JUDGMENT : LORD REED : Outer House, Court of Session. 21st June 2001

[1] During 1998 the respondents were involved in a construction project in Glasgow known as "Homes for the Future". They employed the petitioners to act as the management contractor for the project under a standard JCT form of management contract. A dispute arose between the petitioners and the respondents. It was referred by the petitioners to adjudication, under the provisions contained in Part 1 of the Schedule to the Scheme for Construction Contracts (Scotland) Regulations 1998 (S.I.1998 No. 687). On 28 December 2000 the adjudicator issued what he described as a decision. That decision is the subject of the present application for judicial review.

[2] The statutory context of the adjudication derives from Part II of the Housing Grants, Construction and Regulation Act 1996. Section 108 of the Act provides:

(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose 'dispute' includes any difference.

(2) The contract shall -

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;

(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;

(e) impose a duty on the adjudicator to act impartially; and

(f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

(4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.

(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.

(6) For England and Wales the Scheme may apply the provisions of the Arbitration Act 1996 with such adaptations and modifications as appear to the Minister making the scheme to be appropriate.

For Scotland, the Scheme may include provision conferring powers on courts in relation to adjudication and provision relating to the enforcement of the adjudicator's decision."

[3] In the present case, the contract contained an arbitration clause, but did not comply with the requirements of s108(1) to (4). By virtue of s108(5), the adjudication provisions of the Scheme for Construction Contracts applied, taking effect (by virtue of section 114(4) of the Act) as implied terms of the contract. In relation to Scotland, the Scheme is that contained in Part I of the Schedule to the 1998 Regulations.

[4] Under the Scheme, the adjudication procedure is initiated by a "notice of adjudication", given in accordance with paragraph 1:

"1 (1) 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.

(2) The notice of adjudication shall be given to every other party to the contract.

(3) The notice of adjudication shall set out briefly -

(a) the nature and a brief description of the dispute and of the parties involved;

(b) details of where and when the dispute has arisen;

(c) the nature of the redress which is sought; and

(d) the names and addresses of the parties to the contract (including, where appropriate, the addresses which the parties have specified for the giving of notices)."

It is accordingly the notice of adjudication which identifies the dispute.

[5] Paragraphs 2 to 6 are concerned with the selection of an adjudicator. Paragraph 7 provides:-

"7(1) Where an adjudicator has been selected in accordance with paragraphs 2, 5 or 6, the referring party shall, not later than seven days from the date of the notice of adjudication, refer the dispute in writing ('the referral notice') to the adjudicator.

7(2) A referral notice shall be accompanied by copies of, or relevant extracts from, the construction contract and such other documents as the referring party intends to rely upon.

7(3) The referring party shall, at the same time as he sends to the adjudicator the documents referred to in sub-paragraphs (1) and (2), send copies of those documents to every other party to the dispute."

[6] Paragraph 9 is of some significance to the issues raised in the present case. It provides:

"9.(1) An adjudicator may resign at any time on giving notice in writing to the parties to the dispute.

9(2) An adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication.

9(3) Where an adjudicator ceases to act under sub-paragraph (1) -

(a) the referring party may serve a fresh notice under paragraph 1 and shall request an adjudicator to act in accordance with paragraphs 2 to 7; and

(b) if requested by the new adjudicator and insofar as it is reasonably practicable, the parties shall supply him with copies of all documents which they had made available to the previous adjudicator.

9(4) Where an adjudicator resigns in the circumstances mentioned in sub- paragraph (2), or where a dispute varies significantly from the dispute referred to him and for that reason he is not competent to decide it, that adjudicator's fees and expenses shall be determined and payable in accordance with paragraph 25."

[7] It appears from paragraph 9(2) that the taking of "a decision" in an adjudication prevents a second adjudication from being held in respect of the same dispute: "a decision" renders the dispute in effect *res judicata*, so far as adjudication proceedings are concerned. That is a provision which can readily be understood if it envisages that "a decision" will always determine the matter in dispute.

[8] Paragraph 12 provides:

"12. The adjudicator shall -

(a) act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract; and

(b) avoid incurring unnecessary expense."

[9] Para13 empowers the adjudicator to adopt an investigative role and to determine the procedure to be followed:

"13. The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and shall decide on the procedure to be followed in the adjudication. In particular, he may -

(a) request any party to the contract to supply him with such documents as he may reasonably require including, if he so directs, any written statement from any party to the contract supporting or supplementing the referral notice and any other documents given under paragraph 7(2);

(b) decide the language or languages to be used in the adjudication and whether a translation of any document is to be provided and, if so, by whom;

(c) meet and question any of the parties to the contract and their representatives;

(d) subject to obtaining any necessary consent from a third party or parties, make such site visits and inspections as he considers appropriate, whether accompanied by the parties or not;

(e) subject to obtaining any necessary consent from a third party or parties, carry out any tests or experiments;

(f) obtain and consider such representations and submissions as he requires, and provided he has notified the parties of his intention, appoint experts, assessors or legal advisers;

(g) give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with; and

(h) issue other directions relating to the conduct of the adjudication."

