Before Lord Justice Clerk, Lord Abernethy, Lord Nimmo Smith. Second Division Inner House Court of Session. 24th March 2005

OPINION OF LORD JUSTICE CLERK :

The reclaiming motion

[1] This is a reclaiming motion from a decision of Lord Eassie dated 14 April 2004. The defender and the pursuer are respectively employer and contractor under a construction contract. The pursuer seeks to enforce a decision of an adjudicator to whom a dispute between the parties was referred in terms of the Scheme for Construction Contracts (Scotland) Regulations 1998 (SI No 687 (the Scheme)). The defender pleads that the decision of the adjudicator is *ultra vires* and should be set aside *ope exceptionis*. The Lord Ordinary held the defences to be irrelevant and granted decree *de plano*.

The relevant provisions of the Scheme

[2] Paragraphs 1, 7 and 19 of the Scheme provide *inter alia* as follows:

"1.-(1) Any party to a construction contract ('the referring party') may give written notice ('the notice of adjudication') of his intention to refer any dispute arising under the contract to adjudication ...

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

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."

The agreed facts

[3] It is now agreed that the date of the referral notice to the adjudicator was 18 September 2003. The 28-days period within which he was to reach his decision therefore expired on 16 October. By reason of a mishap in the post, the referral notice did not come into the adjudicator's hands until 23 September. By letter to the adjudicator dated 21 October the defender's agent asserted that the adjudicator had no power to reach a decision on the dispute after 16 October and that any decision reached after that date would be invalid. On the same day, the adjudicator faxed and posted a letter in which he requested the pursuer to consent to the postponement of his decision until at least 23 October in the light of that assertion. By letter faxed and posted that day the pursuer confirmed its consent to the postponement requested. On 23 October the adjudicator intimated to the parties that he had made his decision. On 27 October he sent them his decision dated that day.

The issue

[4] Several issues were debated before the Lord Ordinary, but the only live issue now is whether the adjudicator's jurisdiction expired on 16 October because he failed to reach his decision by that date; or whether it continued and was validly extended by virtue of the pursuer's subsequent consent to the extension.

The decision of the Lord Ordinary

[5] The Lord Ordinary held that the expiry of 28 days from the date of referral did not bring the adjudicator's jurisdiction to an end. These are his reasons.

"[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) [sic] 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."

Submissions for the parties

[6] The solicitor advocate for the defender renewed the submission that he made to the Lord Ordinary. He argued that an adjudicator can readily avoid losing his jurisdiction by complying with the 28 days time limit. If he realises that he will be unable to reach his decision within the 28 days, he can seek an extension in accordance with paragraph 19. This interpretation of paragraph 19(1)(a) was consistent with a principle in the law of arbitration that if a deed of submission stipulates that the award should be made by a specified date, the arbiter's jurisdiction automatically expires on that date (Irons and Melville, *Arbitration*, p 133; Davidson, *Arbitration*, pp 239-240; Hunter, *Arbitration*, para 8-17) and cannot be revived retrospectively (***Blyth and Blyth's Tr v Kaye***, 1976 SLT 67; Davidson, *op cit*, p 240).

[7] Senior counsel for the pursuer submitted that the court should be slow to apply the common law of arbitration to the interpretation of the statutory scheme (***Gillies Ramsay Diamond v PJW Enterprises***, 2004 SLT 545). As the Lord Ordinary observed (Opinion, para [11]), paragraph 19 did not expressly require that any extension of the 28 days period had to be made within that period. If the jurisdiction automatically expired after 28 days, there would be no need for paragraph 19(2), which provided that if the adjudicator failed to reach his decision within the time limit, any party to the dispute could apply for the appointment of a new adjudicator. The true interpretation was that if the adjudicator failed to make his decision within the time limit, he had at worst committed a procedural error (***Macob Civil Engineering Ltd v Morrison Construction Ltd,*** [1999] BLR 93, at p 98; ***Ballast plc v Burrell Company (Construction Management) Ltd,*** 2003 SC 279). His jurisdiction nonetheless continued indefinitely until one of the parties invoked paragraph 19(2) (***Simons Construction Ltd v Aardvaark Developments Ltd***, [2004] BLR 117, at para [28]). In any event, if the jurisdiction did not continue indefinitely in such a case, the delay in this case - 5 days, including a weekend - was not material (***St Andrew's Bay Development Ltd v HBG Management Ltd***, 2003 SLT 740, at para [21]; ***Barnes and Elliot Ltd v Taylor Woodrow Holdings Ltd,*** [2004] BLR 111, at paras 19, 25-26).

