Judicial Review of actions and decisions of Graham Harrison, Jackson Rowe Associates :
OPINION OF Lady Paton : Outer House Court of Session : 13th March 2001.

[1] **Sub-contract for rot eradication works** The petitioners were appointed as main contractors to carry out building works at Holycross Church, Glasgow. They entered into a sub-contract with the second respondents, Miller (Preservation) Limited, in respect of rot eradication at the church. The sub-contract documents comprised a quotation dated 2 February 1999 and a counter-offer dated 24 April 1999. Parties were agreed that the sub-contract was a "construction contract" within the meaning of section 104 of the Housing Grants, Construction, and Regeneration Act 1996 (c.53) - "the 1996 Act".

[2] **Dispute between the parties and subsequent referral to adjudication** A dispute arose in relation to the sub-contract work. The second respondents sought to refer the dispute to adjudication in terms of the 1996 Act. Section 108 of that Act provides an expeditious adjudication procedure for disputes arising under construction contracts. In particular, section 108 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..."

Subsections (2) to (4) then set out various requirements which should be satisfied by the contract in relation to the procedure for adjudication, including a requirement in subsection (3) that there should be a provision that "the decision of the adjudicator is binding until the dispute is finally determined." Subsection (5) provides:

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

[3] The Scheme for Construction Contracts can be found in a statutory instrument, Scheme for Construction Contracts (Scotland) Regulations 1998 (S.I.1998/687) - "the statutory Scheme". Paragraph 8(1) of Part I of the statutory Scheme 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."

Paragraph 23(2) provides:
"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."

[4] Taking the view that the sub-contract did not contain appropriate adjudication provisions satisfying s108, the second respondents turned to the statutory Scheme. They applied to the Academy of Construction Adjudicators for the appointment of an adjudicator in terms of para 2(1)(c) & 2(3) of the statutory Scheme.

[5] The petitioners objected to the purported referral, contending that the sub-contract, properly construed, provided its own mechanism for the appointment of an adjudicator. In particular, on the construction of the sub-contract contended for by the petitioners, certain contractual provisions were incorporated by reference, with the result that a restricted number of named professional bodies could select the adjudicator. The Academy was not one of those bodies.

[6] Nevertheless the Academy appointed an adjudicator. The parties put the preliminary issue of jurisdiction or the validity of the adjudicator's appointment before him for his determination. He decided that he did not have jurisdiction. On the second respondents' request, the Academy appointed another adjudicator, namely the first respondent, Graham Harrison, of Jackson Rowe Associates, Paisley.

[7] **2nd respondents' Referral Notice, adjudicator's views about jurisdiction, and petitioners' Response** In a Referral Notice dated 1 August 2000 referring matters to the first respondent as adjudicator, the second respondents advised the adjudicator in paragraphs 4.3 and 4.6.1 that they had taken the view that there were no provisions in the sub-contract satisfying section 108(1)-(4) of the 1996 Act, and accordingly that they were proceeding on the basis of the statutory Scheme. The first respondent then considered the contract documents and the question whether the dispute was properly before him. He recorded his reasoning and conclusions in a file note dated 10 August 2000 as follows:

"Notes to reach my decision on jurisdiction to adjudicate the disputed matter.

1. *The sub-contract was formed when the responding party sent its letter dated [24] April 1999 to the referring party.*
2. *It appears to have been the intention of the responding party to have the sub-contract back to back with its main contract with its client, however the responding party has included within its letter dated 24 April 1999 certain express terms which when read in the context of the main contract either alter/amend or delete the terms and conditions and move away from back to back arrangements.*
3. *Other references specifically the term `by and large' [in] paragraph 4 of letter dated 24 April 1999, seem to indicate that the main contract was not intended to be back to back, the responding party has also varied other clauses concerning dispute resolution and payment (paras 17 & 9).*
4. *To determine my jurisdiction I have examined the provisions of the contract between the parties and find that it was the intention of the parties `In the event of any dispute arising out of this sub-contract agreement the parties will (not may) make reference to arbitration on the basis set out in the main contract.' It therefore follows, in my opinion, that the main contract adjudication provisions have been struck out.*
5. *I therefore have to decide what adjudication provisions can be implied back into the contract between the parties to enable me to decide whether or not I have jurisdiction in my appointment.*
6. *Alternative 1 I imply the adjudication provision of the main contract back into the sub-contract - the adjudication provisions would be Clause 41[A] then there would be a nominating body noted in the appendix. I have no evidence of whom the nominating body is, only if the NSCC were nominating body would the ACA be able to appoint.*
7. *Alternative 2 - Imply the Scheme into the contract and run the adjudication by their rules.*
8. *I conclude that as the responding party drafted the contract I can apply the contra proferentem rule - it was the intention of the drafting party to refer all disputes to arbitration. The referring party has a statutory right, which he has now exercised, to refer the dispute to adjudication and I therefore imply that the rules of the adjudication should be statutory i.e. the Scheme.*
9. *Under the Scheme, specifically paragraph 2(1)(c), the referring party can go to any adjudicator nominating body for an appointment. They have selected the ACA, who have appointed me and I have decided that the rules will be as the scheme not the ACA rules.*
10. *I may now consider the dispute properly referred to me.*
11. *In the alternative I construe that by varying the terms of the main contract it is not clear which clauses were and were not to apply, and it is safer to only allow the letter to be the sub-contract and ignore everything else. The dispute is over payment and the clause as written in the letter is outlawed under the act therefore the scheme must apply - conclusion as which clauses are to be incorporated `by and large' is anybody's guess and anybody's guess is likely to be wrong. It is clear that the responding party intended not to follow the whole of the back to back approach and it is not for me to guess which clauses of the main contract are to be `by and large' incorporated, therefore I decide the terms of the contract are the letter and where adjudication provisions and payment provisions are not provided for then the scheme will apply.*

