OPINION OF LORD EASSIE : Outer House, Court of Session : 14th April 2004.

[1] In this action the pursuers seek to enforce a decision by an adjudicator to whom a dispute arising out of a construction contract between the parties was referred in terms of the Scheme for Construction Contracts (Scotland) Regulations 1998 (SI 1998/687) - *"the Scheme"*. The defenders plead that the decision of the adjudicator is *ultra vires* and should be set aside *ope exceptionis*.

[2] All the relevant facts have been agreed in a joint minute. The first head of the joint minute deals with the construction contract, which was concluded by exchange of letters in 2002. (The pursuers are the contractors: the defenders are the employer.) The remaining agreed facts relevant to the issues debated before me are as follows:

(i) The pursuers sent the Referral Notice to the adjudicator under cover of the letter dated 18 September 2003 (No 7/2 of Process);

(ii) The letter dated 18 September 2003 (No 7/2 of Process) and undated Referral Notice was posted to the adjudicator on 18 September 2003;

(iii) The letter dated 18 September 2003 (No 7/2 of Process) was posted by Special Delivery reference SU068103839GB;

(iv) The Royal Mail attempted delivery of the letter dated 18 September 2003 (No 7/2 of Process) on Friday 19 September 2003;

(v) Monday 22 September 2003 was an Edinburgh Trades holiday.

(vi) The Referral Notice was collected by the adjudicator on Tuesday 23 September 2003 from Dalkeith Delivery Office;

(vii) On 21 October 2003 the representative of the defenders wrote to the adjudicator (No 7/4 of Process) challenging his jurisdiction;

(viii) The adjudicator by faxed letter dated 21 October 2003 (No 7/4 of Process) requested the pursuers' consent to postpone his decision until at least Thursday 23 October 2003.

(ix) The pursuers confirmed their consent by faxed letter dated 21 October 2003 (No 7/5 of Process);

(x) On 23 October 2003 the adjudicator wrote to the parties (No 7/6 of Process) requesting *inter alia* payment of his fee;

(xi) On 27 October 2003 the pursuers wrote to the adjudicator (No 7/7 of Process) *inter alia* indicating that they would pay the adjudicator's fees;

(xii) On 27 October 2003 the adjudicator delivered his decision and posted his reasons to the parties (No 7/8 of Process).

By way of clarification of head (x), it may be noted that in requesting payment of his fee the adjudicator informed parties that he had made his decision.

[3] Put very shortly, the ground upon which the defenders say that the decision was *ultra vires* the adjudicator is that the decision was, on their contention, reached after the expiry of the time stipulated in the Scheme for the adjudicator to reach a decision. In briefest summary, the pursuers for their part contend that the decision was not late; but even if it were late, that does not render the decision null.

[4] Section 108(1) of the Housing Grants, Construction and Regeneration Act 1996 provides that 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"*. The construction contract negotiated by the parties to this action did not make provision for adjudication of disputes. Accordingly, by virtue of section 108(5) of the Act, the Scheme applied to the contract between the parties. The particular provisions of the Scheme bearing upon the issues arising in this litigation are respectively paragraphs 7 and 19 which are in these terms:

*"**7**.-(1) Where an adjudicator has been selected ... the referring party shall, not later that seven days from the date of the notice of adjudication, refer the dispute in writing ('the referral notice') to the adjudicator.*

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

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

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

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

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

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

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

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

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

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

[5] The defenders' contention is that at the expiry of 28 days from 18 September 2003, namely on 16 October 2003, the time within which the adjudicator was required to give his decision expired. Since the adjudicator had not previously sought and obtained the pursuers' consent to reaching his decision within 42 days, he was accordingly *functus officio* and the decision subsequently reached by him was outwith the time limits of paragraph 19 and was thus a nullity since his jurisdiction as a adjudicator had expired. The pursuers' first line of response, namely that the decision was not late involves two alternative approaches. Of those two approaches one is concerned with the appropriate starting date for the effluxion of time and the other approach is concerned with the appropriate finishing date.

