OPINION OF LORD DRUMMOND YOUNG : Outer House Court of Session : 17th December 2003

[1] In about December 2001 the parties entered into a building contract in terms of which the pursuer undertook to construct 45 flats and other works at 1544 Great Western Road, Glasgow, for the defender. The terms of the contract were those contained in the Scottish Building Contract Contractor's Designed Portion Sectional Completion Edition with Quantities (January 2002 revision), as amended by the parties. In the course of the works various architect's certificates were issued certifying sums due to the pursuer. In respect of architect's certificates nos 20 to 25, the defender claimed to deduct liquidated and ascertained damages from the sums certified as due to the pursuer. Various disputes arose between the parties, including a dispute as to the defender's entitlement to make those deductions. As a result, on 6 May 2003 the pursuer issued to the defender a notice of adjudication in terms of the conditions of contract. The parties agreed on the appointment of an adjudicator, and on 14 May 2003 the pursuer issued a referral notice. In that notice the pursuer requested, among other things, that the adjudicator should decide that the defender should repay forthwith the amounts withheld by way of liquidated and ascertained damages.

[2] The adjudicator issued a decision and reasons for that decision on 17 June 2003. In the decision he found that the defender should repay forthwith the full amount withheld as liquidated and ascertained damages in respect of each interim payment made under architect's certificates nos 20 to 25. He further found the pursuer entitled to interest on those sums, and found that his own costs and those of his legal adviser should be payable as to two-thirds by the defender and one-third by the pursuer. In his reasons, the adjudicator stated that the sums in question were to be repaid by the defender to the pursuer within 14 days of the date of his decision. He further indicated that the rate of interest should be 5% over the Bank of England base rate current at the date when the payment by the defender became overdue.

[3] The pursuer has now raised proceedings to recover the sums found due by the adjudicator, which represent the various amounts deducted by the defender in name of liquidated and ascertained damages together with interest and expenses. Clause 41A.8 of the parties' conditions of contract, added by the Scottish Building Contract, provides as follows:

".1 The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or by court proceedings or by an agreement in writing between the parties made after the decision of the Adjudicator has been given.

.2 In the absence of any directions by the Adjudicator to the contrary the parties shall, without prejudice to their other rights under the Contract, comply with the directions of the Adjudicator immediately on delivery of the decision to the parties.... [T]he Employer and the Contractor shall ensure that the decisions of the Adjudicator are given effect.

.3 If either party does not comply with the decision of the Adjudicator the other Party shall be entitled to take further proceedings including court proceedings to secure such compliance pending any final determination of the referred dispute or difference pursuant to clause 41A.8.1".

The pursuer relies on clause 41A.8.3 to enforce the adjudicator's decision by means of court proceedings. When defences were lodged, the defender advanced a number of lines of defence to the pursuer's claim. The pursuer then enrolled a motion for summary decree. When that motion called before me the only defence that was then advanced was that the adjudicator's decision of 17 June 2003 is vitiated by a breach of the principles of natural justice; on that basis it is said that his decision should not be enforced, and should in due course be reduced *ope exceptionis*. Counsel for the defender conceded that otherwise he had no defence to the pursuer's motion for summary decree. In reply, counsel for the pursuer contended that the foregoing defence as advanced in the defender's pleadings was irrelevant. He further contended that the question of law that arose in relation to the relevancy of the defences was capable of a clear and obvious answer in the pursuer's favour; he adopted the test stated by Lord McCluskey in ***Mackays Stores Ltd* v *City Wall (Holdings Ltd***, 1989 SLT 835. Counsel for the defender accepted that that test was appropriate, but contended that he had stated a relevant defence, and that in any event the question of law did not admit of a clear and obvious answer in favour of the pursuer.

[4] The material events were not in dispute between the parties. The adjudicator was required by the timetable in the adjudication to reach his decision by 13 June 2003. By 10 June 2003 he had received all of

the submissions and productions advanced and adduced by the parties in support of their respective cases in the adjudication. On that date the adjudicator wrote to the agents for the parties and asked the pursuer to grant an extension of four days to the time within which he was required to reach his decision. That request was addressed to the pursuer's agents because, under the terms of the parties' contract, it was the referring party that was entitled to grant such an extension. In the letters to the agents the adjudicator explained that he sought the extension because he wished "to discuss one point in particular with [his] appointed legal adviser". The pursuer granted such an extension, and the adjudicator advised the parties of his decision on 17 June 2003. The result of the adjudicator's discussions with his legal adviser was not made known to the defender, or indeed to the pursuer; nor was either party told of the terms of the discussions that had taken place between the adjudicator and his legal adviser. Neither party made any request to be told the terms of the discussions, or to see their result. Neither party was invited by the adjudicator to comment or make submissions upon the advice tendered by the legal adviser, and neither party requested any opportunity to do so.

[5] On the basis of the foregoing facts, the defender contends that the advice given was material to which the adjudicator was minded to attribute, and would probably have attributed, significance in reaching his decision. Consequently, it is said, the adjudicator's failure to disclose the substance of that advice and to invite comments or submissions thereon prior to arriving at his decision was a breach of the principles of natural justice. It is possible that the decision might have been influenced by advice that was erroneous, incomplete, irrelevant or otherwise exceptionable, but which the parties had no opportunity to counter or correct.

