OUTER HOUSE, COURT OF SESSION

[2017] CSOH 133

CA34/17

OPINION OF LORD BANNATYNE

In the cause

THE EDINBURGH SCHOOLS PARTNERSHIP LIMITED

Pursuer

against

GALLIFORD TRY CONSTRUCTION (UK) LIMITED

Defender

Pursuer: Moynihan QC, Hawkes; MacRoberts LLP
Defender: Ellis QC; Burness Paull LLP

24 October 2017

Introduction

[1] In the present action the pursuer seeks to enforce the decision of an adjudicator dated 28 March 2017.

The Issues

[2] The three broad issues discussed in the argument before me were these: whether the adjudicator's decision is invalid and ought to be set aside on the grounds that (1) he did not have jurisdiction to reach his decision, (2) there was a procedural failure by the pursuer in

referring the adjudication to the adjudicator and (3) the decision he reached was in material breach of natural justice?

Background

[3] In terms of a Project Agreement entered into between the pursuer and the City of Edinburgh Council ("CEC") dated 14 November 2001, the pursuer undertook to provide certain services to CEC in respect of a number of schools in Edinburgh ("the project schools"). Amongst services provided by the pursuer were (a) the design, construction and refurbishment of the project schools ("the construction project"); and (b) the facilities management of those schools ("the FM services").

[4] For the purposes of the construction project, the project schools were divided into the Stage 1 schools and the Stage 2 schools. In respect of the latter, in 2004 the pursuer entered into a Design and Build Contract with the defender ("the D&B contract").

[5] The pursuer in addition entered into an FM Agreement with Amey Community Limited ("the FM Contractor") for the provision of FM services by the latter to the pursuer in connection with the Stage 1 and Stage 2 schools.

[6] The Stage 2 schools consisted of the following: Oxgangs Primary School; Firhill High School; St Peter's Primary School and Braidburn School.

[7] In January 2016, a gable wall at Oxgangs Primary School suffered a partial collapse during a winter storm. The school was closed while immediate action was taken to render it safe for occupation by schoolchildren and investigations were set in train in order to discover the reasons for the collapse. Those investigations in turn expanded to cover the other three schools which had been erected pursuant to the D&B contract as problems were discovered firstly at Oxgangs, and then at each of the other three schools. Works of repair

were carried out by the defender on the express understanding that those works were being carried out without any admission of legal liability.

[8] The work led to concerns about the construction of both Stage 1 and Stage 2 schools. A dispute arose between the parties in relation to various matters arising from the foregoing events. By adjudication notice dated 8 February 2017 the FM Contractor gave notice to the pursuer of its intention to refer a dispute to an expert for adjudication ("the Related Dispute"). In order to achieve a consistent determination of disputes, where any dispute between the pursuer and the defender raises substantially the same issues as arise in an adjudication between the pursuer and the FM Contractor, section 11 of the D&B contract gives the pursuer the right to have the dispute between the pursuer and the defender determined by the expert appointed in relation to the related dispute (that expert being referred to in the D&B contract as "the Related Adjudicator"). The pursuer sought to exercise that right in this case and served notice on the defender under paragraph 11.1 of Schedule Part 2 of the D&B contact of its intention that the dispute between the parties be referred to the Related Adjudicator. On 15 February 2017 both adjudications were conjoined.

[9] The pursuer's title to refer this matter to the related adjudicator was challenged by the defender and the related adjudicator rejected this challenge setting out his reasons therefor in a note dated 13 March 2017.

[10] Moreover the defender challenged the title of the related adjudicator to conjoin the disputes on the basis that the pursuer had not served a preliminary statement and/or referral notice. The adjudicator rejected this challenge setting forth his reasons therefor in a note dated 13 March 2017.

[11] Lastly the defender challenged the entitlement of the related adjudicator to act in a the related adjudication on the basis of purported bias on the part of the related adjudicator. The adjudicator rejected this challenge setting out his reasons therefor in a note dated 20 February 2017.

[12] On 28 March 2017 the adjudicator issued decisions in both adjudications.

The Submissions on behalf of the Defender

[13] As regards the first issue of jurisdiction, Mr Ellis advanced his argument in terms of a number of separate chapters.

[14] The defender's first argument was this: the pursuer had no title to commence an adjudication for the sums claimed as the sums claimed were enforcement of rights which arose under the D&B contract.

[15] The argument in support of the above contention can be summarised in this way: all the pursuer's rights under the D&B contract have been assigned. Title to commence proceedings belongs to the assignee. As a result proceedings have to be commenced either in the name of the assignee or by the assignee using the name of the pursuer.

[16] It was the position of Mr Ellis that it flowed from the assignation by the pursuer in favour of the Governor and Company of the Bank of Scotland as Security Trustee (page 935 JB), that the pursuer assigned to the Security Trustee *inter alia* its whole right, title and interest in and to all rights of the pursuer relative to the D&B contract. It was his positon that in terms of Clause 2 of the assignation it was made clear that the assignation was to have present and immediate effect. Mr Ellis accepted that throughout the assignation it was said to be an assignation in security. However, critically it was his position that this made no difference to the argument on title which he was advancing.

[17] Mr Ellis directed my attention to a Contract Direct Agreement ("CDA") which was entered into between *inter alia* the pursuer, the Bank of Scotland and the defender. It was entered into at the same time as the assignation.

[18] Mr Ellis submitted that it was evident that the assignation was part of a larger suite of documents intended to give effect to a commercial arrangement under which the pursuer as a single purpose vehicle with no covenant of its own provided security to those investing in the project. The real commercial interests being protected were those of the parties behind the single purpose vehicle whose economic interests were in need of security. He argued that there was no doubt that the parties intended that there be an immediate and effective transfer of the relevant rights. The transfer of the rights was necessary in order for there to be immediate security provided for those investing in the venture. As provided for within the assignation itself, it is understood that the assignation was perfected by intimation to the defender at the time.

[19] In development of his argument Mr Ellis turned to examine in a little detail the terms of the assignation.

[20] Clause 1 of the assignation defines rights as follows:

> "'**Rights**' in relation to any contract, agreement or arrangement includes:
>
> (a) the right to receive all and any monies payable thereunder;
>
> (b) the proceeds of any payment thereunder;
>
> (c) all claims for damages for any breach thereof (except for a breach by the Assignor);
>
> (d) the benefit of all warranties and indemnities contained therein;
>
> (e) any right to terminate or rescind the same; and
>
> (f) any right to perform and observe the provisions of the same and to compel the performance and observance of same."

[21] Mr Ellis made the short point that the definition of rights was very wide and clearly includes claims of a type dealt with in the adjudication.

[22] Clause 2 is in the following terms:

> "ASSIGNATION IN SECURITY
>
> In security of the payment and discharge of the Secured Finance Liabilities the Assignor herby assigns to the Security Trustee its whole right, title, interest and benefit in and to:
>
> (a) the Project Documents; and
>
> (b) all Rights of the Assignor relative to the Project Documents."

[23] The above clause Mr Ellis submitted is the operative part of the assignation and amounts to an immediate assignation of everything in the D&B contract.

[24] Clause 3 contains the intimation provisions and in particular Clause 3.1(a) provides:

> "The Assignor shall:
>
> (a) procure that on execution of this Deed notice of the assignation of the Project Documents pursuant to this Deed (in the form of the notice set out in Part 2 of the Schedule) or in such other form acceptable to the Security Trustee is given to all such persons to whom such notice is required to be given in order to create a valid fixed security over the Assigned Rights under the law of Scotland; and ..."

[25] On execution the deed is to be intimated. This shows the clear and present intention that the immediate transfer of rights should take place. It confirms the terms of Clause 2.

