**JUDGMENT: LORD MACFADYEN** : Outer House Court of Session. 15th June 2001

[1] **Introduction :** These two commercial actions came before me for a preliminary hearing in terms of Rule of Court 47.11. In each case the pursuers had enrolled a motion under Rule of Court 21.2 for summary decree in terms of the first conclusion.

[2] In each action the pursuers seek to enforce by decree for payment an award made in their favour by an adjudicator in proceedings under section 108 of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"). The adjudications arose out of related construction contracts. One action (CA55/14/01) relates to a contract for road improvement works on the A76 road at Garleffan, New Cumnock. In relation to that contract, Robert Christie Fleming was appointed adjudicator. I shall call the action relating to that adjudication ***"the Fleming action".*** The other action (CA56/14/01) relates to a contract for the construction of a new access road and associated railhead works at a site near New Cumnock. In relation to that contract, George M. Ross was appointed adjudicator. I shall call that action ***"the Ross action".***

[3] In the Fleming action, the adjudicator issued his decision on 16 March 2001. He ordered the defenders to pay to the pursuers amounts totalling £313,760.84 (inclusive of value added tax). In the Ross action, the adjudicator issued his decision on 22 March 2001. He ordered the defenders to pay to the pursuers amounts totalling £844,742.63 (inclusive of VAT). The pursuers aver that in terms of Clause 23(2) of Part I of the Scheme for Construction Contracts (Scotland) Regulations 1998 ("the Scheme") the decisions of the adjudicators are binding on the parties and must be complied with by them pending final determination of the disputes by legal proceedings, arbitration or agreement. Their first conclusion, in each action, is accordingly for payment of the amount of the relative adjudicator's award. The defenders in their defences put forward various grounds for resisting enforcement of the adjudicators' awards. The pursuers contend, however, in support of their motions for summary decree, that the defenders have no defence to the actions. Mr Borland, for the pursuers, recognised that his submission was tantamount to a contention that the defences were irrelevant in each case, and sought leave to amend the summonses to add pleas to the relevancy of the defences. That motion was not opposed by Mr Currie for the defenders, and was granted.

[4] As I have indicated, Mr Borland's primary motion was for summary decree for the sum sought in the first conclusion in each action. He also advanced, however, a secondary submission that, if the pursuers were not entitled to summary decree for the whole sums sued for, they were entitled to summary decree for certain parts of the adjudicators' awards. Without going into detail at this stage about the basis for those secondary motions, it is convenient to note that the amounts sought in those motions (all stated inclusive of VAT) were (1) in the Fleming action, the aggregate of (a) the amount awarded in Decision 1, namely £64,070.76, and (b) a further amount, forming part of Decision 2 and flowing from Decision 4 on extension of time, calculated at £117,859.83; and (2) in the Ross action, the amount of Decision 1, namely £392,957.05.

[5] Mr Borland sought to support the competency of partial enforcement of an adjudicator's award by reference to my own decision in **Homer Burgess Ltd v Chirex (Annan) Ltd** 2000 SLT 277 at 286-287, and a number of authorities dealing with the analogous question of the partial enforcement of an arbitral award (**Reid v Walker** (1826) 5 S 140, per Lord Glenlee at 143; Irons and Melville on Arbitration 409; Stair Memorial Encyclopaedia, Vol. 2, "Arbitration", para. 487 (Reissue, para. 90); Davidson on Arbitration, para. 18-03). He submitted that where it was possible to separate the "good part" from the "bad part" of a decision, the former could be enforced by granting decree for payment. In the event, Mr Currie did not dispute the competency in principle of partial enforcement, and I therefore need say no more about it as a legal issue.

[6] **The Law** : Mr Borland sought to derive from two cases which he cited a number of principles which he submitted were applicable when enforcement of an adjudicator's decision was sought. The first case was the unreported decision of Lady Paton in **Watson Building Services Ltd, Petitioners** (13 March 2001). At paragraph [21] of her Opinion, her Ladyship said: *"I accept that the purpose of adjudication is to provide a relatively prompt resolution of the many disputes and differences which can arise in the course of construction works. It is envisaged that parties may ultimately take their dispute to a court or to an*

*arbiter, but meantime, until there is a final determination by such court or arbiter, the decision of the adjudicator is binding and is to be obtempered by the parties."*

Her Ladyship went on to quote from **Macob Civil Engineering Ltd v Morrison Construction Ltd** [1999] BLR 93 per Dyson J at paragraphs [14] and [19]:

*"[14] The intention of Parliament in enacting the [1996] Act was plain. 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.*

*[19] If [the adjudicator's] 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."*

