accept that in terms of paragraph 23(2) of Part I of the Scheme an adjudicator's decision, despite being of a provisional nature, is binding on the parties and must be complied with by them until the dispute between them has been finally determined by litigation, arbitration or agreement. It follows that it will normally be appropriate for the court to enforce the adjudicator's decision by granting the appropriate decree. Error of fact or law on the part of the adjudicator will not afford ground for refusal of enforcement, unless the error was of such a nature that the adjudicator's decision was, as a result, one which he had no jurisdiction to make (**Watson Building Services Limited** per Lady Paton at paragraphs [21] to [24]; **Homer Burgess Limited v Chirex (Annan) Limited** 2000 SLT 277 at 284J to 285D; **Macob Civil Engineering Limited v Morrison Construction Limited** [1999] BLR 93 per Dyson J at Paragraph [19]; **Northern Developments (Cumbria) Limited** per His Honour Judge Bowsher QC at paragraph 24). The issues which require to be addressed in dealing with this aspect of the present case are accordingly (1) whether the adjudicator did fall into error, and if so (2) whether his error resulted in his acting outwith the proper scope of his jurisdiction.

[19] In my opinion the adjudicator fell into error in the first place by conflating his consideration of sections 110 and 111 of the 1996 Act. In my opinion Mr Howie was correct in his submission that these sections have different effects and the notices which they contemplate have different purposes. Section 110(2) prescribes a provision which every construction contract must contain. Section 110(3) deals with the case of a construction contract that does not contain the provision required by section 110(2) by making applicable in that case the relevant provision of the Scheme, namely paragraph 9 of Part II. By one or other of these routes every construction contract will require the giving of the sort of notice contemplated in section 110(2). But there the matter stops. Section 110 makes no provision as to the

consequence of failure to give the notice it contemplates. For the purposes of the present case, the important point is that there is no provision that failure to give a section 110(2) notice has any effect on the right of the party who has so failed to dispute the claims of the other party. A section 110(2) notice may, if it complies with the requirements of section 111, serve as a section 111 notice (section 111(1)). But that does not alter the fact that failure to give a section 110(2) notice does not, in any way or to any extent, preclude dispute about the sum claimed. In so far, therefore, as the adjudicator lumped together the defenders' failure to give a section 110(2) notice with their failure to give a timeous section 111 notice, I am of opinion that he fell into error. He ought properly to have held that their failure to give a section 110(2) notice was irrelevant to the question of the scope for dispute about the pursuers' claims.

[20] The more significant issue in the present case, in my opinion, is whether the defenders' failure to give a timeous notice under section 111 had the effect that there could be no dispute at all before the adjudicator as to whether the sums claimed by the pursuers were payable. The section provides that a party "may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment". In my opinion the words "sum due under the contract" cannot be equiparated with the words "sum claimed". The section is not, in my opinion, concerned with every refusal on the part of one party to pay a sum claimed by the other. It is concerned, rather, with the situation where a sum is due under the contract, and the party by whom that sum is due seeks to withhold payment on some separate ground. Much of the discussion of the section in the cases has been concerned with what circumstances involve "withholding" payment and therefore require a notice. Without the benefit of authority, I would have been inclined to say that a dispute about whether the work in respect of which the claim was made had been done, or about whether it was properly measured or valued, or about whether some other event on which a contractual liability to make payment depended had occurred, went to the question of whether the sum claimed was due under the contract, therefore did not involve an attempt to "withhold ... a sum due under the contract", and therefore did not require the giving of a notice of intention to withhold payment. On the other hand, where there was no dispute that the work had been done and was correctly measured and valued, or that the other relevant event had occurred, but the party from whom payment was claimed wished to advance some separate ground for withholding the payment, such as a right of retention in respect of a counterclaim, that would constitute an attempt to "withhold ... a sum due under the contract", and would require a notice of intention to withhold payment. There are some circumstances in which it is difficult to be clear as to whether the position which the party against whom the claim has been made wishes to adopt is to be analysed as disputing that the sum is due under the contract or as seeking to withhold a sum due under the contract. It occurs to me, too, that Scots law may analyse some cases differently from English law. For present purposes, however, it is in my view unnecessary to draw the borderline between the two categories with precision, because it is clear that the adjudicator has adopted the extreme position that any and every attempt to dispute a claim made under a construction contract is to be regarded for the purposes of section 111 as an attempt to "withhold" payment, and therefore as requiring a notice of intention to withhold payment. In my opinion, in so holding, and in consequently declining to address whether the sums claimed by the pursuers were due under the contract, the adjudicator fell into error.