[26] He then moved to Clause 4.3 which provides:

> "The Assignor shall:
>
> (a) procure the due and punctual performance by each of the other parties to the Project Documents of their respective obligations thereunder; and
>
> (b)

(i) perform the obligations on its part contained in the Project Documents;

(ii) notify the Security Trustee of any default (whether by it or by any other party) under the Project Documents promptly after becoming aware of it; and

(iii) institute and maintain all such proceedings and take such other steps as may be necessary or expedient (in the sole opinion of the Security Trustee) to preserve or protect the interests of the Assignor and of the Security Trustee in and to the Project Documents."

[27] It was Mr Ellis' position that on a sound construction this clause operates to do the following: to give to the pursuer the duty to manage rights it has transferred to the Security Trustee; what it does not do is give the pursuer formal title to these rights and thus formal title to institute proceedings. This construction of clause 4.3 he submitted fitted in with the traditional analysis of an assignation. What we have here is an immediate transfer of rights from the cedent to the assignee. However, the cedent is to manage these rights.

[28] Further confirmation of this immediate transfer is given by the terms of Clause 4.4 which provides:

"The Assignor shall not without the prior consent in writing of the Security Trustee (not to be unreasonably withheld):

(a) assign, transfer or otherwise dispose of or create or incur or knowingly permit to subsist any security or encumbrance over any of the Assigned Rights other than as expressly permitted in the Common Terms Agreement;

(b) waive, fail or delay to enforce any of its rights under the Project Documents or terminate or agree to terminate the Project Documents or any of them other than as expressly permitted in the Common Terms Agreement; or

(c) take or omit to take any action the taking or omission of which could reasonably be expected to result in the alteration or impairment of the Project Documents or this Deed or any of the rights under the Project Documents."

[29] The pursuer by this clause is obliged to take certain steps, however, limitations are placed on this.

[30] Clause 4.6 then provides:

> "Without prejudice to Clause 4.5 (*Liability of Assignor*), if the Assignor fails to perform any of its obligations under the Project Documents, the Security Trustee may, but shall not be under any obligation to, perform or procure the performance of such obligation. If the Security Trustee shall perform or procure the performance of any obligation of the Assignor under the Project Documents, the Assignor shall, without prejudice to any other right of the Security Trustee, forthwith on demand by the Security Trustee reimburse the Security Trustee for all reasonable costs and expenses properly incurred by it in so doing together with interest thereon at the Default Rate from the date of demand until the date of payment by the Assignor to the Security Trustee (but without double counting of interest which is payable as such costs and expenses under any other Senior Lender Finance Document)."

[31] Mr Ellis took from the above provision that the Security Trustee is entitled to step in and perform the obligations incumbent on the pursuer and this shows that there has been an effective transfer of rights to the Security Trustee.

[32] He went on to submit that a further confirmation of the creation of an immediate transfer of rights can be seen from the terms of Clauses 10.1 and 10.2 of the assignation.

[33] He submitted that the immediate transfer of rights was important to the Security Trustee where there was competition with any other creditor. If there was not an immediate transfer then the Security Trustee would not win the competition with the other creditor.

[34] In respect to the CDA (page 710 JB) Mr Ellis directed my attention to Clauses 3.1 and 3.2 which provide:

> "3.1 The Global Agent hereby gives, and the Contractor and Guarantor acknowledge, notice to the Contractor and Guarantor that the Service Company has granted or, as the case may be, is to grant with effect from the Effective Date, Security over, *inter alia*, the Secured Agreements under the Security Documents in favour of the Security Trustee (including an assignation by way of security of the Service Company's present and future rights, title, benefit and interest in and to the Secured Agreements) ("**Assigned Rights**"), and the Contractor and Guarantor consent to the creation of the Security over the Secured Agreements on the terms set out in the Security Documents.
>
> 3.2 The Service Company hereby gives, and the Contractor and Guarantor acknowledge, notice to the Contractor and Guarantor that the Security Trustee has agreed with the Service Company that, until such time as the

> Security Trustee notifies the Contractor and Guarantor in writing to the contrary, the Service Company may exercise all of the Assigned Rights save that the Service Company may not without the prior written consent of the Global Agent amend, waive or modify, cancel, terminate, suspend, surrender, assign, novate or transfer any of the Secured Agreements or the Assigned Rights."

[35] In these clauses where the Contractor is referred to, this is the defender and the pursuer is the Service Company.

[36] What Mr Ellis took from Clause 3.1 was this: it is once again clear that what is intended is not a future security but one created with immediate effect.

[37] As regards Clause 3.2 it reflects what is to happen in terms of the assignation: the pursuer is entitled to exercise certain rights but subject to limitations. He argued that in terms of Clause 3.2 of the CSA (as in the assignation) the right to manage is given to the pursuer. This construction was consistent with an immediate transfer of rights.

[38] Having analysed these documents the conclusion Mr Ellis invited the court to draw from them was this: in order for an effective security to be created it has to transfer the rights in terms of the D&B contract immediately. The pursuer can exercise (manage) those rights but does not have title to those rights and is not the owner of the rights. The terms of those documents on a proper construction were consistent with the argument on title which he was advancing.

[39] Mr Ellis' argument continued: it flowed from the above that the pursuer did not have title to the claims which were made within the adjudication. Without title to the claims which were made within the adjudication the pursuer could not commence an effective adjudication. Title is a jurisdictional issue which affects the validity of an adjudication (see: *Rok Build Ltd* v *Harris Wharf Development Co Ltd* [2006] EWHC 5573 (TCC) at paragraph 19 and *Mailbox (Birmingham) Ltd* v *Galliford Try Construction Ltd* [2017] BLR 180).

[40] Mr Ellis then proceeded to address me as to the nature of an assignation: an assignation is the means of transferring the title to incorporeal moveable rights. Once the assignation is perfected by intimation the right is vested in the assignee (see: *Stair Memorial Encyclopaedia Vol 18* paragraphs 16 and 656). In order for there to be an effective assignation in Scots Law there requires to be an immediate transfer of rights, see: *Carter* v *McIntosh* [1862] 24D 925 at 933; *Gallemos L:td (in receivership) Ltd* v *Barratt Falkirk Ltd* 1989 SC 239 at 242 and 246, and; *Jack* v *Jack* [2016] CSIH 75 at paragraph 36.

[41] He in particular directed my attention to the discussion in *Gallemos* v *Barratt Falkirk*. This he submitted was of significance given that the assignation in question was an assignation in security.

[42] He took me first to the Opinion of Lord Dunpark at page 242 who described what was necessary for an effective assignation:

> "In my opinion an effectual assignation must contain words which may be construed as effecting an immediate transference of A's right against C (A's debtor) to B (the assignee), and the transfer is completed when intimation of the transfer is made to C, who then knows that B has become his creditor in place of A;"

[43] He also drew the court's attention to the Opinion of Lord Cowie at page 246 who having considered the Opinion of Lord Justice Clerk Inglis in *Carter* v *McIntosh* derives the following from it:

> "Accordingly it appears that all that is required to constitute an assignation are, first, words giving authority or directions which if fairly carried out will operate a transference, and secondly, that there must be a present intention to transfer."

[44] That these are the requirements for constituting an assignation is further confirmed by the Lord Justice Clerk in *McCutcheon* v *McWilliam* 1876 3R 565 where he sates at page 571:

> "Any words which express a present intention to transfer are sufficient as an assignation."

[45] The analysis in *Gallemos* v *Barratt Falkirk* is confirmed in *Jack* v *Jack* at paragraph 36. However, it does not add anything to what is said in *Gallemos* v *Barratt Falkirk*.

[46] So, if assignation in the instant case is to be effective it must have immediately transferred rights to the Security Trustee. The court should be very slow to hold that it had not transferred rights and thus the assignation could be rendered ineffectual.

[47] His argument continued in this way: from the foregoing analysis there is no doubt that following the assignation and intimation thereof in the present case title for the rights arising under the contract belonged to the security trustee.

[48] An assignation strips the cedent of title to claims and to bring an action based on those claims. If there is no title the action is a nullity: *Bentley* v *MacFarlane* 1964 SC 76 at 79 and 80.

