MC MS Blog

How final is a final certificate?

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At the end of last year, Jonathan *discussed* the Court of Session's judgment in *D McLaughlin & Sons Ltd v East Ayrshire Council*, where Lord Clark looked at the conclusiveness of a final certificate under a Scottish Standard Building Contract with Quantities, 2011 Edition (SSBC, 2011 Edition).

That case has popped up in the law reports again, this time in the Inner House (also called *D McLaughlin & Sons Ltd v East Ayrshire Council*), where three lords (Carloway, Woolman and Malcolm) have considered the Council's appeal against Lord Clark's judgment. In a rare occurrence these days, that judgment split the house.

D McLaughlin & Sons Ltd v East Ayrshire Council

As far as I'm aware, this is the third judgment dealing with this particular dispute (and I'm sure someone will tell me if there are more). That is quite a lot of judgments over this particular final certificate. In a nutshell, so far we've seen:

- *Lord Clark conclude* that the principles set out by Coulson J in *Hutton Construction Ltd v Wilson Properties (London) Ltd* (on *challenging enforcement* of an adjudicator's decision and having the dispute finally resolved during the enforcement process) could also apply in Scotland. A party could do this by raising a counterclaim (there is no process similar to an application under *Part 8* in Scotland). However, on the facts, he did not allow the counterclaim and the matter was listed for a full hearing for another day. This judgment dates from December 2020 and is something that Julie Scott-Gilroy *discussed at the time*.
- When the counterclaim was heard, Lord Clark decided that it should fail. This is the judgment Jonathan discussed (and which I mention in my opening paragraph).
- Lord Carloway and Lord Woolman in the Inner House *dismiss the Council's appeal* from Lord Clark's judgment on a 2:1 basis, with Lord Malcolm writing a long dissenting judgment.

And it may not have ended there, since there is still another action (dating from September 2019), described as pending by the Inner House.

Lord Carloway's judgment

Lord Carloway's judgment explains how the contract's *payment mechanism* operates. He reminded us

that the final certificate sets out the balance due to the contractor at the end of the process. Also that the final certificate does not supersede any of the interim certificates (other than in respect of the contract sum). Those certificates "remain both extant and important".

He also makes the point that if the parties had followed the contract terms as intended, all the interim payments would have been made before the parties got to the final certificate stage, so the final certificate would simply determine the final payment between them. But (and it is a big but), that final certificate would not invalidate what had gone before, what should have been paid in the interim.

Thus, if an interim certificate was not paid, there was nothing to stop the parties adjudicating "at any time" on that certificate, regardless of whether the final certificate had been issued. This was reflected in the parties' contract (*clause 4.15.2*) and it is what the parties did:

- D McLaughlin & Sons Ltd (the contractor) issued an interim payment notice for £950,000 in August 2017.
- The final certificate was issued in July 2019, almost two years after the interim payment notice. The balance due to the contractor was under £1,500.
- Non-payment of the August 2017 interim payment notice was referred to adjudication in March 2020, with the adjudicator deciding in the contractor's favour and awarding it some £430,000.

It did not matter that the contractor disputed the final certificate and had started court proceedings (in September 2019) within the 60-day period the contract required. It was entitled to do that, and it was also entitled to start the adjudication. The only proviso was that, if either party was unhappy with the adjudicator's decision, because it was made after the final certificate had been issued, it had to challenge that decision within 28 days (which hadn't happened). Without that challenge, the parties had to await the outcome of the proceedings dealing with the final certificate. (This applies Coulson J's reasoning in *Trustees of the Marc Gilbard 2009 Settlement Trust v OD Developments and Projects Ltd*.) It is all part of the Construction Act's "pay now, argue later" regime.

Lord Carloway said that, if his analysis was wrong, and the final certificate did supersede the interim payment notice, then the adjudication would have been "incompetent" and could have served no useful purpose. However, the parties had been content to allow the adjudication to proceed, based on the principle that they could adjudicate at any time, and no challenge to the adjudicator's decision had been made within 28 days, so the parties were bound by it. The appeal was dismissed.

Lord Woolman's judgment

Lord Woolman also dismissed the appeal.

I liked his suggested that a construction contract contains three regimes that "mesh" rather than "clash": interim certificates, final certificates and adjudication. He also made the point that those regimes threw a question into sharp relief – "how final is a final certificate?".

I think he answered that question, in the sense that he noted that in this case, "everyone acknowledges that there needs to be a final reckoning". He thought that was most likely to happen in the dormant proceedings, the ones the contractor had started in September 2019. Those proceedings would determine the final balance due to the contractor, and he encouraged the parties to expedite them.

He also concluded the adjudicator was wrong. He thought the adjudicator should have made a nil award, to have accepted the final certificate was "final". Applying *Marc Gilbard*, he said the September 2019 court proceedings were the "only proper vehicle to challenge the final certificate". But there was a "twist in the tail" here too: the adjudicator's decision could not be challenged because the employer did not raise a timeous challenge, it had issued its counterclaim too late.

Lord Malcolm's judgment

In Lord Malcolm's judgment, the appeal should have been allowed.

Lord Malcolm said that an interim payment application is aimed at cash flow while the contract works progress and is a way of adding "a sum to the valuation of the contract works". If paid, that sum is taken into account in the final certificate, which sets out what is properly due for the contract works. He thought that an attempt to enforce an interim payment notice after the final certificate had been issued was not consistent with respect for the final certificate.

As the adjudication was started after the final certificate was issued, and all "interim issues and disputes" were "put in the past by the final certificate", the real issue was whether the adjudicator had reached the correct decision. Lord Malcolm said the adjudicator was not really dealing with an historic debt, he was effectively being asked to challenge the final certificate. He thought the adjudicator had erred by accepting the argument that the final certificate was not "final" because it had been challenged in time by court proceedings being started. In Lord Malcolm's view, the adjudicator should have awarded nothing – the adjudication was issued outside the 60-day period for challenging the final certificate.

Lord Malcolm also thought the judge, Lord Clark, had erred by dismissing the counterclaim because it was raised outside the 28-day period for challenging an adjudicator's decision. He said the merits of the counterclaim should have been considered.

What do I take from this judgment?

The overriding message for me is the importance of adhering to contractual time bars, whether that is in relation to challenging the final certificate (whether through starting adjudication or court proceedings) or in challenging an adjudicator's decision issued after the final certificate. It is clear that parties need to remember to serve a notice of dissatisfaction timeously.

Second, parties also need to take care as to which aspects of a decision they wish to challenge. In the past I have seen notices of dissatisfaction where the parties take different points in their notices in relation to the one, same adjudication. Only disputing part of an adjudicator's decision can be problematical for subsequent tribunals in determining what and what isn't binding on them.

I also see these types of argument frequently in serial adjudications where the parties cannot agree the extent to which a previous adjudicator's decision is binding on subsequent adjudications. It can be extremely complicated to address such matters in a limited period of time. Often there are arguments that reasoning or discrete findings do not form part of the decision, which is similarly complex and far from straightforward.