Down to 10 done by 12.20 p.m. on 10 August 2000.

11 added on 11 August 2000 after a further review of the documentation."

[8] The first respondent then directed the petitioners to respond to the referral. He received the petitioners' Response by facsimile on 14 August 2000, and their appendices on 15 August 2000. The petitioners' Response dated 14 August 2000 stated at the outset:

"[The petitioners] acknowledge receipt of a Notice of Adjudication issued by the Referring Party dated 1 August 2000.

As a preliminary matter it is noted that the Referring Party has applied to the Academy of Construction Adjudicators by Referral Notice of 26 July 2000 for the appointment of an adjudicator to adjudicate on the content of the alleged disputes.

By letter dated 28 July 2000 the respondents wrote to the nominating body, which letter was copied to the Referring Party, to contend that in terms of the contract between the parties hereinafter described, ... the Academy had no jurisdiction as a nominating body to appoint such an adjudicator.

The respondents contend that the Notice of Adjudication and the Referral Notice fail to comply with the express terms of the contract that exist between the parties and as such the adjudicator does not have the necessary authority to adjudicate the alleged dispute.

Accordingly the adjudicator should decline jurisdiction in respect of the reference and the Referral Notice should be withdrawn by the Referring Party. The adjudicator's attention is drawn to the content of Appendix I which contains the results of a previous adjudication on the said same matter by the Referring Party to which the respondent's position was upheld."

[9] The petitioners' Response then gave details relating to the dispute, under various headings including "The Dispute", "Express Terms", "Implied Terms" and "Contentions". Finally, under the heading "Redress", the petitioners stated:

"The [petitioners] seek a decision of the adjudicator that: -

1. *The adjudicator not having been nominated in accordance with the agreed adjudication procedures in the contract does not have jurisdiction nor authority to determine the subject matter of this referral.*

In the event the adjudicator determines that he has jurisdiction to hear this matter, which is denied

2. *that the payment being sought by the Referring Party not being an application in accordance with the contract is not due.*

    1. *(sic) The Referring Party has not set out its entitlement to payment in accordance with the contract between the parties whether by way of legal or quantative (sic) entitlement and accordingly payment is not due*

    2. *Separately, the payment sought if a final payment is not due under the contract and the adjudication is premature."*

[10] **Adjudicator's decision dated 25 August 2000.** The first respondent considered the parties' dispute. In compliance with the strict time-table laid down by s108(2)(c) of the 1996 Act and paragraph 19(1)(a) of the statutory Scheme, he issued a decision dated 25 August 2000, stating *inter alia*:

"1. I am satisfied that The HGCRA 1996 is applicable to this dispute. In the absence of relevant provisions within the contract between the referring party and the other party to deal with this dispute The Scheme for Construction Contract (Scotland) Regulations 1998 will apply insofar as it is relevant.

2. The contract between the parties does not comply with The HGCRA 1996 - s108 adjudication provisions. Accordingly the Scheme for Construction Contracts Part 1 applies to any adjudication under the contract - see s108(5). As adjudicator, properly nominated by an adjudicator nominating body (the Academy of Construction Adjudicators) I have jurisdiction to deal with all the disputes included in the `referral notice' from the referring party, submitted under cover of its letter dated 1 August 2000 ... "

The first respondent then proceeded to deal with the merits of the parties' dispute and ultimately ruled that the petitioners should pay the second defenders £7,917.35 together with value added tax within seven days, that is, by 1 September 2000.

[11] **Sheriff court action and subsequent judicial review in the Court of Session** The petitioners made no payment. The second respondents then raised an action for payment in Greenock Sheriff Court. They were on the point of seeking summary decree when the petitioners raised the current petition for judicial review and reduction of the adjudicator's decision. While the petition also craved interim suspension, parties explained that the remedy of suspension was not required as it had been agreed that all proceedings should await the outcome of the judicial review.

[12] **Petitioners' submissions: adjudicator's appointment and decision** Counsel for the petitioners submitted that the adjudication purportedly carried out was without lawful warrant. The first respondent had been appointed by the Academy, but in terms of the parties' contract the Academy was not authorised to appoint an adjudicator. The petitioners accepted that the contract was a construction

contract to which s108 of the 1996 Act applied. As a result, the contract had to contain provisions complying with s108(1)-(4), enabling either contracting party to refer a dispute arising under the contract to adjudication. Counsel further accepted that adjudication was intended to be a first-stage dispute resolution procedure, introduced by the 1996 Act as a quick and inexpensive means of obtaining an answer to a dispute, without prejudice to a final answer being given at a later stage in either courts of law or an arbitration procedure. Counsel also accepted that, if the contract did not contain Act-compliant provisions, then the adjudication provisions of the statutory Scheme applied as if they were implied terms of the contract.