[6] The issue regarding the starting date arises in this way. The periods of time to which paragraph 19(1) of the Scheme refers are expressed as particular periods *"after the date of the referral notice mentioned in paragraph 7(1)"*. But in the present case the referral notice was undated in the sense that the notice itself did not contain a date. Mr MacKenzie, the solicitor-advocate who appeared for the defenders, submitted that the date of the referral notice should be taken as the date of the covering letter which accompanied its despatch, namely 18 September 2003. The Scheme plainly contemplated that the starting date was date when the referring party - *in casu* the pursuers - took action by sending off the referral notice. If 18 September were the date of the referral notice, a period of 28 days thereafter expired on 16 October 2003, which was five days before the request to the referring party for consent to an extension of time. For his part, counsel for the pursuers, Mr Walker, contended for the starting date of 23 September 2003, being the date upon which the referral notice first came into the adjudicator's possession when he collected it from the Royal Mail's Dalkeith Delivery Office. In support of this contention counsel submitted that the intention of the Scheme was that the adjudicator have 28 days (at least) to carry out his function. It would, he said, be illogical were the commencement of the running of the time afforded to an adjudicator to carry out his task to occur prior to his actually receiving the referral notice and accompanying documentary materials. If the date of receipt - 23 September 2003 - were the starting date, the adjudicator's invitation to the pursuers to give their consent to a later delivery fell within the 28 day period envisaged under head (a) of paragraph 19(1) of the Scheme and the decision would thus, on any view of matters, not be late.

[7] On this branch of the case - the starting date - I consider that the defenders' submissions must be preferred. The use in the Scheme of the term *"date of the referral notice"* implies that the referral notice will have a date expressed upon it and also that the date so expressed will be the date upon which the referring party sends off the referral notice and accompanying documentation to the adjudicator. The use of that term is, in my view, inimical to Mr Walker's submission since the time of actual receipt cannot be known to the referring party when putting the date on the notice. Had the intention of those framing the Scheme been that time flowed only from the date of receipt, that could readily have been expressed. I would add that if a substantial interval elapses between the dispatch of the referral notice and its receipt the adjudicator is not without remedy. He may ask for further time. If that is refused he may resign. Accordingly, in my opinion, the starting date for the running of time for the purposes of paragraph 19(1) of the Scheme is the date of the sending of the referral notice, it being implied that the notice will be accurately dated. In the present cases it is agreed that the referral notice was posted on 18 September 2003.

[8] However, even if the date of the referral notice were 18 September 2003, counsel for the pursuers submitted that the adjudicator's decision was yet not late. That was because 28 days is not the only period stipulated in paragraph 19(1) of the Scheme and accordingly it was not correct to say that the finishing date must be 16 October 2003. Head (b) of the sub-paragraph allows for the reaching of a decision 42 days after the date of the referral notice, *"if the referring party so consents"*. The adjudicator did reach his decision within a period of 42 days from 18 September 2003 and the referring party consented to his doing so. Accordingly, the decision was reached within that period, consonantly with the provisions of paragraph 19(1).

[9] One of the two arguments advanced by Mr MacKenzie in response to this submission for the pursuers was to the effect that the decision was not *"reached"* until copies of it were received by the parties, following payment by the pursuers of the adjudicator's fee, on 27 October 2003; whereas the consent sought and given by the pursuers to the adjudicator for a later decision was for a decision made on or before 23 October 2003. Accordingly, said Mr MacKenzie, the decision was on any view four days late. In support of his proposition that the decision was only *"reached"* on 27 October 2003 when its actual terms were received by the parties, and not on 23 October 2003 when the adjudicator intimated that he had reached his decision, Mr MacKenzie referred to the decision in ***St Andrews Bay Development Limited v HBG Management Limited*** 2003 SLT 740. In that case an adjudicator withheld the issue of her decision until she had received payment of her fee, with the consequence that the terms of the decision which she had reached were not communicated to the parties until after the date set for her to reach her decision. The Lord Ordinary (Wheatley) held that the adjudicator's decision could not be said to be made until its terms were intimated.