Conclusions

Arbitration principles

[8] For the reasons that I gave in ***Gillies Ramsay Diamond v PJW Enterprises*** (*supra*, at para [20]), I consider that the common law principles of arbitration do not give reliable guidance in the interpretation of the Scheme. In my view, the right approach is to go straight to the Scheme and construe it. That was the Lord Ordinary's view (Opinion, at para [22]).

The competing interpretations

[9] We are asked in this case to consider only two possibilities, namely (a) that the adjudicator's jurisdiction expired at the end of the 28th day and (b) that it continued after that date and remained in existence until one of the parties should serve notice of adjudication under paragraph 19(2). Counsel for the pursuer mentioned the possibility that, if the adjudicator's jurisdiction expired at the end of the 28th day, it could subsequently be revived by the consent of the referring party given under paragraph 19(1)(b); but he did not pursue that point and I express no view on it.

[10] The central submission for the pursuer is that, notwithstanding the time limit, the adjudicator's jurisdiction in a case such as this is brought to an end only if and when one of the parties to the dispute serves a fresh notice of adjudication. For that proposition counsel for the pursuer relied on an

obiter dictum of Dyson J in ***Macob Civil Engineering Limited v Morrison Construction Limited*** (*loc cit*) to the effect that if the adjudicator's decision is wrong, whether because he erred on the facts or the law, or because in reaching it he made a procedural error which invalidates it, it is still a binding and enforceable decision on the issue. I agree with that *dictum* in its context. But in that case the adjudicator's decision was, on the face of it, a valid decision made within the scope of his jurisdiction. In such circumstances, the parties are bound to obtemper the decision (cf ***Gillies Ramsay Diamond v PJW Enterprises Ltd***, *supra*).

[11] This case, however, raises the prior question whether the decision complained of appears, on the face of it, to be within the adjudicator's jurisdiction at all. In my view, it does not. On the face of it, it is a decision reached out of time and after a purported extension consented to out of time.

[12] The question then is whether, despite the expiry of the 28 days time limit, the adjudicator retained his jurisdiction. In my view, the true interpretation of paragraph 19 is that the adjudicator's jurisdiction ceases on the expiry of that time limit if it has not already been extended in accordance with paragraph 19(1).

[13] If this contract had complied with section 108 of the Housing Grants, Construction and Regeneration Act 1996 (the 1996 Act), it would have contained a provision that "required" the adjudicator to reach a decision within 28 days of the referral, subject to certain possibilities of extension (s 108(2)(c),(d)). Paragraph 19, which applies to a non-compliant contract such as this (1996 Act, s 108(5)), provides that the adjudicator "shall reach his decision" not later than 28 days after the date of the referral notice provided for in paragraph 7(1) (para 19(1)(a)), again subject to possibilities of extension (para 19(1)(b),(c)). These provisions suggest to me that the time limit is mandatory.

[14] In my opinion, this interpretation reflects the natural meaning of paragraph 19(1)(a). It is simple and straightforward. It provides a clear time limit that leaves all parties knowing where they stand. It has the sensible result that paragraph 19(2) comes into operation only after the original adjudicator's jurisdiction has expired.

[15] The interpretation proposed on behalf of the pursuer necessitates the reading into paragraph 19(1)(a) of a qualification to the effect that, while the adjudicator "shall reach his decision" within 28 days, he is nonetheless entitled to reach it at any time during an indefinite period thereafter, so long as none of the parties has served a fresh notice of adjudication.