[6] In support of his motion for summary decree, counsel for the pursuer argued that no breach of the principles of natural justice had occurred in the present case. He accepted that those principles applied to adjudicators' decisions, but pointed out that the adjudication process was a summary and sometimes a blunt procedure. Consequently the principles of natural justice must apply only so far as the limitations of the procedure permit. If the decision of the adjudicator was arrived at in a manner that was basically fair, it should be enforced; in this connection it was necessary to take account of all of the circumstances of the individual case, and the application of the principles of natural justice would be a question of fact and degree in each individual case. Importantly, if the decision of the adjudicator was the product of a process which the party complaining of a breach of natural justice accepted or did not object to, the adjudicator's decision would be arrived at in a manner that was basically fair. It was, in addition, significant if the adjudicator treated each party equally. In general terms, the adjudication process was far removed from the traditional adversarial process as found in the courts. Reference was made to ***Try Construction Ltd* v *Eton Town House Ltd,*** [2003] BLR 286, *Mitchell* **v** *Cable*, 1848, 10 D 1297, ***Karl Construction (Scotland) Ltd* v *Sweeney Civil Engineering (Scotland) Ltd,*** 2002 SCLR 766, and ***Stanley Cole (Wainfleet) Ltd* v *Sheridan***, *[2003] EWCA Civ 1046*. Counsel further submitted that, in the present case, neither party had been told the terms of the discussions between the adjudicator and his legal adviser, and the defender did not request an opportunity to comment on those discussions. Nor was there anything in the adjudicator's decision or reasons to suggest that he had attributed any significance to the discussions with the legal adviser. The defender did not point to any part of the adjudicator's reasoning that had not been argued by the parties or put by them before the adjudicator. Consequently the adjudicator's decision had been reached in a manner that was basically fair. In any event, counsel for the pursuer submitted that even if there had been a breach of natural justice it was not substantial and relevant. Reference was made to ***Discain Project Services Ltd* v *Opecprime Development Ltd,*** [2001] BLR 285, as authority for the proposition that, if an adjudicator's decision was to be challenged on account of a breach of the principles of natural justice, the breach must be substantial and relevant. Finally, counsel submitted that, even if there had been a breach of natural justice, the defender had acquiesced in that breach. The adjudicator's fax of 10 June 2003 requesting an extension of time had been copied to the defender's representatives, and no objection had been taken or request made to comment or make submissions. In these circumstances the defender was barred by acquiescence from challenging the adjudicator's decision on the basis of a failure of natural justice. In reply, counsel for the defender advanced the arguments summarised in paragraph [5] above. He further argued that, for a breach of the principles of natural justice to be relevant, it was not necessary to demonstrate actual prejudice; the

possibility of prejudice was sufficient. Finally, counsel argued that the requirements of acquiescence did not exist in the present case. Consequently the adjudicator's breach of the principles of natural justice was sufficient to invalidate his decision and render it subject to reduction. On that basis the motion for summary decree should be refused.

Judicial control of adjudicators' decisions

[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. In essence, natural justice means that an arbiter or adjudicator must be impartial and must give each side a fair opportunity to present its case. 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 and the application of the principles of natural justice in particular. I should add that neither party challenged the view that the rules governing arbitration were at least of some relevance to adjudication.

[8] The special features of adjudication are as follows. In the first place, the decision of an adjudicator is provisional in nature and may be undone by subsequent arbitration or court proceedings. Nevertheless, subject to that qualification the decision of an adjudicator is binding and may be enforced by appropriate court proceedings: ***Construction Centre Group Limited*** **v** ***Highland Council***, 2002 SLT 1274; 2003 SLT 623. Indeed, as the foregoing case makes clear, it is of the essence of adjudication that the determination should be capable of speedy enforcement. The fact that the decision is contractually binding, however, tends to support the exercise of judicial control, to prevent the enforcement of any decision that goes beyond the adjudicator's powers or has been pronounced in breach of the principles of natural justice. In the second place, adjudication is conducted according to very short time limits. In this respect it stands in sharp contrast with the typical arbitration of recent years. The existence of such time limits is clearly a factor that must be taken into account when the principles of natural justice are applied to an adjudicator, but it does not render those principles irrelevant or inapplicable. In the third place, under the typical adjudication provisions found in building contracts an adjudicator is given specific powers to take the initiative in deciding the parties' dispute. Thus under the conditions of the Scottish Building Contract that apply to the present case, the adjudicator is entitled to use his own knowledge and experience (condition 41A.6.5.1). He may require the parties to provide additional information on the matters in dispute, and may instruct them to carry out tests or carry out tests himself (condition 41A.6.5.3 and .4). He may obtain such information as he considers necessary from any employee or representative of a party, provided that he gives prior notice to that party (condition 41A.6.5.6). He may obtain from others "such information and advice as he considers necessary on technical and on legal matters subject to giving prior notice to the parties together with a statement or estimate of the cost involved" (condition 41A.6.5.7). While the existence of such powers may be relevant to the precise manner in which the principles of natural justice apply to an adjudicator in any particular case, I do not think that it affects the fundamental basis on which judicial control is exercised. Even in an inquisitorial system, elementary fairness requires that the parties be given an adequate opportunity to present their cases. In any event, I do not think that the system of adjudication can be regarded as inquisitorial. In most adjudications, although the procedures followed are informal, the parties present detailed written submissions to the arbiter on the matter in dispute, and oral hearings are sometimes held. The procedure that is followed in practice is accordingly relatively similar to that followed in an arbitration, although matters are conducted in a more speedy and summary manner.

[9] I should add one final observation on the way that adjudication operates in practice. It is becoming reasonably clear in the practice of the Commercial Court that it is relatively unusual for the parties to a building contract to raise proceedings at the conclusion of the contract covering the same ground as the adjudicator's awards, and I understand that the same is true of arbitration. Generally speaking, therefore,

the decisions of the adjudicator provide in practice the last word on the parties' rights and obligations. This clearly reflects the success of adjudicators in providing fair and rational solutions to construction disputes. It also no doubt reflects the fact that the parties to construction contracts do not want their disputes to be the subject of over-elaborate procedures, which are time-consuming and expensive and divert resources away from the conduct of the parties' businesses. In general terms the law should not load men with burdens hard to bear, and in the particular circumstances of adjudication it is especially important that the control exercised by the courts should not place such requirements on adjudicators that it becomes difficult for them to resolve disputes rapidly by means of informal procedures.