[10] The contract with which Lord Wheatley was concerned in the ***St Andrews Bay Development Limited*** case was not one to which the Scheme applied. The contract had its own provisions regarding adjudication. As counsel for the pursuers noted in the course of his submissions, paragraph 19(3) of the Scheme refers to the delivery of a copy of the decision by the adjudicator *"after he has reached a decision"* and thus envisages that intimation may, and will, be at a point in time later than the stage of the reaching of the decision. In my view, it is implied, at least in the case of a construction contract to which the Scheme applies, that the adjudicator's decision will be expressed in writing. Since paragraph 19(3) of the Scheme clearly distinguishes the reaching of a decision and the subsequent delivery of a copy of the decision I do not consider that one can hold, for the purposes of paragraph 19 of the Scheme, that a decision is only reached when copies of it have been successfully communicated to the parties to the dispute. Insofar as the differences in wording between the Scheme and the contract in the ***St Andrews Bay Development*** case may be thought too immaterial to allow that case to be distinguished from the present, I regret that I must be taken as differing from Lord Wheatley. It respectfully appears to me that where the decision is to be composed in writing the processes of composing a written decision and the subsequent communication of a copy of the written decision are distinct and that a requirement timeously to reach a decision may be satisfied even if there is a failure to deliver a copy of the decision within a particular period of time, or as soon thereafter as may be reasonably practicable. In the present case the adjudicator wrote to the parties by post and fax on 23 October 2003 saying that he had that day *"made the Decision on the above dispute"* and that his attached fee note required to be paid in full prior to the decision being published. In my view it is clear that the date upon which the adjudicator reached his decision was 23 October 2003. The written decision was immediately available on payment of the fee. Whether the terms of the Scheme preclude an adjudicator from requiring payment of his fee in exchange for the release of copies of his written decision and require him to trust to the credit of the parties is not a matter which calls for decision in the present case.

[11] The other - and more fundamental - argument advanced by Mr MacKenzie was to the effect that since the pursuers' consent to the decision being reached within the 42 day period had not been given prior to the expiry of the 28 day period, the adjudicator's powers came to an end at the expiry of the 28 day interval. Since the adjudicator's powers thus came to an end on 16 October 2003, he could not thereafter seek or receive consent from the referring party to reach a decision in succeeding 14 days. In other words, if the adjudication process were to be kept alive after the expiry of the 28th day, it was essential that the referring party give consent to the decision being taken within the 42 day period before the end of the 28th day. The defenders' solicitor-advocate did not seek support for this submission from the text of the Scheme. Indeed I understood him to accept that there was no provision in the text of the Scheme which expressly or impliedly dictated that the referring party could not consent to the adjudicator's reaching his decision within 42 days if the initial 28 days had first expired before consent was sought. The argument which he advanced was that the principles of the law of arbitration in Scotland applied to adjudication; and, under the law of arbitration, the rule was that where the time for delivery of the arbitral decision passed without such delivery the submission lapsed and the arbiter's jurisdiction ceased.

[13] As respects the latter proposition - namely, that under the law of arbitration the jurisdiction of the arbiter ceases upon expiry of the time stipulated for delivery of his award - the solicitor-advocate for the defenders referred to passages in the textbooks on arbitration, namely Irons and Melville, p 133; Hunter (2nd ed), pp 122-128; Davidson, pp 239-240. The textbooks also indicated that where an arbiter is given power to prorogate the time for rendering his decision the prorogation must be effected within the time of the original, or enlarged, submission (cf Irons and Melville, p 133 citing Erskine iv.3.29). Additionally, Mr MacKenzie referred to ***Blyth and Blyth's Trustees v Kaye*** 1976 SLT 67, 69 where the First Division observed (respecting a remit for arbitration which provided for an award to be made by the arbiter within 12 months or within such extended time as by agreement of the parties should be allowed in that behalf) that there was considerable force in the argument that *"the power of extension referred to in the remit was a power exercisable only upon a timeous application in respect of 'live' reference and not one which in any event could be invoked when nothing effective had been done within the period of the remit to bring it into operation, far less timeously to complete it and make an award"*.