[10] Paragraph 17, like paragraph 12, concerns the adjudicator's duty to act fairly in the procedure he follows and also his duty to take relevant information into account:

"17. The adjudicator shall consider any relevant information submitted to him by any of the parties to the dispute and shall make available to them any information to be taken into account in reaching his decision."

[11] Paragraph 19 imposes a tight timetable on the adjudicator, which can be extended by agreement:

"19(1) The adjudicator shall reach his decision not later than -

(a) twenty eight days after the date of the referral notice mentioned in paragraph 7(1);

(b) forty two days after the date of the referral notice if the referring party so consents; or

(c) such period exceeding twenty eight days after the referral notice as the parties to the dispute may, after the giving of that notice, agree.

19(2) Where the adjudicator fails, for any reason, to reach his decision in accordance with sub-paragraph (1) -

(a) any of the parties to the dispute may serve a fresh notice under paragraph 1 and shall request an adjudicator to act in accordance with paragraphs 2 to 7; and

(b) if requested by the new adjudicator and insofar as it is reasonably practicable, the parties shall supply him with copies of all documents which they had made available to the previous adjudicator.

19(3) As soon as possible after he has reached a decision, the adjudicator shall deliver a copy of that decision to each of the parties to the contract."

[12] Paragraph 20 is central to the present case:

"20(1) The adjudicator shall decide the matters in dispute and may make a decision on different aspects of the dispute at different times.

20(2) The adjudicator may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute and, in particular, he may -

(a) open up, review and revise any decision taken or any certificate given by any person referred to in the contract, unless the contract states that the decision or certificate is final and conclusive;

(b) decide that any of the parties to the dispute is liable to make a payment under the contract (whether in sterling or some other currency) and, subject to section 111(4) of the Act, when that payment is due and the final date for payment;

(c) having regard to any terms of the contract relating to the payment of interest, decide the circumstances in which, the rates at which, and the periods for which simple or compound rates of interest shall be paid."

[13] Paragraph 20(1) makes explicit what was implied in section 9(2): that the adjudicator's decision must determine the matters in dispute.

[14] Of the remaining provisions of the Scheme it is necessary to mention only paragraph 23(2):

"23(2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it, until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties."

This makes clear the provisional nature of the adjudicator's decision, and the understanding that it may be superseded by a different decision taken by a court or an arbiter after further consideration of the matters in dispute.

[15] In the present case the petitioners gave a notice of adjudication to the respondents on about 16 November 2000. The notice described the dispute as follows:

"**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 of £521,639 less than this. Accordingly the amount of the payment due and payable is in dispute."

The notice also set out details of the previous history of the 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."

Finally, the notice set out the nature of the redress which was sought:

"**REMEDIES SOUGHT**

1 The Adjudicator is asked to assess the value of work done, the Common Services, the Management Fee, Loss and Expenses and other appropriate amounts due and payable and to make directions as to the amounts due and payable to Works Package Contractors.

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

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.*

4 *The Adjudicator is asked to order payment of the Adjudicator's Fees and expenses by the Respondents".*

[16] On 16 November 2000 Mr J H Atkinson was appointed as adjudicator. The dispute was then referred to him by a notice of referral dated 21 November 2000. That notice of referral gave further details of the dispute, and repeated what had been said in the notice of adjudication as to the redress sought. The details of the dispute were not discussed at the hearing before me, and no reference was made to the other documents which had been submitted to the adjudicator.

[17] The adjudicator had been appointed on three previous occasions as an adjudicator in respect of disputes concerning the same project. In November 1999 he had been appointed in respect of a different dispute which had arisen between the petitioners and the respondents. He had issued a decision in respect of that dispute in December 1999. In September 2000 he had been appointed in respect of a dispute between the petitioners and one of the contractors, Burnhead Contracts Ltd. He had issued a decision in respect of that dispute in November 2000. In September 2000 he had also been appointed in respect of a dispute between the petitioners and the respondents, the dispute being identical to that with which the notice of adjudication of 14 November 2000 was concerned. He had resigned in respect of that appointment (of September 2000) on 3 November 2000, under paragraph 9(1) of the Scheme, as a consequence of the respondents' refusal to consent to an extension of the period allowed for a decision, under paragraph 19(1)(c) of the Scheme.