[49] In *Bentley* v *MacFarlane* the facts in so far as material are set out in the rubric:

> "A motorist who was involved in a collision with another car assigned his right of action arising out of the collision to a third party. He subsequently raised an action of damages against the driver of the other car, who pleaded no title to sue."

[50] Mr Ellis directed my attention to the Opinion of the Lord President at page 80 where he opined that the pursuer had no title to sue and observes that:

> "He (the pursuer) had assigned any title he had to Mr B. Nothing that Mr B subsequently did by reassignation, which only operated from its own date, affected the positon at the date of raising an action. And nothing Mr B subsequently did gave the pursuer as at the date of the raising of the action any title to initiate proceedings. At the best for the pursuer Mr Brown only gave him a title to sue in December 1961, long after the action was raised and from the time when the action was raised until at least December 1961, the pursuer had not the vestige of a title at all.
>
> The pursuer founded upon a passage in Maclaren on *Court of Session Practice* at page 219, which is in the following terms: 'A party who has granted an assignation and then raises an action has a good title to carry it on if he obtains a retrocession

> *pendente processu*.' This passage in my opinion, is not sound law, and I agree with Lord Strachan's observations upon it."

[51] Thus in the instant case the pursuer had no title, he had certain personal rights but no title.

[52] Mr Ellis went on to contend that the law of Scotland recognises both real rights and personal rights. It recognises no intermediate rights. A critical feature of Scots Law is that a party either has a title to a right or it does not. There is no intermediate positon. In support of that contention he directed the courts attention to *Burnett's Trustees* v *Grainger* 2004 SC(HL) 19 at paragraphs 18, 19, 46, 87 and 88 and; *Royal Insurance (UK) Ltd* v *Amec Construction Scotland Ltd* 2008 SC 2001 at paragraph 15.

[53] Having examined in some detail first the material provisions of the documentation and second the general law, with respect to assignation Mr Ellis then moved to consider what he described as the central question in the instant case: whether the fact that the assignation is in security affects the divestiture of the cedent and the transfer of the title to the assignee? His answer to that question was; there is no reason in principle why it should.

[54] In elaboration of this answer he submitted: principle indicates that the very nature of an assignation is that it is a transfer of the right. Any decision to the effect that an assignation in security did not affect the transfer of the right in the generality of cases would be to deny an assignation in security its very nature as an assignation. Such a step would also be undesirable in practice as it would mean that the debtor would have to deal with two parties in any transaction with his debt. What would happen if the two parties disagreed? Since an assignation by its very nature is an immediate transfer of the right it is submitted that only the assignee can have title to the right. There is no reason in principle or practice that this basic analysis does not apply to an assignation for the purposes of security

as well as to an assignation in perpetuity. He submitted that there is no authority which states that this basic analysis does not apply to an assignation for the purposes of security. The simple and straightforward application of the principle of a transfer of the right protects the debtor. What is important from the debtor's point of view is who has title to the debt. The debtor needs to know who the title belongs to. The debtor cannot be expected to enquire into the nature of the relationship or the state of indebtedness between the cedent and the assignee. There is no justification in general to treat an assignation in security any differently from an assignation for any other purpose in this regard.

[55] Mr Ellis referred me to Gloag and Irvine, *Law of Rights in Security* at page 478 where the following is said:

> "In addition to interrupting the *bona fides* of the debtor, intimation has the effect of, and is necessary for, thoroughly divesting the cedent. No one can be fully divested of a debt till another has been invested therein; and, accordingly, the cedent is not wholly divested till, by intimation, the assignee has become the creditor and is fully vested in the debt. Similarly, intimation to the debtor, and that alone, effectually excludes claims by third parties ; for such claims can be derived only from and through the cedent; and, as all right in the cedent is evacuated by intimation, claims by third parties derived from him are, after intimation, necessarily excluded. Hence the effect of intimation is to perfect the title of the assignee, not only against the debtor but also against the cedent and third parties claiming rights through him."

[56] Mr Ellis emphasised that the context of the above discussion was the law of rights in security.

[57] Mr Ellis then turned to examine two passages which he understood would be relied upon by the pursuer with respect to this issue:

> First, *Maclaren Court of Session Practice* at page 219:
>
> "The assignation of a claim in security of a debt due to the assignee does not preclude the cedent from suing for the claim, so long as there is a surplus for which the assignee must account, or so long as the assignee does not object. Where, however, the true interest lies with the assignee and not with the cedent, the latter

> will only be allowed to proceed in an action provided he finds caution for the expenses of process, or sists the assignee as *dominus litus*."

And secondly, *McBryde The Law of Contract in Scotland* paragraph 12-79 where the author says, *inter alia*:

> "Once an assignation is intimated to the debtor, the cedent, *prima facie*, no longer has a title to sue the debtor. An assignation might not completely divest the cedent. It could be in security, leaving the cedent with the right of reversion or only part of a debt may be assigned. The result is that the cedent may retain a title to sue."

[58] Each passage was said to be supported by reference to three authorities, namely: *Robertson Co* v *Exley, Dimsdale & Co* 1832 11 S 91; *Fraser* v *Duguid* 1838 16 S 1130 and; *Manson* v *Baillie* 1850 12 D 775.

[59] It was Mr Ellis' positon that the three cases cited do not support the propositions contained in the above passages.

[60] Mr Ellis analysed each of these cases in turn:

[61] First with respect to *Robertson & Co* v *Exley, Dimsdale & Co* he submitted that the assignation appeared to be of sums due after a current account balance was struck. The court allowed the cedent to bring proceedings to elucidate what was the correct balance. The interlocutor in the case is expressed as doing so on the basis that the assignation was "not to the ground of action, but is merely of the balance in security". It was his positon that the case might be most clearly seen as an example of a partial assignation. The decision was not based on the cedent retaining title in an assignation in security. It did not support the pursuer in the present case having a title to sue.

[62] Secondly, *Fraser* v *Duguid* he submitted again seemed to have been a case of a partial assignation. In any event the main decision of the court was to confirm that an assignee may

sue in the name of the cedent. There was nothing in that case which affected the general principle as to what was an assignation.

[63] Thirdly as regards *Manson* v *Baillie* it was not a decision about who had title to raise the action. It was a decision of application to very special circumstances in which the right which had been assigned was to be abandoned by the assignee and the cedent's right to be revived. The revival might perhaps only be applicable to a situation where the cedent's interest extended well beyond the amount of the obligation secured by the assignation. The radical right recognised appears similar to the radical right that is recognised in bankruptcy, if a trustee abandons an asset which would not allow the bankrupt to prosecute the claim before the trustee abandons it: *cf Geddes* v *Barry* 1822 1 S 480.

[64] Mr Ellis emphasised the very special and unusual circumstances in which it was held that there was title to sue. However, he did accept that it was an exception to the clear rule. The circumstances in which title was said to arise were such that no assistance was provided by the case to the pursuer's argument in the present action.

[65] In conclusion he submitted this regarding these cases: they do not suggest that as a matter of principle an assignation in security is to be treated differently as to its effect on divestiture of title from an assignation for other reasons. It was his positon that the circumstances of the three cases were very clearly distinguishable from the present. Not least because that as in the present case there is no suggestion within the documentation that the assignation in security is merely a partial assignation. None of these cases was of assistance to the pursuer.

[66] Mr Ellis then addressed the question of the significance regarding the title of the pursuer of the CDA. He noted that the pursuer relies upon this document and in particular

the pursuer seeks to rely on the terms of Clauses 3.1 and 3.2 which are in the following terms:

> "3.1 The Global Agent hereby gives, and the Contractor and Guarantor acknowledge, notice to the Contractor and Guarantor that the Service Company has granted or, as the case may be, is to grant with effect from the Effective Date, Security over *inter alia* the Secured Agreements under the Security Documents in favour of the Security Trustee (including an assignation by way of security of the Service Company's present and future rights, title, benefit and interest in and to the Secured Agreements) ('**Assigned Rights**'), and the Contractor and Guarantor consent to the creation of the Security over the Secured Agreements on the terms set out in the Security Documents.
>
> 3.2 The Service Company hereby gives, and the Contractor and Guarantor acknowledge, notice to the Contractor and Guarantor that the Security Trustee has agreed with the Service Company that, until such time as the Security Trustee notifies the Contractor and Guarantor in writing to the contrary, the Service Company may exercise all of the Assigned Rights save that the Service Company may not without the prior written consent of the Global Agent amend, waive or modify, cancel, terminate, suspend, surrender, assign, novate or transfer any of the Secured Agreements or the Assigned Rights."