Natural justice: fair opportunity to present a party's case

[10] Nevertheless, I am of opinion that certain minimum standards of conduct are required from adjudicators, and that those standards are found in the well-established principles of natural justice. These are traditionally expressed in the maxims *nemo judex in causa sua*, no one appointed to determine a dispute should have any bias or personal interest in the outcome of that dispute, and *audi alteram partem*, both sides must be given a fair opportunity to present their cases. In the context of adjudication, it is usually the second principle that will be relevant. I mention this because in certain of the English decisions on the applicability of the principles of natural justice to adjudicators there has been a tendency to run the two principles together, and to treat a failure to give one side a fair opportunity to present its case as a form of bias. In some relatively extreme cases, such as ***Discain Project Services Ltd* v *Opecprime Development Ltd*,** [2001] BLR 285, that may be justified. Nevertheless, the existence of bias is not essential to the principle that parties must be given a fair opportunity to present their respective cases, and usually it will only be necessary to consider the latter principle. Both parties were agreed that the principles of natural justice, and in particular the principle *audi alteram partem*, were capable of applying to proceedings before an adjudicator. Where they disagreed was in the details of the principle and its application to the facts of the case. It is accordingly necessary to examine the manner in which the principle has been formulated and applied in previous decisions.

[11] In Scots law, the principle that parties to a dispute must be given a proper opportunity to put forward their cases has been affirmed in a number of important authorities. **In *Inland Revenue* v *Barrs***, 1961 SC (HL) 22, Lord Reid stated (at page 30) *"[T]his at least is clear: no tribunal, however informal, can be entitled to reach a decision against any person without giving to him some proper opportunity to put forward his case".*

That case also gives important guidance as to how the principle applies in a case where the tribunal has itself discovered new material that may have a bearing on the case. At a hearing at which the taxpayer intimated an intention to claim loss certificates and produced certain computations in support, the General Commissioners deferred consideration of the application; subsequently, however, they issued a directive to the taxpayer and the Inspector of Taxes instructing them how the losses were to be computed, and then without further procedure issued loss certificates for amounts greater than those shown in the taxpayer's computations. That procedure was held objectionable on two grounds. First, the Inspector had asked for an opportunity to comment on the taxpayer's computations but none was given. Secondly, in Lord Reid's words (at page 30), *"if the Commissioners had found new matter which they thought would justify... increasing the amount of loss to be determined, justice required that some notice of it should be given to the Crown with an opportunity to state objections".*

[12] Similar principles were applied by the First Division in ***Barrs* v *British Wool Marketing Board*,** 1957 SC 72, a case involving a statutory tribunal that determined the valuation of wool. In that case, Lord President Clyde stated (at page 82):

"Although quasi-judicial bodies such as this tribunal are not Courts of law in the full sense, it has always been the law of Scotland that they must conform to certain standards of fair play, and their failure to do so entitles a Court of law to reduce their decisions. Were it not so, such tribunals would soon fall into public disrepute, and confidence in them would evaporate. Fair and equal opportunity afforded to all interests before the tribunal is the fundamental basis upon which the tribunal must operate, and, in the absence of such fair play to all, it is right and proper that a Court of law should reduce the tribunal's decision....

It is important to observe the width of this principle. It is not a question of whether the tribunal has arrived at a fair result; for in most cases that would involve an examination into the merits of the case, upon which the tribunal is

final. The question is whether the tribunal has dealt fairly and equally with the parties before it in arriving at that result. The test is not 'Has an unjust result been reached?' But 'Was there an opportunity afforded for injustice to be done?' If there was such an opportunity, the decision cannot stand".

Lord Sorn stated (at pages 87-88): *"Perhaps there may be cases in which a tribunal like this, whose proceedings are informal, has followed a procedure contrary to the principles of justice and yet in which it would be possible to hold that this did not matter, because no actual injustice had resulted. At any rate, I do not feel it necessary to commit myself to the view that this could never be so. There might be transgressions of such a nature that a Court would not hold them to be material. For present purposes I think it enough to say that, in the ordinary case, the effect of a transgression is to render the proceedings null. It is important that the principles of justice should be observed and it is desirable that the rule that they must be observed should have behind it, and should be known to have behind it, the sanction of nullity. I think we should be slow to encourage the idea that these principles could be safely disregarded so long as it could be proved that no positive injustice had resulted. Nor is that a thing which could always be proved with a sufficiently convincing degree of certainty".*

In that case the members of the tribunal examined the wool in the presence of two appraisers employed by the British Wool Marketing Board, the Board's regional officer and a representative of the producer. The tribunal then retired to consider their decision. When they did so they were accompanied by the two appraisers and the Board's regional officer, but they excluded the producer's representative. The appraisers and regional officer did not take part in their deliberations. The First Division nevertheless reduced the tribunal's decision, on the basis that there was a possibility of injustice.