[18] The adjudicator issued his decision in respect of the present dispute on 28 December 2000. The critical part of the document is in the following terms:

*"**DECISION :** The decisions 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. <u>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</u>.*

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

[19] Although the decision is not clearly expressed, it is apparent that the adjudicator has refused to grant the redress sought. If one reminds oneself of the matters in dispute, as described in the notice of adjudication - namely the amount of the payment due and payable - it is clear that the adjudicator has not decided that amount. In relation to the central request made by the petitioners as referring party - that *"the adjudicator assess the value of work done, the common services, the management fee, loss and expense and other appropriate amounts due and payable to the Referring Party and... make directions as to the amounts due and payable to Works Package Contractors"* - his decision is: "*Not valid"*.

[20] Elsewhere in the document the adjudicator has included a section entitled "Commentary", which he states has been included to meet a request for the reasons behind his decision. In the discussion before me, it was agreed that the important part of the Commentary was that headed "Contractual Matrix". This is in the following terms:

> *"**CONTRACTUAL MATRIX***
> *This topic is to my view the crux of the problem. The contract as presented lacks full clarity. That would be bad enough but both parties and their advisers have, during the progress of the works adopted 'ad hoc usual practice' rather than follow the strict 'code' set out for them in the contract. Throughout the submissions 'breach' as a word appears frequently. This is the result of allowing 'informal ad-hoc usual practice' and procedures to supervene the terms and conditions which were pre-agreed as the basis of the contract. Such behaviour is not a problem until some major catastrophe occurs. In this case £502,668.62, or thereby perceived problems. As they arise outwith the strict contract matrix, that is what they are, with the remedies less easy to find and even more unpalatable. This statement is not as one-sided as it seems both are Parties are equally at risk in such circumstances.*
>
> *As regards the Referring Party the introduction of a bespoke in-house contract for the work packages has not, to my view, produced the certainty that use of a compatible form would have. The decision document dated 8th November 2000 on the Burnhead Contracts Ltd v Ballast Wiltshier Plc Adjudication pointed out on page 4 of same the basis of contract between the Referring Party and Burnhead was a stand alone arrangement. It concluded that lacking full 'transparency' leaves 'dark' holes in interpretation. This in turn meant that the Works Package Contractor could be entitled to payment in terms of the bespoke contract whereas the Referring Party may not necessarily possess the same right of reimbursement under his contract with the Respondent. This is a crucial consideration which the Referring Party failed to adjust in his bespoke form to produce certainty of reimbursement from the Respondent. In truth that happened in 1998 and has to be accepted as a fait accompli. Having stated the above my experience in terms of 'Homes for the Future' in terms of Burnhead leads me to believe that the remainder will also have the same problem. The extent of the exposure is difficult to gauge as insufficient records exist within the submissions and from comment may not even exist at all.*
>
> *On the Respondent's side I am not persuaded that all is as it should be. This in part is apparently due to actions or in some cases lack of actions on the part of consultants generally. Tozer Capita's comments previously seen by me certainly pointed in that direction. The avoidance on the Respondent's part claimed by the Referring Party has also been in evidence in this Adjudication and its abandoned predecessor. From my experience there must be some reason for this but cannot do other than draw conclusions which are inadmissible in any event. However what the case may be the Respondent is relying upon the Referring Parties 'breaches' and saying nothing.*
>
> *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.*
>
> *For the sake of clarity and avoidance of doubt the Burnhead Adjudication is, in my view, irrelevant to this Adjudication. The Referring Party cannot use that Adjudication as the basis for claiming reimbursement in this Adjudication. Principally as the contractual matrix in Burnhead is an in house bespoke form of contract with no*

transparency. This has also been persuasive in reaching the decision in this Adjudication as regards the remaining Works Packages.

Given the lack of clarity and a compatible contractual matrix I have found it impossible to reach what I can substantiate as reasonable 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."

[21] So far as I can understand that passage, it appears that the adjudicator was concerned about the parties' failure to abide strictly by the terms of the JCT contract which they had entered into, in their dealings with each other and with third parties. For example, it appears from the notice of referral that one of the areas of contention concerns work which was carried out without the issue of a formal architect's instruction but which, according to the petitioners, was informally instructed or approved by the respondents:

"Further, it is believed by the Referring Party that the valuation and certification process has been either directly or indirectly interfered with by the Respondent. As a result, the Quantity Surveyor and the Architect have, for example, insisted for the purposes of valuation and certification upon sight of formal written instructions for work included in the Referring Party's applications, where it is known that none exists 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."

Another example is that it appears that, in issuing contracts for some at least of the individual works packages, the petitioners may have used a bespoke contract rather than the standard form envisaged by the JCT contract which they had entered into with the respondents. Such matters are a common feature of building contract disputes, and raise issues (such as waiver, personal bar or variation of contract) with which any practitioner in that field will be familiar.

[22] It appears that the adjudicator formed the view that these problems rendered the dispute incapable of determination by adjudication. I draw that conclusion from, for example, his statement:

".... [T] his referral may have been capable of Adjudication.... The problem is now ripe for alternative methods of disposal unless the Parties can reach some settlement outwith ADR."