[16] Counsel for the pursuer relied on the reasoning of His Honour Judge Richard Seymour QC on this point in ***Simon Construction Ltd v Aardvark Developments Ltd*** ([2004] BLR 117). The contractual provision in that case required the adjudicator to give his decision by 17 June. He issued it on 25 June. Judge Seymour held *inter alia* that the decision was binding, whenever given, provided only that the adjudication agreement, if any, had not already been terminated for failure to produce a decision within the relevant time-scale and that a fresh notice of referral had not already been given by one of the parties (para 26). He said of paragraph 19 of the Scheme for England and Wales that

"it must be implicit in that provision that the first adjudicator ceases to have jurisdiction in 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" (para 28).

I think that Judge Seymour's references to a notice of referral must have been made *per incuriam*, since the only notice to which paragraph 19 refers is a notice of adjudication. But in any event I fail to see why the principle to which Judge Seymour refers should be implicit in paragraph 19. On the contrary, in my opinion, that principle can be derived from it only on a contrived interpretation. If the intention underlying paragraph 19 had been to create a jurisdiction of the duration contended for on behalf of the pursuer, it could readily have been expressed in plain terms.

[17] Furthermore, I fail to see why, on the pursuer's interpretation, the continuing jurisdiction of the adjudicator should be terminated by the mere fact that one of the parties serves a notice of adjudication under paragraph 19(2). That need not result in the appointment of a new adjudicator, since the party serving it may fail to follow it up by procedure under paragraphs 2 to 7.

[18] Counsel for the pursuer argued that if the adjudicator's jurisdiction automatically expired in a case such as this on the elapse of 28 days, paragraph 19(2) would be otiose. I do not agree. In my view, paragraph 19(2) has sensible content on that hypothesis because it does not merely entitle the referring party to start again. It entitles any of the parties to serve a fresh notice of adjudication. Any other party may thereby take the initiative away from the original referring party.

[19] The Lord Ordinary has suggested that the interpretation for which the defender contends is counter-productive because if the adjudicator lost his jurisdiction on the expiry of 28 days, despite being within a day or so of reaching his decision, the dispute would go back to square one with the sort of delay that the adjudication system seeks to avoid. But the same result can happen on the pursuer's interpretation, because even if the adjudicator's jurisdiction continues beyond the 28th day, it will be terminated if one of the parties serves notice of adjudication on the 29th day, however imminent the decision may be.

[20] I think that it is worth bearing in mind that the situation that has occurred in this case need never have arisen. Adjudications involve parties who are, in general, professionally advised and are familiar with construction law and practice, and with the 1996 Act and the Scheme in particular. Adjudicators are specialists who may be assumed to know and understand the provisions of the Act and the Scheme and who may reasonably be expected to comply with them. An adjudicator should be able to assess the prospects of his reaching a decision within 28 days as soon as he receives the papers in the case. If he is in doubt, he should at once seek the referring party's consent to an extension under paragraph 19(1)(b) or, if need be, seek the consent of all parties to an extension under paragraph 19(1)(c). If any party is concerned that the adjudicator may not meet the deadline, he should raise that question with the adjudicator in good time.

The alternative submission for the pursuer

[21] Counsel for the pursuer submitted that, even if the court were to reject his primary submission, nevertheless the adjudicator's failure to reach his decision within the time limit in this case was not so serious as to make the decision a nullity. It was a technical failure rather than a fundamental error or impropriety. This was the reasoning of Lord Wheatley in ***St Andrew's Bay Development Ltd v HBG Management Ltd*** (2003 SLT 740, at p 744F-G). I do not accept it. It provides no hard and fast criterion by which a court could determine for how long after the time limit a failure to reach a decision can be considered to be merely technical, or in what circumstances the jurisdiction can be said to come to an end.