(See also **Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd** [2000] BLR 522 per Buxton LJ at para. 2; **Karl Construction (Scotland) Ltd v Sweeney Civil Engineering (Scotland) Ltd** 2001 SCLR 95 per Lord Caplan at paragraphs [17] and [19].) In paragraph [24] of her Opinion, Lady Paton quoted *inter alia* the following passage from **Northern Developments (Cumbria) Ltd v J & J Nichol** [2000] BLR 158 at 162 where His Honour Judge Bowsher QC in turn quoted 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 (sic) 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 in the reasons, will still not ordinarily be capable of being challenged and should, ordinarily, still be enforced; ...*

*(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."*

The second case on which Mr Borland relied was **Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd** (*supra*). He referred to the judgment of Chadwick LJ at paragraph 27: *"The first question raised in this appeal is whether the adjudicator's determination in the present case is binding on the parties ... The answer to that question turns on whether the adjudicator confined himself to a determination of the issues that were put before him by the parties. If he did so, then the parties are bound by his determination, notwithstanding that he may have fallen into error. As Knox J put it in* ***Nikko Hotels (UK) Ltd v MEPC plc*** *[1991] 2 EGLR 103 at page 108 ... if the adjudicator has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity."* (See also per Buxton LJ at paragraph 12.)

[7] From those authorities Mr Boreland drew three propositions:

1. The court should give a fair, natural and sensible interpretation to the adjudicator's decision.
2. The court should be slow to characterise a mistaken answer given by the adjudicator to a question as amounting to an excess of jurisdiction.
3. If the adjudicator has answered the right question in a wrong way, his decision will nevertheless be binding on the parties.

[8] Mr Currie did not seek to contradict Mr Boreland's submissions on the law, submitting that the issues in the present case concerned not what the law was, but how it should be applied to the particular facts of the case. He advanced only one separate submission of his own. That was that by virtue of paragraph 22 of Part I of the Scheme, which obliged the adjudicator to provide reasons for his decision if requested to do so, it was a requirement of the Scheme that the adjudicator's decision be transparent, and not ambiguous on any critical matter.

[9] I have no difficulty in accepting that adjudication is intended to provide a means of obtaining a speedy, but merely provisional, resolution of a dispute arising in the course of a construction contract. It is envisaged that ultimately, whether by litigation or arbitration or agreement between the parties, the determination of the dispute may be a different one from the provisional determination made by the adjudicator. It is, however, envisaged that the adjudicator's determination will in the meantime be implemented.

[10] I also accept that an adjudicator's decision will be enforceable even if it can be shown that the adjudicator has in making his determination made an error of fact or law. On the other hand, if the adjudicator has made a determination that he had no jurisdiction to make, his decision will be *ultra vires*. A defender who can successfully attack an adjudicator's decision on a ground of the latter sort will be able to resist enforcement. The distinction, in my view, is between a decision that is unsound but valid, and a decision that is invalid because it was not one that the adjudicator had power to make. Since I would express the distinction in that way, I have reservations about the way in which the first of His Honour Judge Thornton's propositions, quoted in paragraph [6] above, is expressed. If it had said *"the soundness of which is challenged"* rather than *"whose validity is challenged"*, I would have agreed with it. The other reservation that I would express relates to Dyson J's treatment of *"procedural error"* in **Macob.** I would not rule out the possibility that there may be a procedural error which produces the result that the adjudicator has made a decision that is beyond his jurisdiction. I agree, however, with His Honour Judge Thornton's fourth proposition in so far as it encourages a pragmatic approach to the interpretation of the adjudicator's decision, and suggests that the court should be careful not too readily to characterise a mistake on the part of the adjudicator as taking him out of his jurisdiction.

[9] **The Fleming Action - The Issues :** Mr Borland identified three lines of defence relied upon by the defenders in the Fleming action. All three were characterised by the defenders as going to the adjudicator's jurisdiction. The first contention was that the pursuers had sought to have a decision of several disputes made in one adjudication, something that was not permitted under the Scheme ("the 'several disputes' issue"). The second contention was that the adjudicator had no jurisdiction to make any award in respect of work done by the pursuers after the defenders had rescinded the contract, because such works could not be said to have been carried out under a construction contract. Moreover, since the pursuers' referral notice did not distinguish between pre-rescission and post-rescission works, the adjudicator had no jurisdiction to consider any part of the matters referred to him ("the rescission issue"). The third contention was that in respect of the claim for payment under application No. 9 the defenders had contended that no sum could be due in the absence of a certificate. The adjudicator had failed to address that contention, and had made an award without determining that payment was due under the contract ("the certification issue").

[10] **The Fleming Action - The "Several Disputes" Issue :** Mr Borland submitted that the defenders' averments on this issue disclosed no defence to the action. Their contention was, he submitted, contrary to authority on the meaning of "dispute" in the Scheme. On a sensible interpretation of the issues referred to the adjudicator, they formed a "dispute" which could therefore properly be referred to adjudication.