Before me, the parties agreed that this meant that, in the adjudicator's view, the problem could only be resolved by alternative dispute resolution, unless otherwise settled by agreement. The adjudicator's view that he cannot decide the matter referred to him is perhaps more clearly expressed in his statement: "I have found it impossible to reach what I can substantiate as reasonable legally based decisions." The same viewpoint is apparent in his statement: "Where the parties have departed from the strict pre-agreed code then they have to accept that it is, as with Courts, not the Adjudicator's place to make decisions..." These statements indeed suggest that the dispute is, in the adjudicator's view, equally incapable of resolution by litigation.

[23] In response to a request for clarification of his reasons, the adjudicator provided a letter dated 29 December 2000 which stated *inter alia*:

"In formulating the decision the major influence was the decision in the Burnhead Adjudication.

In that Adjudication it was noted that whilst liabilities were created between Ballast and the Works Package contractors these were based on a separate contractual basis which was not fully transparent with the Management contract with Burrell. The decision in that case was based on the intercontractual liabilities created between Ballast and Burnhead. I was not convinced that under the Management contract Ballast would be able to fully substantiate the level of reimbursement that was payable to Burnhead. On examining the submissions this did not resolve the doubts on that matter which led me to the decision that I could not value as requested."

Accordingly, it is clear that the adjudicator considered that he was unable to determine the matter which had been referred to him as being in dispute, namely the amount due and payable by the respondents to the petitioners.

[24] In the discussion before me, the submission on behalf of the petitioners was straightforward. In terms of paragraph 20(1) of the Scheme the adjudicator was under a duty to decide the matters in dispute. He had failed to do so. He was not entitled to decide that he was unable to decide. It could not have been intended that that would be a "decision" within the meaning of the Scheme. In the first place, the adjudication was meant to produce a rough-and-ready answer as a stop-gap solution. Secondly, it would be absurd if an adjudicator could "decide" that he had too little information to make a determination, thereby preventing - by virtue of paragraph 9(2) - the bringing of a second adjudication if additional information became available. Reference was made to ***Karl Construction (Scotland) Ltd*** **v** ***Sweeney Civil Engineering (Scotland) Ltd,*** 2001 SCLR 95. I was requested to grant declarator that the adjudicator had failed to make any decision in respect of the matter set out at paragraph 6.1 of the referral notice, and to grant reduction of the decision as a whole. Although it might be said that the adjudicator had issued a decision in respect of the matter raised in paragraph 6.2 of the referral notice, that decision was itself plainly wrong in law and was in respect of a point which did not arise unless a decision had been taken in respect of para 6.1.

[25] On behalf of the respondents, on the other hand, it was submitted that the adjudicator had implemented his duty under paragraph 20(1) of the Scheme. He could validly decide that he was unable to exercise his statutory jurisdiction. The import of what the adjudicator had said was that the petitioners' claims did not arise under the contract - ie. "the strict contract matrix", as the adjudicator described it - and that he therefore had no jurisdiction to reach a decision on those claims under paragraph 20(2)(b). If he was in error in equating the expression "the contract", in the Scheme, with the written terms of the JCT contract, regardless of any question of waiver, variation or the like, that was an error falling within his jurisdiction, with which the court could not interfere. Similarly, the adjudicator's statement that "where the parties have departed from the strict pre-agreed code then they have to accept that it is, as with Courts, not the Adjudicator's place to make decisions" meant that, in his view, there could be no legal liability to make payment if there was a departure from the terms of the written contract. That was not a failure to decide, but an error within jurisdiction. The adjudicator had taken the view, rightly or wrongly, that he was empowered only to reach a valuation in accordance with the terms of the JCT contract. He had therefore taken the view that he was not in a position to undertake any valuation in respect of the petitioners' claim, which relied on departures from those terms. That was the import of his decision: the redress sought was "not valid", because there was no valid basis on which he could undertake a valuation, which was what he was being asked to do. If that was an error, it was not one which would lead a court to interfere with his decision. Reference was made to ***Watson Building Services Ltd, Petitioners***, 13 March 2001, unreported, at paragraph 24, where the Lord Ordinary quoted, as giving guidance as to the appropriate approach to be taken by the courts, principles formulated by His Honour Judge Thornton, QC in ***Sherwood & Casson Ltd*** **v** ***Mackenzie,*** 30 November 1999:

> *"(i) a decision of an adjudicator whose validity is challenged as to its factual or legal conclusions or as to procedural error remains a decision that is both enforceable and should be enforced;*
>
> *(ii) a decision that is erroneous even if the error is disclosed by the reasons, will still not ordinarily be capable of being challenged and should, ordinarily, still be enforced;*
>
> *(iii) a decision may be challenged on the ground that the adjudicator was not empowered by the Act to make the decision, because there was no underlying construction contract between the parties or because he had gone outside his terms of reference;*
>
> *(iv) the adjudication is intended to be a speedy process in which mistakes will inevitably occur. Thus, the court should guard against characterising a mistaken answer to an issue, which is within an adjudicator's jurisdiction, as being an excess of jurisdiction. Furthermore, the court should give a fair, natural and sensible interpretation to the decision in the light of the disputes that are the subject of the reference;*
>
> *(v) an issue as to whether a construction contract ever came into existence, which is one challenging the jurisdiction of the adjudicator, so long as it is reasonably and clearly raised, must be determined by the court on the balance of probabilities with, if necessary, oral and documentary evidence."*

Counsel relied especially upon the first of these "principles".