[14] In the event I did not understand counsel for the pursuers to quarrel Mr MacKenzie's submissions on these rules of the law of arbitration. It is however to be remembered that, as I understood Mr MacKenzie to accept, the rules respecting cessation of an arbiter's jurisdiction by the effluxion of time are not absolute. To use the term employed in Irons and Melville, parties *"may, however, homologate the continued exercise of the arbiter's functions beyond the fixed period to the extent of excluding objection on this ground [expiry of the submission on the lapse of time]"*.

[15] While the rules in arbitration may be thus relatively settled and uncontroversial Mr MacKenzie's first proposition that the principles of the law of arbitration apply - or should apply - to adjudication is more contentious and was in dispute before me.

[16] I was referred to certain passages in recently decided cases which advert to the relationship between arbitration and adjudication pursuant to the 1996 Act. Chronologically these were (i) ***A v B*** 2002 SLT 242l (ii) ***Costain Limited v Strathclyde Builders Limited*** (unreported, 17 December 2003); and (iii) ***Gillies Ramsay Diamond v PJW Enterprises Limited*** (unreported) 24 December 2003). The first two are Outer House decisions by Lord Drummond Young; the last is a decision of the Second Division. The solicitor-advocate for the defenders founded upon the passages in *A v B* in paragraph [8] in which Lord Drummond Young said:-

"First, a distinction must be drawn between two types of court proceedings that may arise out of an adjudication. The first of these is judicial review of the adjudicator's decision. For this purpose, it seems appropriate in Scots law at least to treat an adjudicator as a species of arbiter; consequently the grounds of judicial review will be those that have long been familiar in relation to arbitrations. Essentially, these relate to the jurisdiction of the adjudicator, whether he has acted within the terms of the reference that has been made to him, and to misconduct on the part of the adjudicator. Judicial review is not possible, however, on the ground that the adjudicator has made an error of fact or law provided that his decision cannot be considered irrational. The second type of court proceedings that may arise out of an adjudication is an action to enforce an adjudicator's award. The nature of the latter type of action is described by Lord Macfadyen in ***Construction Centre Group Limited v Highland Council*** *[2002 SLT 1274] in the following terms ... 'It is, in my view, important to appreciate the nature of this action. In it, the pursuers do not ask the court to endorse the correctness of the adjudicator's decision on the merits of the dispute referred to him. Rather the pursuers merely ask the court to recognise that the parties have bound themselves contractually to implement the adjudicator's decision. The pursuers seek decree from the court, not because they are in the right of the dispute, but because they are contractually entitled to require the defenders to implement the adjudicator's provisional determination of the dispute, whether it be right or wrong."*.

Further reference was also made to paragraph [16] in which Lord Drummond Young said, *inter alia*, that in his opinion the decision of an adjudicator was in exactly the same position as a decree arbitral and in which he observed that the functions of an adjudicator were essentially similar to those of an arbiter.

[17] In his later decision in ***Costain v Strathclyde Builders Ltd*** Lord Drummond Young said, at paragraph [7]

"The issue between the parties in the present case turns on the principles according to which judicial control may be exercised over adjudicators in Scots law. For this purpose, I am of opinion that an adjudicator must be regarded as a type of arbiter. An adjudicator is an individual appointed by the parties to a contract to decide one or more disputes arising under that contract. His decision is binding on the parties by virtue of their agreement to that effect. Those are the essential features that characterise an arbiter. I am accordingly of opinion that the well-established rules that govern the judicial control of arbiters apply to

adjudicators. Those rules include application of the principles of natural justice. ... Adjudication possesses a number of special features by comparison with the typical arbitration of modern times. But in my view these do not affect the basic rules that apply to judicial control in general ...".

