OPINION OF LORD MACFADYEN : Outer House Court of Session : 23rd August 2002.

Introduction

[1] This commercial action relates to a dispute which arose out of a contract between the parties in terms of which the pursuers undertook to design, construct and maintain for the defenders works known as the Small Isles and Inverie Ferry Scheme. When the dispute arose, it was referred to adjudication in accordance with the provisions of the contract, which complied with the requirements of the Housing Grants, Construction and Regeneration Act 1996 ("the Act"). On 28 June 2002 the adjudicator issued his decision, in terms of which he found the sum of £245,469.24 payable by the defenders to the pursuers, and ordered payment within seven days. The defenders have not made payment. In this action, therefore, the pursuers conclude for payment of the sum to which they were found entitled by the adjudicator, with interest from the date of citation. Defences have been lodged, in which the defenders put forward a number of grounds for resisting the granting of decree in terms of the conclusion. The pursuers have enrolled for summary decree for the sum concluded for, on the ground that no defence to the action is disclosed in the defences. The defenders have opposed that motion.

The test for summary decree

[2] Rule of Court 21.2(1) provides that a pursuer may, at any time during the dependence of an action after defences have been lodged, apply for summary decree *"on the ground that there is no defence to the action, or a part of it, disclosed in the defences"*. An application for summary decree may take a number of forms, one of which is a motion "to grant decree in terms of all or any of the conclusions of the summons" (Rule 21.2(2)(a)). In the present case the application takes the form of a motion for decree in terms of the sole conclusion of the summons. Where the motion takes that form, the court may grant it *"if satisfied that there is no defence to the action disclosed"* (Rule 21.2(4)(a)). Mr MacKenzie, who appeared for the pursuers, properly referred me to **Mackays Stores Ltd v City Wall (Holdings) Ltd** 1989 SLT 835 in which Lord McCluskey considered the circumstances in which it would be appropriate for the court to decide, on a motion for summary decree, a substantial issue of law raised in the defences, and expressed (at 836E) the opinion that:

"The test I have to apply at this stage must be to ask myself if the question of law which is raised (the only question being one of law) admits of a clear and obvious answer in the pursuers' favour."

In the event Mr Currie for the defenders accepted that I might determine the matter at this stage if I was satisfied (as I am) that the issues had been adequately discussed in the parties' submissions. I should record, however, in connection with Lord McCluskey's observations at 836H about the considerations favouring deferring the decision until after full debate on the procedure roll, that in this case a full day was set aside as a diet for the pursuer's motion for summary decree, and an order for the exchange by the parties of notes of argument was made and implemented.

[3] In view of the terms of Rule 21.2 Mr MacKenzie accepted that he could only succeed in his motion if he persuaded me that I should hold at this stage that none of the points taken by the defenders in the defences had any merit. The defences contain ten pleas-in-law, and Mr MacKenzie proposed for the purpose of presenting his submissions to address them in four groups. He characterised the first group (pleas 1, 2 and 3) as being concerned with the provisional nature of an adjudicator's determination. The second group (pleas 5 and 6) involved contentions that the adjudicator's decision was ultra vires. The third (pleas 7, 8 and 9) related to the question of retention or set-off. The fourth group was a miscellaneous one encompassing the remaining pleas which did not fall into the other three groups, namely plea 4 (relevancy) and plea 10 (quantum). Mr Currie, however, helpfully interrupted Mr MacKenzie's submissions to say that he did not seek to rely on pleas 4 or 10. Moreover, when he came to make his own submissions, Mr Currie did not seek to maintain that there was a sound defence based on the proposition that the adjudicator's award was ultra vires. It is therefore only necessary for me to consider the submissions made by counsel in relation to the first and third groups of pleas-in-law identified by Mr MacKenzie.

The provisional nature of an adjudicator's award

[4] Mr MacKenzie submitted that an adjudicator's award was, on the one hand, provisional, in the sense that its effect might be reversed or altered when the dispute in question was finally resolved by agreement between the parties, or by arbitration, or by litigation. On the other hand, it was temporarily

binding and enforceable, and therefore required to be implemented by the parties and should, if necessary, be enforced by the court. In the context of disputes arising out of construction contracts, the process of adjudication was a creature of statute. The relevant provisions were to be found in section 108 of the Act. Section 108(1) confers on a party to a construction contract a right to refer a dispute arising under the contract for adjudication under a procedure complying with the section. Subsection (2) requires the contract to enable a party to give notice at any time of his intention to refer a dispute to adjudication, and inter alia to provide a certain timetable for the conduct of the adjudication. Adjudication can therefore arise at any stage in the contract. Subsection (3) provides:
"The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement."