[13] Counsel submitted that the contract in question did contain Act-compliant adjudication provisions. The provisions were to be found in the standard form of the Scottish Building Contract Contractors Designed Portion without Quantities (April 1998 revision), which had, the petitioners contended, been incorporated by reference into the sub-contract. In terms of those provisions, the authorised appointing bodies were the Royal Incorporation of Architects in Scotland, the Scottish Building Employers Federation, the Royal Institution of Chartered Surveyors in Scotland, and the National Specialist Contractors Council. The Academy was not an authorised appointing body. The first respondent had nevertheless been purportedly appointed by the Academy. The first respondent had then purportedly decided that the contract did not contain adjudication provisions satisfying s108(1)-(4) of the 1996 Act, and that he was driven to the statutory Scheme. He thus concluded that he had been validly appointed. Counsel contended that, on the contrary, the first respondent had not been validly appointed: cf. ***John Mowlem & Co plc* v. *Hydra-Tight Ltd.,*** Queen's Bench Division (Technology and Construction Court), 6 June 2000, Judge Toulmin Q.C. The first respondent's purported adjudication was of no effect, and fell to be reduced.

[14] Counsel for the petitioners understood that the respondents' position was that the first respondent *qua* adjudicator was entitled to determine the content and import of the parties' contract, including the question of his own jurisdiction; and if the first respondent decided that he did indeed have jurisdiction, it was not appropriate for the court to intervene. However counsel for the petitioners submitted that such an approach was wrong. The 1996 Act gave the adjudicator power to determine disputes and differences "arising under the contract": section 108(1). The Act did not refer to a wider category, such as disputes "in relation to" or "in connection with" the contract. A dispute as to what the contract was could not be a dispute "under the contract". It had to be remembered that the adjudicator was not a lawyer. On a proper construction of section 108(1), the first respondent simply did not have power to determine the issue: cf. the analogous case of ***Donaldson's Hospital* v *Esslemont***, 1925 S.C. 199. As the first respondent did not have the power to be adjudicator, he was *ultra vires*, and the supervisory jurisdiction of the Court of Session had to be invoked. With such a fundamental invalidity at issue, any suggestion that the petitioners might have had an alternative remedy (usually in any event a statutory remedy, not a contractual remedy), did not arise: cf. ***Mensah* v *Secretary of State for the Home Department***, 1992 S.L.T. 177 at p.180. The adjudicator's decision should be reduced.

[15] **1st respondent's submissions: adjudicator's appointment and decision** Counsel for the first respondent submitted that the petition should be refused. There was provision in the parties' sub-contract for arbitration. The petitioners accordingly had a contractual remedy available to them if they wished to challenge the adjudication decision. The petitioners ought to have resorted to that contractual remedy before seeking judicial review: cf. ***McIntosh* v *Aberdeenshire Council***, 1999 S.L.T. 93. Counsel also suggested that the current dispute could also have been resolved in the Greenock Sheriff Court proceedings (cf. the circumstances in ***Homer Burgess Ltd.* v *Chirex (Annan) Ltd.***, 2000 S.L.T. 277), although the availability or otherwise of the remedy of reduction in the sheriff court might be a matter which would require to be addressed. Nevertheless counsel's final position was that the present petition for judicial review was not incompetent, and that the merits should be argued. Reference was made to Clyde and Edwards, Judicial Review, paragraph 8.36.

[16] Counsel submitted that the decision of an adjudicator was by its nature an interim decision. The decision was always open to review by the court or the arbiter ultimately determining the merits. The intention of the 1996 Act was a quick, cheap, interim resolution procedure. If the courts were to interfere on a regular

basis, the purpose of the statutory scheme would be undermined. Where an adjudicator answered the right question in the wrong way, the court should not interfere, even where the error was blatant: ***Allied London & Scottish Properties plc* v *Riverbrae Construction Ltd.,*** 2000 S.L.T. 981; ***Karl Construction (Scotland) Ltd* v *Sweeney Civil Engineering (Scotland) Ltd.,*** 21 December 2000 (Lord Caplan).

[17] It was nevertheless accepted that there might be circumstances in which an adjudicator might exceed his jurisdiction. For example, in ***Homer Burgess Ltd.* v *Chirex (Annan) Ltd.***, 2000 S.L.T. 277, one issue was whether matters of dispute arose "under a construction contract"; Lord Macfadyen held that they did not, and granted reduction of the adjudicator's decision. By contrast in the present case the decision of the first respondent was within his jurisdiction. Provided an adjudicator's decision was within his jurisdiction, the courts would not interfere: cf. ***Allied London & Scottish Properties plc* v *Riverbrae Construction Ltd.****, cit. sup.*, ***Bouygues (UK) Ltd.* v *Dahl-Jensen (UK) Ltd.***, 31 July 2000 (Court of Appeal). Even if the adjudicator's decision was wrong - and in *Bouygues (UK) Ltd*., parties agreed that the decision was wrong - if the decision was within the adjudicator's jurisdiction, it was valid and binding until the ultimate arbitration or court procedure: ***Northern Developments (Cumbria) Ltd.* v *J. & J. Nichol*** [2000] B.L.R. 158 at p.162; ***Karl Construction (Scotland) Ltd.* v *Sweeney Civil Engineering (Scotland) Ltd.*** *cit. sup.*