[67] It was his position that it was clear from the foregoing that immediate transfer of the rights is intended. The question is: what is the effect of allowing the service company (the pursuer) to "exercise" the rights. The pursuer contends that as a result of this it is entitled to advance the claims which have been assigned. His positon was that this simply could not be correct. To give effect to that argument would mean that the rights to the claims have not been assigned but that they remain with the cedent. There would have been no transfer. There was, on this hypothesis, no assignation at the effective date. Rather the rights remained with the pursuer. Such a position clearly could not be an effective assignation according to the cases of *Gallemos* and *Jack*. What is more in these circumstances the rights would not have been transferred to the security trustee and would have remained susceptible to the pursuer's creditors. No security would have been granted. It is clear that

the parties intended to create an effective assignation but thereafter to make provision in respect of the management of those rights. The pursuer's interpretation would lead to that assignation and security being ineffective. It was his positon that it would not be appropriate to adopt an interpretation which frustrated the objectives of the contract see: *Chitty on Contracts 32nd Edition* paragraph 13 – 084.

[68] He argued that the most sensible content is given to these provisions if they are understood not as leaving title with the pursuer but with leaving management of the rights thus allowing it to pursue claims and to give good discharges therefore but always on behalf of the security trustee. Any proceedings would require to be raised in the name of the security trustee who has title to the claims. He submitted that this is a perfectly reasonable and workable construction which is consistent with there being an effective transfer of the rights and security to the security trustee but with the pursuer managing those rights on a day to day basis until it is in default. Thus effectively the debtor knows that he can deal with the pursuer on behalf of the security trustee. Nonetheless title remains with the Security Trustee. Any proceedings to enforce the claim therefore must be raised in the name of the person who has title, namely: the Security Trustee.

Conclusion

[69] It was Mr Ellis's positon that the consequence of the foregoing is that the pursuer has no title to bring proceedings. The proceedings ought to have been commenced in the name of the Security Trustee or be raised by the Security Trustee in the name of the pursuer. It is not suggested on behalf of the pursuer that the adjudication or indeed the current court proceedings are brought by the Security Trustee using the name of the cedent. The pursuer had no title at the time of the notice of adjudication commencing the adjudication

proceedings. In these circumstances the court should uphold his first argument in respect to the validity of the adjudication.

The Second Issue

[70] The second argument was based on an alleged failure by the pursuer to follow the procedural requirements of the D&B contract. The argument continued that due to this failure the adjudicator did not have jurisdiction to hear the adjudication. In particular it was contended that there was an omission to provide a statement of particulars as required in terms of paragraphs 11.2 and 11.3 of the Schedule Part 2 of the D&B contract.

[71] Paragraphs 11.2 and 3 provide as follows:

> "11.2 In the event that the Employer notifies the Contractor and the other party to the Related Dispute in writing of its intention that the Dispute be referred to the adjudication of the Related Adjudicator, then the Employer will provide no later than seven (7) days from the date on which the Related Referring Party gave notice of its intention to refer the Related Dispute to adjudication, to the Related Adjudicator and to the other parties to the Dispute and Related Dispute the particulars set out in paragraph 11.3.
>
> 11.3 The particulars referred to in paragraph 11.2 are;
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> (a) a copy of this Agreement (to the Related Adjudicator only);
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> (b) a copy of the Adjudication Notice referred to in paragraph 2.1;
>
> (c) a preliminary statement from the Employer setting out
>
> (i) the basis and grounds for consolidation of the Dispute and the Related Dispute;
>
> (ii) the cases of the parties to the Dispute (Insofar as the cases of both parties to the Dispute can at the relevant time be described);
>
> (iii) any relief sought by the parties to the Dispute; and
>
> (iv) a list of and copies of any documents served in relation to the Dispute.

> Any such particulars sent by the Employer to the Related-Adjudicator shall be sent at the same time to the other parties to the Dispute and the Related Dispute."

[72] Thus 11.2 required a statement of particulars containing information as listed in paragraph 11.3. Only after service of these particulars may the related adjudicator give notice of his intention that the dispute and related dispute be conjoined. That notice of intention by the Related Adjudicator must be given within 7 days of the date when the Related Referring Party (here the FM Contractor [Amey]) gave notice of its intention to refer the related dispute to adjudication. Amey gave such a notice of intention on 8 February 2017. The pursuer gave the defender notice of intention to refer the dispute to adjudication on 13 February 2017. On 14 February 2017 the pursuer sent the related adjudicator a letter. That letter is relied upon by the pursuer to demonstrate the fulfilment of the obligations incumbent on it under paragraphs 11.2 and 11.3 of the Schedule Part 2.

[73] In the instant case the failure in said letter was this: the letter did not set out the matters detailed in 11.3. In particular all that is said in relation to the matters in 11.3(c)(i) and (ii) was by reference to certain parts of the adjudication notice and recording that the defender had denied liability.

[74] Mr Ellis sought to put this failure within the statutory framework for adjudications as provided by section 108(2) of the Housing Grants Construction and Regeneration Act 1996. It requires the contract to *inter alia* provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to the adjudicator within 7 days of the notice of adjudication in the dispute. If the contract does not provide this then the scheme under the Construction Contracts (Scotland) Act will apply. The notice under section 11.2 is the means by which the dispute is in the present case referred to the

adjudicator as confirmed by paragraphs 11.6 and 11.7. It is the means by which the contract complies with the requirements of the Act.

[75] Thus the particulars under 11.3 serve the purpose of referring a dispute which is to be conjoined to the adjudicator. Accordingly it forms the equivalent of a referral notice under the scheme. The particulars are therefore intended to provide the referral of the dispute to the related adjudicator. Given the foregoing it is an important document. The requirements in the contact need to be fully complied with. Notice is given both to the adjudicator and to the responding party of the details of the dispute. Mr Ellis' argument continued as follows: given that background it is not sufficient simply to refer to the adjudication notice. The required details must be set out within the referring document itself. In the present case the letter itself does not set out the details of the dispute. It simply refers to paragraphs within the adjudication notice. It does not contain the detail, so far as the cases of both parties can at the time be described. It did no more than record that the defenders denied liability. The notice accordingly did not conform to the requirements of paragraph 11.3. Thus there was no valid conjoined adjudication.

[76] The above concluded the first branch of the defender's argument relative to jurisdiction.

The Third Issue

[77] In terms of the next branch of the defender's argument Mr Ellis contended that there had been a number of material breaches of natural justice.

[78] The defender's first contention was of apparent bias on the part of the adjudicator.

[79] The legal framework within which that argument fell to be considered was not a matter of dispute between the parties. The correct test is that stated by Lord Hope in *Porter*

v *Magill* [2002] 2 AC 357 that "a fair minded and informed observer" would conclude that there was "a real possibility of bias".

[80] The factual basis upon which Mr Ellis advanced the above argument was this: the adjudicator had decided in an adjudication between the pursuer and Amey on 11 November 2016. In the course of doing so the adjudicator interpreted parts of a contract in substantially the same terms as the D&B contract with which the present dispute is concerned. That earlier adjudication related to Stage 1 schools for which a D&B contract had been concluded in 2001. There was a determination that defects existed in similar buildings in Stage 1 schools using the same construction techniques used in Stage 2 schools. In the course of his decision in the adjudication which is the subject of this case the adjudicator referred to his earlier conclusions on parts of the contract. This it was submitted showed that he had approached the current adjudication with that earlier decision in mind. There was accordingly a real possibility of bias.