The subsequent arbitration or litigation contemplated in subsection (3) is not, Mr MacKenzie submitted, a process of review of or appeal from the adjudicator's decision, but rather a final determination of the dispute in respect of which the adjudicator's decision had provided a provisional determination; the ultimate arbitration or litigation would supersede the adjudicator's award, but until it did so that award was binding, required to be implemented, and could if necessary be enforced (**City Inn Ltd v Shepherd Construction Ltd** 2002 SLT 781 at 794K, paragraph [59]). Adjudication was concerned not merely with providing an answer to a matter of dispute, but with securing payment of money on the basis of a provisional decision. In support of that emphasis on actual payment, Mr MacKenzie referred to **Farebrother Building Services Ltd v Frogmore Investments Ltd** (Technology and Construction Court, 20 April 2001, unreported) in which His Honour Judge Gilliland QC said:
"The general rule in relation to adjudication decisions is that they are binding until set aside, and the approach which this court has adopted is that they should be enforced summarily because the whole purpose of adjudication is to provide a quick and effective remedy for the payment of money on a provisional basis."

[5] It is not disputed that the contract between the parties in the present case is a construction contract, or that it makes provisions for adjudication which comply with the requirements of the Act. The contractual dispute resolution procedure is to be found in Clause 66 and Annex 3. Clause 66(4) provides:
"The Employer [the defenders] and the Contractor [the pursuers] shall give effect forthwith to every decision of:
(i) ...
(ii) the Adjudicator on a Dispute given under this Clause 66
unless and until the decision is revised by agreement of the Employer and the Contractor or pursuant to this Clause 66 and Annex 3 to Conditions of Contract."

Clause 66(6)(ii) provides: *"Any decision of the Adjudicator shall be final and binding upon the Employer and the Contractor unless and until there is an amicable settlement in accordance with paragraph 2 of Annex 3 to Conditions of Contract or unless and until the Dispute has been referred to arbitration as hereinafter and an arbitral award has been made or a settlement reached between the Employer and the Contractor."*

Clause 66(6)(iv) provides inter alia: *"... the Employer and the Contractor shall give effect forthwith to every decision of the Adjudicator except and to the extent that the same shall have been revised by a settlement reached between the Employer and the Contractor or an arbitral award."*

Paragraph 1 of Annex 3 contains the contractual adjudication procedure adopted by the parties. Paragraph 1.10 provides: *"The Adjudicator's decision shall be binding until the Dispute is finally determined by legal proceedings, by agreement or by arbitration as provided in paragraph 3 (Arbitration) of this Annex 3 to Conditions of Contract."*

[6] It was clear, Mr MacKenzie submitted, that in accordance with the provisions of the parties' contract, the adjudicator's decision was binding on the parties, and fell to be implemented. Arbitration might ultimately result in a different determination of the dispute, but neither the Act nor the parties' contract contemplated that that circumstance would stand in the way of enforcement of the award in the meantime. Reference was made to **A & D Maintenance and Construction Ltd v Pagehurst Construction Services Ltd** [2000] 16 Const LJ 199, and **Absolute Rentals Ltd v Gencor Enterprises Ltd** [2001] Const LJ 322. Such being the intention of the parties as expressed in their contract, reflecting the intention of Parliament, the defenders first plea-in-law was not well founded. The proposition stated in that plea was

that decree should be refused, because the effect of a decree would be to give a final judgment in place of an interim decision. That was not, however, so. The decree sought was merely a means of enforcing the adjudicator's award, as the Act and the contract contemplated it should be enforced. It was not a decision on the merits of the dispute. It would not stand in the way of a final determination of the dispute by arbitration different from the provisional determination made by the adjudicator. The defenders' second plea, which founded on the court's power to open up, review or revise certificates, opinions and decisions under the contract and so to determine the rights and obligations of the parties, and contended that on that ground decree should not be pronounced, was likewise ill founded, for the same reason. In granting decree in this action, the court would not be exercising the power mentioned in the plea; it would not be determining the substantive dispute between the parties on its merits. It would merely be lending its authority to the enforcement of the adjudicator's award, and doing so simply on the ground that the parties had agreed that an adjudicator's award should be binding and enforceable. The third plea for the defenders, which sought a sist of this action pending arbitration, ignored the existence of the contractual obligation to pay the sum awarded by the adjudicator pending a subsequent final determination of the dispute by litigation, arbitration or agreement (**Absolute Rentals Ltd v Gencor Enterprises Ltd**, per His Honour Judge Wilcox at 324).