[18] It is however clear from the Inner House decision in ***Gillies Ramsay Diamond*** that the rules of the law of arbitration are not to be applied in all respects to construction contract adjudications. The case related to the restriction on the power of an arbiter to award damages. In delivering his opinion, the Lord Justice Clerk (with whom the other members of the Court concurred) at paragraph [20] disagreed with an observation in an earlier case that adjudication is a form of arbitration and went on to say -

"Adjudication has certain superficial similarities to arbitration; but in my opinion it is a sui generis system of dispute resolution. Whereas arbitration is a form of conclusive resolution of disputes, an adjudication is a form of provisional resolution only. Adjudication does not oust the jurisdiction of the courts or of an arbiter. Its primary purpose is to regulate a dispute ad interim, pending a definitive resolution of it by litigation, arbitration or agreement. The provisional nature of an adjudication is linked with the short time limits within which the process has to be concluded (Scheme, para 19). On that view, I consider that a Scottish adjudicator is not subject to the common law limitation on the powers of an arbiter.".

[19] Counsel for the pursuers submitted that adjudication was not the same thing as an arbitration and that, as demonstrated by ***Gillies,*** the technical rules of arbitration did not necessarily apply to the adjudication. Counsel mentioned in particular the distinction between the provisional nature of adjudication as an interim arrangement pending ultimate resolution by a court or by arbitration on the one hand and the finality of arbitration on the other hand. Given that provisional nature of adjudication, intended to assist the performance of construction contracts where disputes arise in their course, it would not make sense if that procedure were defeated by a strict, prescriptive approach to time limits. Defeat of adjudication awards on a procedural technicality would not accord with the spirit of the act.

[20] The provisional nature of adjudication, intended simply as an interim resolution of a dispute, was linked by counsel for the pursuers to the further submission that lateness did not in any event entail nullity of the adjudicator's decision. In support of that proposition Mr Walker referred to the other branch of Lord Wheatley's decision in the ***St Andrews Bay Development*** case, namely that failure actually to provide the parties with the terms of an adjudication decision within the time limits was not a fundamental error or impropriety which vitiated the decision. The particular passage relied upon in Lord Wheatley's opinion is to be found within paragraph [21] and is in these terms:-

"While the failure of an adjudicator to produce a decision within the time limits is undoubtedly a serious matter, I cannot think that it is of sufficient significance to render the decision a nullity. The production of a decision two days outwith the time limit provided is not such a fundamental error or impropriety that it should vitiate the entire decision. Such a failure is a technical matter, and it is of significance in the present case that no challenge is offered to the merits of the adjudicator's decision. ..."

Counsel further referred to the judgment of HH Judge Richard Seymour QC, sitting in the Technology and Construction Court within the Queen's Bench Division of the High Court in England and Wales, in ***Simons Construction Limited v Aardvark Developments Limited*** [2003] EWHC 2474 (TCC). Reference was made in particular to paragraphs 26ff of the judgment in which His Honour considered whether a failure by an adjudicator timeously to produce a decision rendered the decision unenforceable. Counsel pointed out that in independently concluding that the failure did not have that consequence Judge Seymour also drew comfort from the result arrived at in the ***St Andrews Bay Development*** case, as respects that issue.

[21] Mr Walker also submitted that the provisional nature of an adjudicator's decision and the thinking behind the legislation meant that the court should in principle enforce adjudicators' awards. He referred to the judgment of Dyson J in ***Macob Civil Engineering Limited v Morrison Construction Limited*** [1999] BLR 93, particularly the passage at p 97 in which Dyson J dealt with an argument to the effect that where there is an adjudicator's decision whose validity is challenged the decision is not binding or enforceable as a contractual obligation until it had been determined or agreed that the decision is valid. The view expressed by Dyson J was that if that argument were correct it substantially undermined the effectiveness of the scheme for adjudication. Reference was also made to ***Watson Building Services Limited v Harrison*** 2002 SLT 846 in which, at paragraph [21]ff the Lord Ordinary (Lady Paton) set out quotations from a number of judgments in which the nature of adjudication as a means of providing a speedy temporary resolution of a dispute pending its final determination is emphasised.