[18] There was a two-stage test: (i) Firstly, it was necessary to ascertain whether the adjudication provisions applied. Thus in ***Homer Burgess Ltd.*** the question was whether a dispute arose under a "construction contract". (ii) Secondly, it was necessary to ascertain whether the issue was one which the adjudicator was asked to decide. There might be circumstances in which an adjudicator was *ultra vires*, as in *Homer Burgess Ltd.* But in the present case, a dispute as to whether or not the terms of the standard form Scottish Building Contract Contractors Designed Portion without Quantities (April 1998 revision) - "the SBCC terms" - had been incorporated into the sub-contract had been placed before the adjudicator. He had made a decision on that dispute, and his decision was binding on the parties. The first respondent's decision had been about a contractual issue, which fell within his jurisdiction. The adjudicator had jurisdiction to determine his own jurisdiction, and having decided that he had jurisdiction, the court should not interfere.

[19] **2nd respondents' submissions: adjudicator's appointment and decision** The solicitor-advocate for the second respondents did not wish to contest the competency or appropriateness of the process of judicial review. He submitted that the source of the adjudicator's powers in the present case was the statute. Only where an adjudicator could be said to have acted outwith his statutory powers, for example by answering a question which had not been referred to him, could he be deemed *ultra vires*. In the present case, the adjudicator had been asked to decide a dispute about the contractual terms - a dispute which incidentally affected the procedure for the appointment of the adjudicator, and thus his jurisdiction. It mattered not whether his decision on the construction of the contract was right or wrong. The only question for the court was whether the adjudicator had acted outwith his powers. Clearly he would have acted outwith his powers if he had decided that the SBCC terms had been incorporated into the sub-contract and that the Academy was therefore not an authorised appointing body, yet had proceeded to ignore that conclusion and had determined the merits of the dispute. In such circumstances, the adjudicator would have acted *ultra vires*. But in the present case, the adjudicator had answered the issue put before him. He had concluded that the relevant SBCC terms had not been incorporated into the sub-contract. He had therefore reverted to the statutory Scheme and had ruled that the Academy was the appropriate appointing body. He had not acted *ultra vires* or without jurisdiction.

[20] The solicitor-advocate submitted that the second respondents' position could be summarised in seven propositions: (1) It was agreed that the petitioner's challenge was directed against the appointment process. (2) The appointment process was dependent upon the contract terms. For a decision to be made about the appointment process, a decision had to be made about the contract terms. (3) A question about the relevant contract terms was put to the adjudicator in this case. (4) The adjudicator had power to decide questions put to him, including questions about the relevant contract terms. The petitioners' suggestion that an adjudicator might not be able to determine what the contractual terms were, and that only where the contractual terms were not in dispute, could the adjudicator step in, was not correct.

Reference was made to English authorities such as ***Northern Developments (Cumbria) Ltd.* v *J.& J. Nichol*** *cit. sup*., and ***Bouygues (UK) Ltd.* v *Dahl-Jensen (UK) Ltd.***, *cit. sup*. (5) The adjudicator's decision on the relevant contract terms determined the question of the appointment process, and that in turn determined the question of jurisdiction. (6) The adjudicator's decision was binding on the parties until arbitration or litigation. (7) The petitioners could not challenge the adjudicator's decision where the adjudicator had the power to make that decision. In the present case, the petitioners had placed the dispute about jurisdiction before the adjudicator in terms of their Response. Reference was made to ***Karl Construction (Scotland) Ltd.* v *Sweeney Civil Engineering (Scotland) Ltd.,*** 21 December 2000 (Lord Caplan); ***Bouygues (UK) Ltd.* v *Dahl-Jensen*** *(UK) Ltd*., 31 July 2000 (Court of Appeal); ***Whiteways Contractors (Sussex) Limited* v *Impresa Castelli Construction UK Limited***, 9 August 2000, Queen's Bench (Technology and Construction Court), His Honour Judge Bowsher Q.C., 2000 16 Construction Law Journal 453, and in particular paragraphs 14, 20, 24 -27. Finally, reference was made to ***Tim Butler Contractors Limited* v *Merewood Homes Limited***, 12 April 2000, Technology and Construction Court; His Honour Judge Gilliland Q.C., especially paragraphs 29-31. The petition should be refused.

