OPINION OF Lord Bonomy : Outer House Court of Session **:** 26th June 2001.

[1] In July 2000 the petitioner and the respondents entered into a contract for the petitioner to lay and finish a concrete surface over previously laid refrigeration pipes and insulation for an ice rink at Greenacres Curling Club. The petitioner did the work in August and submitted an invoice for £19,484.17. The respondents refused to pay, contending that the concrete supplied did not comply with the contract specification.

[2] Because the contract is a construction contract within the terms of the Housing Grants, Construction and Regeneration Act 1996, the adjudication provisions of section 108 of that Act apply. The effect of section 108 in the case of this contract is that either party may refer a dispute arising under the contract for adjudication under the Scheme for Construction Contracts (Scotland) Regulations 1998. The Scheme is set out in Part I of the Schedule. The decision of the adjudicator on the dispute is binding, but only until the dispute is finally determined by legal proceedings, by arbitration or by agreement. Adjudication under the 1996 Act is a means whereby disputes arising in the course of the execution of a contract may be speedily resolved in a way which enables the contract works to proceed, subject to the right of parties to ultimately re-visit these disputes in litigation, arbitration or discussion. Before me parties were agreed that if, in determining a dispute, an adjudicator ordered payment, his order would be enforceable until the party opposing payment secured a determination in his favour in court action or arbitration following completion of the contract works. For example, he could obtain an award of damages for breach of contract to set off against the amount that the adjudicator had ordered him to pay. It is thus possible for the same dispute to be determined in different ways in an adjudication and in subsequent litigation.

[3] It is not, however, possible for the same dispute to be the subject of two separate adjudications. Paragraph 9(2) of the Scheme prevents that. It is in these terms: "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."

[4] This petition for suspension and interdict arises out of what the petitioner contends is the respondents' attempt to refer to adjudication a dispute which has already been determined by adjudication under reference made by the petitioner. The petitioner seeks to interdict the adjudicator appointed at the instance of the respondents from continuing with the adjudication proceedings initiated by the respondents and to suspend these proceedings. On 24 April 2001 at a hearing at which the petitioner alone was represented I was persuaded to pronounce decree of interdict and suspension ad interim. The respondents now seek recall of that decree. The adjudicator has not lodged answers and did not appear at the hearing.

[5] The adjudication proceedings at the instance of the petitioner commenced on February 2001. In his notice of adjudication initiating the proceedings and in the subsequent referral notice the petitioner specified the dispute thus:

"Referring Party having supplied and laid concrete floor slabs in terms of the parties' contract are contractually entitled to payment of invoice GA/CR/01 in the sum of £19,484.17."

In their response document the respondents specified the dispute and the redress sought by them as follows:

"The Referring Party have failed to carry out their contractual obligation to supply and lay the concrete floor in terms of the parties' contract and as such the Respondents are not obliged to pay any amount.

It is submitted by the Respondents that the redress sought by the Referring Party should be refused and the adjudicator should find that:

Contrary to item 3.3 of the referral notice, the Respondents' design consultant did specify the correct concrete mix to achieve the specified surface tolerance.

The Referring Party failed to meet the specification.

The Referring Party is not contractually entitled to payment of any sum due to their failure to meet their contractual obligations ..."

Item 3.3 of the referral notice was a statement of the petitioners' belief that the respondents' design consultant had failed to specify the correct concrete mix. On 30 March 2001 the adjudicator decided that the petitioner was entitled to full payment of £19.484.17.

[6] On 13 April 2001 the respondents initiated the adjudication proceedings which are the subject of this petition. Their notice of adjudication identified the dispute as follows:

"(*Powerfloated Concrete Floors) having contracted to supply and install a concrete ice rink slab to the specification provided by (Greenacres) has failed to meet the specification which has resulted in the ice rink slab being defective and not in accordance with the contract. (Powerfloated Concrete Floors) has refused to accept liability for the defective slab. (Powerfloated Concrete Floors) has refused to accept that the slab is not in accordance with the contract. The works took place during August 2000."*

[7] Mr Davidson, for the respondents, strove manfully to identify some difference between the disputes referred to the respective adjudicators. He tried to encapsulate the difference in one sentence as this: the first round of adjudication was held to determine if the money should be paid; the second round was held to identify deficiencies in the work. He founded in particular on a reference by the first adjudicator in his decision to the failure of Greenacres to serve a notice of intention to withhold payment in terms of Section 111(2) of the 1996 Act. Mr MacKenzie, for the petitioner, assured me that that technical point had not been relied upon by the petitioner in the adjudication. He submitted that it was simply part of a complete statement by the adjudicator of the factual history. He accepted that the first adjudicator's process of reasoning in arriving at his decision was very difficult, if not impossible, to follow, but pointed to various factual matters relating to the specification taken into account by him. He thus submitted that the first adjudicator's decision appeared to be a decision on the dispute whether the petitioner's application for an order for payment should be granted or should be refused on the ground that the petitioner had failed to meet the specification.

