

Judicial Review by Extra Division, Inner House, Court of Session. 17th December 2002.  
Lord President, Lord Johnston, Lord Weir.

**OPINION OF THE COURT : Lord Johnston.**

- [1] This is a reclaiming motion at the instance of the respondents in proceedings for a judicial review brought by the petitioners in respect of a building contract dispute, and in particular the referral thereof to an adjudicator.
- [2] The matter is governed by the Housing Grants Construction and Regeneration Act 1996 ("the Act") and in particular, Part II thereof. Section 108 of that Act confers a right on parties to a construction contract to refer the matter to an adjudicator. The extent to which such a dispute can be referred is governed by Section 107, which is in the following terms:  
*"(1) The provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing. The expressions 'agreement', 'agree' and 'agreed' shall be construed accordingly.*  
(2) *There is an agreement in writing -*  
*(a) if the agreement is made in writing (whether or not it is signed by the parties),*  
*(b) if the agreement is made by exchange of communications in writing, or*  
*(c) if the agreement is evidenced in writing.*  
(3) *Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.*  
(4) *An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement."*
- [3] The background to the matter is a construction contract, which is admitted by the parties to be governed by the relevant legislation, being implemented by the petitioners as management contractor on behalf of the employer respondents, in relation to a construction development in Glasgow. We were informed as a matter of fact that practical completion of the works had been achieved in 1999 but that adjudication disputes have continued thereafter, one of which is the matter with which this petition is concerned.
- [4] The procedure in respect of adjudication is contained in Part I of the Schedule to the Scheme for Construction Contracts (Scotland) Regulations 1998 (SI 1998/687) made in pursuance of certain provisions of the Act. Paragraph 1(1) of Part I of the Schedule to those regulations is in the following terms:  
*"Any party to a construction contract ('the referring party') may give written notice ('the notice of adjudication') of his intention to refer any dispute arising under the contract to adjudication."*
- [5] The Schedule goes on to identify further procedural steps and in particular by paragraph 7, which requires the referring party, after an adjudicator has been appointed, to refer the dispute by means of a referral notice to the adjudicator. That notice requires to be accompanied by relevant documents.
- [6] In this case there is no dispute that the proper procedure was followed in as much that a dispute was identified, made the subject of an appropriate notice in terms of the Act and a subsequent referral to an appointed adjudicator was effected, all against the background, in respect to which parties were agreed, that the contractual relationship between them was governed by the Act.
- [7] The notice of adjudication issued by the petitioners as referring party identifies the parties and goes on as follows:  
*"2. THE CONTRACT*  
*The parties entered into a contract subject to inter alia the terms of the JCT Form of Management Contract 1987 Edition. The contract was entered in or about September 1998. The contract related to a project known as the Terrace and Object Buildings, Home for the Future Project, Glasgow Green, Glasgow. In terms of the contract, the Burrell Company (Construction Management) Limited was the Employer and Ballast Wiltshier plc was the Management Contractor. The contract entered into by the parties is a construction contract for the purposes of the HGCR 1996.*

**3. THE DISPUTE**

*The Referring Party is entitled to have the works valued periodically and to be paid by the Respondent. Valuations issued by the Respondents' Professional Team have fluctuated considerably during the last 12 months and no payments have been made by the Respondents since 3 November 1999.*

*The Respondents have asserted a right to withhold certain monies but in 12 months have produced no detailed proof of any entitlement.*

*The Referring Party believes the total sum due to be in the order of £1,600,000 gross exclusive of retention and any VAT liability. The Referral Notice will give exact detail. The current certificate shows a gross value £521,639 less than this.*

*Accordingly the amount of the payment due and payable is in dispute.*

*A Notice of Adjudication in respect of the dispute referred to above was served on the Respondents on 8 September 2000. A Referral Notice was issued on 22 September. The Respondents lodged a response to the Referral Notice on or around 4 October 2000, disputing the Referring Party's valuation of sums due. However, the Adjudicator resigned before issuing a decision. The dispute between the parties remains unresolved."*

- [8] The Referral Notice duly issued identifies again the dispute as follows:

**"4. THE DISPUTE**

*The Referring Party is entitled to have the works valued periodically and to be paid by the Respondents. Valuations issued by the Respondents' Professional Team have fluctuated considerably during the last 12 months and no payments have been made by the Respondents since 3 November 1999.*

*The Respondents have asserted a right to withhold certain monies but in 12 months have produced no detailed proof of any entitlement.*

*The Referring Party believes the total sum due to be £1,588,177.85 gross (exclusive of retention and any VAT liability).*

*This is detailed in the Schedule produced in Volume 5 titled 'Summary & Collection'.*

*The current certificate (the 'amended' Certificate 18) is in the sum of £1,078,361 gross. This is £509,816.65 less than is due & payable to the Claimants.*

