JUDGMENT : SHERIFDOM OF LOTHIAN & BORDERS AT LINLITHGOW. 26 February 2004

The Sherriff, having resumed consideration of the casue, Sustains the second plea in law for the pursuers; Quod ultra repels parties' please; Repels the defenders' answers and grants decree de plano; Reserves the question of expenses meantime.

NOTE : This is an ordinary action in which the pursuers seek payment of the sum of £55,540.75 with interest and expenses being the balance due under an adjudication in terms of a contractual dispute under a building contract. The case comes before me in debate on both parties' preliminary pleas. Both sides accept that the case will be determined by the outcome of the debate either by the granting of decree de plano or dismissal/absolvitor.

Judgment : The situation set out in the pleadings is approximately as follows:

1. The parties entered into a construction contract and proceeded on the basis of an exchange of letters dated 1st and 2nd August 2002. Inevitably there was a dispute. The pursuers claim that the contract is a contract in writing under Section 107 of the Housing Grants Construction and Regeneration Act 1996 ("the Act") and that, as such, a referral to Adjudication was appropriate. The defenders claim that there was no contract evidenced in writing for the purposes of Section 107 of the Act and that the Adjudicator ought to have concluded that he had no jurisdiction to determine the dispute. The Adjudicator concluded he did have jurisdiction and did determine the dispute. The sum sued for is the balance due under the Adjudication.

2. The defenders' agent accepted that the outcome of this debate would decide the case. If' I were to hold that the contract between the parties is a contract in writing as defined for the purposes of Section 107 of the Act then I should grant decree *de plano* in favour of the pursuers. If on the other hand I decide that the contract is not a contract in writing, then I should grant decree of absolvitor or dismissal in favour of the defenders.

3. The defenders' agent submitted that the relevant Sections of the Act are Sections 107 and 108. He explained that this was a new form of mandatory dispute resolution in the UK, peculiar to construction contracts. In this case there was an Adjudication governed by the legislation in which the Adjudicator decided he did have jurisdiction to make a decision. There is complete agreement between the parties that there is a contract between them which is evidenced by a letter of 1st August 2002 and the response dated 2nd August 2002 (despite the latter wrongly referring to a letter of 2nd August 2002.) Those two documents do contain and import contractual obligations and rights but the issue is whether or not those two letters can be regarded as a construction contract for the purposes of the Act.

4. The defenders' agent indicated that it is commonplace for parties to adopt a standard form of buildings contract and referred me to the JCT Standard Form of Building Contract ("JCT") lodged in his third Inventory of Productions as an illustration of what might be normal. He submitted that both parties to a construction contract wanted certainty and he submitted that there was no such certainty here. He referred me to the pursuers' first Inventory of Productions which contains said two letters of 1st and 2nd August and suggested that they summarised prior verbal discussions. The firm of McLay Leonard referred to are Consulting Engineers appointed by the defenders. The intention was to enter into something more formal than the faxed correspondence of 1st and 2nd August but the speed of the required work meant that nothing more happened contractually. The defenders' agent submitted that if these letters were the extent to which the contractual obligations were reduced to writing then this was not a contract in writing because there is a complete absence of the specification of the works which had obviously been discussed. That in turn meant that this contract was not adjudicateable. The defenders' agent then referred me to the second Inventory for the pursuers and the third Inventory for the defenders both of which contained the referral notice. The defenders' agent explained what was contained in the referral notice in the process by which the Adjudicator is appointed. I was referred specifically to paragraphs 12 and 13 on page 2 of the referral notice and advised that paragraph 13 was regarded as particularly crucial. In paragraph 13 reference is made to verbal discussions and to the 15 page fax which itself was obviously referred to during the verbal discussions. None of this appears in the two documents dated 1st and 2nd August 2002 which the defenders' agent conceded were the

contract documents. The defenders' agent submitted it would have been easy for the pursuers to state the obligations more clearly. They could have referred to the 15 page fax, but they did not. Effectively therefore this was a verbal contract only partially reduced to writing. I was told that it was clear from the Adjudication that parties had a different view of the pursuers' obligations.

5. The defenders' position is, and always has been, that the pursuers had assumed a very very high degree of risk and they did not, in the exchange of correspondence, seek to limit their obligations to a defined work scope. The Adjudicator was required thereafter to interpret the contact and it was submitted that it is not for the process of Adjudication to determine basic contractual obligations where these have never been reduced to writing.