[7] Mr Currie's submission was that the motion for summary decree was incompetent, because the arbitration provisions of the contract did not permit the arbiter to take account of a final decree of the court pronounced in accordance with the adjudicator's decision. He argued that Mr MacKenzie's submissions that the arbiter would simply address the dispute of new, and that the adjudicator's decision would by then be water under the bridge (except to the extent that account would require to be taken of payments made in implement of his decision), were inconsistent with Clause 66(4), which provided for the adjudicator's decision being given effect forthwith "unless and until the decision is **revised** by agreement ... or pursuant to ... Clause 66 and Annex 3" (emphasis added). Reference to the same concept of revisal of the adjudicator's decision by the arbiter was repeated in Clause 66(6)(iv). What was thus contemplated was review of the adjudicator's decision by the arbiter. The powers of the arbiter were, however, to be found in paragraph 3 of Annex 3. Paragraph 3.1 defines inter alia the circumstances in which an arbiter may be appointed. It provides inter alia as follows: *"Where the Adjudicator's decision pursuant to paragraph 1 ... is not accepted by either the Employer or the Contractor, ... either the Employer or the Contractor may serve a notice in writing on the other to refer the Dispute to the arbitration of a single arbiter".*

Paragraph 3.2 provides inter alia that: *"Such arbiter shall have full power to open up review and revise any decision opinion instruction direction certificate or valuation of the Engineer ..."*

Mr Currie pointed out, however, that paragraph 3.2 confers on the arbiter no corresponding power to open up and revise the adjudicator's decision. Still less was there any power in the arbiter to alter the effect of a final decree of the court. The effect of the decree which the pursuers sought would therefore be to remove the provisional quality of the adjudicator's decision, and to prevent the defenders from obtaining a different determination of the dispute by arbitration.

[8] In my opinion there is no merit in this aspect of the defence to the action. It is in my view well settled that the purpose of the Act was to secure that every construction contract contains provisions which enable the parties to the contract to obtain from an adjudicator in respect of any dispute arising under the contract a speedy decision which is binding and enforceable but at the same time merely provisional pending final determination by litigation, arbitration or agreement (section 108(3); **Watson Building Services Ltd v Harrison** 2001 SLT 846, per Lady Paton at 852F, paragraph [21], **Macob Civil Engineering Ltd v Morrison Construction Ltd** [1999] BLR 93, per Dyson J at paragraph [14], among other authorities). It follows, in my opinion that a party who holds an adjudicator's award finding him entitled to payment of a sum of money, either forthwith or at a fixed date which has passed, is ordinarily entitled to take steps to enforce it, and may do so by raising an action for payment of the sum awarded. Not to allow enforcement of an adjudicator's award in that way would, in my view, obstruct the attainment of the purpose of section 108. As Judge Gilliland pointed out in **Farebrother**, in my view correctly, the whole point of adjudication under a contract complying with section 108 is to obtain payment of money on a provisional basis.

[9] The argument which Mr Currie put forward in support of his contention that it would be incompetent to grant summary decree in the present case is not, in my opinion, sound. It involved, in my view, two errors: one relating to the nature and effect of the decree which the pursuers seek, and the other relating to the powers of an arbiter operating under Annex 3 to the Conditions of Contract. It is, in my view, important to appreciate the nature of this action. In it, the pursuers do not ask the court to endorse the soundness of the adjudicator's decision on the merits of the dispute referred to him. Rather the pursuers merely ask the court to recognise that the parties have bound themselves contractually to implement the adjudicator's decision. The pursuers seek decree from the court, not because they are in the right of the dispute, but because they are contractually entitled to require the defenders to implement the adjudicator's provisional determination of the dispute, whether it be right or wrong. The result is that any decree pronounced in this action is not a finding by the court that the adjudicator was right, but merely a recognition that he has made an award and that the defenders are bound, for the time being, to implement it. Such a decree would thus, in my opinion, have no effect on the final determination of the dispute by the arbiter. Any payment made in pursuance of the decree would, of course, have to be taken into account by the arbiter in determining what payment, if any, he should order to give effect to his determination of the dispute; but such account would have to be taken of sums paid, whether paid under decree of this court or voluntarily in recognition of the provisionally binding quality of the adjudicator's decision.