[21] The cases which were cited by Mr Howie are not, it seems to me, wholly consistent. The clearest support for the position which he adopted is, in my view, to be found in **Woods Hardwick Limited** per His Honour Judge Thornton QC at paragraphs 9 and 10, with which I agree. The clearest indication to the contrary is to be found in **Northern Developments (Cumbria) Limited** per His Honour Judge Bowsher QC at paragraph 29. For the reasons which I have attempted to set out in paragraph [20] above, I am of opinion that, if Judge Bowsher is to be understood to have meant that, without a section 111 notice, there can be no dispute of any sort as to whether the sum claimed is properly due, His Honour to that extent took too broad a view of the effect of section 111.

[22] In my opinion, the absence of a timeous notice of intention to withhold payment does not relieve the party making the claim of the ordinary burden of showing that he is entitled under the contract to receive the payment he claims. It remains incumbent on the claimant to demonstrate, if the point is

disputed, that the sum claimed is contractually due. If he can do that, he is protected, by the absence of a section 111 notice, from any attempt on the part of the other party to withhold all or part of the sum which is due on the basis that some separate ground justifying that course exists. It is no doubt right, as the adjudicator pointed out, that, if the section did require a notice of intention to withhold payment as the foundation for a dispute as to whether the sum claimed was due under the contract, it would be relatively straightforward for the party disputing the claim to give such a notice. But that consideration does not, in my view, justify ignoring the fact that the section is expressed as applying to the case where an attempt is made to withhold a sum due under the contract, and not as applying to an attempt to dispute that the sum claimed is due under the contract. Nor, in my view, is there merit in the adjudicator's concern that acceptance of the defenders' construction of section 111 would render the 1996 Act largely ineffective. I see no difficulty for an adjudicator in reaching a provisional determination of a dispute as to whether the sum claimed is due under the contract. That is what, on the adjudicator's own view of the section, the adjudicator would require to do if the party disputing the claim on the basis that the sum claimed was not due under the contract gave a notice of intention to withhold payment on that ground. In my opinion, therefore, the adjudicator erred in holding that the pursuers were relieved, by the defenders' failure to give a timeous notice of intention to withhold payment, of the need to show that the sums claimed were due under the contract.

[23] The issue which remains for consideration is whether the nature of that error was such that the adjudicator must be regarded as having made a decision that he had no jurisdiction to make. I have come to the conclusion that the adjudicator's error did not take him out of the proper scope of his jurisdiction. I was, at first, attracted by Mr Howie's submission to the contrary. The question put to the adjudicator was whether the defenders had given an effective notice of intention to withhold payment, and, if so, whether the defenders were obliged to pay the sums claimed. The adjudicator applied his mind to the first part of the question and held that no timeous notice of intention to withhold payment was given. It is not contended by the defenders that he was wrong in that part of his decision. He then turned to the second part of the question, and held that, because there was no timeous notice, there was no basis on which the defenders could dispute the pursuers' claim, and the sum claimed was therefore due by virtue of what he held to be the effect of section 111. I have held that he was wrong in so concluding. The effect of the error was that he did not address the question of whether the sums claimed were due under the contract. Mr Howie's submission was that he therefore did not address the issue on which, on a sound construction of the effect of section 111, the dispute referred to him for his decision turned. He did not do what he had been appointed to do. He had failed to ask himself the right question, and had thus made the jurisdictional error of failing to exhaust the dispute referred to him. I have come to the conclusion, however, that that analysis of the nature and effect of the adjudicator's error too readily characterises as an error as to jurisdiction an error which was in truth within the scope of his jurisdiction. It seems to me that the following analysis is preferable. The adjudicator was asked to determine whether the defenders had failed to give a timeous notice of intention to withhold payment. He answered that question in the affirmative. The question which then arose for his consideration was whether, in that event, the defenders were obliged to pay the sums claimed. He addressed that question, and answered it too in the affirmative. His reason for giving that answer to that part of the issue before him lay in the view he took of the effect of section 111, a view which I have held to be erroneous. But that was an erroneous answer which he gave after asking himself the right question, in the sense of the question referred to him for decision. It was the answer that was wrong, not the question. If he had taken what I hold to be the correct view of the effect of section 111, he would have gone on to consider whether the sums claimed were contractually due. But the fact that he did not reach that stage because he took an erroneous view of the prior question does not, in my opinion, amount to an error as to the scope of his jurisdiction. I am therefore of opinion that the adjudicator made an *intra vires* error rather than one which rendered his decision *ultra vires*. His decision was wrong, but not in such a way as to be invalid and reducible.