[13] Perhaps more directly in point to adjudication is the earlier case of ***Black* v *John Williams & Co (Wishaw),*** 1923 SC 510; 1924 SC (HL) 22. That case involved an arbitration in respect of a roughcasting contract, carried out by a master plasterer. Lord President Clyde described the proceedings as *"of the simplest and most informal character"* (at 1923 SC 513). The relevance to adjudication is very obvious. The arbiter had examined two witnesses outwith the presence of one of the parties and another witness outwith the presence of either party. The contractor sought to reduce the award. This was refused, on the basis that the relevant part of the arbiter's decision had gone in the contractor's favour. Lord President Clyde, however, made the following remarks about the duties of an arbiter in such circumstances (at 1923 SC 513-514):

"When two parties agree to submit their differences to the adjudication of a third, and when that third party consents to give his services for the determination of those differences, the result is to set up a conventional tribunal which stands in a very peculiar, and in some respects a very difficult, position. On the one hand, an arbiter carries on his shoulders all the obligations of justice which rest upon a regularly constituted Court of law. On the other hand, he is dispensed -- in his own discretion -- from the observance of those well-tried forms of procedure which, in the case of an ordinary Court, provide the instruments by which the judicial function is performed and the means whereby the circumstances of a dispute are adequately and fairly ascertained, and which also afford to the parties invaluable safeguards and guarantees for the full and fair presentation of their contentions. When an arbitration is informally conducted, the arbiter is deprived of these aids to a just and even-handed inquiry into the disputes submitted to him; yet he is all the time under the strictest obligation to see that the proceedings, however informal, are so conducted that the substantial conditions of... 'fair justice between man and man' are never infringed. It follows that, with regard to the duties of an arbiter in the conduct of a submission, including a matter so important as that of hearing witnesses, it is impossible to lay down absolute or universal general rules, breach of which by an arbiter will necessarily make his award invalid. The question must be one of circumstances; and the test to be applied is whether the proceedings were truly and essentially consistent with 'fair justice between man and man,' or whether, on the other hand, they were such as to permit of any possibility of injustice. I say 'possibility,' because the test, owing to its very generality, must be rigorously applied".

That decision was upheld in the House of Lords. The informality of procedure that is permissible in such an arbitration is emphasised in the speeches there. Both Lord Dunedin and Lord Shaw of Dunfermline pointed out that it was probably unnecessary for the arbiter to hear any evidence at all; he could decide the case on the basis of his own practical knowledge (1924 SC (HL) 27 and 28). Nevertheless, it was clearly accepted that the basic principles of natural justice were still applicable.

[14] Counsel for the present pursuer placed considerable emphasis in his argument on the fact that the parties had been treated equally by the adjudicator; neither was given an opportunity to comment on the advice tendered by his legal adviser. Equality of treatment is clearly material to the first principle of natural justice, that the decision-maker should have no bias or interest in the outcome of proceedings. It is not necessarily relevant to the second principle, however. That principle is that that each party should be given a fair opportunity to present its own case, and it is no answer to say that neither side has been allowed to present its case. Indeed, part of the rationale for this principle is that the adjudicator's understanding of the facts or the law or both may be either incorrect or incomplete, and hearing arguments from the parties allows him to evaluate his reasoning critically and correct any errors that may appear. If no opportunity is given for such arguments, however, the opportunity for critical evaluation is seriously reduced, and any error may stand uncorrected. The adjudicator's ability to carry out such an exercise of critical evaluation is reduced whether only one party or both are prevented from stating their cases fully. If only one is prevented, that is itself unfair, but the converse does not hold; if both are prevented, the result may still be in breach of the principles of natural justice. This is clearly implicit in a number of the decisions on natural justice, including *Inland Revenue* **v** *Barrs, supra*, and *Fountain Forestry Holdings Limited* **v** *Sparkes*, 1989 SLT 853; in both of those cases the tribunal produced material of its own and did not call for comments from either party, but there was still held to be a breach of the principles of natural justice.

Decisions on natural justice and adjudication

[15] The application of the principles of natural justice to the process of adjudication has been considered in a number of recent English decisions at first instance in the Technology and Construction Court; the ability of parties to present their cases was in issue in ***Balfour Beatty Construction Ltd* v *London Borough of Lambeth***, [2002] BLR 288**, *Try Construction Ltd* v *Eton Town House Group Ltd*,** [2003] BLR 286, and ***RSL (South West) Ltd* v *Stansell Ltd***, *[2003] EWHC 1390 (TCC)*. In all of these cases it was accepted that the principles of natural justice were applicable to adjudication proceedings. It was further accepted that if an adjudicator obtains material from sources other than the parties, including his own knowledge and experience, he must give the parties a reasonable opportunity to comment on that material. **In *Balfour Beatty Construction Ltd* v *London Borough of Lambeth***, Judge Humphrey Lloyd QC set out his approach as follows (at [2002] BLR 301-303):

"An adjudicator is not of course limited to the material presented by the parties. He may obtain further information and may apply his own knowledge and experience. Above all, he has to take the initiative in ascertaining the facts and the law. He has an absolute discretion to do what he considers necessary.

Is the adjudicator obliged to inform the parties of the information that he obtains from his own knowledge and experience or from other sources and the conclusions which he might reach taking their sources into account? In my judgment it is now clear that, in principle, the answer may be: Yes. Whether the answer is in the affirmative will depend on the circumstances....

It is now clear that the construction industry regards adjudication not simply as a staging approach towards the final resolution of the dispute in arbitration or litigation, but as having itself considerable weight and impact that in practice goes beyond the legal requirement that the decision has for the time being to be observed. Lack of impartiality or unfairness in adjudication must be considered in that light. It has become all the more necessary that, within the rough nature of the procedure, decisions are still made in a basically fair matter so that the system itself continues to enjoy the confidence it has now apparently earned. The provisional nature of the decision also justifies ignoring non material breaches. Such areas, if apparent (as they usually are) will be rectified in a negotiation and settlement based on the decision... However, the time limits, the nature of the process and the ultimately non-binding nature of the decision all mean that the standard required in practice is not that which is expected of an arbitrator. Adjudication is closer to arbitration than an expert determination, but it is not the same....