[8] I agree with the submission of Mr MacKenzie that the effect of the notice of adjudication, the referral notice and the response document was to submit to the first adjudicator the dispute whether the petitioner had fulfilled his contract and was entitled to payment or whether payment should not be ordered because the petitioner had failed to comply with the specification. In my opinion, that dispute appears to be substantially the same as that which the respondents now seek to refer to a second adjudicator. The fact that the respondents seek damages for breach of contract or alternatively rectification of the slab at the expense of the petitioner as their redress does not alter the fact that the dispute is substantially the same, i.e. whether the petitioner executed the contract in accordance with its terms or failed to comply with the specification for the concrete.

[9] That brings paragraph 9(2) of the Scheme into play. Mr Davidson had two submissions to the effect that suspension and interdict were not appropriate remedies to give effect to that paragraph. His first submission was characterised by him as a cross between relevancy and competency and was that there was no wrong identified in the petition which was capable of being interdicted. He relied on English authority, usefully summarised in Workplace Technologies plc v E Squared & Another reported in the Construction Industry Lawletter issued April 2000 at page 1607, which indicated that in England it may be the case that there is no power to grant an injunction to restrain a party from initiating a void reference and pursuing proceedings which themselves are void. The second submission was that ordinary petition procedure was incompetent where the application was made, as this one was, to the supervisory jurisdiction of the Court. Such an application could now be made only by petition for judicial review.

[10] In dealing with the first submission Mr MacKenzie relied on the Stair Memorial Encyclopaedia volume 2, paragraph 434 and the cases referred to therein, in particular Sinclair v Clyne's Trustee (1887) 15 R. 185, as clear authority for intervention by the Court in Scotland where an arbiter proposes to exercise a jurisdiction which he does not possess. On the basis of that authority I accept Mr MacKenzie's submission that it is competent to pronounce interdict in such circumstances. I also accept his submission that there is no reason why the same should not apply in the case of an adjudicator. Certainly none was advanced by Mr Davidson and I can think of none.

[11] Mr Davidson's second submission, on the other hand, was one for which Mr MacKenzie had no answer. While the cases to which Mr MacKenzie referred appear to constitute a line of authority about the interdicting of arbitration proceedings, they are simply examples of the exercise by the Court of its supervisory jurisdiction. Mr MacKenzie rather recognised that that was so when he submitted, in dealing with the balance of convenience, that, if the second adjudication was allowed to proceed and a decision was made in favour of the respondents, the petitioner would then require to seek judicial review of that decision, and that by granting interim interdict the Court would prevent that from happening. If the Court would in these circumstances be exercising its supervisory jurisdiction, then it would also plainly be doing so when asked in the present proceedings to consider interdicting the second adjudication. Since 1985 it has been mandatory to present applications to the supervisory jurisdiction of this Court by petition for judicial review. Rule 58.3.-(1) of the Rules of the Court of Session provides:

"Subject to paragraph (2), an application to the supervisory jurisdiction of the Court, including an application under Section 45(b) of the Act of 1988 (specific performance of statutory duty), shall be made by petition for judicial review."

Paragraph (2) does not arise. Rule 58.3.-(1) comes into play in two respects. What the petitioner seeks to challenge is the vires of the second adjudicator, and that challenge arises out of the failure of the second adjudicator to resign as required by paragraph 9.2 of the Scheme, in other words his failure to implement his statutory duty. While interdict and suspension is the remedy sought, that is simply a means of effecting specific performance of the second adjudicator's statutory duty. These are issues which must nowadays be raised by petition for judicial review. Ordinary petition procedure is no longer competent. It follows that there is no prima facie case for interim decree. I shall accordingly grant the respondents' motion and recall the interim interdict and suspension pronounced on 24 April 2001.

[12] Arguments were presented on the balance of convenience. I do not consider that any useful purpose would be served by endeavouring to determine where the balance lies.

Petitioners: MacKenzie, Solicitor Advocate, Masons
Respondents: Davidson, Drummond Miller, W.S.