6. The defenders' agent then moved on to the issue of variations. The pursuers were claiming for variations. The work scope had changed, they had been prolonged on site and they had incurred costs thereby. These were stated in the referral notice paragraphs 36 to 39. Paragraphs 41 and 42 set out a number of bullet points some of which are variations. The Adjudication was really about the extent of the additional costs because the letters of 1st and 2nd August are silent on variations. The contract did not visualise the requirement for variations and variations are a necessity in building contracts. That is why the standard forms so usefully spell out such matters and how to cost them. This was a lump sum contract where the cost of carrying out the works was to be £115,000.00. The defenders agent submitted that it would not be unrealistic to say that the variations could be treated as separate contracts. If the pursuers carried out work outwith the original obligations, they should be treated as separate contracts. The defenders' agent submitted that even if he was wrong about that, it was necessary to look at what gave rise to the variations. The defenders' agent referred to paragraph 70 on page 9 of the referral notice and said this was used to characterise variations but is only the receipt of a fax of a sketch from the Structural Engineers. There was no attempt to price the variations and no agreement in regard thereto. The Adjudicator is therefore left guessing as to what to do. The two essential components to construction contracts, which components must be in writing, are firstly what the contractor will do and secondly how much he will get for the work. The pursuers were well aware soon after they entered the contract, that it was badly worded from their end or else they envisaged problems because of the wording. The defenders' agent regarded it as telling that the pursuers soon attempted to correct the situation. The Adjudicator held that it was too late for them to do so because the contract had been formed.

7. I was then referred to the defenders' third Inventory of Productions, item 2 which was the pursuers' letter of 7th August 2002 to the defenders. The second paragraph showed a failure to attempt to define the work scope, a failure to refer to the 15 page fax of 23rd July and that the pursuers were trying to import conditions through the backdoor. Again it was telling that experienced parties had realised the import of contractual certainty. The Adjudicator correctly disregarded this as coming too late. Item 3 from the same Inventory is an undated letter from the pursuers to the defenders which bears to have been faxed on the 15th August and which, it was submitted, was another attempt to formalise an informal arrangement. The heading clearly spelt out that this was a "revised quotation" and the Bill of Quantities gives information which would be normal at the contract stage. If this was part of the contract then it was something which the Adjudicator could adjudicate upon. The next page is headed "Clarification of Offer and Conditions" and is not in a standard form. It deals with matters such as payment, insurance etc and yet the Adjudicator said it was not a contract document.

8. I was then referred to the Adjudicator's decision which was contained in the pursuers' first Inventory of Productions, item 3. Page 6 thereof contained the findings in Fact and Law. The first finding was unclear because it went on about correspondence dated 23rd and 24th July which it did not elevate to the status of contract documents. In the note of reasons of the Adjudicator, paragraph 10 sets out the contract whilst in paragraph 24 on page 7 the Adjudicator allows for implied terms otherwise one party might be unjustly enriched. The defenders' agent submitted that as there was no express variation in the contract, then the variations themselves, unless there is written agreement to them, cannot be adjudicated upon. Section 107 of the Act states the requirements for agreement and nothing shows that there was agreement on the variations of work scope or costs. In paragraph 25 the

Adjudicator takes a view on when a variation is not a variation and how much a referring party should get for it. Again he argued certainty was required and it was not good enough to ask the Adjudicator to take a view on fundamental aspects of the contract.