[10] The contractual provisions in Clause 66 and Annex 3 are not, perhaps, as consistent as they might be. Clause 66(4) refers to the adjudicator's award being "revised" in pursuance of Annex 3. So too does Clause 66(6)(iv). On the other hand, Clause 66(6)(ii) contemplates that it is "the Dispute" that will be referred to arbitration. The latter formulation is adopted in Annex 3, paragraph 3.1, where it is provided that a party who does not accept the adjudicator's decision may give notice "to refer the Dispute to the arbitration of a single arbiter". I do not consider, however, that that divergence of language gives rise to any real difficulty. It is, in my view clear that what is referred to arbitration is "the Dispute", i.e. the same dispute as was referred to the adjudicator for provisional determination, but the reference to the arbiter is for final determination. There is a sense in which the arbitral decision will "revise" the adjudicator's decision, in that it may produce a final determination of the dispute which is at variance with the provisional determination made by the adjudicator, but I do not consider that the use of the word "revised" in Clause 66(4) and (6)(iv) compels the conclusion that the arbiter's task is not to approach the resolution of the dispute de novo but to review the adjudicator's decision. I therefore find it entirely unsurprising that, while paragraph 3.2 of Annex 3 gives the arbiter power to open up, review and revise decisions, opinions, certificates etc. of the engineer, it contains no similar power in relation to the adjudicator's decision. In the context of an arbitration in which what has been submitted for decision is "the Dispute", such a power is in my view unnecessary. Equally, there is in my view, no need to give the arbiter power to open up a decree of this court enforcing the adjudicator's award. What this court may do by way of enforcing the adjudicator's provisional determination has no bearing on the arbiter's final determination of the dispute. All that needs to be taken into account by the arbiter in making his award is the extent to which payment to account has been made. It is irrelevant whether that payment was made by the defenders without compulsion in recognition of the provisionally binding quality contractually conferred on the adjudicator's award, or as a result of enforcement of a decree of this court for payment of the sum awarded by the adjudicator.

[11] For these reasons there is in my opinion no incompatibility between any decree in favour of the pursuers pronounced in this action and the provisional character of the adjudicator's award. There is no substance in the suggestion that if such a decree were granted the arbiter would be precluded from making a final award finding the pursuers entitled to less than had been paid under the decree. Decree in this action will not be a judicial determination of the merits of the dispute, but merely enforcement of the contractual obligation of the defenders to make payment in accordance with the adjudicator's provisional determination. To sist this action pending arbitration would be to ignore the express contractual recognition that the adjudicator's provisional award is to be implemented pending final determination of the dispute by arbitration. I am satisfied that, so far as the points discussed in this section of my opinion are concerned, no sound defence to the action has been put forward.

Retention or set-off

[12] In their seventh, eighth and ninth pleas-in-law the defenders put forward in various forms the proposition that, since they have a claim against the pursuers for payment of liquidate damages which they quantify at the sum of £420,000, they are entitled on that account to refuse to pay the sum awarded to the pursuers by the adjudicator and to resist enforcement of the award in this action. In the seventh plea, the point is advanced on the basis that they are entitled to withhold such payment because they have (albeit after the date of the adjudicator's decision) served a valid notice under section 111 of the Act. In the eighth plea, it is advanced on the basis that they are entitled to exercise a right of compensation or set-off. In the ninth plea, it is advanced on the basis of a right of retention. Mr MacKenzie's submission was that the defenders were not entitled, on any of these bases, to resist the granting of decree in this action.

[13] Mr Mackenzie submitted that the claim for liquidate damages could have been advanced before the adjudicator as ground for his not ordering the defenders to pay the sum which he held was otherwise payable by them to the pursuers. The defenders had chosen not to advance that argument at that stage, and could not rely on it now to resist enforcement of the adjudicator's award. In **KNS Industrial Services (Birmingham) Ltd v Sindall Ltd** [2001] 17 Const LJ 170 His Honour Judge Humphrey Lloyd QC said (at 182):

*"As Judge Thornton said in [**Fastrack Contractors Ltd v Morrison Construction Ltd** [2000] BLR 168] 'the "dispute" is whatever claims, heads of claims, issues or contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference'. A party to a dispute who identifies the dispute in simple or general terms has to accept that any ground that exists which might justify the action complained of is comprehended within the dispute for which adjudication is sought. ... The adjudicator is appointed to decide the dispute which is the subject of the notice and that notice determines his jurisdiction."*