[81] The next section of the argument in terms of this chapter of breach of natural justice was this: the adjudicator had not allowed the defender a response to matters raised in a reply dated 10 March 2017 made by the pursuer to certain objections on jurisdictional grounds which had been advanced by the defender. It was argued that this amounted to a breach of natural justice.

[82] The factual circumstances founding this contention were that the no title issue was first raised before the adjudicator by the defender in a response document of 3 March. That point was responded to by the pursuer in a document of 10 March 2017. In addition on 10 March the pursuer produced a letter of consent and a number of authorities were referred to on the no title issue. It was this to which the defender had not been given an opportunity by the adjudicator to respond.

[83] It was argued by Mr Ellis that this failure to allow a response was a material one in that the response might have made a considerable difference to the adjudicator's determination. The issue of no title is an important one and potentially determinative of the dispute. A material breach on a matter which is of importance may invalidate an adjudicator's decision, see: *Cantillon Ltd* v *Urvasco Ltd* [2008] BLR 250 at paragraphs 56 and 57.

[84] Mr Ellis also advanced as part of his argument regarding a failure to allow a response that in addition to failing to allow the defender an opportunity to respond to the line of authority put forward by the pursuer, the adjudicator had referred to a further authority of his own on the application of which he invited no comment. It was argued that the further authority of his own demonstrated that the adjudicator had not fully understood what the arguments for the defender would have been. This procedure was unfair. Mr Ellis accepted that the foregoing point as a standalone one would not amount to a material breach of natural justice, however, it could be considered in terms of the argument regarding a failure to allow the defender to respond.

[85] The third argument was that the adjudicator referred to his earlier adjudication decision and his reasoning therein. The assumption is that it was necessary for him to do so in order to reach his conclusions. Again, he had not made it apparent to the parties in the current adjudication that he intended in any way to rely on his earlier decision. Thus no opportunity was offered to the parties to comment on that earlier decision. This once more amounted to a denial of natural justice.

[86] For the foregoing reasons Mr Ellis moved that I should sustain the second plea-in-law on behalf of the defender and set aside the adjudicator's decision. This would in

consequence require me to sustain the defender's third and fourth pleas-in-law and to assoilzie the defender .

The Reply on behalf of the Pursuer

Title to Sue

[87] In response to the position advanced by Mr Ellis, Mr Moynihan argued as follows.

[88] There is a valid, present assignation of the D&B contract, but it is an assignation in security. The difference between an assignation in security and an absolute assignation is a significant one for the purposes of the argument on title to sue. It was a difference which the defender failed to recognise in the argument put forward by Mr Ellis. Contrary to the suggestion in the pleadings of the defender and as set forth by Mr Ellis in his submissions in an assignation in security, the cedent is not stripped of title. Such an assignation does not deprive the cedent of ownership of the contractual rights.

[89] In support of this contention Mr Moynihan first directed my attention to: *Halliday Conveyancing Law & Practice* at paragraph 8.71 where the author explains in a section headed "Assignations of Incorporeal Rights in Security" as follows:

> "Incorporeal rights which are assignable may normally be made the subject of security. The documentation may be either expressly as security for a personal obligation or by way of *ex facie* absolute assignation or transfer qualified by a separate document to the effect that the transaction is truly one which creates a security. The forms of assignation or transfer are appropriate to the nature of the right assigned and the creditor's title should be completed by intimation or notice as in the case of an absolute assignation or transfer. An assignation or transfer in security does not in a question between the debtor and the creditor divest the former or ownership of the security subject, and it is the duty of the creditor, subject to the terms of the relevant documents, to consult the debtor in any dealings with it. Accordingly it is necessary to incorporate in the documents any powers of dealing with the security subject which the creditor considers he may require."

[90] Mr Moynihan also relied on the passage in Maclaren, *Court of Session Practice* at page 219, which I have earlier set out in full, with particular reference to the implications for title to sue where an assignation is in security.

[91] Lastly he turned to *McBryde: The Law of Contract in Scotland* at paragraph 12-79 which I set out in full earlier and commented on that passage as follows:

It correctly recognises the conceptual distinction between an absolute assignation and an assignation in security and the consequence of that distinction for the cedent's title to sue in respect of the rights assigned in security. The authorities cited at footnote 258 support the proposition that an assignation in security might not completely divest the cedent, with the result that the cedent may retain a title to sue: *Robertson & Co* v *Exley, Dimsdale & Co* (1832) 11 S. 91; *Fraser* v *Duguid* (1838) 16 S. 1130; and *Manson* v *Baillie* (1850) 12 D. 775. The last of these provides the clearest authority. The pursuer, Manson, assigned a debt which he claimed was due to him by trustees of his late uncle's estate, to another individual, Cullen, in security of advances made by Cullen to him. The operative provision in the assignation read:

> "... surrogating hereby, and substituting the said John Cullen, and his foresaids, in my full right and place of the premises, with full power to them to ask, crave, uplift, and pursue for the sums of money, principal, interest, and factor's fee hereby assigned. ..."

Cullen raised an action in his own name against the trustees, which failed. He declined to proceed further with the case. Manson petitioned the House of Lords, stating that the assignation "was merely in security of certain advances" and that "the radical and real right and interest in the said action and claims, remain in your petitioner". The matter was remitted to the Court of Session with instructions to consider whether Manson had such title and interest in the action as to entitle him to be sisted as a party. As the report narrates, the

trustees advanced the same line of argument as the defender does here: although the assignation bore to be only in security, it conveyed the debt to Cullen, with full powers to do everything which the cedent would do himself. The trustees submitted that "till [Manson] has retrocessed, he was not entitled to appear in the action". The Court held that Manson had title and interest in the action, and although the report would suggest that the focus was primarily on Manson's interest (Cullen was obliged to account to him for any balance once his debt was satisfied) the 'no title argument', based upon an assignation in security containing similar operative wording, was explicitly before the Court and was rejected. The defender's argument is substantially founded on the assignee being the party that has the sole financial interest in the D&B contract. That argument is wrong. The security trustees (the assignees) do not have the sole financial interest in the contract. Rather the pursuer continues to have a material interest in the D&B contract.

[92] Mr Moynihan sought support for the foregoing in the terms of the assignation and surrounding documents.

[93] He firstly submitted that the pursuer has a reversionary interest: (Assignation Clause 16). Secondly the pursuer has a present and continuing financial interest in the contract for these reasons: (i) the pursuer remains liable to perform all of the obligations under the contract see: the Assignation Clause 4.3(b)(i), the Intimation and CDA Clause 4.5.3 - no Additional Party has any obligation, and (ii) payments by the defenders are made to the pursuer's bank account (CDA clause 5.1, JB 719) Beyond that any sum recovered by the pursuer from the defender in respect of the present claim would be payable to the pursuer: CDA Clause 5.1.

[94] The defender accepts that the authorities in *Maclaren* as referred to above support the conclusion that the cedent in an assignation in security may retain title to sue at least in exceptional circumstances.

[95] That must include the present case where:

(a) the pursuer has a present financial interest in the claim as explained above.

(b) there is an agreement among the security trustees, as assignee, the pursuer, as cedent, and the defender, as debtor, that the pursuer may exercise the rights prior to any Enforcement Event. This submission was made under reference to the Assignation, Clauses 4.3(b)(iii) and contrast Clause 5(d), the Intimation; and CDA Clause 3.2; and

(c) the assignee has given its consent to the pursuer proceeding with the adjudication. The fact that this came later on the same day after the adjudication notice had been served is irrelevant because as in *Manson* v *Baillie* what is relevant was that Cullen (as assignee) asserted no objection when asked by the Court.