[24] **The Solvency Issue :** The second ground on which the defenders seek to resist enforcement of the adjudicator's awards lies in their assertion that the pursuers are insolvent and would be unable to meet any decree for repayment that might be granted in proceedings for final determination of the parties' rights and liabilities under the contracts. The point is made in the defenders' pleadings in the following terms:

"Separatim esto any sum of money due is both due and payable by the pursuer under any of the said pretended awards (which is denied), an enforceable decree in the pursuer's favour ought not to be pronounced pending final disposal of actions at the instance of the defender against the pursuer for damages in relation to breaches by the pursuer of its obligations under the said contracts and for determination of the true amounts (if any) payable by the defender to the pursuer under each of the said contracts. There are reasonable grounds for apprehension that, in the event that the defender were to make payment of the sums brought out in respect of the said pretended awards, but were to succeed thereafter in demonstrating in subsequent proceedings that those sums were not in fact due in terms of the said contracts, the pursuer would be unable to make payment of any sum ordered to be paid or repaid in those subsequent proceedings. The most recent accounts for the pursuer lodged with the Registrar of Companies show the pursuer to be trading at a loss and to be absolutely insolvent with a deficiency of assets to liabilities of £321,732. In these circumstances, it is submitted that to enforce payment of any of said sums ad interim would be unjust, exposing the defender to the risk of paying the pursuer in full sums which may not in truth be due and payable under said contracts, while being unable by reason of the pursuer's insolvency to secure payment from the pursuer of such sums as might be awarded in its claim for damages, or which the Court might order to be repaid as representing monies of which the said adjudicator ought not to have ordered payment ad interim."

[25] Mr MacColl pointed out that the pursuers do not admit that they are insolvent. They have produced a letter from their auditors (No. 6/1 of process) in which it is said that the management accounts as at 30 April 2001 show the pursuers to be solvent, with net assets of approximately £94,000. The letter further states that the pursuers have "the ability to obtain further funds in respect of [their] financing should this be necessary". Consequently, Mr MacColl submitted, if the line of defence was a relevant one, some form of inquiry would be required to resolve the dispute as to whether the pursuers are insolvent. Mr MacColl's primary submission, however, was that the averment that the pursuers were insolvent did not in the circumstances constitute a relevant defence to the conclusion for decree enforcing the adjudicator's decisions. He submitted that there was no binding authority on the point. Although reference was made to certain English authority (see paragraphs [27] to [29] below), it did not support the contention that insolvency of the pursuers was ground for withholding decree enforcing the adjudicator's decision. The furthest that the authorities went was to support the view that, in English procedure, there might in such circumstances be justification for a stay of execution. They afforded no support for the proposition that decree should not be granted.

[26] Mr Howie submitted that, since the defenders' contention was that on a final resolution of the dispute between the parties the sums awarded by the adjudicator would be repayable by the pursuers to the defenders, and since there was ground for apprehension that because of the pursuers' insolvency they would not be able to make repayment, any decree to which the pursuers might otherwise be entitled with a view to enforcement of the adjudicator's awards should be withheld. Instead the court, having held that the pursuers were entitled to payment in terms of the adjudicator's awards, should sist the cause pending resolution of the defenders' action for final determination of the issues between the parties. If the insolvency defence was relevant, Mr Howie accepted that some form of inquiry would be required to resolve the issue as to whether or not the pursuers were insolvent. The relevancy of that defence was, however, supported by the English authorities.