9. The defenders' agent went on to submit that where there is a challenge to the Adjudicator's jurisdiction, the Adjudicator is entitled to avail himself of independent legal advice. The Adjudicator did so on this occasion and he sought and obtained advice from DLA Solicitors Edinburgh (DLA"). It is standard for parties to be given a copy of any such advice received. That was duly done on this occasion and DLA's letter of 7th May 2003 is included in appendix l. The Adjudicator's own preliminary view was that he did have jurisdiction and this was duly confirmed by the advice received from DLA. The Adjudicator can accept or reject this advice and perhaps a key part of the advice is contained on page 2 of said letter, paragraph 5. Reference was made to the case of ***RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Limited*** 2002 BLR 217 ("**RJT**"). The defenders' agent submitted this was a very important case for the adjudication process. He submitted the legislation has not been well drafted, hence a flurry of reported cases to define what was apparently lacking. **RJT** contains major ramifications for the whole process, and many experts in the construction industry feel that the case has in fact gone too *far.* However the defenders' agent accepted that RJT has subsequently been approved and that there is an indepth analysis of Section 107 provided. The crux of the decision by Lord Justice Ward is on page 221, paragraph 11 wherein it was stated "once jurisdiction to refer the matter to arbitration (both agents agreed that this word ought to have been "adjudication") was established the Judge held, and in my judgement rightly held, that it was proper within that adjudication to decide whether or not a particular term had been incorporated into the contract." The defenders' agent indicated he had a degree of difficulty in reconciling this paragraph with paragraph 12 wherein a demanding timetable was outlined. The defenders' agent submitted that this was the language used by DLA in paragraph 5 of their letter of 7th August. The expression "*jurisdictional threshold*" refers to paragraph 11 of **RJT** and if read with paragraph 12 in relation to providing certainty, then jurisdictional threshold means that only once there is contractual certainty can an Adjudication be applied for to decide a dispute. The defenders' agent accepted that not every minute detail needed to be in writing but that the essentials did. The issue here was whether or not the jurisdictional threshold had been met and he submitted that it had not.

10. The defenders' agent then referred to paragraph 13 of RJT and to paragraph 16 of the same case in which Judge Bowsher QC is quoted in the following terms:- *"Disputes as to the terms, expressed and implied, of oral construction agreements are surprisingly common and are not readily susceptible of resolution by a summary procedure such as Adjudication. It is not surprising that Parliament should have intended that such disputes should not be determined by Adjudicators under the Act."* The defenders' agent submitted that that was what we had here. Paragraph 19 of RJT sets out that what is required is a complete agreement and not a partial one. Lord Justice Auld on page 223 of RJT takes a slightly different tack in paragraph 22 but still states that what is important is that the terms of the agreement material to the issue or issues giving rise to the reference should be clearly recorded in writing, not that every term, however trivial or unrelated to those issues, should be expressly recorded or incorporated by reference.

11. The implications of RJT are that contractual certainty is what is required for the jurisdictional threshold to be reached. In terms of paragraphs 5 and 7 of DLA's said letter, the defenders' agent submitted that both the author of that letter and the Adjudicator were wrong. What was missing from this contract was so fundamental as to be fatal to any reference to adjudication. In their said letter, DLA also refer in paragraph 9 to the case of ***Ballast PLC v The Burrell Company (Construction Management) Limited*** 2002 BLR 279 ("Ballast") The defenders' agent submitted this case had no particular relevance. In contrast the case of ***Debeck Ductwork Installation Limited v T and E Engineering Limited*** ("Debeck") an unreported case from the County Court Technology and Construction Court in Birmingham District Registry takes the principles a step on from RJT. From the opening paragraph of Debeck, Judge Kirkham sets out the position and then in the sixth and seventh paragraphs on page 2 of that case he outlines what is or is not referred to in the fax in that case. Whilst

the fax there may have mentioned money it did not mention work scope which was a similar position to the current case.

12. The defenders agent then referred me to ***Carillion Construction Limited v Davenport Royal Dockyard*** 2003 BLR 79 ("**Carillion**") and in particular to the second paragraph on page 79 where Judge Bowsher QC dismisses the application and states *"Section 107(3) of the Act does not provide for adjudication in relation to an alleged fundamental variation of a construction contract that has been made orally and without writing."* The defenders' agent submitted that even if I did not agree that this was not a construction contract in writing, then I must consider the evidence which exists to support the variations that the pursuers seek payment for. The test is a high one. He submitted that the parties had failed to reach agreement on the varied works. On page 84 of **Carillion**, paragraph 34 the defenders' agent submitted that this was not quite on all fours with the current case but it served as a reminder of the import of the fax of Is' August 2002. It was an attempt to formalise a verbal agreement.

13. If the pursuers say that a 15 page fax predated the contract and the Adjudicator held it defined the work scope then there is a contract in writing. The defenders agent submitted that that does not stand up to logical analysis if the assumption is (and it is) that the contract is only formed by two documents, the letters of 1 st and 2"d August. It is trite to say that anything outwith that is also outwith the contract.