[21] **Opinion: adjudicator's appointment and decision** 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. Thus the parties can be ordered to make payments, to refrain from certain actions, or to carry out certain actions, any or all of which may assist the progress of the works pending the ultimate resolution of all disputes by a court or an arbiter. As Dyson J. commented in ***Macob Civil Engineering Ltd.* v *Morrison Construction Ltd***., [1999] B.L.R. 93, at paragraphs 14 & 19:

> *"[14] The intention of Parliament in enacting the 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."*

[22] Buxton L.J. made similar observations in ***Bouyges (UK) Ltd.* v *Dahl-Jensen Ltd***., July 31, 2000 (Court of Appeal), paragraph [2]:

"The purpose of this procedure is to enable a quick and interim, but enforceable, award to be made in advance of the final resolution of what are likely to be complex and expensive disputes."

[23] In ***Karl Construction (Scotland) Ltd.* v *Sweeney Civil Engineering (Scotland) Ltd***., 21 December 2000, Lord Caplan observed in paragraphs [17] and [19]:

> *"[17] ... the broad objective of the 1996 Act and consequential Regulations was to facilitate the interim regulation of construction contracts. Such contracts are notably capable of generating complex and extensive disputes between affected parties and it seems that the statute was particularly concerned with ensuring that parties with claims for interim payments could have the option of a procedure which would enable them to have their claim resolved quickly and practically. This could result in an order for immediate payment of any sum due albeit on a provisional basis. The final rights of the parties can be determined at the conclusion of the contract by litigation, arbitration, or agreement, as may be appropriate. Meantime the mischief of one of the relevant parties obstructing payment by raising debatable questions can be mitigated ... [19] ... The objective is to get a practical provisional decision in proceedings where the parties are likely to have commercial considerations in mind rather than to have a concern for extensive legal analysis. ... in the background is the fact that any resolution of the dispute in the adjudication is only a provisional result to deter stalemate but that errors can eventually be corrected ..."*

[24] Further guidance as to the appropriate approach by the courts can be found in ***Northern Developments (Cumbria) Ltd.* v *J. & J. Nichol,*** [2000] B.L.R. 158 at p.162, where His Honour Judge Bowsher Q.C. quotes

with approval principles formulated by His Honour Judge Thornton Q.C. in an unreported case (***Sherwood & Casson Limited* v *Mackenzie***, 30 November 1999) as follows:

"(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."

[25] In my view, one of the disputes which the parties to a construction contract may have is a dispute about the appointment, jurisdiction, or lawful authority of the adjudicator seeking to resolve the parties' disputes. Depending on the circumstances of the case, such a dispute may, or may not, qualify as a dispute "arising under the [construction] contract" within section 108(1) of the 1996 Act. Unlike ***Homer Burgess Ltd.* v *Chirex (Annan) Ltd.,*** *cit. sup.,* the parties in the present case were agreed that the sub-contract in question was indeed a "construction contract", although they could not agree whether the relevant SBCC terms had been incorporated by reference. Parties were further agreed that the answer to their dispute about the jurisdiction or lawful authority of the adjudicator lay in the proper construction of the terms of the construction contract. In such circumstances, bearing in mind the distinctive nature and purpose of the adjudication procedure introduced by the 1996 Act for use only in relation to construction contracts, with its ultimate safety-net of review of all matters by a court or an arbiter, I conclude that: -

i. Firstly, the adjudicator, although not a lawyer, can and should consider the contract terms, form a view about their meaning and import, and make decisions and rulings accordingly. In certain cases, it may be advisable for the adjudicator to obtain legal advice (cf. section 108(f) of the 1996 Act and paragraph 13(f) of the statutory Scheme), but such advice is not mandatory. I have difficulty accepting the petitioners' submission that a dispute about "what the contract was" could not properly be determined by the adjudicator. Many disputes arising in the course of construction works relate to the meaning and effect of the contractual terms: see, for example, ***Karl Construction (Scotland) Ltd.* v *Sweeney Civil Engineering (Scotland) Ltd.,*** *cit. sup.;* ***Tim Butler Contractors Limited* v *Marewood Homes Limited****, cit. sup*. In my view, in enacting the adjudication provisions in the 1996 Act, Parliament intended that adjudicators such as the first respondent could and should determine the meaning and import of the terms of the construction contract under which the dispute arises, including any contractual terms directed to dispute resolution procedures.

ii. Secondly, authorities such as ***Donaldson's Hospital* v *Esslemont***, *cit. sup.,* ***Watt* v *Lord Advocate*,** 1979 S.C. 120, and ***Anisminic Ltd.* v *Foreign Compensation Commission*** [1969] 2 A.C. 147 (the latter two cited in several adjudication cases, including ***Homer Burgess Ltd.* v *Chirex (Annan) Ltd****. cit. sup*.) relate to decision-making bodies with exclusive jurisdiction. By contrast, a construction contract adjudicator's decision is merely 'provisional' or 'interim' pending final determination by a court or arbiter. For that reason alone, the *dicta* and reasoning in authorities such as ***Donaldson's Hospital, Watt* v *Lord Advocate***, and ***Anisminic Ltd***, may have less force in a case such as the present.

iii. Thirdly, the dispute in the present case, involving as it does the proper construction of the terms of the sub-contract, does not fall within either heads (iii) or (v) of the principles formulated by His Honour Judge Thornton Q.C., and quoted by His Honour Judge Bowsher Q.C. in ***Northern Developments (Cumbria) Ltd.*** **v** ***J. & J. Nichol,*** *cit. sup*.