An adjudicator is of course entitled to use the powers available to him but he may not of his own volition use them to make good fundamental deficiencies in the material presented by one party without first giving the other party a proper opportunity of dealing both with that intention and the results. The principles of natural justice applied to an adjudication may not require a party to be aware of 'the case that it has to meet' in the fullest sense, since

adjudication may be 'inquisitorial' or investigative rather than 'adversarial'. That does not, however, mean that each party need not be confronted with the main points relevant to the dispute and to the decision".

In relation to this passage I would comment that, whatever the position may be in England, it appears to me that in Scotland adjudication must be regarded as a species of arbitration for the purpose of the judicial control of adjudicators' decisions and procedures. There are no doubt important practical differences between the typical adjudication and the typical modern arbitration, and these may be relevant to the court's approach in any individual case; nevertheless there are fundamental similarities of principle between arbitration and adjudication, and the grounds for judicial control should in my opinion be similar. The one clear exception is the stated case procedure created by the Administration of Justice (Scotland) Act 1972, which obviously does not apply to adjudicators, but the well-developed common-law principles that govern the judicial review of arbiters' decisions are in my opinion highly pertinent. I should also add in relation to Judge Lloyd's reference to non-material breaches of the principles of natural justice that in my view it will only be proper to ignore such breaches if there is a positive indication that the breach has not been material. If there is a significant doubt about the matter, it must be presumed that the breach is material. That is in accordance with the principles laid down in Scotland in ***Barrs* v *British Wool Marketing Board***, *supra*, and ***Black* v *John Williams & Co (Wishaw)***, *supra*. Subject to these qualifications, however, I respectfully agree with Judge Lloyd's approach.

[17] ***Balfour Beatty Construction Ltd* v *London Borough of Lambeth*** was followed by Judge David Wilcox in ***Try Construction Ltd* v *Eton Town House Group Ltd***, *supra*, where the decision in the former case was distinguished. In *Balfour Beatty* the contractor had applied for an extension of time, but did not submit any critical path analysis with its application. The application was granted in part by the architect, and thereafter matters were referred to adjudication. The adjudicator identified his own analysis of the critical path and awarded the contractor a greater extension of time. Thus the adjudicator took the initiative in discovering the facts and applying his own knowledge and experience to them, and effectively did the contractor's work for it. Judge Lloyd held that there had been sufficient time to allow the parties to comment on the adjudicator's analysis. In those circumstances the defendant had a realistic prospect of demonstrating that, because the adjudicator's method of analysis had not been agreed or commented on by either party, his decision was itself invalid as not having been made fairly. Consequently summary judgment was refused. In *Try Construction*, by contrast, Judge Wilcox held that the adjudicator had considered evidence properly put before him and then come to a conclusion based on that evidence. While he had reached conclusions on the critical path, and had employed a programming specialist, he had done so using a process agreed upon by the parties.

[18] The most recent English authority dealing with the application of the principles of natural justice to adjudicators is the decision of Judge Richard Seymour QC in ***RSL (South West) Ltd* v *Stansell Ltd***, *supra*. The principles applied in that case were stated as follows (at paragraph 32):
"It is elementary that the rules of natural justice require that a party to a dispute resolution procedure should know what is the case against him and should have an opportunity to meet it.... It is essential, in my judgment, for an adjudicator, if he is to observe the rules of natural justice, to give the parties to the adjudication the chance to comment upon any material, from whatever source, including the knowledge or experience of the adjudicator himself, to which the adjudicator is minded to attribute significance in reaching his decision".

In that case the adjudicator had indicated to the parties' representatives that he wanted to obtain assistance on programming issues from a specialist in that area. The plaintiff's representative agreed without qualification, but the defendant 's representative agreed subject to a request that he be allowed to see any report prepared by the specialist and that he be given reasonable time to comment upon any such report. The specialist's preliminary report was offered to the parties for comment. The plaintiff's representative provided comments; the defendant's representative did not, because the conclusion in the preliminary report was that the plaintiff had failed to prove its case. The adjudicator's decision was based on the specialist's final report, which differed in certain material respects from his preliminary report. The parties' representatives were not given an opportunity to comment on that final report. Judge Seymour held that the adjudicator should not have had any regard to the specialist's final report without giving both parties an opportunity to consider the contents of that report and to comment upon it. If

necessary, he should have obtained an extension of time to allow that to happen. In these circumstances the plaintiff's application for summary judgment was refused. In my respectful opinion, both the result in the case and the reasons for it are clearly correct. It is noticeable that Judge Seymour's principal ground of decision, that contained in paragraph 32 of his opinion, is not dependent on the request made by the defendant's representative to comment on any report from the specialist. It is rather based on the general principles of natural justice, and the need to give parties an opportunity to comment on any new material.

[19] In Scotland the only reference has been made to natural justice in the context of adjudication occurs in ***Karl Construction (Scotland) Ltd* v *Sweeney Civil Engineering (Scotland) Ltd,*** 2002 SCLR 766. The main issue in that case was whether the decision of an adjudicator was *ultra vires*. It appears, however, that an alternative argument was advanced by the reclaimers' solicitor to the effect that the adjudicator had departed from the parties' agreed position on the law, and ought to have invited submissions before doing so. This argument does not appear to have been accompanied by any citation of authority, and there is no indication that there was any attempt to explore the manner in which the principles of natural justice might be applicable to an adjudicator. An Extra Division rejected the argument on two grounds: first, that the adjudication process was far removed from the traditional adversarial format adopted in the courts, and secondly that the adjudicator would not be circumscribed by the terms of any written representations made to her, on the law or any other matter. It is clear that no proper argument was presented in that case; indeed the respondents were not even represented. I do not think that it is authority for the proposition that the principles of natural justice have no relevance to the adjudication process. Moreover, on the facts of the particular case it was clear that the issue on which the reclaimers contended that submission should be invited was one that was not relevant to the adjudicator's decision. That issue was whether the contractual provisions were compatible with the Housing Grants, Construction and Regeneration Act 1996, but the final position of both parties was that the contractual provisions were compatible with the Act.