14. In summary the defenders' agent submitted that the construction industry prefers and uses lengthy standard form contracts for certainty. He submitted it was hard to think of a contract more uncertain than this one for the Adjudicator to interpret. There was no doubt at all that the contract did not incorporate all the discussions. As such the original contract was not properly evidenced in writing. There is no other way of interpreting the correspondence in the letters of 1st and 2nd August. They are fundamentally lacking in detail. The pursuers tried but failed to resolve the difficulties. In reality it is not the original contract seeking payment - these are questions of variations which provide even less certainty.

15. The pursuers' agent confirmed parties were agreed that the outcome of the debate would decide the case and he invited me to uphold his second plea in law, to hold that the defences were irrelevant, to repel the answers and to grant decree *de plano.* He indicated that the proper decision related to whether or not the Adjudicator has jurisdiction rather than whether or not he had exceeded the jurisdiction he did have.

16. The pursuers' agent referred to the case of ***The Construction Centre Group Limited v Highland Council*** 2003 SC464. This was an Inner House decision and at page 472 paragraph 14 the Court set out that an Adjudicator's decision was binding and enforceable, providing it was within his jurisdiction.

17. I was then referred to Section 107 of the Act and in particular to Section 107(2)(b) which, it was submitted, covered precisely the situation in this case.

18. The pursuers' agent then referred to RJT which, whilst not authoritative, was highly regarded. He referred specifically to the first paragraph of the commentary on page 218 which stated *"there is little difficulty where the contract is contained in a written document or is created by the exchange of correspondence."* In his view the admission by the defender in this case over the makeup of the contract is critical and, at the same time, fatal to his position. The defenders accept that there is a contract, that it is made up of the two letters of 1st and 2nd August 2002 and he pointed out that that was' what the Adjudicator found, what DLA advised the position to be and what the agents for both the defenders and the pursuers in this case had analysed the position to be.

19. The pursuers' agent then lodged two cases which were not on his original list of authorities these being ***R G Carter Limited v Edmund Nuttall Limited*** **("Carter")** which appeared to be an unreported case from the High Court of Justice Queens Bench Division Technology and Construction Court in London dated 21St June 2000 and ***Ballast Plc v Burrell Co (Construction Management) Limited*** 2002 SC279 ("**Ballast**"). The pursuers' agent submitted that the Carter case was very similar to this case in that parties were agreed that there was a contract but disputed the terms thereof. He conceded that

Carter really addressed Section 108 of the Act rather than Section 107 however the approach of the Court in Carter was endorsed in relation to Section 107 in RJT.

20. The pursuers' agent then addressed me on the question of jurisdictional thresholds and disputed what the defenders' agent had said about certainty. The Court recognised that the threshold can be overcome after which the Adjudicator can determine if a clause can be incorporated. That is inconsistent with the concept of certainty advanced by the defenders. The threshold is defined by the legislation and I was referred again to Section 107(2). If there is agreement in writing established by an exchange of communications in writing then the threshold has been satisfied. Certainty cannot be the over-riding criteria on the way building contracts operate because many such contracts have inconsistent or vague terms which do not mean that there is not a contract in writing.

21. The pursuers agent then turned to the case of **Carillion** at page 84 paragraph 34. Standing the concession on the existence of the contract, and its make-up, he submitted that there is a contract here which the Adjudicator can construe. A second set of questions as to the terms of the contract which may be incorporated or construed cannot deprive the Adjudicator of his jurisdiction. Ballast was also supportive of this proposition. The pursuers agent submitted that **Ballast** was an extraordinary case which had caused much debate in construction circles. The Adjudicator held that any part of the contract which fell out with the JCT standard form of building contract meant he had no jurisdiction to look at it. The Inner House held that the Adjudicator did have to value the claim and, as he had failed to do so, he had not exhausted his jurisdiction. On page 286 paragraph 17 of Ballast the pursuers' agent submitted that the jurisdiction of the Adjudicator is fixed by referral notices, provided the Adjudicator has jurisdiction under a construction contract in writing. If so, then there is a matter for him to construe and rule upon. This analysis was on all fours with the analysis of DLA in their said letter of 7th August.