[11] Paragraph 1(1) of Part I of the Scheme provides for the right of any party to a construction contract to refer "any dispute arising under the contract" to adjudication, and paragraph 1(3) also refers to "the dispute" in the singular. Mr Boreland drew attention, however, to paragraph 20(1), which provides:
*"The adjudicator shall decide the matters [plural] in dispute and may make a decision on different aspects of the dispute at different times."*

He referred to **Fastrack Contractors Ltd v Morrison Construction Ltd** [2000] BLR 168 at 176, paragraph 20, where His Honour Judge Thornton said:
*"It is to be noted that [the 1996 Act] refers to a 'dispute' and not to 'disputes'. Thus, at any one time, a referring party must refer a single dispute, albeit that the Scheme allows the disputing parties to agree, thereafter, to extend the reference to cover 'more than one dispute under the same contract' and 'related disputes under different contracts'. During the course of a construction contract, many claims, heads of claim, issues, contentions and causes of action will arise. Many of these will be, collectively or individually, disputed. When a dispute arises, it may cover one, several or many of one, some or all of these matters. At any particular moment in time, it will be a question of fact what is in dispute. Thus, the 'dispute' which may be referred to adjudication is all or part of whatever is in dispute at the moment that the referring party first intimates an adjudication reference. In other words, the 'dispute' is whatever claims, heads of claim, issues, contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference."*

In the present case there was referred to adjudication, Mr Borland submitted, a single dispute between the parties, which included three elements, namely (i) the issue as to the amount due under interim certificate 7, (ii) the issue as to the amount due under application No. 9, and (iii) the issue as to extension of time (see paragraphs 9.1, 9.2 and 9.4 of the referral notice). These were all aspects of a single dispute as to what was due by the defenders to the pursuers. Mr Boreland also referred to **Whiteways Contractors (Sussex) Ltd v Impresa Castelli Construction UK Ltd** (9 August 2000, unreported), in which the "dispute" referred to adjudication concerned failure to pay a final account and two interim applications, and also an issue over extension of time, and the adjudicator's jurisdiction was upheld (see paragraphs 11, 21 and 24). That, he submitted, bore out the proposition that a dispute could have several component parts. The fact that there were three elements in the pursuer's claim did not mean that what was referred to adjudication was not a single *"dispute"*.

[12] Mr Currie's submission was that it was clear that the adjudicator had determined two separate disputes between the parties. It was clear from the adjudicator's decision at page 7 that he regarded Decisions 2, 3 and 4 as inter-related. That being so it was a tenable view that the issues addressed in those decisions formed parts of a single dispute. Decision 1, however, stood alone, and was independent of the other three. It was clear on the face of the adjudicator's decision that he had determined two disputes. That was not permissible, in the absence of the consent of the parties. Mr Currie referred to paragraph 8(1) of Part 1 of the Scheme, which provides:
"The adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on more than one dispute under the same contract."

The defenders had not consented to the separate disputes covered by the reference being the subject of a single adjudication (see paragraph 9.15 of their response). The terms of paragraph 8(1) were sufficient to exclude the operation of section 6(c) of the Interpretation Act 1978, so that "dispute" in paragraph 1 could not be construed as including "disputes".

[13] The *ratio* of **Fastrack Contractors Ltd** could not, Mr Currie submitted, be sound. If, as His Honour Judge Thornton had said at paragraph 20, the "dispute" was whatever claims, heads of claim, issues, contentions or causes of action then in dispute were crystallised in the adjudication reference, it was difficult to see any scope left for the application of paragraph 8(1). There was a danger that, if a multiplicity of unrelated issues could be focused in one adjudication, the supposedly speedy process of adjudication would be overburdened. A party had a legitimate interest to withhold consent to several disputes being determined in a single adjudication, since multiplication of issues might be incompatible with the speedy and summary nature of the process. It might be that it was open to an adjudicator to hold that a range of issues all formed one dispute, but before taking that course he required to address the matter and find a basis for regarding the issues as sufficiently connected for that purpose. In the present case, on the face of the adjudicator's own decision there was no sufficient connection between the issues. The adjudicator said nothing to justify rejecting the contention that he was being asked to address more than one dispute. All that he said, in section 2.0 at page 3 of his decision, was:
*"... I am satisfied that I can deal with the matters put before me for my decision within a single adjudication"*.

That disclosed no assessment of whether the issues were sufficiently inter-related.

[14] In my opinion paragraph 1 of Part I of the Scheme contemplates the reference to adjudication of a dispute. Although, if the contrary intention did not appear from the terms of the Scheme, section 6(c) of the Interpretation Act 1978 would allow paragraph 1 to be read as if it referred *to "a dispute or disputes"*, I am of opinion that the contrary intention does appear from paragraph 8(1), which permits the adjudicator to adjudicate at the same time on more than one dispute under the same contract only with the consent of all parties to those disputes. The defenders clearly withheld their consent in the present case.