Application of principles of natural justice to adjudication

[20] The practical application of the principle *audi alteram parte* to adjudication perhaps calls for some comment, in view of the particular features of adjudication described in paragraph [8] above. In my opinion the following propositions are applicable; they are, however, always subject to the qualification that, as Lord President Clyde points out in ***Black* v *John Williams & Co (Wishaw),*** *supra*, in this area it is impossible to lay down absolute or universal general rules, breach of which by an adjudicator will necessarily make his award invalid. The application of the relevant principles must depend on the circumstances of the individual case.

1. The general principle, stated in cases such as ***Inland Revenue* v *Barrs,*** *supra*, is that each party must be given a fair opportunity to present its case. That is the overriding principle, and everything else is subservient to it.
2. Subject to that overriding principle, together with any express provisions in the parties' contract, procedure is entirely under the control of the adjudicator.
3. In considering what is fair, it is important to bear in mind that adjudications are conducted according to strict time limits; consequently the time that is given to a party to comment on any particular matter may be severely restricted to ensure that overall time limits are met.
4. It is also important, in considering what is fair, to keep in mind that the procedure in adjudication is designed to be simple and informal. The requirement of fairness should not place any grievous burden on either the adjudicator or the parties; all that it will normally require is that each party should be given an opportunity to make comments at any relevant stage of the adjudication process.
5. If, as is usual, the party who refers a question to adjudication makes written contentions in support of its case, the other party must be given an opportunity to make similar contentions. Express provision to that effect is made in condition 41A.6.2 of the conditions applicable to the Scottish Building Contract used in the present case. If the contentions of either party contain material that is not

touched upon in the contentions of the other party, it may be desirable to ensure that that other party is given an opportunity, however short, to comment on the additional material.

6. An adjudicator is normally given power to use his own knowledge and experience in deciding the question in dispute; such a power is conferred by condition 41A.6.5.1 of the present form of contract. If the adjudicator merely applies his own knowledge and experience in assessing the contentions, factual and legal, made by the parties, I do not think that there is any requirement to obtain further comments. If, however, the adjudicator uses his own knowledge and experience in such a way as to advance and apply propositions of fact or law that have not been canvassed by the parties, it will normally be appropriate to make those propositions known to the parties and call for their comments. As I have indicated, the time scale may be very short.

7. An adjudicator may also be given power to require parties to give additional information or to carry out tests, or to carry out such tests himself; such powers are found in condition 41A.6.5.3 and .4 of the present contract. If such powers are exercised, it will normally be appropriate to make any additional information or the results of any tests known to the parties, and call for their comments. Once again, the time given may be very short.

8. An adjudicator may be given power to obtain from other persons such information and advice as he considers necessary on technical or legal matters; such a power is found in condition 41A.6.5.7 of the present contract. If such a power is exercised, the position is similar to that outlined in paragraph 6 above. If the information or advice raises any matter that has not been canvassed by the parties in their submissions or otherwise, it will normally be appropriate to make such matter known to the parties and call for their comments.

9. In this connection, I do not think that any distinction can be drawn between issues of fact and issues of law. An adjudicator will not usually be a lawyer; thus he must depend for information and advice about the law on other persons, whether the parties or his legal adviser. I cannot see any distinction for present purposes between information and advice about the law obtained in that way and information and advice about questions of fact. This point is discussed further in paragraph [22] below.

[21] As I have indicated, I do not think that the foregoing approach will place any undue burden on adjudicators or the parties to adjudications. The system of adjudication has rapidly built up a substantial degree of confidence on the part of those involved in the construction industry. This is reflected in the fact that the decisions of adjudicators are usually accepted as being in practice final. That has clear advantages to the parties. If that confidence is to be maintained, however, it is important that adjudicators' decisions should be free from any suspicion of unfairness. It is not an answer to say that an adjudicator's decision may be reopened at the conclusion of the contract by arbitration or litigation; it is clear that the industry does not regard such a course as generally desirable, and a multiplicity of proceedings is obviously to be avoided. It is accordingly vital that basic standards of fairness should be applied to adjudicators and rigorously enforced. That in my opinion requires application of the principles of natural justice in the manner suggested in the last paragraph.

[22] I should comment on one further matter, namely whether there is a distinction between questions of fact and questions of law for the purposes of the principle *audi alteram partem*. Counsel for the pursuer submitted that, at least when an adjudicator obtained advice from an appointed legal adviser, there was no requirement that he should disclose the content of his discussions to the parties or invite their comments on those discussions. Advice was to be distinguished from information, which might require to be disclosed for comment. In this respect, counsel argued, the role of legal adviser is akin to that of a clerk to an arbiter, and it has never been held that an arbiter was obliged to invite comments on discussions with his clerk about the law. Ultimately, counsel's position was that discussions on matters of law between an adjudicator and his appointed legal adviser were merely part of the ordinary process by which the adjudicator arrived at a decision; as such they did not have to be disclosed to the parties for comment. In my opinion it is impossible in this context to draw a distinction between information and advice; nor is it possible to draw any useful distinction between fact and law. The giving of advice will typically involve the imparting of information. If, for example, legal advice is given about a particular