[26] In a brief reply, counsel for the petitioners submitted that, on the respondents' approach, the adjudicator had plainly erred as to the extent of his own jurisdiction, which was not confined to determining

liabilities arising under the strict terms of the written contract regardless of issues of personal bar and waiver, any more than was that of a court or an arbiter. Such an error was reviewable. Reference was made to ***Homer Burgess Ltd* v *Chirex (Annan) Ltd***, 2000 SLT 277, 284K.

[27] It appears from the cases cited to me that different views have been taken as to the appropriate legal framework within which to address the issues raised by adjudicators' decisions: in particular whether the adjudicator is to be regarded as a statutory decision-maker, albeit one whose statutory powers and duties have been clothed in contractual form (the approach adopted by Lord Macfadyen in ***Homer Burgess Ltd* v *Chirex (Annan) Ltd***, as I understand his Opinion), or whether adjudication should be regarded as a contractual procedure (as Dyson J. appears to have regarded it in, for example, ***Macob Civil Engineering Ltd* v *Morrison Construction Ltd*** [1999] BLR 93).

[28] Section 108 of the 1996 Act envisages that adjudication procedure may be agreed between the parties, provided that their agreement fulfils the requirements of sub-sections (1) to (4); or, in default, it will be imposed under the Scheme promulgated by the responsible Minister, in which event the procedure is deemed to be a matter of implied agreement, by virtue of section 114(4). In either event, although the provisions have contractual effect, they cannot be regarded as terms to which the parties have freely agreed: in one form or another, they are compulsory contract terms imposed by statute. Nevertheless, I do not propose to approach the issue in this case on the footing that the adjudicator was exercising a jurisdiction created by statute (or, in other words, exercising statutory powers and bound by statutory duties). First, such an approach would not be warranted if the adjudication procedure had been one expressly incorporated into the contract, since the adjudicator's powers and duties would then be created and defined by contract; and I would not regard it as appropriate or desirable to draw a fundamental distinction between adjudication under contract terms complying with section 108(1) to (4) and adjudication under the Scheme. It is indeed possible that an adjudication might be governed partly by express contract terms and partly by the Scheme, since the contract might comply only in part with the requirements of section 108(1) to (4); and that is reflected in the terms of section 114(4) *("Where <u>any</u> provisions of the Scheme for Construction Contracts apply...":* emphasis added). In that event, it would be unrealistic to treat differently the Scheme provisions from the express contractual provisions. Secondly, section 114(4) itself requires the court to give effect to the Scheme provisions as implied terms of the contract between the parties.

[29] Each party to the contract is therefore to be regarded as having a contractual right to refer a dispute to adjudication; and each party equally has a contractual duty to comply with the adjudicator's decision. These rights and duties only exist, however, within limits which are set by the terms of the contract. The right to refer a dispute, for example, is confined to disputes arising under the contract: paragraph 1(1) of the Scheme. Since adjudication has a contractual basis, the construction and effect of paragraph 23(2), and in particular the words - *"The decision of the adjudicator shall be binding on the parties, and they shall comply with it"* - depends on the construction of the express and implied terms of the contract.

[30] A number of significant features of adjudication are apparent from the express terms of the Scheme. First, it is apparent from section 108(3), and from paragraph 23(2) of the Scheme, that adjudication does not oust the jurisdiction of the courts (or of an arbiter) to determine the merits of the same dispute. In that respect it differs from arbitration. On the other hand, the adjudicator's decision is binding, pending a final determination of the dispute by the courts (or by arbitration). In other words, the adjudicator's decision is of a provisional nature, and not intended necessarily to be the same as the decision which will eventually be reached by litigation or arbitration. As appears from section 108(2) and from paragraphs 13 and 19 of the Scheme, adjudication is intended to be an expeditious means of reaching a decision: the timetable envisaged is too short to allow for the type of procedure, or the type of hearing, which would in most cases be necessary for the issues of fact and law involved in the dispute to be explored as fully as in an arbitration or in court proceedings; and the adjudicator is therefore entitled to adopt a more inquisitorial role than that of a judge or an arbiter. These aspects of adjudication - the short timetable, the scope for inquisitorial procedure, and the provisional nature of the decision - fit together as elements in a coherent scheme. Notwithstanding the provisional nature of the decision, however, the parties agree to comply with it: an obligation which can be enforced by application to the court. On such an application being made, it cannot be appropriate for the courts to undertake an investigation into the merits of the

dispute in order to ascertain whether the adjudicator has reached the same decision as a court would have done: were the courts to do so, section 108 and the Scheme would be rendered pointless. To some extent, therefore, the adjudicator's decision must be binding, temporarily, notwithstanding that a court would not agree with it; and to the extent that the adjudicator's decision is binding, it might be said that there is, in effect, a temporary ouster of the court's jurisdiction to determine the matters in dispute.