[96] With respect to the defender's construction of Clause 3.2 of the CDA he submitted that it was too narrow, in so far as Mr Ellis argued that it did not leave the title with the pursuer but merely management of the rights. Properly construed that clause means that the pursuer retains title to sue for its own interest, that he submitted was the positon for the following reasons:

(a) That it is consistent with the terms of the Assignation, Clause 4.3(b)(iii), in particular when that clause is contrasted with Clause 5(d) which confers on the assignee the right to commence legal proceedings only from the date of an Enforcement Event.

(b) There is no surprise in any of this. The parties are merely taking advantage of the "exception" which has been recognised by Mr Ellis in the course of his address to the court in circumstances in which it is clear that the assignee wishes to undertake no additional liability save when directly necessary to protect the secured creditors should an Enforcement Event occur.

[97] None of the foregoing prevents the assignation in security in a competition between creditors being as valid and effectual as an absolute assignation. The proper conclusion here is that the pursuer had title to sue this adjudication.

The Response to the Pursuer's Contention that there had been a Failure to Follow the Procedural Requirements of the D&B Contract

[98] In regard to the contention that there was a defect in the statement of particulars Mr Moynihan referred me to Clause 11.3 of the D&B contract which set out the particulars that were to be contained in the statement.

[99] He began his submission by referring me to 11.3(c)(iv). He described this as an interesting provision. He observed that a number of documents were set out as being required to be produced in order to conform with 11.3. What was noteworthy was they could just be attached. There was no requirement for them to be repeated *ad longum* in the statement of particulars. There was nothing there which suggested that if one can find the information required in terms of 11.3 in some other document referred to within the statement of particulars that this amounted to non-compliance with the terms of the provisions.

[100] Mr Moynihan then directed my attention to the letter relied upon by the pursuer as showing that the requirements of 11.2 and 11.3 were met (the letter of 14 February 2017

JB 219) and drew my attention to the fact that there was provided with it a copy of the adjudication notice. This document set out at some length the nature of the dispute. He then asked the question: what would be gained in repeating that at length in the statement of particulars? He answered that question this way: nothing. He in particular referred to sections 4 to 7 of the adjudication notice and pointed out that these ran to some 8 pages and repeated the question what would be the point in setting that out at length in the statement of particulars. He once more gave the same answer: nothing. The adjudication notice was produced as part of the documents which accompanied the said letter and 11.3 was complied with by reference to the content of this notice.

[101] The defender's point regarding the putting of this information within the statement of particulars is this: the statement of particulars is the claim to which the defender responds, it is in a sense the summons to which the defender is required to respond in the adjudication. It is thus necessary for everything to which it is required to respond to be within that document. Mr Moynihan submitted, that the above was a misunderstanding, it is the said notice which is relevant in this context. That is illustrated by the defender's own response. It is headed response to the adjudication notice and in the response the adjudication notice is answered following the numbering system used within the adjudication notice. The adjudication notice rather than the statement of particulars was the document which amounted to the summons in terms of the adjudication process.

[102] Mr Moynihan then turned to the statutory framework which is found in section 108 of the 1996 Act. This is an enabling provision telling us what contracts must contain. It sets out the minimum requirements for an adjudication scheme. If not complied with in a contract it is the statutory scheme which then is imposed. Here there is a contractual scheme.

[103] He observed that the statutory scheme did not require a statement of particulars. It did not require that any particular documents be produced in order to refer the matter to adjudication. In terms of section 108(2)(a) the notice to refer the dispute to an adjudication could be as little as a letter. It was simply some form of intimation. The statutory scheme does not make any reference to how a referral is made. That matter is left to parties. In the instant case a statement of particulars is just a part of how the matter is referred to adjudication.

[104] Mr Moynihan said that the only purpose in referring to the statute was this: there was nothing within it which suggested that a statement of particulars must be self-contained. There was nothing in the statute to support such a contention. In conclusion it was his positon that the issue of the giving of particulars should be approached in a practical manner. Accordingly if by reference to the notice of adjudication all the information is available to the defender in order to allow them to reply (as they in fact were able to do) then that was sufficient.

[105] It was his position that there was no merit in this particular point.

[106] In regard to the issue of apparent bias Mr Moynihan set out his positon in four short propositions:

(a) where a judge or adjudicator made a decision in a related case it does not necessarily disqualify that judge from hearing a related case raising the same issue.

(b) the test: is whether there is any reason to doubt the judge will come to the second case with an open mind.

(c) in the present case there was no reason to doubt that the adjudicator would come to the adjudication with an open mind as the issues raised before him in the second adjudication were totally different.

(d) in the second adjudication the adjudicator did at page 3 refer to his first decision on the nature of what was a defect, but he tells us that because he has not heard any argument to the contrary he was in a positon to proceed on the basis of the decision which he had made in the earlier adjudication.

[107] He then turned to look in a little detail at the factual background in the instant case which gave rise to the issue.

[108] The first adjudication in which the adjudicator sat was between the pursuer and Amey and related to Stage 1 schools. It was his position that nothing in particular turned on that matter.

[109] The dispute in that first adjudication arose out of a particular provision in the D&B contract. The provision in question was a limitation provision relative to latent defects. The argument in the first adjudication related to this limitation provision. The question of the proper construction of the word defect arose with respect to the limitation provision. No engineering evidence was led in that adjudication.

[110] When it came to the second adjudication the subject of the argument before the adjudicator did not involve Clause 30.5 of the D&B contract (the limitation provision), which had been the subject of the first adjudication. Limitation was not an issue.

[111] The first issue in the second adjudication was the engineering work: what was the cause of the collapse? Was there a breach of contract? Secondly, there was an issue regarding head restraints. Thirdly there was a dispute about how prevalent those defects

were in other Stage 2 schools. Fourthly, there was an issue as to whether it was necessary for the council to have closed schools rather than have repair work done in the summer.

[112] The adjudicator heard evidence on these issues and came to a conclusion on them.

[113] Given that Clause 30.5 did not feature at all in the second adjudication, the defender's argument he submitted is bound to fail.

[114] Although the adjudicator referred to a decision he had made in his first adjudication, he pointed out that he had not heard any argument on that matter at the second adjudication and it was not an issue in the second adjudication accordingly there was no reason for him to, as described by Mr Moynihan, reinvent the wheel. There was no basis to suggest apparent bias.

[115] Turning to the propositions he had earlier set out there was no basis upon which to erect an argument of apparent bias. There was no question of the test in *Porter* v *Magill* being satisfied.

[116] As regards the final arguments put forward by Mr Ellis under the broad head of material breach of natural justice Mr Moynihan's position was that these arguments were irrelevant.

[117] The defender's positon was that it had not been given a fair hearing in that: (1) not given an opportunity to respond in respect to the title to sue issue; (2) not given an opportunity to comment on a case relied upon by the adjudicator with respect to title to sue and (3) the lack of opportunity for the defender to refer to the adjudicator's decision of 2016. Mr Moynihan argued that these points were irrelevant in that (1) if the court found in favour of the defender on the title to sue issue, the action would be dismissed. If, however, the court took the converse view and repelled the objection of no title to sue then the argument that there had been a denial of natural justice with respect to the title to sue issue outlined

above is otiose. It does not matter how the adjudicator decided the matter. The matter had been considered afresh by the court. The hearing before the court supersedes what happened before the adjudicator. Accordingly there was no merit in this series of arguments.

[118] For the foregoing reasons Mr Moynihan moved that the court should grant decree *de plano* in terms of the first and second conclusions.

Discussion

Title to Sue

[119] The defender's argument with respect to title to sue can be summarised in this way: all the pursuer's rights under the D&B contract have been assigned and accordingly title to commence proceedings rests with the assignee. I am persuaded that the foregoing is wrong, in that the pursuer, the cedent is not stripped of title by an assignation in security.

[120] The argument advanced by Mr Ellis I believe is fundamentally flawed. It does not recognise the fundamental difference between an absolute assignation and an assignation in security. It is not a matter of dispute that in the instant case the assignation is *ex facie* and expressly an assignation in security. It is I believe a well recognised principle that unlike in the situation of an absolute security the cedent in an assignation in security is not wholly divested of that which is being assigned.