[22] Counsel for the pursuer also relied on ***Barnes and Elliot Ltd v Taylor Woodrow Holdings Ltd*** ([2004] BLR 111) in which His Honour Judge Humphrey Lloyd QC expressed his agreement with Lord Wheatley's approach. In that case the contractual provision, in the view of the judge, required the adjudicator both to reach his decision and to communicate it in writing to the parties within the time limit (at para 17). The adjudicator signed his decision on day of the time limit, but did not communicate it to the parties on that date. They received it on the following day. Judge Lloyd held that a decision arrived at timeously was in principle valid even though, because of an error by the adjudicator in dispatching his decision, it did not reach the parties within the time limit (at para 26). Counsel for the pursuer suggested that we should take a similar approach to a delay in making a decision to that which Judge Lloyd took to a delay in communicating it. I express no view on Judge Lloyd's conclusion on this point because the case is distinguishable in respect that the decision itself was reached within the time limit. For the purposes of this case, the significant part of that decision, in my view, is Judge Lloyd's comment that section 108 *"only confers authority to make a decision within the 28-day period or such other period as it provides"* (*ibid*). I agree. It appears that if the adjudicator's failure in that case had been, as in this case, a failure to reach a decision within the time limit, Judge Lloyd would have interpreted paragraph 19(1)(a) as I have done.

Disposal

[23] The parties agree on the material facts and they agree that the case turns entirely on their competing interpretations of paragraph 19. Since I am of the view that the defender's interpretation is right, I propose to your Lordships that we should allow the reclaiming motion, recall the interlocutor of the

Lord Ordinary, sustain pleas in law 2 and 3 for the defender, reduce the award *ope exceptionis* and grant decree of *absolvitor*.

OPINION OF LORD ABERNETHY

[24] The issue in this case is within a short compass. It is whether the time limits in paragraph 19(1)(a) of the Scheme for Construction Contracts (Scotland) Regulations 1998 (SI 1998/687) - "the Scheme" - are mandatory or directory.

[25] It was common ground that the terms of the Scheme apply in this case in default of the provisions of section 108(1) to (4) of the principal Act, the Housing Grants, Construction and Regeneration Act 1996, and are to have effect as implied terms in the parties' contract: sections 108(5) and 114(4) of the Act.

[26] I agree with your Lordship in the chair that the common law principles of arbitration do not give reliable guidance in the interpretation of the Scheme and that the right approach is to go straight to the Scheme itself and construe it. In doing that and so determining the issue before us the court in my opinion must consider the particular provision which has not been complied with in light of the general object which Parliament intended to be achieved by enacting the provisions for adjudication. Given that the provisions of the Scheme are to have effect as implied terms of the parties' contract, the intention of Parliament is to be imputed to the parties to the contract: see *Ballast plc* v *The Burrell Company (Construction Management) Limited* 2001 SLT 1039, Lord Reed at page 1047I, affirmed on appeal 2003 SC 279.

[27] In my opinion there is no doubt what the intention of Parliament was in providing for the right to refer disputes to adjudication in terms of section 108 of the 1996 Act. It was identified by Dyson J. in ***Macob* v *Morrison*** 1999 BLR 93, a case to which the Scheme applied, when he said (at page 97):
"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." See also ***Ballast*** per Lord Reed at page 1047J.

[28] It was recognised that the time limits prescribed by the Scheme were tight. Thus Dyson J. said in ***Macob* v *Morrison*** (at page 97):

"The timetable for adjudications is very tight ... Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this."

In ***Ballast*** Lord Reed (at para. 11) also noted that "paragraph 19 imposes a tight timetable".

[29] It is inevitable that from time to time mistakes will occur. Here there were two. The first (by the pursuers) was that the referral notice was undated. It was, however, sent with a covering letter dated 18 September 2003 and posted to the adjudicator on that date. It did not reach him until 23 September. He took it that he had 28 days from that date in which to produce his decision. If that had been correct, the deadline for the decision was 21 October. On that date the representative of the defenders wrote to him challenging his jurisdiction on the ground that his decision should have been reached by 16 October (28 days after 18 September) and he therefore had no power to issue it after that date. From the terms of the letter it appears that this was the first time that such a view had been expressed and it followed upon the rejection by the adjudicator of an earlier challenge to his jurisdiction by the defenders on a different ground.