[26] Accordingly I consider that the adjudicator in the present case had the power to determine the meaning and import of the sub-contract terms, even where such an exercise resulted in his determining a dispute about the validity of his appointment and in effect his jurisdiction. Not only did he have the power and authority to carry out such an exercise, but a question relating to the proper construction of the sub-contract terms, and thus the validity of his appointment, was expressly put to him by the parties. Accordingly he was not answering a question which had not been put. The first respondent having had jurisdiction, and having acted within his jurisdiction, the petition in my view falls to be refused.

[27] There is a further reason, in my view, why the petition should be refused. Any party challenging the legality or authority of an adjudicator may have several options open to him. Options were outlined by His Honour Judge Thornton Q.C. in ***Fastrack Contractors Ltd.*** **v** ***Morrison Construction Ltd****. and anor.*, [2000] B.L.R. 168, at paragraph [31] as follows:

"[31] If a party challenges the entire jurisdiction of the adjudicator, as Morrison does, it has four options. Firstly, it [i.e. the challenging party] can agree to widen the jurisdiction of the adjudicator so as to refer the dispute as to the adjudicator's jurisdiction to the same adjudicator. If the referring party agrees to that course, and the appointed adjudicator accepts the reference to him of this second dispute, the jurisdiction of the adjudicator could then be resolved as part of the reference. The challenging party could, secondly, refer the dispute as to jurisdiction to [a] second adjudicator. This would not put a halt to the first adjudication, if that had already led to an appointment, since the adjudicator has a statutory duty, unless both parties agree otherwise, to decide the reference in a very short timescale. The challenging party could, thirdly, seek a declaration from the court that the proposed adjudication lacked jurisdiction. This option is of little utility unless the adjudicator has yet to be appointed or the parties agree to put the adjudication into abeyance pending the relatively speedy determination of the jurisdiction question by the court. The Technology and Construction Court can, for example, resolve questions of that kind within days of them being referred to it. Fourthly, the challenging party could reserve its position, participate in the adjudication and then challenge any attempt to enforce the adjudicator's decision on jurisdictional grounds. That is the course adopted by Morrison."

[28] In the present case, it was suggested - certainly by the solicitor-advocate for the second respondents - that the petitioners may have anticipated adopting the fourth option outlined in ***Fastrack Contractors Ltd.*** (cf. the approach adopted by the challenging party in ***John Mowlem & Co. plc*** **v** ***Hydra-Tight Ltd****. cit. sup*., an authority cited by the petitioners). Nevertheless the solicitor-advocate suggested that the petitioners had in fact followed the first option in ***Fastrack Contractors Ltd.*** (cf. the approach adopted by the challenging party in ***Whiteways Contractors (Sussex) Limited*** **v** ***Impresa Castelli Construction UK Limited,*** *cit. sup*.). I agree. I consider that the petitioners, by the explicit terms of their Response, chose to place the issue of the proper construction of the terms of the sub-contract, and thus the consequential matter of the correct procedure for the appointment of the adjudicator and the question of the first respondent's jurisdiction and authority, before the first respondent for his decision. In so doing, I consider that the petitioners unreservedly accepted that the dispute over the proper construction of the sub-contract terms insofar as relating to the appointment of the adjudicator was to be treated, together with any other disputes (for example, about payment), as a "dispute arising under the contract" which it was both competent and appropriate for the first respondent to resolve - with all the consequences flowing therefrom, such as the interim binding nature of his decision in terms of paragraph 23(2) of part I of the Scheme. Not only did the petitioners in terms refer the jurisdiction dispute to the first respondent for his decision ("Redress: The [petitioners] seek a decision of the adjudicator that: - 1. The adjudicator not having been nominated in accordance with the agreed adjudication procedures in the contract does not have jurisdiction nor authority to determine the subject matter of this referral") but in their Response they continued:

"In the event the adjudicator determines that he has jurisdiction to hear this matter [italics added] which is denied [the petitioners seek a decision of the adjudicator] 2. that the payment being sought by the referring party not being an application in accordance with the contract is not due; 2. [sic] The referring party has not set out its

entitlement to payment in accordance with the contract between the parties whether by way of legal or quantative [sic] entitlement and accordingly payment is not due; 3. Separately, the payment sought if a final payment is not due under the contract and the adjudication is premature."

The petitioners thus clearly confirmed that, even if the adjudicator's decision on jurisdiction was contrary to their submission and in their view wrong, the adjudicator could and should proceed to determine the merits of the parties' disputes. Standing the petitioners' actions and the terms of their Response, it is not in my view open to them, having received a decision unfavourable to them, to seek at a later stage to resist the adjudicator's order for payment by invoking the supervisory jurisdiction of the Court of Session to challenge the adjudicator's decision on his jurisdiction.

[29] In all the circumstances, it is my view that the first respondent's decision is binding upon the parties in terms of paragraph 23(2) of Part I of the Scheme, until any ultimate litigation or arbitration, and that the petition should be refused.

[30] **Incorporation of relevant SBCC terms into sub-contract** While the above is sufficient for disposal of the petition, it may be appropriate that I express a view about the question of incorporation of the SBCC terms into the sub-contract.