Adopting that approach, Mr MacKenzie turned to the notice served in the present case to see what the scope of the adjudication was. Paragraph 2 of the Notice of Adjudication (No. 6/4 of process) narrates that the pursuers submitted their Interim Application for Payment No. 21, showing an amount applied for, net of previous payments, of £5,505,972.57; that the engineer declined to certify that any further payment was due; and that the dispute was constituted by the pursuers' disagreement with the engineer on that point. Paragraph 3 of the Notice stated that the adjudicator was to be asked inter alia:

"3.1 To open up, examine and review Interim Application for Payment No. 21 to period ending 3 April 2002 to find an amount payable to the Referring Party of £5,505,972.57 or such other amount as the Adjudicator may determine.

3.2 To order payment by the Responding Party within seven days of the date of the Adjudicator's decision in the sum of £5,505,972.57 or such other amount as the Adjudicator may determine."

The scope of the adjudication, Mr MacKenzie submitted, was not simply: How much ought to have been certified as payable in respect of Interim Application No. 21? It encompassed in addition a request for an order for payment of the sum so determined. It followed that it was incumbent on the defenders to put before the adjudicator in the course of the adjudication not only their evidence and submissions in support of the nil certification in respect of Interim Application No. 21, but also any other grounds on which they sought to rely in resisting an order for payment of any sum which the adjudicator held ought to have been certified. The arguments that they were entitled to set off their claim for liquidate damages against the sum which ought to have been certified, or that they were at least entitled to retain any such sum pending determination of their claim for liquidate damages, were arguments that could and should have been advanced in the course of the adjudication. The fact that the defenders had not advanced them did not extinguish their rights. They remained entitled to exercise any rights of retention or set-off which they truly possessed against any future payment under the contract. It was not, however, open to them, having declined or failed to advance the argument in the adjudication, now to deploy it as ground for not implementing the adjudicator's decision, which they had contractually bound themselves to implement.

[14] Equally, Mr MacKenzie submitted, the defenders attempt at this stage to rely on a section 111 notice served within the seven day period following the date of the adjudicator's decision, was ineffective to entitle them to resist enforcement of that decision. Section 111(1) provides as follows: *"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."

In terms of section 111(2) a notice of intention to withhold payment, to be valid, required to be given not later than the prescribed period (here one day - see Clause 60(9)) before the final date for payment. Under the present contract, payment became due on certification by the engineer, with the final date for payment falling 28 days after delivery of the contractor's monthly statement to the engineer - see Clause 60(1). The role of a notice of intention to withhold payment, Mr MacKenzie submitted, was to bring about a dispute over payment, which might then be referred to adjudication. It was not contemplated in the Act that such a notice might be served in response to an adjudicator's decision. In the present case there had, at the adjudication stage, been no need for a section 111 notice, because there was no certification of a sum due, which meant that there could be no final date for payment. It did not follow, however, that the contention that any sum which the adjudicator found should have been certified could be withheld against the defenders' claim for liquidate damages could not be advanced in the absence of a section 111 notice. On the contrary, that contention remained available before the adjudicator, and should have been advanced at that stage if it was to be advanced at all.

[15] In connection with his submissions in relation to section 111, Mr MacKenzie referred to two cases decided in the Technology and Construction Court. The first of these cases was **Solland International Ltd v Daraydan Holdings Ltd** (15 February 2002, unreported), in which in the adjudication the responding party relied on what it claimed was a valid section 111 notice. The adjudicator held that the notice was not valid. The responding party then sought to resist the granting of summary judgment on grounds covered in the invalid notice. His Honour Judge Richard Seymour QC identified the issue as being whether, after the adjudicator had given his decision, the potentially paying party could raise matters relevant to what sum should in fact be paid (paragraph 24). He held that they could not. Mr MacKenzie founded on the views expressed by Judge Seymour in paragraph 30. The second case was **David McLean Housing Contractors Ltd v Swansea Housing Association Ltd** [2002] BLR 125. In that case the defendants, after the adjudicator's decision had been made, gave notice under the contractual equivalent of section 111 asserting a counterclaim for liquidate damages, and on that ground sought to resist enforcement of the adjudicator's decision by summary judgment. His Honour Judge Humphrey Lloyd QC held that they were entitled to do so. To a material extent, however, his decision turned on the fact that the adjudicator had made a decision on the extent to which the contractor was entitled to an extension of time, from which decision the quantification of the employer's claim for liquidate damages followed. There was thus no stateable defence to the counterclaim for liquidate damages, and on that account summary judgment enforcing the adjudicator's award in favour of the contractor was refused. Mr MacKenzie claimed support for his submissions from Solland, and submitted that **McLean** was distinguishable.