[30] In the event, the adjudicator's assumption was held to be not correct. It was mistaken. That was the second mistake. The Lord Ordinary held that the starting date for the 28 day period was 18 September and, although initially challenged by the pursuers in their Grounds of Appeal, that is now accepted. The date by which the adjudicator should have reached his decision in terms of paragraph 19(1)(a) was therefore 16 October 2003. For the sake of completeness it should be added that the supposed deadline of 21 October was on that day purported to be extended in terms of paragraph 19(1)(b) of the Scheme to 23 October and, although initially challenged by the defenders in their Grounds of Appeal, it is now accepted that the adjudicator made his decision on that day. From this it would be reasonable to assume that if the adjudicator had thought that the deadline was 16 October, he would have sought an extension by that date.

[31] It is perhaps not surprising that the adjudicator (and one of the parties) made the error as to the date from which the 28 day period was to run. The Scheme provides that he shall reach his decision *"not later than ... 28 days after the date of the referral notice"*. That may seem clear enough. The 1996 Act, however, requires the adjudicator to reach a decision *"within 28 days of referral"* without further specification. And the relevant clause in the JCT Standard Form of Building Contract with Contractors' Design (which in one or other of its versions was the form of contract in ***Simon's Construction Ltd.*** **v** ***Aardvark Developments Ltd.*** 2004 BLR 117 and ***Barnes and Elliot Ltd.*** **v** ***Taylor Woodrow Holdings Ltd. and Anor***. 2004 BLR 111, to which I shall refer shortly) provides that the adjudicator shall "within 28 days of his receipt of the referral" reach his decision. No doubt the adjudicator was also familiar with this form of contract. It is, to say the least, unfortunate that these phrases are not uniformly worded.

[32] We were referred to a number of cases in which the timetables provided by one or more of these provisions had been considered by judges at first instance. In ***St Andrew's Bay Development Ltd.*** **v** ***HBG Management Ltd.*** 2003 SLT 740, a case to which a version of the Standard Scottish Form of Building Contract with Contractors' Design applied, Lord Wheatley said (at page 744G):

"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."

It is to be noted that in this case also no challenge was offered to the merits of the adjudicator's decision.

[33] In ***Simon's Construction Ltd.*** **v** ***Aardvark Developments Ltd.*** His Honour Judge Seymour, QC, held that the decision of the adjudicator, which was eight days late, was nonetheless binding on the parties in the absence of one or more of them having terminated the adjudication agreement and served a fresh notice of referral in terms of paragraph 19(2)(a) before the decision was made.

[34] In ***Barnes & Elliot Ltd.*** **v** ***Taylor Woodrow Holdings Ltd. and Anor.*** His Honour Judge Lloyd, QC, held that a delay of a day or two in communicating the decision to the parties (which it was provided should be done "forthwith" when a decision is reached) because of an error by the adjudicator was excusable because it was "within the tolerance and commercial practice that one must afford to the Act and to the contract". That was sufficient to answer the issue before him but he went on to say that that tolerance did not entitle an adjudicator not to complete the decision within the time allowed. He gave reasons for this distinction, which it is unnecessary to examine, but in the commentary on these two cases the editor of the Building Law Reports raises a doubt as to whether the distinction is justified.

[35] Judge Lloyd also said that any extension of time must be obtained before the initial period ran out. He was speaking in the context of the JCT 98 Standard Form of Contract with Contractors' Design which applied in that case but, as the Lord Ordinary noted in his Opinion in the present case (paragraph 11), the solicitor advocate for the defenders accepted that there was nothing 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 expired before consent was sought. This particular point was not fully argued in the debate before us and so I prefer not to reach a concluded opinion on it but at least it cannot be said that it undermines the intention in the Scheme: it is expressly envisaged in paragraph 19(1)(b) that the period within which the decision is to be reached might be up to 42 days if the referring party consents, and indeed longer than that if both parties agree. Moreover, there are many examples in other fields of law, for example criminal law, where even apparently important statutory time limits may be extended retrospectively.