[31] The relevant parts of the sub-contract were as follows:

"[Counter-offer dated 24 April 1999]

3.The intention of the sub-contract is that you will carry out and complete on our behalf those works in your quotation under acceptance forming part of the Main Contract and shall accordingly observe, perform, and comply with all the provisions of the Main Contract in so far as they may relate to the sub-contract works and are not inconsistent with any express provisions of the sub-contract.

4.This acceptance is therefore placed with you subject by and large to the same terms and conditions as the Main Contract and further comprising:- The Scottish Building Contract Contractors Designed Portion without Quantities (April 1998 revision). The contract works are as listed in 1/6 ...

17. In the event of any dispute arising out of this sub-contract agreement the parties will make a reference to arbitration on the basis as set out in the Main Contract."

[32] Counsel for the petitioners submitted that the first respondent's file note dated 10 August 2000 showed that he had found the relationship between the main contract and the sub-contract so unclear that he regarded the contract as void from uncertainty. Accordingly he was driven to the statutory Scheme. The first respondent had also considered the *contra proferentem* rule, and had construed the contract against the petitioners' interests.

[33] Counsel submitted that the first respondent had been searching for a back-to-back relationship between the main contract and the sub-contract - "back-to-back" in the sense that the sub-contract would incorporate all the terms of the main contract. Having looked for a back-to-back relationship, and having failed to find it, the first respondent had been too readily driven to the conclusion that the contract was void for uncertainty. The true position was that the sub-contract was to be performed "within but not necessarily upon the terms and conditions of the main contract": cf. ***Parklea Ltd.* v *W. & J.R. Watson Ltd.***, 1988 S.L.T. 605 at p.608C. The sub-contractor was not to perform in a way which would conflict with the main contract. The phrase "by and large" indicated that the intention was not to incorporate all the terms of the main contract. Standing the well-established authority ***Goodwins Jardine & Co.* v *Charles Brand & Son*** (1905) 7F 995, counsel accepted that wording such as that contained in the sub-contract did not incorporate a dispute resolution procedure provided in the main contract for disputes between the employer and main contractor so as to provide a dispute resolution procedure for disputes between the main contractor and the sub-contractor. As ***Goodwins Jardine & Co.* v *Charles Brand & Son*** *cit. sup.* established, the use of terminology such as "by and large" might bind the sub-contractor into accepting the result or outcome of any such dispute resolution procedure as between employer and main contractor: but the wording was not sufficient to create a dispute resolution procedure as between main contractor and sub-contractor. Nevertheless counsel pointed out that the sub-contract went on to provide "and further comprising Scottish Building Contract Contractors Designed Portion without Quantities (1998)" - a standard form regulating the contractual relations between "the employer" and "the contractor". Clause 8 of the standard form provided:

"8. If any dispute or difference arises under or by reason of breach of this contract either party may refer it to adjudication in accordance with Clause 41A."

Clause 41A of the SBCC standard form (Scottish Supplement) provided *inter alia*:
"41A.2 The adjudicator to decide the dispute or difference shall be either a person agreed by the parties or, on the application of the party who is seeking the appointment of the adjudicator and the referral of the dispute or difference to adjudication the nominator shall be the Chairman, Vice-Chairman, President or Vice-President of either the Royal Incorporation of Architects in Scotland or the Scottish Building Employers Federation or the Royal Institution of Chartered Surveyors in Scotland or the National Specialist Contractors Council and the selection of the nominator shall be made by the said party at a time not earlier than when any dispute or difference arises."

[34] Counsel for the petitioners submitted that the SBCC terms had been validly incorporated into the parties' sub-contract and those terms satisfied the requirements of section 108(1)-(4) so far as adjudication was concerned. Accordingly any adjudicator should be appointed by one of the bodies named in Clause 41A.2. Paragraph 17 of the letter dated 24 April 1999 did not detract from Clause 41A.2, as adjudication was merely a first-stop procedure, and did not preclude the parties from going on to arbitration. Contracting parties were not entitled to contract out of the adjudication procedure: it would make a nonsense of the adjudication scheme if a contractual term such as paragraph 17 could be regarded as vacating adjudication provisions contained elsewhere in the contract.

[35] Counsel for the petitioners further submitted that the arbiter had been wrong to be influenced by the *contra proferentem* principle. That principle was of little assistance when construing standard form construction contracts: ***Tersons Ltd* v *Stevenage Development Corporation*** [1963] 2 Ll.R. 333 at p.368. On any view, the maxim was a last resort.