*Accordingly the amount of the payment due and payable is in dispute."*

- [9] Thereafter details of the claim are set out in that notice. Of particular importance is paragraph 5.5 which is in the following terms:

*"5.5 Reference is made to Section 2 in the Comments on Relevant Background Information in Volume 1 regarding Valuation & Payment, and the documents referred to in that Section. Further, it is believed by the Referring Party that the valuation and certification process has been either directly or indirectly interfered with, by the Respondents. As a result, the Quantity Surveyor and the Architect have, for example, insisted for the purposes of valuation and certification, upon site of formal, written instructions for work included in the referring parties applications, where it is known that none exist but where equally cogent and persuasive evidence of the instruction by and/or approval of the Respondents and/or others on their behalf, is and has been made, available. Reference is made to the comments regarding AIs and Drawings in Sections 3 & 4 of said Comments, respectively, and the documents referred to in those Sections."*

- [10] The decision of the adjudicator was issued on 28 December 2001 in the following terms:

**"DECISION**

*The decision on the various remedies sought contained in the Referral are as follows*

*1. 'The Adjudicator is asked to assess the value of the work done, the common services, the management fee, loss and expense and other appropriate amounts due and payable to the Referring Party and to make directions as to the amounts due and payable to Works Package Contractors.*

**DECISION 1**

*Not valid:- On the grounds that the issues and methods utilised in formation of the works package contracts lack certainty and reliability as to value and related considerations.*

2. *'The Adjudicator is asked to find that where his directions regarding any Works Package Contract would involve reduction of amounts previously paid in relation to that Package, no reduction in value due and payable to the Referring Party may be made until such time as the Referring Party recovers from the relevant Works Package Contractor(s) any sums found in those directions to have been overpaid'.*

**DECISION 2**

*Not valid:- On the grounds that not in accordance with the Act or Regulations and in particular Part II Regulation 11 on conditional payment provisions; in addition this presupposes that the costs could have been passed on to the Respondent without proof that they could contractually be recovered due to lack of true transparency between works package and main contracts.*

3. *'The Adjudicator is asked to order payment by the Respondents to the Referring Party of any sums due and payable arising from the remedies sought under 1 and 2 above'.*

**DECISION 3**

*Not Applicable:- On the grounds of Decisions 1 and 2.*

4. *'The Adjudicator is asked to order payment of the Adjudicator's fees and expenses by the Respondent'.*

**DECISION 4**

*Not Granted: On the grounds that both parties, on the basis of joint several liability for the costs, will share them equally. This is based on the joint failure to ensure that the contract and its conditions were adhered to in their entirety. On receipt of the Decision the Responding Party is to immediately remit £2,771.50 inclusive of VAT to the Referring Party as the share of fees and expenses of the Adjudicator.*

**DIRECTION**

*Both parties will be responsible for their own direct costs arising from this adjudication."*

[11] The Lord Ordinary heard a debate and issued a comprehensive judgment. Having rehearsed the background and the law, which were not in general dispute before us, the Lord Ordinary goes on to state as follows:

*"[39] Balancing the various considerations to which I have referred, I have come to the conclusion that the Scheme should be interpreted as requiring the parties to comply with an adjudicator's decision, notwithstanding his failure to comply with the express or implied requirements of the Scheme, unless the decision is a nullity; and it will be a nullity if the adjudicator has acted ultra vires, (using that expression in a broad sense to cover the various types of error or impropriety which can vitiate a decision), for example because he had no jurisdiction to determine the dispute referred to him, or because he acted unfairly in the procedure which he followed, or because he erred in law in a manner which resulted in his failing to exercise his jurisdiction or acting beyond his jurisdiction.*

*[40] Applying that general approach to the circumstances of the present case, it seems to me that the adjudicator was bound to determine the dispute referred to him, provided the dispute fell within his jurisdiction. Paragraph 20(1) of the Scheme expressly provides that 'the adjudicator shall decide the matters in dispute' (subject to his power to issue separate decisions on different aspects of the dispute); and that is reflected in paragraph 9(2). The adjudicator cannot determine with binding effect the extent of his own jurisdiction: the limits of his jurisdiction are determined by the notice of adjudication and the provisions of the Scheme, and cannot be narrowed or extended by the adjudicator's misconstruing those limits. I refer to Lord Reid's example of the tribunal which 'may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it' [**Anisminic v. Foreign Compensation Commission** [1969] 2 A.C. 147] at page 171; and also to his observation that '[i]t cannot be for the commission to determine the limits of its own powers' (at page 174; see also Lord Pearce at p 194F and per Lord Wilberforce at p 209A). I need not address, in the present case, the type of situation with which the decision in **Watson Building Services Ltd, Petitioners v. Harrison** 2000 S.L.T. 646] was concerned, where the parties had requested the adjudicator to determine the validity of his own appointment and in effect his own jurisdiction: a situation which I would be inclined to regard as raising specific issues as to the effect of the parties' agreement, rather than as illustrating any general point as to the extent to which an adjudicator's decision will have binding effect.*