[15] The question in my opinion therefore comes to be whether, despite the defenders' contention that what was referred to the adjudicator was more than one dispute, the adjudicator was correct in holding, or was at least entitled to hold, that all of the issues referred to him constituted a single dispute. Whether what is in issue is a dispute or several disputes is, in my view, a matter of circumstance which the adjudicator must, in the first instance, decide for himself if the point is raised. It is very easy to subdivide

and analyse what is in substance one dispute into its component parts and to label each part a separate dispute. That is not, however, the correct approach. A realistic view must, in my view, be taken. There is, in my view, some force in Mr Currie's criticism of His Honour Judge Thornton's analysis in **Fastrack Contractors Ltd** of what constitutes a dispute. If everything currently in dispute between the parties forms a single dispute, paragraph 8(1) is severely restricted in scope or perhaps even deprived of content. I do not find much assistance in **Whiteways Contractors (Sussex) Ltd** because, although what was there treated as a dispute was similar to what the pursuers seek to have regarded as a dispute in the present case, it does not appear that the "several disputes" argument was advanced in that case. However, looking at what was in issue in the present case, notwithstanding the fact that there is a closer connection between Decisions 2, 3 and 4 than there is between that group and Decision 1, I am not persuaded that the adjudicator fell into error in holding that the whole matters referred to him constituted a single dispute as to what was at the time of the reference due under the contract by the defenders to the pursuers. Mr Currie rightly pointed out that the adjudicator did not clearly demonstrate in his decision that he had addressed the question of whether there was a sufficient connection among the various issues to enable him to treat them as one dispute, or set out his reasons for holding that they could be so treated. I am of opinion, however, that that consideration does not support the conclusion that the adjudicator has gone beyond the proper scope of his jurisdiction. It is not disputed that the matters referred to the adjudicator were matters that could competently be made the subject of adjudication. The adjudicator, faced with the "several disputes" argument advanced before him by the defenders, held that it was open to him to regard the matters before him as one dispute. In the circumstances I am not persuaded that he was wrong to take that view. Notwithstanding the adjudicator's obligation in terms of paragraph 22 to provide reasons for his decision, I do not consider that Mr Currie's criticism of the adequacy of his explanation of his view on the *"separate disputes"* issue is sufficient to lead to the conclusion that he went beyond the proper scope of his jurisdiction, or affects the validity or enforceability of his decision. I therefore accept Mr Borland's submission that the "separate disputes" argument does not afford the defenders a defence to this action.

[16] **The Fleming Action - The Rescission Issue** : Mr Borland submitted that this issue turned on the defenders' contention before the adjudicator that effective notice of rescission was given on 14 August 2000. It was only if the contract was rescinded within the period when the work in question was done that the argument that the adjudicator had no jurisdiction in relation to post-rescission work, or in relation to work which was undifferentiated as to whether it was done before or after rescission, could arise. The pursuers disputed that there was effective rescission. The matter was dealt with by the adjudicator in his decision at page 3, paragraph 2.0, in the following terms:

*"The Responding Party [the defenders] asserts that, because of the service of a notice to rescind the contract served on the Referring Party [the pursuers] on 14 August 2000, I do not have jurisdiction to adjudicate on the matters in dispute. It is submitted that, since the Referral Notice does not distinguish between works carried out before and after that date, the matters in dispute cannot constitute a dispute under the contract and, for that reason, I do not have jurisdiction to consider the dispute. ...*

*With regard to the question of repudiation and rescission, I have concluded that I should give my decision on the matters in dispute since the question of repudiation and rescission is unresolved and may only be so by the Courts at some future date. Therefore I proceed on the basis that the parties' obligations, one to the other, remain as set out in the contract or as governed by statute and that the matters in dispute may be decided by me under the terms of the [1996 Act]".*

Mr Borland submitted that that was in effect a rejection of the defenders' contention that the contract had been rescinded. Whether that rejection was sound or unsound, it was an *intra vires* decision by the adjudicator on a matter within his jurisdiction. The adjudicator having rejected the contention that the contract had been rescinded, the basis for the defenders' contention on the rescission issue was removed.

[17] Mr Currie submitted that it was clear, on a proper reading of paragraph 2.0 of the adjudicator's decision, that he had not rejected the contention that the contract had been rescinded. On the contrary, he had declined to address the question whether the contract had been rescinded, adopting the position that the question was unresolved, and might only be resolved by the court at some future date. That was a jurisdictional error on the part of the adjudicator. He required to address, albeit on a provisional basis,

the question whether the defenders were right in contending that the contract had been rescinded. That was because, if that contention was right, the dispute over post-rescission work, not being a dispute arising under a construction contract, was beyond his jurisdiction. Without a positive finding by the adjudicator that the contract had not been rescinded, it could not be said that the whole dispute was within the adjudicator's jurisdiction.