[16] Mr Currie sought to explain how it came about that the defenders had not made their claim of retention or set-off in respect of liquidate damages in the proceedings before the adjudicator, and to submit that it was open to them to raise the matter now as a defence to this action. He accepted that the scope of an adjudication was defined by the referring party in the notice of adjudication. He maintained that many adjudicators apply that principle strictly. He contended that some adjudicators would not allow a question of retention in respect of a claim for liquidate damages to be asserted in defence if the notice of adjudication did not mention that counterclaim as part of the dispute submitted to adjudication. Notwithstanding what was said in **KNS Industrial Services (Birmingham) Ltd v Sindall Ltd** at 182 (see paragraph [13] above), there was no procedure to enable a responding party to ensure that all issues on which he sought to place reliance would be entertained by the adjudicator. Mr Currie did not accept that the terms of paragraph 3.2 of the Notice of Adjudication in the present case were such as to ensure that the defence of retention or set-off was within the scope of the dispute referred to the adjudicator. He accepted that those defences had not been put before the adjudicator, and explained that that was in part the result of the defenders' solicitor's previous experience of adjudicators taking a narrow view of the scope of the dispute, although also partly the result of the view taken of the applicability of section 111 procedure after issue of the adjudicator's decision. He submitted however, that since adjudication procedure did not give a responding party an entitlement to ensure that a defence of set-off was

entertained by the adjudicator, the defenders were entitled to advance that defence as ground for resisting enforcement of the adjudicator's award.

[17] Mr Currie submitted that the section 111 notice, given after the date of the adjudicator's decision but before the expiry of the seven days which he allowed for payment, complied with the relevant statutory provisions and was valid and effective to entitle the defenders to retain the sum which the adjudicator had ordered them to pay. Although adjudication is a contractual procedure, the contractual provisions governing it are required, and in the absence of express compliant provision implied, by statute. Since it thus has its origin in statute, clear language is required if the procedure is to take away a party's ordinary right of retention. The language of the section did not yield that result. In the first place, section 111 prohibits the withholding of "a sum due under the contract" unless an effective notice of intention to withhold payment has been given. The sum due under the adjudicator's award is a "sum due under the contract", because the defenders' obligation to make payment of it arises from the contractual obligation required by section 108(3) and found in this contract in Clause 66(40 and (6)(iv), and paragraph 1.10 of Annex 3. There is thus nothing in the terms of the section to indicate that a section 111 notice is not a valid response to an adjudicator's award. In the second place, prior to the adjudicator's award, there was no "sum due under the contract" in respect of which a section 111 notice might have been given. Where an adjudication is in respect of a sum certified as payable by the engineer, that certified sum is a "sum due under the contract". Here, however, because the engineer declined to certify any sum as due in respect of the pursuers' Interim Application for Payment No. 21, there was no "sum due under the contract" in respect of which a notice of withholding could have been given before the adjudication. In these circumstances, Mr Currie submitted that where there was no opportunity for a responding party to serve a withholding notice before the adjudication, although he might be able to persuade the adjudicator to entertain the question of retention in respect of liquidate damages in the course of the adjudication, he was not obliged to do so in order to preserve the right of retention, because he could validly serve a withholding notice against the adjudicator's award.

[18] Mr Currie summarised his submission on this aspect of the case in four points:

1. *There was nothing in the Act or the contract to suggest that the responding party was to be deprived of his entitlement to exercise a right of retention in respect of a claim for liquidate damages against the sum awarded by the adjudicator.*
2. *Although section 111 may have been drafted with the normal situation of a certified sum "due under the contract" in mind, and thus have contemplated primarily the giving of a notice of withholding before adjudication, the language of the section was wide enough to cover the giving of a withholding notice against a sum which came to be "due under the contract" by virtue of an adjudicator's decision.*
3. *Except by invoking the procedure provided for in section 111, a responding party had no entitlement to have his defence of retention entertained by the adjudicator. An adjudicator would be entitled to take the view that a claim of retention in respect of liquidate damages, raising as it often would a potentially complex issue of extension of time (which might fall outwith the particular adjudicator's technical competence), did not fall within the scope of the dispute referred for adjudication.*
4. *It would be manifestly unjust to deprive the defenders of their right of retention in respect of their claim for liquidate damages.*