[31] The contract imposes a number of express requirements with which the adjudicator "shall" comply: for example, he must act impartially (paragraph 12(a)); he must carry out his duties in accordance with the contract (*ibid*); he must reach his decision in accordance with the applicable law (*ibid)*; he must avoid incurring unnecessary expense (paragraph 12(b)); he must consider any relevant information submitted to him by any of the parties to the dispute (paragraph 17); he must make available to them any information to be taken into account in reaching his decision (*ibid)*; and he must decide the matters in dispute (paragraph 20(1). The consequences of any failure to comply with those requirements are not stated in the contract, and therefore have to be determined by interpretation of the contract.

[32] Since the adjudicator is not, in the absence of bad faith, liable for anything done or omitted to be done in the discharge or purported discharge of his functions (s108(4), & para 26 of the Scheme), he is not liable in damages for any breach of the requirements of the contract. For his decision to be held up by applications to the court for the enforcement of those requirements (eg by interdict) would generally be incompatible with the contractual timetable and with the intention that the procedure should be expeditious. If the requirements are intended to be enforceable, therefore, the means of enforcement would appear to be the release of the parties from obligations which would otherwise be binding upon them: notably the obligation to comply with the adjudicator's decision, or the obligation to pay his fees and expenses. It cannot however be taken for granted that the requirements in question are necessarily intended to be enforceable. Another possibility is that the requirements may be stated for the guidance of the adjudicator & the parties but without the intention that non-compliance should affect the binding character of his decision; or the consequences of a failure to comply with the requirements may depend on the specific nature of the failure. The choice between such possibilities is perhaps more often encountered in the context of statutory provisions, where the question sometimes arises whether the use of the word *"shall"* is intended to mean that non-compliance deprives the subsequent decision of binding effect. In the statutory context, it is clear that there is no uniform answer: it depends on the construction of the particular statute (see e.g. ***London & Clydeside Estates v Aberdeen District Council,*** 1980 SC (HL) 1). As was observed by Lord Justice General Hope in ***Carruthers* v *HM Advocate*** 1993 SCCR 825 at p.803: *"[I]t is relevant to consider the purpose of the rule and its context and to examine also the consequences if that rule is not observed."*

In ***London and Clydeside Estates Ltd*** Lord Keith of Kinkel also observed at p 42 that:
"[S]omething may turn upon the importance of the provision in relation to the statutory purpose which the provision is directed to achieving, and whether any opportunity exists of later putting right the failure".

In the present context, the provisions of the Scheme have to be interpreted in the light of the intention of Parliament in enacting the 1996 Act, and more particularly the intention of the Minister in making the Scheme: an intention which has to be imputed to the parties to the contract, given the incorporation of the Scheme provisions as implied contractual terms. That general intention was aptly summarised by Dyson J. in ***Macob Civil Engineering Ltd* v *Morrison Construction Ltd*** [1999] BLR 93 at p 97:
"It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement".

Having regard to that intention, Dyson J. concluded, if I understand his judgment correctly, that an adjudicator's decision was intended to be binding notwithstanding any failure to comply with the requirements of the Scheme, provided the decision was of the dispute which had been referred to him. He said at p. 98:
"At first sight, it is difficult to see why a decision purportedly made by an adjudicator on the dispute that has been referred to him should not be a binding decision within the meaning of s.108(3) of the Act, para 23(1) of the Scheme and clause 27 of the contract. If it had been intended to qualify the word 'decision' in some way, then this could

have been done. Why not give the word its plain and ordinary meaning? I confess that I can think of no good reason for not so doing, and none was suggested to me in argument. If his decision on the issue referred to him is wrong, whether because he erred on the facts or the law, or because in reaching his decision he made a procedural error which invalidates the decision, it is still a decision on the issue. Different considerations may well apply if he purports to decide a dispute which was not referred to him at all."

It appears to have been argued before Dyson J. (as recorded at p 97) that "where there is a decision whose validity is challenged, that is not a decision which is binding or enforceable as a contractual obligation until it has been determined or agreed that the decision is valid". This argument was rejected (pp.97-98):

"It will be seen at once that, if this argument is correct, it substantially undermines the effectiveness of the Scheme for adjudication... Thus, on [counsel's] argument the party who is unsuccessful before the adjudicator has to do [no] more than assert a breach of the rules of natural justice, or allege that the adjudicator acted partially, and he will be able to say that there has been no 'decision'".