[36] If the requirement to reach a decision within the 28 day period in terms of paragraph 19(1)(a) is mandatory, it would follow that everything that was done after 16 October is a nullity. That would be so even if the decision was only one day late. The process of adjudication would be brought, uncompleted, to an abrupt halt. The only way to proceed with it would be to start from the beginning again with a new adjudicator. If this were correct it would follow that not only would the Lord

Ordinary in the present case have reached the wrong conclusion but the ***St. Andrew's Bay*** and ***Simon's Construction*** cases and, by parity of reasoning, possibly ***Barnes & Elliott*** were also wrongly decided.

[37] I have already said what in my opinion the intention of Parliament was in enacting the provisions for adjudication. Turning now to paragraph 19 of the Scheme, paragraph 19(1) provides that the adjudicator shall reach his decision within 28 days after the date of the referral notice but, as stated above, it also envisages that this may be extended to 42 days if the referring party consents or even longer if all the parties to the dispute consent. So, while the aim of the legislation clearly is to reach a decision within a short time, it is not rigidly fixed at 28 days: there is a certain latitude available.

[38] Paragraph 19(2) of the Scheme provides that if an adjudicator fails, for any reason, to reach his decision timeously, it is open to any of the parties to a dispute to start adjudication afresh in terms of that sub-paragraph. I agree with the Lord Ordinary (paragraph 23 of his Opinion) that this envisages that an adjudicator may fail for one or more reasons to reach his decision on time. I also agree with him that it envisages that the adjudication process will nevertheless be followed through, albeit with a new adjudicator. But was it the intention of Parliament that this should be the only way that that could be achieved, even if the decision by the first adjudicator is only one day late? As the Lord Ordinary pointed out, given the nature and purpose of adjudication, that makes little sense. I can think of no reason why Parliament would have intended such a result and none was suggested to us. In my opinion it would seriously undermine the aim of providing a speedy provisional resolution to the dispute and would involve the parties in extra expense. No benefit to anyone was suggested - and none occurs to me - which is consistent with the purpose of adjudication.

[39] Moreover, it is in my view plainly implicit that if a fresh notice is served and a new adjudicator is requested to act in terms of paragraph 19(2)(a) the jurisdiction of the first adjudicator comes to an end. Not only that but it is also implicit in my opinion that the original adjudicator retains jurisdiction to determine the dispute until that happens. I therefore respectfully agree (as the Lord Ordinary did at paragraph 24 of his Opinion) with the observations to this effect by Judge Seymour in ***Simon's Construction Ltd.*** in paragraph 28 of his judgment. If, however, the first adjudicator's jurisdiction comes to an end immediately upon his failure to reach a decision in accordance with sub-paragraph (1), then in my opinion, agreeing with the submission of senior counsel for the pursuers, sub-paragraph (2) is superfluous, or at least largely so. I recognise that in the event of such a failure that sub-paragraph entitles any of the parties to serve a fresh notice of adjudication and this could happen on the 29th day, even if the decision is expected imminently, but it is difficult to see what genuine interest a non-referring party would have in doing so and the referring party, of course, would have none.

[40] In the course of the debate there was some discussion as to whether a time must come when the decision is so late that it must amount to a nullity. Senior counsel for the pursuers did not accept that that must be so. For my part I agree with him. The Scheme provides a mechanism in paragraph 19(2) for dealing with a situation where a decision is so delayed that one or other party to the dispute does not want to wait any longer. Operating that mechanism would have the effect, in my opinion, of terminating the previous adjudicator's jurisdiction and thereby rendering any decision he might produce thereafter a nullity. The practicalities of the situation are that it will usually not be in the interests of both parties to countenance serious delay. And if it is, then while it may be untidy, no harm is done by a continuation of the adjudicator's jurisdiction without limit of time. But the usual situation is that at least one of the parties will want a provisional resolution of the dispute, and therefore an enforceable decision of the adjudicator, as soon as may be. So the idea of an unending, or even a lengthy, period awaiting the adjudicator's decision when it is required does not seem to me to cause any real difficulty.