[121] This difference is recognised in the passages which are set out in full earlier in this opinion in McBryde, *The Law of Contract in Scotland* at 12-79, in Maclaren *Court of Session Practice* at 219 and *Halliday Conveyancing Law and Practice* paragraph 8-71.

[122] Each of the above passages recognises that there is a conceptual difference between an absolute assignation and an assignation in security. Moreover, they recognise that this

conceptual difference has consequences with respect to the issue in the instant case, namely: the title to sue of the cedent.

[123] The observations made by the first two authors are based upon their consideration of the same three authorities, namely: *Robertson & Co* v *Exley Dimsdale & Co*; *Fraser* v *Duguid*; and *Manson* v *Baillie*.

[124] First: *Manson* v *Baillie and others*, the material facts are: Manson granted an assignation in security in favour of Cullen. Cullen raised an action against alleged debtors of Manson. The court assoilzied the defenders. Cullen declined to proceed any further with the action. Manson wished to proceed further. The title of Manson to proceed was challenged.

[125] The Lord President opined in a short judgement as follows at page 777:

> "It is very clear that this is a mere assignation in security, by which Manson gave full power to Cullen to sue this action, on the distinct condition that he should account to Manson for the whole sums he might recover after satisfying his own debt. Then Cullen takes up the case, and carries it a certain length, but he declines to incur the expense of carrying our judgment to appeal. In these circumstances the question is, whether Manson has an interest to sist himself for the purpose of following out the appeal? I think he has; for I cannot see why, in this positon of affairs, he should not proceed himself."

[126] Lord Mackenzie in an equally short judgment at page 777 said this:

> "I think Manson is entitled to be sisted, on the general principle that a party may always sist himself for his interest. Now, this is not an absolute assignation for a price paid, in which the cedent's right is at end; but it is an assignation of security, containing a direct obligation on the assignee to account to the cedent for any balance that might remain after his debt was satisfied. It enabled Cullen to sue, not for himself only, but for Manson also. If he had raised this action for himself alone, the respondents might be entitled to object to Manson insisting in it at this stage. Cullen now says that he does not wish to appeal, because his interest is too small to make that expedient; but Manson thinks differently. The assignation coveys a debt much larger than Cullen's claims against Manson; and that being the case, the latter has a substantial interest to insist in the appeal."

[127] Lastly Lord Cunninghame at page 778 observed:

> "The general rule is, that when the assignee's right fails, the cedent's right revives. Here the right was really Manson's from the outset; for Cullen was bound to account to him, if he succeeded, for the whole balance after paying himself."

[128] Each of the judges appears to me to answer the question before the court regarding title to sue in favour of the cedent for broadly the same reason, namely: because this was an assignation in security the cedent's right was not at an end. Rather the cedent continued in the circumstances averred to, have retained an interest and therefore had a title to sue.

[129] In *Robertson & Co* v *Exley Dinsdale & Co* the facts of the case can be conveniently taken from the head note: "An assignation of a claim, in security of a debt due to the assignee, and to the extent of the debt, held (after notice to the assignee who did not object) not to preclude the cedent for pursing the recovery of the claim so assigned.

[130] The reasoning of the court in holding as above can be seen from the terms of the interlocutor which was pronounced:

> "In respect it is not stated that the pursuers are insolvent, and as the assignation is an assignation not to the ground of action, but is merely of the balance in security; and it is admitted that the assignees are responsible to the pursuers for the balance, after payment of their debt, repels the preliminary defences."

[131] In the third case of *Fraser* v *Duguid* the facts are not material. However, Lord McKenzie in considering the question of title to sue observed at page 1131 as follows:

> "The action is for £1403. The assignation to Johnstone was only for £1102. It did not divest Fraser in toto, and could not warrant the dismissal of the action in total."

Again it appears that the decision was based on the cedent retaining an interest.

[132] It appears to me that what can be taken from a proper analysis of these three cases is the following underlying general principle: that in circumstances such as a partial assignation or an assignation in security the cedent's right is not at an end on the assignation

being granted. An assignation either partial or in security does not completely divest the cedent. It does not divest the cedent for this reason: the cedent may in appropriate circumstances retain an interest. It follows that the cedent in an assignation in security has title to sue.

[133] I am satisfied that on a proper analysis of the above cases the defender is wrong in asserting that these cases do not suggest that as a matter of principle an assignation in security is to be treated differently as to its effect than an absolute assignation.

[134] A fourth case is relied upon solely by Maclaren as supporting the position he outlines at page 219. This is the case of *McCuaig* v *McCuaig* 1909 SC 355 and it was touched on briefly in the course of argument before me. In this case the material facts were these: in a competition between A and B for special service as heir in certain subjects A assigned his whole interest in the subjects to his law agent. The assignation was *ex facie* absolute but was qualified by a back-letter to the effect that it was in security of the agent's advances and outlays and that security was limited to £400. The value of the subjects was about £5,000.

[135] The issue in the case was a different one to that which is before me, namely: who was the *dominus litis*? The court held that *dominus litis* was A in that the interest in the cause remained with him.

[136] The Lord President in his Opinion said this at page 357:

> "In the present case I cannot hold that the agent has the true interest in the suit. If the case is successful, the agent will get at the most, under the assignation, £400, whereas the appellant will obtain the whole estate – which we are told is, roughly speaking over £5,000 – *minus* what is due to the agent. Accordingly the agents interest seems to me to be merely incidental, and an incidental interest does not make a party *dominus litis* even although he may also be supplying the funds required for the action. The true test of whether a party is or is not *dominus litis* is probably whether he has or had not the power to compromise the action. Judged by that test, I do not think that the agent here can be held to be *dominus litis*."

[137] Although the issue before the court was a different one in my view the reasoning of the Lord President supports the underlying general principle which I have identified.

[138] Applying the above analysis to the circumstances of the case before me I conclude that the pursuer on a sound reading of the assignation, the CDA and the intimation of the assignation has an interest of such a type that would bring it within the principle I have identified as arising from the above authorities.

[139] I would generally observe that from the terms of these documents it is clear that the pursuer has a significant and continuing interest in the subject matter of the assignation, namely: the D&B contract. I agree with the argument advanced by Mr Moynihan that it is not the Security Trustees (the assignees) who have the sole financial interest in the contract.

[140] The above can be seen from the following specific provisions to which I was directed by Mr Moynihan, namely: the pursuer has a reversionary interest in terms of Clause 16 of the assignation and a further interest given its present and continuing liability to perform all of the obligations in terms of the D&B contract and lastly payment by the defenders is directed to be made to the pursuer's account.

[141] It is also of some importance to note that any sum recovered by the pursuer from the defender in respect of the present claim would be payable to the pursuer in terms of Clause 5.1 and not to the assignees.

[142] It is clear on a sound construction of the assignation, the CDA and the intimation that unlike in an absolute assignation where the assignee is substituted for the cedent, here the assignee is not substituted for the cedent, in particular the assignee does not assume any of the liabilities. Looking to the whole terms of these documents there is a community of interest between the cedent and the assignee.

[143] Thus given the present and continuing financial interest which the pursuer has it is given the right and title to sue in respect of that interest. I agree with the argument advanced by the pursuer that Clause 3.2 of the CDA properly construed means that the pursuer retains title to sue for its own interest. That is consistent with the terms of Clause 4.3(b)(iii) of the assignation and Clause 5(d) which allow the assignee to commence legal proceedings only from the date of the enforcement event as defined in the CDA. Thus until such an event takes place the pursuer has the interest and has title to sue. After the enforcement event when the primary interest is that of the assignee, the assignee has title to sue.

[144] This construction is consistent with the terms of the various documents as a whole and with the general architecture of these documents and reflects the commercial reality of the position: that the assignee has no interest until an enforcement event whereas the pursuer has a highly material interest at least prior to that event. It is not contentious that no enforcement event has taken place.