*[41] In the present case I find it difficult to understand the adjudicator's decision, and to determine on what precise basis he reached his decision that the remedies sought were 'not valid'.*

[42] *So far as I can make sense of what he has written, he appears to have decided that he could not carry out any valuation, or find any payment due, because the parties had departed from the terms of the pre-printed contract in a number of respects. There is no indication that he had in mind section 107 of the 1996 Act, which applies the relevant provisions only to agreements in writing; nor did that provision feature in the discussion before me. His approach seems to have been (as the respondents' counsel submitted) that he was empowered only to order payment under 'the contract' (paragraph 20(2)(b)), and that the expression 'the contract' meant, in this case, the standard JCT form entered into at the outset, regardless of anything else that might subsequently have been agreed, whether in writing (within the meaning of section 107) or otherwise, and regardless in particular of any issue of, for example, waiver or personal bar or variation of the contract. In other words, he appears to have considered that it was impossible, as a matter of construction of his own powers, for him to take into consideration, within the framework of adjudication, even the possibility that the parties might depart from the terms of the JCT conditions. Such an approach was in my view wrong in law; nor did I understand counsel for the respondents to argue the contrary, his submission being directed rather to the proposition that the error was one with which the court could not interfere. As I have mentioned, I was not addressed on the details of the dispute or referred to any of the documentation submitted to the adjudicator, apart from the notice of adjudication and the referral notice. Even from the terms of the referral notice, however (from which I quoted earlier), it is apparent that there were allegations that variations had been instructed by or on behalf of the respondents otherwise than in the form stipulated in the JCT conditions, and that the respondents had in bad faith prevented the issue of certificates. Given that allegations of that nature were being made, the adjudicator's error was material. As a result of that error, the adjudicator misconstrued his powers, and in consequence failed to exercise his jurisdiction to determine the dispute. His decision is therefore a nullity. In reaching that conclusion I do not in any way pre-judge the decision that might be taken by another adjudicator properly directed as to the law. I cannot and do not express any opinion as to whether or not the JCT conditions remained the sole source of the parties' rights and obligations, or as to whether or not any sum is due or payable to the petitioners. The error which I have identified (so far as any conclusion can confidently be derived from the somewhat obscure language used by the adjudicator) is merely the belief that, as a matter of law, a departure from the JCT conditions necessarily entails that no adjudication can be carried out.*

[43] *I shall therefore sustain the petitioners' pleas-in-law, repel the respondents' pleas-in-law, grant the declarator sought and reduce the decision. I shall not withhold reduction of Decision 2, given that that matter did not arise for decision in the light of the earlier (erroneous) Decision 1, and that the adjudicator's decision on that matter cannot sensibly be severed from the remainder of his decision."*

- [11] Before us there were presented four grounds of appeal, but only the third was insisted in. However, counsel for the reclaimers developed an additional argument against the background of the decision of this court in **King v. East Ayrshire Council** 1998 SC182 to the effect that, having regard to the fact that practical completion of the works in respect to which the contract related had been achieved, there was no substantial benefit or interest accruing to the petitioners to insist on the remedy of adjudication at this stage. No notice had been given on this point and we allowed it to be heard without prejudice to the respondent's position before us as regards the propriety of so doing.
- [12] Counsel for the reclaimers based his attack upon the Lord Ordinary's opinion under the third ground of appeal on two general propositions and a particular one relative to this case. The general ones were, first, that the decision of the adjudicator dated 28 December 2000 identified by the Lord Ordinary could only be susceptible to judicial review if it was a nullity, and, secondly, the decision would be a nullity if it did not determine the issue referred to him by the notice, which in this case was dated 14 November 2000.
- [13] The particular proposition thereafter identified by counsel was that in fact the decision did determine the dispute in respect that the adjudicator determined that what was being put to him in fact did not correspond to what was the original dispute identified in the notice, being based, it was said, on specific written contractual terms. Accordingly the Lord Ordinary had misdirected himself in deciding that the position adopted by the adjudicator amounted to an error in law. In essence the submission of counsel was that the adjudicator had properly recognised that what was being put before him went far beyond the original dispute. In particular, it referred to, or was based upon, terms of a contract that had either been varied, altered or otherwise departed from. The original dispute

could not invoke this motion by reason of the fact that it was concerned only with claims based on the written aspects of the original contract.

- [14] These submissions were based upon particularly two parts of the decision of the adjudicator as follows.