[41] Although we are construing a piece of legislation for general application, it may be instructive to consider what the result of the competing interpretations would be in practice in the circumstances of the present case. According to the averments in the pleadings the pursuers carried out works for the defenders. The works were commenced on 28 June 2002. They were completed some 13 months later,

on 23 July 2003. The pursuers' final account was submitted on the same day in the sum of £297,559.69 plus VAT. Payment was due in full by 20 August 2003. The defenders had paid sums to account amounting to £175,000 plus VAT. They disputed the sum claimed, however, and did not pay any more. So, if the pursuers' claim was a good one they were lying out of a considerable sum of money which they were due while, on the other hand, the defenders were holding on to a considerable sum of money which they should not have been. The adjudication process then commenced in September 2003. In the event, a month or so later the adjudicator decided that the pursuers were entitled to payment from the defenders of £58,003.46 plus VAT.

[42] If the timetabling provisions of paragraph 19(1)(a) are directory, and in the absence of any fresh notice having been served in terms of paragraph 19(2), the decision of the adjudicator would be valid. In terms of paragraph 23(2) of the Scheme it would be binding on the parties and they would be bound to comply with it, until the dispute was finally determined by legal proceedings, arbitration or agreement between the parties. The purpose of the adjudication would thereby have been served and the dispute resolved on a provisional interim basis within some two months of the dispute having crystallised by reason of the non-payment by the defenders of the sum claimed.

[43] If, on the other hand, the timetabling provisions are mandatory, the result would be that because, through a perhaps understandable error on his part, the adjudicator's decision was seven days late it would be a nullity. The dispute, apparently so quickly resolved on a provisional interim basis, would remain unresolved. The purpose of the adjudication would not have been achieved. The time and expense involved in the adjudication process, which is not inconsiderable, would be wasted. The defenders would remain in possession of the sum of £58,000 plus VAT which the adjudicator found due by them. The pursuers would remain outlying of that sum.

[44] The merits of the adjudication have not been disputed. What then is to happen? The defenders would appear to have no interest in starting a fresh adjudication process. They have made no attempt to do so. So it would be for the pursuers to start it. Further time and expense would be incurred. No doubt this time great care would be taken to see to it that the decision was issued timeously and, if any award were made and no other flaws could be detected in the decision, it would be binding on the defenders and they would comply with it. I am unable to see what constructive purpose would be served by all this. On the contrary, it seems to me that it would seriously undermine the effectiveness of the scheme of adjudication.

[45] For these reasons I am in agreement with the Lord Ordinary that the provisions relating to the time in which the adjudicator should reach his decision under paragraph 19(1)(a) of the Scheme are directory rather than mandatory. In reaching that conclusion I have the misfortune to differ from your Lordships. I would have refused the reclaiming motion and adhered to the Lord Ordinary's interlocutor.

OPINION OF LORD NIMMO SMITH

[46] I am in entire agreement with the Opinion of your Lordship in the chair. I would only add that we are agreed that the issue before us depends on the proper construction of paragraph 19 of the Scheme. If a speedy outcome is an objective, it is best achieved by adherence to strict time limits. Likewise, if certainty is an objective, it is not achieved by leaving the parties in doubt as to where they stand after the expiry of the 28-day period. These considerations reinforce the view that paragraph 19 means exactly what it says, so that it is not open to an adjudicator to purport to reach his decision after the expiry of the time limit.

For defender and reclaimer: J S McKenzie, solicitor advocate; Masons
For pursuer and respondent: Smith QC; Lindsays WS