[27] In considering the English authorities on this point it is convenient to begin with **Bouygues (UK) Limited v Dahl-Jensen (UK) Limited** [2000] BLR 522. In that case Chadwick LJ, having expressed the view that in the ordinary case an adjudicator's determination ought to be enforced by summary judgment, noted that that was not an ordinary case because Dahl-Jensen were in liquidation. He noted various provisions of the insolvency legislation. He noted their effect in the following terms:

"If Bouygues is obliged to pay to Dahl-Jensen the amount awarded by the adjudicator, those moneys, when received by the liquidator of Dahl-Jensen, will form part of the fund applicable for distribution amongst Dahl-Jensen's creditors. If Bouygues itself has a claim under the construction contract, as it currently asserts, and is required to prove for that claim in the liquidation of Dahl-Jensen, it will receive only a dividend pro rata to the amount of its claim. It will be deprived of the benefit of treating Dahl-Jensen's claim under the adjudicator's determination as security for its own cross-claim."

He then observed:

"In circumstances such as the present, where there are latent claims and cross-claims between parties, one of which is in liquidation, it seems to me that there is a compelling reason to refuse summary judgment on a claim arising out of an adjudication which is, necessarily, provisional. All claims and cross claims should be resolved in the liquidation ...".

To some extent that view depended on the relevant rules of court, which conferred a discretion with regard to the granting of summary judgment. In the event, the summary judgment granted by the judge at first instance was not set aside, but a stay of execution was imposed. That course was, however, followed at least in part because of the unusual circumstance that the insolvency point had not been taken before the judge at first instance.

[28] The next case which was mentioned in counsel's submissions was **Rainford House Limited v Cadogan Limited (**13 February 2001, unreported). In that case the claimants were in administrative receivership. His Honour Judge Richard Seymour QC made the following comments on **Bouygues:**

"While, at first sight, Chadwick LJ [in the passage quoted in paragraph [27] above] seems to be saying that, at least where the claimant is a company in liquidation, the existence of the regime established by Insolvency Rules 1986 was a reason for there to be a trial of the action in which the claimant was seeking to enforce the adjudicator's award in his favour, it is plain, in my judgment, that that is not a correct understanding. It seems to me that what Chadwick LJ meant was either that, in the exercise of the discretion which the Court has under Part 24.2 of the Civil Procedure Rules in any case, it should not make an order which would have the effect of subverting the scheme established by Insolvency Rules 1986 for dealing with cases in which the claimant was in liquidation, or that the process for which Insolvency Rules 1986 provide for the purposes of ascertaining the net position of an alleged debtor should be treated as a trial for the purposes of Part 24.2 and as necessary in a case in which the claimant seeking to enforce the award of an adjudicator under Part II of the 1996 Act was a company in liquidation. If the latter is the correct understanding, obviously there is no relevant mechanism which can be considered as a trial unless the claimant is a company in liquidation".

His Honour went on later to say:

"The point as to whether it is appropriate in this case to enter summary judgment for Rainford is ultimately a short one. The policy underlying Part II of the [1996 Act] is, in my judgment, that there should be a swift mechanism by which a dispute under a construction contract as to who has to pay what to whom while the construction work to which the contract relates is in progress can be resolved on a binding, but interim, basis, leaving the final resolution of disputes, if that proves to be necessary, to follow at leisure, without disrupting the cash-flow of the project. I do not consider that the policy of the statute is to transfer as between the parties to construction contracts the risk of insolvency of one of the parties. ... [It] is plain, in my judgment, that the statute is not concerned to re-allocate risk of having to endure the consequences of a trading partner becoming insolvent, but simply to address the question, on the footing that all parties are solvent, which party should hold the fund of money about which there is a dispute pending the resolution of that dispute. Thus, if there is a substantial chance, demonstrated by objective evidence, such as the making of a winding-up order, or the appointment of a receiver, that money the obligation to pay which is actually disputed ... will, if paid, be for practical purposes lost, it seems to me that that is a circumstance which ... ought to be considered on any application for summary judgment."