[18] It was not argued by the pursuers that the adjudicator had jurisdiction to determine a dispute as to work done after rescission of the contract. Nor, I think, was it suggested on their behalf that the adjudicator would have had jurisdiction to determine a dispute over a claim presented in a form which did not distinguish between work done before and work done after rescission. There was, however, a dispute as to whether the contract had been rescinded at all. The adjudicator's jurisdiction therefore, in my view, depended on his holding that the contract had not been rescinded. If he had held that the contract had not been rescinded, that would have removed the basis of this challenge to his jurisdiction. The question therefore comes to be one of interpretation of paragraph 2.0 of his decision. I do not consider that Mr Borland was right in characterising what the adjudicator there said as a decision that the contract had not been repudiated. No doubt the adjudicator proceeded **as if** he had held that there had been no repudiation. But in my view the only fair reading of paragraph 2.0 is that the adjudicator regarded the question of rescission or no rescission as unresolved, declined to resolve it, and regarded it as capable of resolution only by the court at a future date. In my view he was right to the extent that a **final** resolution of the question whether the contract had been rescinded could only be made in due course by the court (or an arbiter). But that did not mean that it was not part of his task to make a **provisional** determination of the question of rescission as a necessary preliminary to his exercising jurisdiction over the dispute in question. On the contrary, I am of opinion that the adjudicator would only have had jurisdiction if he had first **decided** that there had been no rescission. Having made no such decision, he had in my opinion no jurisdiction to determine the part of the dispute affected by that issue.

[19] **The Fleming Action - The Certification Issue :** Mr Borland submitted that, contrary to the defenders' contention, the adjudicator had addressed and had rejected the submission that there could be no entitlement to payment without certification. The contractual provisions for certification and payment were contained in Clause 60 of the ICE Conditions of Contract (fifth edition). They were modified by a letter dated 16 September 1999 from the consulting engineers, WSP, which stated *inter alia*: *"4. Payment for work would be 30 days after certification."* Mr Borland pointed to the defenders' submissions to the adjudicator on this point at paragraph 5 on pages 9 and 10 of their Response:

*"The terms of Clause 60 of the Conditions of Contract are not disputed.*
*However, it is submitted that the payment provisions under the conditions of contract were varied by WSP's letter of 16th September 1999 to the extent that payment was to be made 30 days after certification. ...*
*Applying the provisions of the [1996 Act] to the contract payment terms, the due date for payment is the date of certification and the final date for payment is thirty days thereafter."*

*Mr Borland submitted that the adjudicator dealt with that issue in paragraph 4.0 of his decision in the following terms:*

*"The next matter to consider is whether or not an effective notice of intention to withhold payment has been issued. There appears, at page 10 of the Referral Notice, a payment mechanism, which identifies a final date for payment 37 days after the date of application. The Responding Party provides an alternative timetable for payment at Part 5 on pages 9 and 10 of their Response which, although not specifically stated, identifies a final date for payment 60 days after the date of application.*
*I consider that both payment mechanisms put before me fail to comply with s. 110 of Part II of the [1996 Act] in that they fail to provide a mechanism for determining when a payment becomes due under the contract. Further, it is not possible to establish a final date for payment without assuming a date for certification and no such date is stated in the contract. I conclude that only the full mechanism of the [Scheme] at Part II can be applied."*

Mr Borland submitted that that passage disclosed that the adjudicator had addressed the defenders' submission on the certification issue, and had held that because the provision for certification did not state a date for certification, the matter fell to be regulated instead by the Scheme. Right or wrong, that was a determination by the adjudicator of the defenders' contention on the certification issue. It therefore

could not be said that the adjudicator had made a jurisdictional error by not addressing a contention put to him.

[20] Mr Currie's submission was that, in concluding that the contractual certification and payment mechanism did not comply with section 110 of the 1996 Act and therefore did not apply, the adjudicator had addressed and determined a question not put to him by the parties. In so doing, he had exceeded his jurisdiction (**Watson Building Services Ltd**, per Lady Paton at paragraph [26]; **Bouygues**, per Buxton LJ at paragraphs 12 and 14). As could be seen from the Referral Notice at page 10 the pursuers did not submit that the payment mechanism did not comply with section 110. The defenders' contention, as set out at page 14 of their Response, was that:
*"it is a precondition to payment under the contract that a certificate is issued by the Engineer. Accordingly [the pursuers] do not have any right under the contract to payment in respect of sums yet to be certified."*

In avoiding the question of the absence of certification by holding that the contractual payment mechanism did not apply and the Scheme therefore did, the adjudicator was deciding a question on which the pursuers had made no submission, and the defenders had had no opportunity to make submissions. The adjudicator's decision on that matter therefore fell into the category of deciding a question not put to him, which was a jurisdictional error which invalidated his decision in relation to application No. 9 and rendered it unenforceable.