*"In truth the referred matters are not 'premature' and possibly 'overmature'. The nature of Adjudication is set up to deal with disputes on an ongoing basis which allows the project to continue with a temporary solution which may become final if the parties so wish. With all due respect to the Parties two matters arise. First had they used the perpetual motion of a string of small Adjudications the risk management of these matters would have been simpler. Second and most important is that this referral may have been capable of Adjudication. This is based on the complexity and interaction of too many factors which are not properly recorded, and if the submission text is correct, if ever recorded. The problem is now ripe for alternative methods of disposal unless the Parties can reach some settlement outwith ADR."*

and

*"Given the lack of clarity and a compatible contractual matrix I have found it impossible to reach what I can substantiate as reasonably legally based decisions. Whatever my instincts appear to indicate the basis of responsible decisions can only arise under the contract. Where the parties have departed from the strict pre-agreed code then they have to accept that it is, as with Courts, not the Adjudicators place to make decisions that give business efficacy to situations where the factual contract does not match up to the actions of the parties being based on another contractual base."*

- [16] Counsel for the reclaimers focussed upon Section 107 of the Act and in particular the need for any contractual claim being referred to an adjudicator as a relevant dispute to be based on the written terms of the contract. The adjudicator had determined that what he was being asked to do was to value works based on matters other than within strict written contractual terms and accordingly he did not have the power so to do. He therefore correctly determined that what he was being asked to do was not within his powers and accordingly, despite the terminology that he used, he was effectively declining jurisdiction in respect of the claims actually submitted to him.
- [17] Counsel for the respondents adopted a broader approach. He submitted that the claim as originally focussed in the notice of adjudication and the subsequent referral notice was a claim for valuation of works performed within the terms of the contract. It was necessary, he submitted, to recognise the broad terms of Section 107 with regard to the importance or requirement that contractual terms relied upon had to be in writing. It was not necessarily restricted, he said, to the original terms of the contract, having regard particularly to subsections 2 and 3 of Section 107 of the Act. It could, he submitted, be extended to instructions subsequently reduced to writing. He accepted that there might be some parts of the claim that were encompassed by the referral notice which were not in writing or at least not supported by Section 107. However, that was a matter for the adjudicator to determine as part of the exercise of his function. Counsel accepted as a consequence of this argument that some aspects of the claims put forward by his clients might fail before the adjudicator or indeed might fail completely but that was nothing to the point in relation to the powers and consequent duty of the adjudicator under the Act. The adjudicator had then effectively declined to consider the matter. That, counsel submitted, was a failure in his duty inconsistent with the powers conferred upon him in terms of his jurisdiction. Accordingly he submitted the Lord Ordinary had reached the correct conclusion.
- [18] We are clearly of the view that the submissions of counsel for the respondent before us are correct.
- [19] It is important to recognise that the powers of the adjudicator, if categorised as a question of jurisdiction, are focussed by the dispute set out in the notice or adjudication and subsequently "amplified," to use counsel's own expression, by the referral notice, but those claims, in our opinion, are essentially for valuation in respect of work done. However, the validity of the claims made may well depend upon the terms of the contract or at least the basis upon which they are contractually asserted. As regards jurisdiction, accordingly, it is our opinion that the adjudicator, while restricted to issues focused in the dispute, has nevertheless both the power and duty to determine whether or not a claim that is put forward in respect of valuation of work done is validly asserted under the contract. He must answer that question either in the affirmative or the negative. He cannot decline to address it,

which is what the adjudicator in fact did in this case. He appears to have proceeded upon the basis that because it was asserted that some claims or some parts of the claim were not necessarily based on the contractual written terms, that went beyond his jurisdiction. In our opinion his power is based on the notice of dispute which identified the question which the adjudicator had to address. Thereafter it was his duty in addressing that question to consider the validity of each and all of the claims put forward, which in turn would require him to consider the basis upon which they were being asserted. If not contractually based, they must inevitably fail either in whole or in part. However, that nevertheless required him to consider that issue which he declined to do, and in so doing fell into an error of law which is material.

- [20] We consider that the Lord Ordinary properly addressed the issue when he says:  
*"As a result of that error the adjudicator misconstrued his powers and in consequence failed to exercise his jurisdiction to determine the dispute. His decision is therefore a nullity."*
- [21] With that statement we are in complete agreement for the reasons we have given.
- [22] There remains the initial issue raised by the reclaimers with regard to the substance or lack of it in the application for review. We consider that if, as here, the adjudicator has made a fundamental error in his approach, the victim must have an interest so to assert before this court, whatever the practical consequences, there is therefore no substance in this point.
- [23] Against this background we consider that the Lord Ordinary reached the correct conclusion and for the correct reasons this reclaiming motion will be refused and his interlocutor will be affirmed.

Act: Glennie, Q.C., Masons, (Petitioners and Respondents)

Alt: Keen, Q.C., Dundas & Wilson, (First Respondents and Reclaimers)