[145] What the parties have done here in terms of the whole documentation is to bring matters within the general principle I have earlier set out. The whole terms of the documentation and the contractual context favour the position contended for by the pursuer and its construction of Clause 3.2 of the CDA.

[146] Further and in any event the assignee has given its consent to the pursuer proceeding with the adjudication. Although it came later on the same day the adjudication notice had been served that is not relevant. The important point is that as in *Manson* v *Baillie* the assignee did not object when asked about his position.

[147] What I have said regarding the assignation and the pursuer having title to sue in no way effects (1) the position that there is a valid present assignation of the D&B contract and

(ii) that in a competition between creditors it is as valid and effectual as an absolute assignation.

[148] Accordingly for the foregoing reasons I am satisfied that the pursuer had title to bring the adjudication.

The Procedural Argument

[149] I am persuaded that there is no merit in the argument put forward by Mr Ellis.

[150] His primary point is this: the letter relied upon the pursuer to demonstrate the fulfilment of the obligations incumbent on it in terms of paragraphs 11.2 and 11.3, namely: the letter of 14 February 2017, does not fulfil these as it does not itself set out the required details. I can identify no such requirement in the contract. There is no provision in the contract defining the form in which the information to be contained in the statement of particulars should be presented.

[151] However, I agree with Mr Moynihan that looking to the terms of 11.3(c)(iv) is suggestive that all of the information provided does not require to be in the statement of particulars itself.

[152] It appears to me that as long as the information which is required to be produced in terms of 11.3 is provided there is no reason that it cannot be supplied by reference in the statement of particulars to another document. It is in my view sufficient to refer the recipient by reference to other documents rather than to repeat what may be lengthy documents *ad longum* in the statement of particulars itself.

[153] I cannot see any reason why such a reference to another document should not be sufficient to satisfy the terms of the clause. It was not suggested in the course of the

argument before me that any form of prejudice had resulted to the defender or to anyone else by this course being followed.

[154] The argument advanced by Mr Ellis that the statement of particulars was equivalent to a referral notice under the statutory scheme appeared to me to have no real force for the reasons advanced by Mr Moynihan. The statement of particulars is only one part of the documentation which in terms of the contractual scheme refers the matter to the adjudicator. It is noteworthy in this context that it was the notice of adjudication which was responded to by the defender. The defender did not respond to the statement of particulars. I think that Mr Ellis was overemphasising the importance of the statement of particulars within the procedure as set out in the contract. The argument which he advanced did not in my view support a position that the particulars cannot be provided by reference to documents outwith the statement of particulars itself.

[155] What in essence we have here is an adjudication notice which contained all the necessary information for the defender to reply to it, as in fact it did in its response. This was not a situation where it was unable to reply because of the way in which the particulars required in terms of Clause 11.3 were presented to it.

[156] I agree with Mr Moynihan that the giving of the information required by Clause 11 should be approached in a practical way. Approaching it in that way I am not persuaded any proper criticism of the letter relied upon by the pursuer can properly be made. I do not believe that there is any merit in the argument advanced by Mr Ellis.

Apparent Bias

[157] Turning to the argument in respect of apparent bias the starting point is that when an

adjudicator has made a decision in a case it does not necessarily disqualify him from hearing a related case raising the same issue.

[158] Thereafter the question is this: whether "a fair minded and informed observer" would conclude there was "a real possibility for bias".

[159] It is not a matter of dispute that the substance of the dispute before the adjudicator in the first adjudication related to a limitation provision and in particular the argument in terms of the limitation provision turned on the definition of defect for the purposes of that provision.

[160] Equally it was not disputed that that provision was not an issue in the second adjudication. It did not feature at all in the second adjudication. Again it was not disputed that the primary issue in the second adjudication was this: what was the cause of the collapse of the wall? Flowing from that was the question of whether there had been a breach of contract? No such points arose in the first adjudication.

[161] There were three further issues in the second adjudication, namely: head restraints; the prevalence of the defects found in other Stage 2 school and then finally the necessity for the EDC to close the schools while remedial works were carried out. None of these issues was before the adjudicator at the first adjudication.

[162] Accordingly the issues before the adjudicator at the first and second adjudications were entirely different. In no real sense was there any overlap in the issues before the adjudicator at the first and second adjudications.

[163] The adjudicator did in passing in his second decision refer to his finding with respect to what amounted to a defect in his first decision. He then said this:

> "Given that no contrary argument has been presented on the matter, I see no reason to depart from my reasoning I deployed in my decision on the Phase 1 dispute for holding that...."

There is nothing in this passage which could be said to satisfy the test. The adjudicator in the absence of any contrary argument was clearly entitled to reach this view. Nothing there could cause a fair minded observer to conclude that there was a real possibility of bias,

[164] It is perhaps interesting to have regard to the factual matrix in *Amec Capital Projects Ltd* v *Whitefriars City Estates Ltd* 2004 EWCA (Civ) 1418 (to which the courts attention was directed by Mr Moynihan) as set out by Dyson LJ at paragraphs 2 – 9 and to note that even in the extreme circumstances set out there apparent bias was not made out. The circumstances there amply illustrate that as contended for by Mr Moynihan the present case comes nowhere near satisfying the test.

[165] For the above reasons I accordingly reject the defender's argument under this head.

[166] As regards the final matters raised by Mr Ellis in terms of his natural justice argument I am satisfied that Mr Moynihan's response, for the reasons he advanced, is correct. In that I am repelling the argument of no title to sue any denial of breach of natural justice with respect to that issue is otiose. Thus any failure by the adjudicator to allow the defender to respond or his reference to a case upon which he was allegedly not expressly addressed or his alleged failure to allow parties to address him with respect to his first adjudication decision is irrelevant. The defender has had a full and proper opportunity to address the court with respect to title to sue and apparent bias. That supersedes what occurred before the adjudicator. With respect to the decision I have reached I would refer to the observation of Dyson LJ in *Amec Capital Projects* v *Whitefriar City Estates* at paragraph 41.

[167] I accordingly for the above reasons reject Mr Ellis' argument under this head.

The Third Conclusion

[168] A secondary issue was raised, which related to the third conclusion which sought a sum said to represent 95% of the expenses of the adjudication. It was argued by Mr Ellis that this conclusion was irrelevant as the adjudicator's award made a finding of liability of expenses but did not finalise the sum due.

[169] Mr Moynihan accepted that the claim was premature: there had been no taxation or any agreement as to the level of expenses. The claim for practical reasons had not been taxed or agreed given the substantive disputes regarding the adjudication earlier discussed. However, it was thought once these issues were decided there could be a further discussion regarding the expenses issue. It was a more efficient way of dealing with the matters of expenses to raise it in this action than to have to raise a separate action.

[170] Mr Moynihan's position was that I should not dismiss the pursuer's claim in terms of the third conclusion. Rather if the court were with him regarding the earlier arguments the matter in terms of conclusion 3 could be continued for taxation or agreement.

[171] Given that the pursuer was not seeking decree in terms of his third conclusion at this point Mr Ellis was content to leave any further procedure regarding this matter to the court.

[172] Having found in favour of the pursuer with respect to the earlier arguments I believe it is appropriate to continue the matter in terms of the third conclusion to allow for taxation or agreement. The practical means by which this can be achieved can be further discussed at the By Order hearing which I intend to have in this case.

Conclusion

[173] If the court held the adjudication award to be valid, the pursuer, it was accepted by Mr Ellis, is entitled to decree *de plano* in terms of his first two conclusions.

Decision

[174] I accordingly sustain the pursuer's first plea-in-law; repel the defender's first to fourth pleas-in-law and award decree in terms of the first two conclusions.

[175] This case will be put out By Order in order that I can be addressed with respect to how in practical terms I should deal with the issue surrounding the third conclusion and also with respect to the issue of expenses upon which I have not been addressed.