[21] In approaching this issue I remind myself that it bears only on the aspect of the dispute between the parties that concerns the pursuers' application No. 9. It was in relation to that matter that the defenders took the point that no payment could be contractually due because there had been no certification. That is clear from the passage quoted in para [20] above from page 14 of their Response, and from paras 9.9 and 9.11 of the Response. The passage in the adjudicator's decision to which Mr Borland referred was not concerned with the claim for payment in respect of application No. 9, but rather with application No.7 (i.e. it was part of Decision 1, not part of Decision 2). I find nothing in the part of para 4.0 of the adjudicator's decision dealing with Decision 2 that expressly mentions the certification issue. It may be that his reason for making no mention of that point at that stage was that he considered that he had already dealt with the point in the part of Decision 1 quoted in para [19] above, or it may be that he simply rejected the defenders' submission about the need for certification without explaining his reasons for doing so.

[22] In these circumstances I am not persuaded that it would be right to hold that the adjudicator committed a jurisdictional error. The issues before him (in terms of paragraphs 9.2 and 9.3 of the Referral Notice) were the assessment of the amount due in respect of application No. 9 and whether an order for payment of that amount should be made. The defenders' position on those issues was that the amount due should be assessed at nil, and no payment should be ordered, because nothing was contractually due in the absence of certification. It is clear that, whatever his reasons for doing so may have been, the adjudicator rejected the defenders' contention. In so doing, he was in my opinion answering the question put to him. He may, if the passage quoted in paragraph [19] above is to be taken as expressing his reasons for doing so, have done so on a ground not clearly focused in the parties' contentions. It may be that he has failed to express his reasons for doing so clearly. It may also be that he was wrong in law in doing so. But I do not consider that it would be right to characterise the decision as one which resulted from the adjudicator addressing the wrong question, and thus as involving his acting in excess of his jurisdiction.

[23] **The Fleming Action - Result :** For the reasons which I have set out I have come to the conclusions:

1. that on the "several disputes" issue it cannot be said that the adjudicator exceeded his jurisdiction;
2. that on the rescission issue the adjudicator did fall into an error which involved his acting outwith his jurisdiction; and
3. that on the certification issue the adjudicator did not exceed his jurisdiction.

Mr Borland accepted that if I reached those conclusions the pursuers would not be entitled to summary decree in respect of the whole sum sued for in the first conclusion, but submitted that they would be

entitled to summary decree for the sums (1)(a) and (b) mentioned in paragraph [4] above. That was because the pursuers' entitlement to those amounts was unaffected by the invalidity of the adjudicator's decision on the rescission issue. Mr Currie accepted that that was so. I shall accordingly grant summary decree enforcing the adjudicator's Decision 1 in full, and his Decision 2 to the restricted extent of £117,859.83. I shall therefore grant summary decree for the total sum of £181,930.59, with interest thereon at the rate of 8 percent a year from the date of citation until payment.

[24] **The Ross Action - The Issues :** In this case too, three lines of defence are relied upon. Again the defenders maintain that each goes to the adjudicator's jurisdiction. Although the points taken arise in somewhat different form from that in which they arose in the Fleming action, the same shorthand labels can be applied. In this case the "several disputes" issue takes the form of a contention by the defenders that the adjudicator acted on erroneous legal advice in rejecting the submission that he had no jurisdiction because he was being asked to decide more than one dispute in one adjudication without the defenders' consent. The rescission issue takes the form of a contention by the defenders that the adjudicator, in rejecting the submission that the contract had been rescinded, acted on legal advice instead of making his own assessment of the circumstances. The certification issue again takes the form of a contention that the adjudicator failed to address the argument that in the absence of certification no sum was contractually due in relation to application No. 9.

[25] **The Ross Action - The "Several Disputes" Issue :** Mr Borland submitted that in this case there was referred to adjudication a single dispute between the parties which, as in the Fleming action, included three elements, namely (i) the issue as to the amount due under interim certificate 7, (ii) the issue as to the amount due under application No. 9, and (iii) the issue as to extension of time (see paragraphs 9.1, 9.2 and 9.4 of the Referral Notice). Again, these were properly to be regarded as all forming aspects of a single dispute as to what was due by the defenders to the pursuers under the contract. That was so for the same reasons as had been advanced in relation to the Fleming action. The "separate disputes" issue therefore did not afford ground for holding that the adjudicator had committed a jurisdictional error that invalidated his decision and rendered it unenforceable.