[33] One observation I would make is that I am not sure that I understand the usage of the words "valid" and "invalidates" in the passages I have quoted. I would myself have regarded an error which "invalidates" a decision as one which *ipso facto* renders the decision non-binding. The issue, in the way in which I would have used the terminology, is whether a given error does or does not "invalidate" the decision.

[34] It is of course true that, to the extent that any breach of the requirements of the Scheme renders a decision non-binding, scope exists for such breaches to be alleged by the party which has been unsuccessful before the adjudicator, and for the successful party thus to be prevented from enforcing the adjudicator's decision until the allegation has been examined by the court. The delay in enforcement which could be caused by an unmeritorious challenge, and the scope for such challenges, would depend to some extent upon the grounds upon which a decision could relevantly be challenged, and to some extent upon the procedures followed by the court. If the relevant grounds for challenge were confined to the sort of matters which can be raised under Scots law in the context of challenges to the decisions of other jurisdictions created by contract (eg arbiters and disciplinary bodies) - what might broadly be summarised as ***Wednesbury*** grounds - then experience in other contexts suggests that such challenges are generally capable of speedy resolution, since they do not normally require any detailed or prolonged investigation into complex issues of fact. Moreover, if one construed the Scheme as conferring upon the adjudicator a jurisdiction to take decisions which, albeit provisional, excluded *pro tanto* the ordinary jurisdiction of the courts to determine parties' rights and obligations, then under Scottish procedure such decisions would be capable of challenge (on limited grounds) by an application for judicial review (the alternative being to raise the invalidity of the decision by way of defence to proceedings for its enforcement). That approach is implicit in the present proceedings, which have been brought, by way of judicial review, by the unsuccessful party to the adjudication proceedings; and it has also been implicit in other proceedings which have been brought in Scotland (eg. ***Allied London and Scottish Properties Plc* v *Riverbrae Construction Ltd*** [1999] BLR 346; ***Karl Construction (Scotland) Ltd v Sweeney Civil Engineering (Scotland) Ltd***, 2001 SCLR 95; ***Watson Building Services Ltd, Petitioners***, 13 March 2001, unreported). Under that procedure, the merits of the challenge would, in most cases at least, be determined at a first hearing held relatively soon after the presentation of the application. Any issues of fact which might arise could be dealt with speedily under the procedures available under judicial review procedure. If, on the other hand, a challenge could relevantly be based upon any error of law, with the court exercising its ordinary jurisdiction to determine such issues on their merits, then it would be necessary for any action for enforcement of a disputed decision to proceed to a full hearing under ordinary procedure, unless the defence was so manifestly unmeritorious that summary decree could be granted (something which, in practice, would be likely to be rare). In other words, the proceedings, if raised in the Sheriff Court, would proceed to a debate; if raised in the Court of Session, they would proceed to a hearing on Procedure Roll (unless the proceedings had been raised as a commercial action, in which event the case would proceed to a debate). Any issues of fact which might arise would require to be determined after proof (subject, again, to qualification in the case of a commercial action in the Court of Session). In other words, unless the party seeking to enforce the decision had elected to raise a commercial action (in which event an expedited and flexible procedure would apply), the enforcement

of the decision would in practice be likely to be held up by a period of at least several months, and possibly for a longer period. I doubt whether that can have been the intention of the Scheme, for the reasons discussed by Dyson J. in the passages I have quoted.

[35] At the same time, however, it does not appear to me necessarily to follow that adjudicators' decisions were intended to be entirely immune from challenge, particularly bearing in mind the capacity of the Scottish legal system to address rapidly the type of challenge, on limited grounds, which would require to be raised by way of an application to the supervisory jurisdiction of the Court of Session. In other contexts where provisional decisions have to be taken (eg. on an application to a court for interim interdict, or for the appointment of a provisional liquidator), or where summary remedies are provided (eg. summary enforcement of a debt), or where it is important to avoid delay in the application of decisions (eg. decisions of general importance taken by central or local government), the law does not dispense with judicial protection, although it is likely to place limits upon it. It also appears to me to be necessary to remember that, although both parties to the contract undoubtedly have a strong interest in the enforceability, without delay, of adjudicators' decisions, they also have an interest in being protected against decisions which are unjust. The potential significance of adjudicators' decisions is plain. As was observed by His Honour Judge Bowsher, Q.C. in ***Austin Hall Building Ltd* v *Buckland Securities Ltd*** 11 April 2001, unreported, T & C Ct, at paragraph 22:

"The enforcement of an adjudicator's decision through the courts might put one party into liquidation or bankruptcy or save the other from a similar fate. An adjudicator's decision may be at least as important as a decision of a court making an order for a temporary injunction or for a payment to account. No one would suggest that a court making orders of that sort should not comply with the common law rules of natural justice".