His Honour went on to hold that the factors which led Chadwick LJ to hold that summary judgment was not appropriate in **Bouygues** were not present in **Rainford House Limited**. He did, however, grant a stay of judgment.

[29] The third case mentioned in argument was **Absolute Rentals Ltd v Gencor Enterprises Limited** (unreported). In that case, His Honour Judge David Wilcox said:

"The Defendant has late, served statements putting into question the Claimant's financial viability and contends that I should stay judgment pending the outcome of the Defendant's substantial claim now referred to arbitration. To do so would frustrate the Scheme. ... I am not in a position to judge the financial standing of either company. It is not desirable that I should on such limited evidence before me, neither is it desirable to do so on such an application. It is entirely possible that if there is any impecuniosity in the Claimants, it could derive from the Defendant's default. I do not know what the timetable for the arbitration is or [whether] the solution will be by the Arbitrator or by agreement. The purpose of the Scheme is to provide a speedy mechanism for settling disputes in construction contracts on a provisional basis and, by requiring decisions by Adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement, whether those decisions are wrong in point of law or fact, if within the terms of the reference. It is a robust and summary procedure and there may be casualties although the determinations are provisional and not final."

Mr Howie submitted that that view should be rejected as being at odds with the other authorities.

[30] I do not find it easy to draw from those cases any clear guidance as to how to answer the question which comes before me, which is whether averments attacking the solvency of the pursuers constitute a relevant defence to an action for enforcement of the adjudicator's awards. The reasoning, in **Bouygues** and **Rainford House** in particular, seems to me to depend on specialities of English procedure relating to the circumstances in which it is appropriate (a) to grant summary judgment and (b) to grant a stay of execution. Stripped of those specialities, the cases do not seem to me to afford any clear support for the proposition that, in the case of a pursuer company which is not in liquidation, averments of insolvency are a relevant defence to an enforcement action. It seems to me that I must approach the matter by turning once again to the terms of the 1996 Act and the Scheme made thereunder. There seems to me to be nothing in the legislative provisions to qualify the expressed intention that an adjudicator's provisional award should be enforced pending final resolution of the dispute, to the effect of making an exception in the case where the claimant, although not in liquidation, can be shown to be insolvent. I am therefore not persuaded that the defenders' averments to the effect that the pursuers are insolvent constitute a relevant defence.

[31] **Interest :** Mr Howie submitted that, if I were otherwise satisfied that decree should be granted in favour of the pursuers, interest should not be granted as concluded for. In each conclusion the pursuers seek interest on the principal sum at the rate of eight per cent a year from the date of citation until payment. Mr Howie pointed out that, so long as the arrestments referred to in the defences had remained in place, the defenders had been interpelled from making the payments concluded for. It followed that during that period the sums sued for had not been wrongfully withheld, and interest was therefore not payable. Interest should therefore be awarded only from the date on which the arrestments were loosed, namely 17 May 2001. Mr MacColl accepted, in my view rightly, that that submission was sound, and conceded that the award of interest should be restricted accordingly.

[32] **Result :** For the reasons which I have given, I am of opinion that each of the two defences which were maintained at debate are irrelevant. I shall give effect to that decision, in the first instance, by sustaining the pursuers' second and third pleas-in-law and excluding from probation the averments in support of the defenders' fourth and sixth pleas-in-law. I shall, in view of Mr Howie's concession on the arrestment issue, repel the defenders' fifth plea-in-law of consent. I shall then, because no other relevant defence is averred, sustain the pursuer's first plea-in-law and repel the remainder of the defences. I shall, finally, grant decree *de plano* for the principal sums mentioned in the first, second and third conclusions, with interest on each sum at the rate of eight per cent a year from 17 May 2001 until payment. I shall reserve the question of expenses.

Pursuers: MacColl, Morison Bishop
Defenders: Howie, Q.C., Macroberts