[26] In response, Mr Currie adopted the submissions he had made in relation to the Fleming action. He submitted that the adjudicator had never applied his mind to whether more than one dispute had been referred to him. The adjudicator's decision contained the following section:

> **8.00** **CONCLUSION ON LEGAL POINTS RAISED**
> I herewith enclose a copy of Opinion of Colin Fraser (McGrigor Donald Solicitors together with copies of his faxes dated 26 February 2001 and 15 March 2001) and I have decided the following:-
> **8.01** That I have jurisdiction in relation to the matters in the Adjudication and Referral Notices."

That disclosed, according to Mr Currie, that the adjudicator had not applied his own mind to the *"several disputes"* issue, but had delegated the taking of that decision to Mr Fraser. Mr Fraser had plainly erred on the point. In paragraph 6.2 of his Opinion he referred to the passage from the judgment of His Honour Judge Thornton in **Fastrack Contractors Ltd** which I have quoted in paragraph [11] above. In paragraph 6.3 he said *"I consider this approach to be sound and equally good law in Scotland. It is consistent with what I perceive to be the intention of the legislation, which seeks to avoid nice debate in relation to what can be referred to adjudication. I commend the approach, in the case cited, to the Adjudicator."*

No attempt was made by Mr Fraser or by the adjudicator to consider whether there was a sufficient connection between the matters referred to enable them to be treated as a single dispute. Mr Currie cited paragraph 53 of the reissue of the Article on "Arbitration" in the Stair Memorial Encyclopaedia where it is said that: *"it is clear that an arbiter is entitled to seek guidance on points of law ... so long as he applies his own mind to the advice which he receives and forms his own opinion when arriving at his award."*

He submitted that the same applied to an adjudicator. He could, as paragraph 13(f) of Part I of the Scheme provides, obtain legal advice, but the decision was for him to take personally. As paragraph 20(1) of Part I of the Scheme provides: *"The adjudicator shall decide the matters in dispute ..."*.

It was impossible to tell, from the adjudicator's decision, to what extent, if any, he had applied his own mind to the matter.

[27] In my opinion, the various matters referred to the adjudicator formed a single dispute as to the sums due by the defenders to the pursuers under the contract. I am therefore of opinion that the adjudicator did not exceed his jurisdiction in determining the whole matters referred to him. He took advice on the "separate disputes" issue, as he was entitled to do in terms of paragraph 13(f) of Part I of the Scheme. Although, for the reasons mentioned in paragraph [15] above I have reservations about the soundness of the view on what constitutes a dispute expressed by His Honour Judge Thornton in **Fastrack Contractors Ltd**, on which Mr Fraser relied in advising the adjudicator, it does not follow, in my view, that in following Mr Fraser's advice the adjudicator in the event fell into error. I do not consider that it can be inferred from the terms of paragraphs 8.00 and 8.01 of the adjudicator's decision that he did not apply his mind to the advice tendered by Mr Fraser. He expresses himself as having made his own decision. I am of the opinion that the adjudicator sought advice as he was entitled to do, obtained advice which was based on and accurately reflected the authority then available, albeit that authority may not be wholly satisfactory, and reached a conclusion which was in the result sound. I am therefore of opinion that the adjudicator did not fall into jurisdictional error on the "separate disputes" issue, and that his decision is therefore not on that account unenforceable.

[28] **The Ross Action - The Rescission Issue** : Mr Borland submitted that on a proper reading of paragraphs 8.00 and 8.01 of his decision, the adjudicator had adopted the views expressed by Mr Fraser as his own. It was clear from paragraph 3.1.1 of Mr Fraser's Opinion that he had properly understood the defenders' contention on the rescission issue. In sections 5.4 and 5.5 of his Opinion, Mr Fraser discussed the question of rescission, and concluded (in paragraphs 5.4.15 and 5.5.9) that the contract had not been rescinded. In section 5.4 the conclusion depended on its being found that that substantial completion was achieved prior to the date of the purported rescission, viz. 14 August 2000 (see paragraph 5.4.9). In the event the adjudicator found the pursuers entitled to an extension of time until 2 August, by which date therefore substantial completion must have taken place. Section 5.5 dealt with the matter on a basis that had not been put forward by the defenders (see paragraph 5.5.2). Mr Fraser's conclusion on that approach was that there was no material breach of contract, and that rescission could not be justified on that basis. In these circumstances the adjudicator was entitled to conclude, in light of Mr Fraser's advice, that he had jurisdiction.

[29] Mr Currie submitted that on the face of paragraphs 8.00 and 8.01 of the adjudicator's decision, he had simply delegated the issue of whether there had been rescission to Mr Fraser, and had not applied his own mind to it. There were clear indications in Mr Fraser's Opinion that he did not intend it to be treated as determinative of the issue. He indicated that there was matters of fact for the adjudicator to decide (see for example paragraphs 5.4.3, 5.4.12 and 5.5.7). There was nothing to indicate that the adjudicator had applied his mind to those matters of fact.