22. The pursuers' agent then turned to the pursuers' first Inventory of Productions item 3, which is the Adjudicator's decision dated 31 St May 2003 with the Note of Reasons and the two letters from DLA dated 7th and 14 May 2003 respectively. The Adjudicator's decision and the DLA letters are incorporated into the pursuers' pleadings, brevitatis causa, and admitted by the defenders and therefore the pursuers' agent felt I could have regard to them. He referred to paragraphs 7 and 8 and with regard to the latter referred to the excerpt from RGT. Paragraph 9 he submitted was supported by Ballast and paragraph 11 he agreed with entirely. This advice was followed by the Adjudicator because it confirmed his own view. It is a view shared by the pursuers' agent and he submitted that I should adopt this approach to Section 107.

23. Turning now to the question of variations the pursuers' agent submitted it was critical to distinguish between variations to a contract already formed and variations to the work scope of a contract. He did not agree that building contracts are usually in standard form and even when parties do adopt the JCT, it is frequently amended, especially at sub-sub-contract level, as we have here. Inequality of bargaining power means the main contractor often imposes more stringent terms on a sub-contractor. Work is invariably changed and yet there is no question of amending the contract, which remains. He referred me again to the case of **Carillion**, paragraph 34 and asked me to adopt the same distinction that there are variations to the works in this case but not to the contract itself. If I agree that there is a contract in writing, then following all the cases, and especially Ballast, the Adjudicator did have jurisdiction and it was for him to go on to decide if the claims were validly accepted under the contract.

24. The pursuers' agent then referred me to DLA's second letter of 14th May 2003 which he submitted was consistent with the pursuers' analysis today and he commended that approach to me.

25. The pursuers' agent then referred me to the pursuers' second Inventory of Productions item 3 and in particular to the letter dated 11th April 2003 from Allan W Wood. He invited me, following Ballast, to categorise the essence of the claims made here. The Adjudicator required to consider each head of claim and decide if it was validly asserted under the contract. He then had the power and indeed the duty to do so under his jurisdiction. In terms of the pursuers' first Inventory of Productions item 3 he duly made his decision as he was required to do. The pursuers' agent submitted that, even if I felt the

Adjudicator had been wrong, that was not a matter for this Court, unless the Adjudicator's error in law had taken him outwith his jurisdiction.

26. In terms of **Carillion** the Adjudicator in this case had asked the right question which was essentially to give the valuation of the sum due to the current pursuers. If I agreed, then we had a contract in writing and the Adjudicator had jurisdiction under Section 107. The scope of the jurisdiction is fixed by the referral and Adjudication notices. Essentially the question was what the value of the sum due by the defenders to the pursuers was. To answer that the Adjudicator had to consider each claim and decide if it was validly asserted under the contract. He did that. None of that deprived the Adjudicator of his jurisdiction or his decision of its binding and enforceable status. Indeed quite the opposite was the case.

27. The defenders' agent responded briefly by referring to the defenders' second Inventory of Productions items 1 and 2 which he felt were suggestive of a verbal contract reduced to writing but not to a construction contract for the purposes of the Act. He conceded that Ballast on the face of it, was highly persuasive for the pursuers but did not involve an in depth analysis of Section 107. **RJT** and **Debeck** are more involved with interpreting that Section and there was insufficient certainty in this case for the Adjudicator to have held that he had jurisdiction. As far as **Carillion** was concerned the defenders' agent submitted that even where the Adjudicator gets it wrong, that may not necessarily invalidate his decision because he has the right to get it wrong. That however is quite different from the situation where he should not have determined it at all.

28. In my view the submissions of the pursuers agent are well founded. I am satisfied that the letters of 1st and 2nd August 2002 do comprise a contract in writing and, as such, are subject to Section 107 of the Act. In terms of Section 107, the Adjudicator did have jurisdiction and, in terms of that jurisdiction, he did determine this dispute. The position appears to be clearly set out in the various cases to which I was referred and in particular in the case of **Ballast.** From the outset, the pursuers thought the Adjudicator had jurisdiction; the Adjudicator himself agreed with that but sought legal advice to clarify the position; said legal advice from DLA confirmed the Adjudicator's views and I too am convinced. I therefore grant decree *de* plano.

29. Although I invited submissions on the question of expenses, both sides were in agreement that the question of expenses should be reserved meantime.