[19] I agree with the view expressed by His Honour Judge Humphrey Lloyd QC in **KNS Industrial Services (Birmingham) Ltd v Sindall Ltd** at 182 that the scope of an adjudication is defined by the notice of adjudication, but I also agree that any ground that may be founded on by the responding party to justify his position also falls within the scope of the adjudication. Leaving aside at this stage the potentially restrictive effect of section 111, if the notice raises the issue whether a particular sum is due by the employer to the contractor, it seems to me to be axiomatic that the adjudicator must entertain any relevant defence on which the responding party wishes to rely in arguing that that sum is not due. In particular, it seems to me (still leaving section 111 aside) to be clear that an employer who claims to be entitled to liquidate damages and seeks to retain a sum that would otherwise be due to the contractor against that claim, is in principle entitled to put that contention forward before the adjudicator. In my view, an adjudicator who held otherwise, and declined to permit the responding party to raise the issue of retention would be misdirecting himself. I can, to some extent, understand Mr Currie's anecdotal

observations about adjudicators taking a strict view of the scope of the adjudication. Indeed, I can see that, in the case figured by Mr Currie in argument, an adjudicator who has been appointed to determine a quantity surveying issue as to the amount due in respect of the work done by the contractor to date, if confronted with a defence based on retention in respect of liquidate damages which is in turn met by a claim for extension of time by the contractor raising complex issues as to the causation of delay in the progress of the works, might be reluctant to regard the extension of time issue as falling within the scope of the adjudication. It seems to me, however, that even if, in that case, the adjudicator declined to entertain the extension of time dispute, as being a separate one from the one referred to him, that would not entitle him to refuse to allow the employer to argue for retention on the basis of the liquidate damages claim. The fact that that claim was extant and prima facie justified would in my view be sufficient to entitle the adjudicator to give effect to the plea of retention, without entertaining the substantive dispute as to whether an extension of time should be granted and the prima facie claim for liquidate damages thus defeated. In my view Mr Currie may be right in contending that the adjudicator in the present case was not bound to accept as part of the subject matter of the adjudication any dispute between the parties as to whether the defenders' liquidate damages claim was sound or should be defeated by the grant of an extension of time. On the other hand he was not, in my opinion, right in arguing that the adjudicator could have declined to allow the defenders as responding party to plead retention pending determination (if necessary by a further adjudication) of their liquidate damages claim. This is not therefore a case in which the defenders have been deprived of the opportunity of pleading retention by the narrow scope of the adjudication. On the contrary, they chose not to raise the issue in the course of the adjudication. Had they done so, however, (again reserving the question of the impact of section 111) they would in my opinion have been entitled to insist that the adjudicator entertain it. The fact that the defenders chose not to advance their retention argument before the adjudicator does not, in my view, entitle them to rely on it now for the purpose of depriving the adjudicator's award of the enforceability which the Act and the parties' contract conferred upon it. Moreover, although the defenders cannot, in my opinion, exercise their right of retention against the adjudicator's award, the consequence is not that they have lost the right of retention. It remains exercisable against any future sum falling due to the pursuers under the contract.

[20] I do not consider that in the circumstances of this case section 111 affects the matter. On the one hand, I am of opinion that it is correct that the defenders had neither opportunity nor obligation to give a section 111 notice in advance of the adjudication. That is because in the absence of an engineer's certificate there was at that stage no "sum due under the contract" in respect of which a "due date for payment" might pass. The context in which the section provides for the giving of a notice of intention to withhold payment thus did not arise. On the other hand, it follows, in my opinion, that the absence of a notice under section 111 did not prevent the defenders from putting forward in the adjudication their plea of retention in respect of their claim for liquidate damages. Section 111 prohibits withholding of payment without a notice only where the sum withheld is a "sum due under the contract", and as already noted, the absence of a certificate in respect of Interim Application for Payment No. 21 meant that there was in advance of the adjudication no contractual obligation on the defenders to pay any sum under that Interim Application. In short, I am of opinion that on a sound reading of section 111 in the somewhat unusual circumstances of this case, the defenders had no opportunity to lodge a withholding notice in support of their plea of retention, but at the same time did not need such a notice to entitle them to plead retention before the adjudicator.