[30] In my opinion, on a fair reading of paragraphs 8.00 and 8.01 of the adjudicator's decision, it is evident that, albeit in light of the advice which he received from Mr Fraser, he himself made the decision as to whether he had jurisdiction *("I have decided ... That I have jurisdiction").* By incorporating Mr Fraser's Opinion in his own decision, the adjudicator gave, in my view, a clear indication of the approach which he had adopted to the rescission issue. Reading the two documents together, it is in my view clear that he held that there had been no rescission. That was a decision of mixed fact and law for him to take. I do not consider that the defenders have demonstrated that that decision was wrong. This ground of attack on the validity and enforceability of the adjudicator's decision therefore, in my view, fails.

[31] **The Ross Action - The Certification Issue :** The defenders' contention under this heading is that payment could only be due under the contract if there had been certification, that the adjudicator failed to address that issue, and that failure resulted in his decision being beyond his jurisdiction. Mr Borland's submission was that the adjudicator had addressed the issue. He pointed to paragraph 4.04 of the adjudicator's decision where the defenders' submission that certification was a pre-condition of payment was recorded. He then pointed to paragraph 9.02 of the decision, where the adjudicator said:
*"I have weighed the evidence put before me and I prefer the evidence of the Referring Party relative to the mechanism for payment for the works in that payment was due to the Referring Party within thirty-seven days of*

*the date of submission to the engineer by the Referring Party of an application for payment for the Works. No withholding Notice in respect of same was issued timeously."*

That, Mr Borland submitted, involved implicit rejection of the argument that payment was conditional on certification.

[32] Mr Currie submitted that it was plain from both parties' submissions, as recorded by the adjudicator, that they were agreed that certification was a part of the procedure leading to entitlement to payment (see paragraphs 4.04 **BARR** and 4.04 **LAW**). Paragraph 9.02, on which Mr Borland relied as the adjudicator's ruling on the certification issue, could not be regarded as constituting such a ruling. That paragraph was concerned, as its heading made plain, with the claim under interim certificate 7. The certification issue did not arise in that context. It only arose in relation to the claim in respect of application No. 9. That was dealt with in paragraph 9.03 of the decision. That paragraph contained no reference to the certification issue. The result was that the adjudicator had failed to answer a question put to him, and had therefore fallen into jurisdictional error.

[33] It seems to me to be clear that the adjudicator was aware that the defenders were contending that there could be no payment without certification. He recorded their submission to that effect in paragraph 4.04 of his decision. I do not consider that paragraph 9.02 can be regarded as a rejection of that argument, because it does not deal with the claim in connection with which the certification issue arose. There is no discussion of the point in the part of the decision which deals with the claim in connection with which the issue did arise, namely paragraph 9.03. It therefore appears that the adjudicator has either contrived to lose sight of the submission after recording it in paragraph 4.04 or has rejected it without expressing any reasons for doing so.

[34] I do not consider that in those circumstances it would be correct to hold that the adjudicator failed to address a question put to him by the parties, and thus fell into jurisdictional error. In my view the question which the parties had put to the adjudicator was what sum was payable by the defenders to the pursuers in respect of application No. 9 (see paragraphs 9.2 and 9.3 of the Referral Notice). The defenders' contentions included the proposition that the answer should be that nothing was payable, because there had been no certification. In my view the adjudicator answered the question put to him, by finding that the defenders were due to pay the pursuers the sum mentioned in paragraph 10.02 of his decision. In answering that question, he may have failed to take account of the contention about certification, or may have rejected it. If he rejected it, he may have been wrong in doing so. It is certainly unsatisfactory that his reasons for his decision do not make it clear that he dealt with the contention, and, if he rejected it, why he did so. I am not persuaded, however, that it would be right to hold that any of those deficiencies had the effect that, in making the award he did in paragraph 10.02 of his decision, the adjudicator exceeded his jurisdiction.

[35] **The Ross Action - Result** : For the reasons which I have given I have come to the conclusion that none of the issues raised by the defenders affords them a sound defence to enforcement of the adjudicator's award. I shall therefore grant summary decree for payment by the defenders to the pursuers of the sum of £844,742.63, with interest thereon at the rate of 8 percent a year from the date of citation until payment.

[36] **Future Procedure :** When I made *avizandum*, I continued the preliminary hearings to a date to be fixed. At those hearings the extent to which any further procedure in these actions is required can be discussed. I shall reserve until then the question of expenses.

Pursuers: Borland; Masons
Defenders: Currie, Q.C.; Drummond Miller, W.S.