topic, that will usually involve information about the principles established by case law, the provisions of statutes or the significance and proper interpretation of terms of contracts. In practice is very difficult to draw a distinction between the information contained in the advice and the advice itself, and if the law attempted to do so it might place adjudicators in an almost impossible position. So far as the distinction between fact and law is concerned, I cannot see that it has any substance in this context. If an adjudicator takes specialist advice from, for example, a programmer, and the programmer produces calculations of his own, those must in my opinion be disclosed to the parties for their comments; in ***Balfour Beatty* v *London Borough of Lambeth***, *supra*, Judge Humphrey Lloyd so held, and the decision in ***Inland Revenue* v *Barrs,*** *supra*, is to similar effect. If the adjudicator takes advice from an appointed legal adviser, and that adviser provides legal advice that goes beyond the scope of the parties' submissions to a significant extent, I am unable to see any distinction. That is especially so in view of the fact that the adjudicator will not normally be legally qualified, and must therefore depend upon his legal adviser. So far as the relationship between arbiter and clerk is concerned, if it were apparent that the clerk had given advice that went significantly beyond parties' submissions, without opportunity for them to comment, that might provide a ground for reduction of the arbiter's decision. Finally, I do not consider that discussions between an adjudicator and his legal advisers are immune from the *audi alteram partem* principle because they are merely part of the ordinary process by which the adjudicator arrives at a decision. If no new matters are raised in the discussions the principle does not apply. If new matters are raised, however, it seems to me that basic fairness requires that the parties should be given an opportunity to comment; in such a case the discussions cannot be described as merely part of the ordinary process of arriving at a decision, because something new and material is brought into play.

Is it sufficient to demonstrate that a breach of the principles of natural justice has resulted in the possibility of injustice rather than actual injustice?

[23] Counsel for the defender submitted that at least in Scots law it was sufficient for a challenge based on breach of the principles of natural justice if the party making such challenge could demonstrate the possibility that the breach had produced injustice. There was no need to demonstrate actual injustice. He referred to the opinion of Lord President Clyde in ***Black* v *John Williams & Co (Wishaw),*** *supra*, at 1923 SC 514-516, where reference is made to "any possibility of injustice" as the test of whether the court should interfere. Likewise, in ***Barrs* v *British Wool Marketing Board***, *supra*, the test put forward was *"Was there an opportunity afforded for injustice to be done?"* (at 1957 SC 82).

[24] In my opinion this argument is correct. It is clearly the approach that was taken in the two cases cited by counsel, ***Black*** and ***Barrs,*** and to that extent appears binding in Scotland. In any event, in practice it will frequently be extremely difficult to discover whether any actual prejudice has been caused by a breach of the principles of natural justice. Those principles are important, however, as Lord President Clyde indicates in ***Black;*** consequently the mere fact of a breach should be a ground for challenge, so that justice may be seen to be done. Moreover, as I have already mentioned, I think it important that confidence in the adjudication process should be maintained. That should apply both to the system of adjudication in general and to the decisions reached in particular cases. For such confidence to be maintained, however, it is important in my view that adjudicators should be clearly seen to give parties a fair opportunity to present their arguments. That policy can only be fulfilled by a strict approach to the principle *audi alteram partem*. In addition, it should be a very straightforward matter for an adjudicator to dispel any suggestion of injustice by disclosing the terms of any advice that he has sought, or any information that he has obtained from sources other than the parties. If that makes it clear that there is no actual injustice because the advice or information related to matters that had been adequately canvassed by the parties in their submissions, the possibility of injustice will be negated, and the adjudicator's decision can be enforced. As a practical matter, even if a decision of an adjudicator is reduced, I consider that he could issue a supplementary decision disclosing the terms of the relevant information and advice. Provided that it is clear that the matters covered by the information or advice had been adequately canvassed by the parties, the new decision could be enforced. Alternatively, if there is any doubt as to whether the matters in question had been covered by the parties, the proper course would be to disclose the terms of the information or advice to the parties and call for their comments, and subsequently to issue a new decision following consideration of those comments.

Application of the principles of natural justice to the facts of the case

[25] I have found the application of the foregoing legal principles to the facts to be the most difficult part of the present case. Ultimately, however, I am of opinion that the defender's averments are sufficient to disclose a breach of the principles of natural justice that has resulted in the possibility of injustice to the parties. Following the presentation of submissions and productions by the parties, the adjudicator indicated that he intended to discuss one particular matter with his legal adviser. He did not state what the matter was, and it is accordingly not clear whether it is a matter that was adequately covered by parties' submissions. If it is a matter that was not dealt with in the submissions of both parties, there will be a breach of the principles of natural justice, in that the parties were not told what the matter was and were not asked for their comments on it. Likewise, the terms of the advice obtained from the adjudicator's legal adviser are not known. If, however, that advice included matters that were not adequately dealt with in the parties' submissions, there will be a breach of the principles of natural justice because the advice was not made known to the parties and were not asked for their comments. Such comments might have been highly material. For example, the request for a advice might have proceeded on a misunderstanding of the facts, or the advice itself might contain mistaken information about the relevant law, or might itself involve a misunderstanding of the facts. Any such mistaken misunderstanding might have been corrected had the parties' comments been called for. At the very least, the parties' comments might have affected the adjudicator's ultimate evaluation of the issues before him. In either event, there is a possibility of prejudice to the parties. It is possible, of course, that no new matters were covered in either the request for advice or the advice itself, and that there was accordingly no actual prejudice to either party. Nevertheless, on the basis of the principles discussed in the last paragraph, I am of opinion that that it is immaterial that no actual prejudice has been demonstrated; the mere possibility of prejudice is sufficient. Of course, if there is no actual prejudice, the adjudicator can easily put matters right by disclosing the matter of which he sought his legal adviser's advice and the terms of that advice. Until those matters are disclosed, however, I must conclude that the defender has set out a relevant case that would, if proved, justify reduction of the adjudicator's decision. That is a sufficient basis to refuse the pursuer's motion for summary decree.