[21] I do not consider that either **Solland** or **McLean** is directly in point. In **Solland t**he court held that a party whose section 111 notice given in advance of the adjudication was held invalid by the adjudicator could not resuscitate the same point as a defence to enforcement of the adjudicator's decision. It does not follow from that decision that the defenders in this case, who did not give a section 111 notice before the adjudication, are excluded from giving one after the adjudicator's decision has been issued. In McLean, it seems to me that the outcome was heavily influenced by the fact that the adjudicator had, in dealing with the question of extension of time, decided all that needed to be decided to support the claim for liquidate damages, and that that was sufficient to make it inappropriate to grant summary judgment in terms of the adjudicator's decision without taking into account set-off of the liquidate damages. I am not

certain that I fully understand what part Judge Lloyd regarded the section 111 notice as playing in the matter. At all events, I do not consider that his decision affords a secure basis for holding as a matter of generality that it is open to a defender to give a section 111 notice to withhold payment of a sum awarded by an adjudicator.

[22] Mr Currie founded his submission that a section 111 notice could competently be given after an adjudicator had issued his decision at least in part on the terms of the section which relate the notice to a "sum due under the contract". It is, no doubt, correct that the defender's obligation to pay the sum awarded by the adjudicator is of a contractual nature, founded on the provisions made in the contract in order to comply with section 108(3). But that is not enough to persuade me that the language of section 111 is sufficiently wide to make it legitimate to give a withholding notice in respect of the adjudicator's award. What section 111 provides is that a party may not "withhold payment **after the final date for payment** of a sum due under the contract" (emphasis added). The final date for payment has a technical meaning in terms of section 110(1), which is reflected in this contract in Clause 60(1). The context in which the phrase is used is ordinary payments becoming due at intervals during the course of the contract in consequence of the certification procedure. The structure of the contractual timetable is such that payments of that sort may not be withheld after the final date for payment unless a notice has been given. It follows, in my view, that section 111 is intended to apply only to the withholding of payments in respect of which the contract provides for a final date for payment. It was not intended to apply, and does not apply, to payments due in consequence of an adjudicator's decision.

[23] If Mr Currie's construction of section 111 were correct, there would be nothing to confine the giving of a post-adjudication notice of intention to withhold the adjudicator's award to cases possessing the peculiarity which this case possesses, namely that there was no opportunity to give such a notice before the adjudication. If he were right that, because the sum awarded by the adjudicator is a sum due under the contract, section 111 permits the giving of a withholding notice in respect of the adjudicator's award, such a notice could be given in any case, whether the point had already been argued before the adjudicator or not. There would, on that construction, be nothing in the section to restrict the scope of post-adjudication notices to cases in which the point taken in the notice could not have been, and had not been, taken before the adjudicator. It would, however, in my view be destructive of the effectiveness of the institution of adjudication if a responding party could decline to put forward an available defence in the course of the adjudication, then give a section 111 notice seeking to withhold on that ground the sum awarded by the adjudicator.

[24] For these reasons I am of opinion that section 111 does not permit the giving of a withholding notice in respect of an adjudicator's award. I do not consider that that gives rise to any injustice. The defenders have not been deprived of their right of retention. On the contrary, they have lost it (so far as the sum held to be payable in respect of Interim Application for Payment No. 21 is concerned) through not advancing it at the proper time in the course of the adjudication, when they could have done so without a section 111 notice. If they had advanced it then, the point would have fallen within the scope of the dispute referred to adjudication, and the adjudicator would have been obliged to address it. It would, however, be inconsistent with the enforceable quality conferred by the Act (and the terms of any contract compliant with the Act) on an adjudicator's decision to allow the right of retention or set-off to be put forward as a defence to an action seeking enforcement of the adjudicator's decision. In the events which have happened, the defences which the defenders seek to advance in their seventh, eighth and ninth pleas-in-law are unsound and do not afford a defence to this action.

Result

[25] I am accordingly of opinion that there is nothing in those parts of the defences that Mr Currie sought to maintain which constitutes a defence to the action. I shall therefore grant the pursuers' motion for summary decree in terms of the conclusion of the summons, except that I shall reserve the question of expenses.

Pursuers: MacKenzie, Solicitor Advocate; Masons
Defenders: Currie, Q.C.; Dundas & Wilson, C.S.