[36] In response to the petitioners' argument, counsel for the first respondent submitted that the decision reached by the adjudicator when construing the contract was correct on the merits. The reference on page 2 of the sub-contract to the SBCC conditions resulted in just the sort of difficulties envisaged by Lord Jauncey in ***Parklea Ltd.* v *W. & J. R. Watson Ltd.,*** 1988 S.L.T. 605. The standard form was designed for the "employer" and "contractor". A main contractor was responsible for design; the sub-contractor was not. The obligations imposed on the sub-contractor were completely different from those imposed on the main contractor. It made no sense to try to read the standard terms applicable to the main contract into the sub-contract. There were uncompleted blanks in the SBCC standard form - for example, in relation to the contract drawings. In any event, scarcely one clause seemed to fit the sub-contractor's circumstances. It was therefore a failed attempt to incorporate a standard form which was wholly inapplicable to the main contractor/sub-contractor relationship. If the reference to the SBCC standard form achieved anything, it made clear to the sub-contractor that he had to comply with the broad scope of the main contract. The sub-contractor had to comply, for example, with provisions relating to permitted time periods for noisy work; safety regulations; and any time-table for materials being brought on site. As the petitioners' counsel had conceded, ***Goodwins Jardine & Co.* v *Charles Brand & Son*** (1905) 7 F 995 authoritatively determined that arbitration clauses could not be incorporated by a general reference. There was no distinction in this context between arbitration clauses and adjudication provisions: thus if it was not possible to incorporate the SBCC terms in their totality, it was *a fortiori* not possible to try to select clauses such as adjudication provisions and attempt to incorporate them into the sub-contract. The wording of the contract in ***Parklea Ltd.* v. *W. & J.R. Watson Ltd****. cit. sup.* was more supportive of incorporation than the wording in the present case. And in ***Comorex Ltd.* v *Costelloe Tunnelling (London) Ltd.,*** 1995 S.L.T. 1217, where an attempt was made to incorporate the main contract *in toto*, it was held that the general conditions were specifically apt to govern the relationship between the contractor and employer, and they could not properly be adapted to govern the relationship between the contractor and sub-contractor other than by specific words which the court could not supply. As was pointed out at p.1220 of ***Comorex Ltd.***, the court could not manipulate clauses, such as adjudication clauses, and could not select parts of a contract. Counsel agreed that the terms of section 108 were mandatory: the right to adjudication could not be waived or contracted out of. If parties purported to contract out of it, the statutory Scheme applied. The first respondent had been correct in determining

that the SBCC adjudication provisions had not been incorporated. The result was a sub-contract which made provision for arbitration (by Clause 17 of the letter dated 24 April 1999) but no provision for adjudication. It had been correct to revert to the statutory Scheme.

[37] The solicitor-advocate for the second respondents adopted the first respondent's submissions.

[38] **Opinion: incorporation of SBCC terms** I agree with both petitioners and respondents that, on a proper construction of the sub-contract, the second respondents were bound to perform the sub-contract "within but not necessarily upon the terms and conditions of the main contract" in the words of Lord Jauncey in ***Parklea Ltd.* v *W. & J.R. Watson Ltd.***, *cit. sup.*

[39] I also agree with counsel for the petitioners that the arbitration clause - Clause 17 of the letter dated 24 April 1999 - did not have the effect of excluding or rendering ineffective any contractual provisions for adjudication, as the adjudication scheme introduced by the 1996 Act does not replace or supplant arbitration, but simply confers on parties the right to obtain a temporary interim resolution of a dispute pending ultimate determination of all the parties' disputes by a court or by arbitration. As Dyson J. put it in ***Macob Civil Engineering Ltd.* v *Morrison Construction Ltd***. [1999] B.L.R. 93 at paragraph [14]:
" ... Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process."

Thus had Clause 41A been incorporated into the sub-contract, I would have held, contrary to the adjudicator's view, that the contractual adjudication provisions were not excluded or rendered ineffective by Clause 17.

[40] However, in my view, incorporation of the whole of the SBCC terms as set out in the standard form, unedited and unaltered, was not successfully achieved by the reference in the sub-contract, for the reasons advanced by the first respondent and adopted by the second respondents. That being so, standing the well-established authority of ***Goodwins Jardine & Co.* v *Charles Brand & Son***, *cit. sup.*, I cannot accept that, whatever other clauses might or might not have been incorporated into the sub-contract, the adjudication provisions contained in Clause 41A of the SBCC standard form had been incorporated into the sub-contract. As Lord Jauncey commented in ***Parklea Ltd.* v *W.& J.R. Watson Ltd.*** *cit. sup.*, at p.607:
"If it appears from a consideration of [the sub-contract] documents as a whole that the parties have not incorporated the whole of the main contract provisions then it matters not that some of those provisions, if they had been incorporated, would have fitted very neatly with the sub-contract."

See too *dicta* of Temporary Judge T.G. Coutts, Q.C. at p.1220E-H of ***Comorex Ltd.* v *Costelloe Tunnelling (London) Ltd.,*** 1995 S.L.T. 1217.

[41] Accordingly it is my view that the sub-contract did not contain provisions which satisfied section 108(1) to (4) of the 1996 Act. I accept therefore that the second respondents had to revert to the statutory Scheme, and accordingly that the first respondent was validly appointed by the Academy of Construction Adjudicators.

[42] **Conclusion** For the reasons given above, I repel the first plea-in-law for the petitioners, sustain the second plea-in-law for the first respondent and the first plea-in-law for the second respondents, and refuse the petition. I reserve the question of expenses to enable parties to address me on that matter.

Petitioners: Sandison, Dundas & Wilson C.S.
First respondent: Logan, Balfour & Manson
Second respondents: Mackenzie, Solicitor-Advocate, Masons