The potential for irremediable injustice is equally apparent. Dyson J. commented in ***Bouygues* v *Dahl Jensen*** [2000] BLR 49, at page 55:

"It is inherent in the scheme that injustices will occur, because from time to time, adjudicators will make mistakes. Sometimes those mistakes will be glaringly obvious and disastrous in their consequences for the losing party. The victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation, and possibly even by a subsequent adjudication. Sometimes they will not be able to do so, where, for example, there is intervening insolvency, either of the victim or of the fortunate beneficiary of the mistake."

Notwithstanding the ephemeral & subordinate character of an adjudicator's decision, & the deemed intention that adjudication should be an expeditious procedure rooted in commercial common sense, I would be slow to attribute to the parties an intention that the adjudicator's decision should always be binding notwithstanding errors of law, procedural unfairness or lack of consideration of relevant material submitted to him by the parties, no matter how fundamental such a breach of the adjudicator's obligations might be.

[36] Like Dyson J. I have approached the issues raised by adjudication within a contractual framework, for the reasons I have explained. One difference between Scots and English law (in procedure at least), however, is (as I have already mentioned) that judicial review is not confined under Scots law to issues of public law, but extends to powers conferred by a contract upon a third party to determine the rights of the parties to the contract *inter se*. In particular, judicial review under Scots law extends to arbitration and is not uncommon in the context of arbitration under building and engineering contracts. This is a factor which appears to me to be potentially relevant, as those responsible for the Scottish Scheme can be taken to have been aware both of the possibility, under Scots law, of a relatively rapid determination of questions as to the compatibility of a decision with what might be described as ***Wednesbury*** standards; and they can also be taken to have been aware of the role played by judicial review under existing Scots law and practice in relation to construction contracts.

[37] The contractual approach which I have adopted may differ to some extent, in emphasis at least, from the approach adopted by Lord Macfadyen in ***Homer Burgess Ltd* v *Chirex (Annan) Ltd*,** 2000 SLT 277. Lord Macfadyen regarded adjudication procedure as "clothed in contractual form" (at p.284A), but as essentially statutory (at p. 284L):

"Despite the form in which the statutory intent is expressed, an adjudicator is in my view in substantially the same position as any other statutory decision maker, at least so far as the power of the courts to review whether he has acted within his jurisdiction is concerned".

[38] Although I have not treated the adjudicator as a "*statutory decision maker"* - primarily because of the statutory requirement to give effect to the Scheme provisions as implied contractual terms - the authorities on judicial review to which Lord Macfadyen referred may nevertheless be relevant, since the scope of such authorities is not restricted, under Scots law, to inferior jurisdictions of a statutory nature. In other words, the adjudicator may be, in Lord Macfadyen's words, "in substantially the same position" as a statutory decision maker. In particular, if the decision of an adjudicator is susceptible to challenge on what I have been describing as ***Wednesbury*** grounds, under judicial review procedure, but is not otherwise open to challenge on the basis of error of fact or law, then the guidance given by Lord Reid in ***Anisminic Ltd* v *Foreign Compensation Commission*** [1969] 2 AC 147 at p.171 is helpful:

"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity... But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It 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 and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly".

Homer Burgess Ltd* v *Chirex (Annan) Ltd is itself an example of a case where the adjudicator had no jurisdiction to enter on the inquiry: the contract was not a "construction contract" within the meaning of the 1996 Act. There have been other examples of the same kind of case (eg. ***The Project Consultancy Group* v *The Trustees of the Gray Trust*** [1999] BLR 377). In other English cases it has been held that the adjudicator must also, in the course of proceedings falling within his jurisdiction, comply with the requirements of natural justice, or act fairly, as it might tend to be expressed (eg. ***Austin Hall Building Ltd* v *Buckland Securities Ltd,*** *cit supra,* at paragraphs 43-47, and authorities cited there). In ***Bouygues* v *Dahl Jensen*** Dyson J. accepted that an adjudicator's decision was of no effect in law if he had *"decided the wrong question rather than given a wrong answer to the right question"* (at p. 56), a test which, if I understand the judgment correctly, could equally well be expressed, in Lord Reid's words, as asking whether the adjudicator had misconstrued the provisions giving him power to act so that he failed to deal with the question remitted to him and decided some question which was not remitted to him. The decision of the Court of Appeal in the same case ([2000] BLR 522) similarly distinguishes between error within jurisdiction and jurisdictional error (see e.g. *per* Buxton LJ at paragraph 14).

[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*** 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 *per* 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*** 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.

Petitioners: Glennie, Q.C.; Masons
Respondents: Cormack, Dundas & Wilson, C.S.