[22] The provisional nature of an adjudicator's decision is, in my view, important to bear in mind in deciding upon the extent to which the principles of the law of arbitration may be transferred to the adjudication process. Adjudication, unlike arbitration, does not deprive the parties - even pending the adjudication process - of access to the courts or to the conclusive determination of an arbitrator. As was clearly expressed by the Second Division in ***Gillies*****,** adjudication is *sui generis*. The rules - particularly the technical rules - of arbitration do not automatically transfer to adjudication. It is of course possible and proper to apply the broad principles and limitations of the supervisory jurisdiction exercised by the Court of Session by way of judicial review to adjudication decisions (being the issues with which Lord Drummond Young was primarily concerned) but in my opinion ultimately one must construe the adjudication scheme itself.

[23] When one turns to the provisions of the Scheme one finds that the Scheme itself envisages the event that an adjudicator may not, for whatever reason, be able to produce his decision within the stipulated time limits. Thus, sub-paragraph (3) of paragraph 19 enables either party to require the adjudication to start anew with a different adjudicator. Accordingly, where the adjudicator has not proceeded expeditiously to produce a decision, either party may effectively dismiss the adjudicator and substitute another. It appears to me that underlying this provision is the intention that, once initiated, the process of adjudication shall be carried through, even if, where there is a dilatory adjudicator, he requires to be replaced. In my view the implication of this must be that the essential proposition of the solicitor-advocate for the defenders to the effect that on expiry of the 28 day period the adjudicator's jurisdiction lapsed and he was therefore *functus officio* is misplaced. If correct, the proposition would entail that in such a situation the parties are obliged to go through the process of re-commencing the adjudication process with a different adjudicator - at additional expense and delay - even though the original adjudicator's decision became available within a day or so thereafter. Particularly in light of the nature and purpose of adjudication it would make little sense that the process of adjudication be re-commenced simply because a decision was late. In other words, I consider that on a proper view of the Scheme, the provisions relating to the times in which the adjudicator should reach his decision are directory, rather than mandatory provisions entailing nullity of any late decision. Delay by an adjudicator in producing his decision within those time limits does not bring the adjudication process to an end but enables it to be continued with a fresh adjudicator, should either party so wish. It does not mean that an adjudicator's decision, even if delivered late, is null and unenforceable for want of jurisdiction.

[24] In reaching that view I derive support from the judgment in ***Simons Construction Ltd.*** The terms of paragraph 19 of the scheme for England and Wales [The Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649] are in similar terms to those of paragraph 19 of the Scheme. Judge Seymour observed, in paragraph 28 of his judgment, as respects paragraph 19 of the scheme for England and Wales that -

"That paragraph envisages that, if an adjudicator fails to reach his decision within whatever is the relevant time period in the particular case, any of the parties to the dispute may serve a fresh referral notice and a new adjudicator could be appointed. It must be implicit in that provision that the first adjudicator ceases to have jurisdiction in the relation to the dispute upon the giving of a fresh referral notice, but also that until the giving of a fresh referral notice the original adjudicator retains jurisdiction to determine the dispute." I respectfully agree.

[25] For all these reasons I consider that the position adopted by the defenders is misplaced and that their defence to this action is irrelevant. There is no dispute as to the amount of the adjudicator's award or the apportionment of his fee, which reflect the sums sued for, and I shall therefore grant the motion by counsel for the pursuers for decree *de plano*.

Pursuers: S. Walker; Lindsays

W.S. Defenders: John S. MacKenzie, Solicitor-Advocate; Masons