[26] In his submissions, counsel for the pursuer emphasised certain of the facts of the case. In the first place, neither party was told the terms of the discussions between the adjudicator and his legal adviser, and neither party asked to be told the terms of the discussions or asked to comment on the discussions. An argument based on acquiescence is implicit in this proposition; I deal with that part of the pursuer's argument below at paragraphs [31]-[33]. Otherwise, the point is that both parties were treated equally. For the reasons stated above, I am of opinion that that is not an answer to an allegation that the principles of natural justice have not been followed. In the second place, counsel submitted that nothing in the adjudicator's decision or reasons suggested that he attributed any significance to the discussions that he had had with his legal adviser. The answer to that is in my opinion that the mere possibility of injustice is sufficient for a challenge to an adjudicator's (or indeed an arbiter's) decision, for the reasons set out in paragraph [24] above. The parties do not know the content of the legal advice obtained by the adjudicator. It could have been crucial. Indeed, because the adjudicator asked for advice on a particular matter, it is a reasonable inference that he thought that it was important. On that basis, I do not think that the possibility of injustice can be excluded.

[27] In the third place, counsel for the pursuer submitted that the defender did not point to any part of the adjudicator's decision or reasons that was formulated by the adjudicator himself and not founded on parties' submissions; nor did the defender allege that any part of the adjudicator's reasoning had not been argued by the parties, or was not before the adjudicator in the adjudication process. Once again, I am of opinion that the answer is the possibility of injustice. Neither the terms of the adjudicator's discussions with his appointed legal adviser nor the terms of the latter's advice are known to the parties; consequently it cannot be known whether the matter discussed was one that had been dealt with in parties' submissions. Even without such knowledge, however, I am of opinion that the approach laid down in ***Barrs*** and ***Black*** applies, and that the possibility of unfairness is sufficient to justify a challenge to the adjudicator's decision. It is clear that advice was sought and tendered, and it is impossible to exclude the possibility that such advice went outwith the terms of the parties' submissions. Even on the

approach taken by Lord Sorn in ***Barrs***, it is only if the possibility of injustice can be excluded that a contravention of the principles of natural justice will be irrelevant. In my opinion that cannot be said in the present case.

Must it be demonstrated that a breach of the principles of natural justice is substantial?

[28] The second argument advanced by counsel for the pursuer was that a decision of an adjudicator could only be challenged by reason of a breach of the principles of natural justice if that breach were shown to be substantial and relevant; it was for the party challenging the decision to establish that the breach was of that nature. In support of that proposition, counsel referred to ***Discain Project Services Ltd* v *Opecprime Development Ltd,*** *supra*, where Judge Bowsher QC stated (at [2001] BLR 296, paragraph 68):
"I stress that an unsuccessful party in a case of this sort must do more than merely assert a breach of the rules of natural justice to defeat the claim. Any breach proved must be substantial and relevant".

In my opinion these observations are clearly correct. Even if a breach of the principles of natural justice occurs, if it is not relevant to the decision reached by the adjudicator, it must be ignored. That is illustrated by the decision in ***Black* v *John Williams & Co (Wishaw),*** *supra*, where a clear breach of the principles of natural justice was disregarded because the decision had gone in favour of the party who made the complaint. The statement that a breach of the rules of natural justice must be substantial perhaps calls for slightly more comment. In my opinion it covers two matters. In the first place, any breach that can properly be regarded as *de minimis* must be ignored on the ground that it is not material. In the second place, subject to the principles of natural justice, procedure in adjudication is entirely under the control of the adjudicator. Consequently, if the procedures followed by an adjudicator are to be open to challenge, it is immaterial that they are lacking in formality or are different from the procedures that a court would follow; they must go so far as to deny one or both parties a fair opportunity to present their cases.

[29] I am nevertheless of opinion that the foregoing approach does not help the pursuer. Ultimately, counsel's submission was that the defender did not point to any part of the adjudicator's decision that amounted to new matter that had not been argued by the parties. On that basis, it was said, any breach of natural justice would not be of such substance and materiality as to affect the validity of the decision. The answer to that is as stated above, that the mere possibility of injustice is sufficient for reduction on the ground of a failure of natural justice. Without information about the matters discussed by the adjudicator with his legal adviser and the advice tendered by the legal adviser, it is impossible to know whether the breach of the principles of natural justice was substantial and relevant. Consequently this line of argument does not provide an answer to reduction.

Acquiescence

[30] The third argument advanced by counsel for the pursuer was that the defender, through the actings of its agents, had acquiesced in any breach of the principles of natural justice. The adjudicator had informed both parties, in his fax of 10 June 2003, that he intended to seek advice from his appointed legal adviser. Neither party, however, had asked to be told what was to be discussed, or the terms of the discussions; equally, neither party had asked for an opportunity to comment on those discussions. Nor was any objection taken to the procedure proposed by the adjudicator. That, it was said, should be contrasted with an earlier occasion, on 30 May 2003, when the defender's representatives had specifically asked for an opportunity to comment on new potentially relevant material; that reinforced the absence of any such request following the fax of 10 June 2003. In these circumstances, it was said, the defender was barred by acquiescence from challenging the adjudicator's decision on the ground of a breach of the principles of natural justice. In reply, counsel for the defender submitted that, for a plea of acquiescence or waiver to succeed, it was necessary that the party advancing the plea should have conducted its affairs differently in reliance on the other party's conduct that was said to amount to acquiescence. In the present case, counsel submitted, there was no suggestion of any act or omission on the pursuer's part to suggest that it had conducted its affairs differently in reliance on the defender's conduct.

[31] The defender's submission on this matter related to acquiescence in the proper sense of the word, as a form of personal bar. My understanding of the pursuer's argument, however, was that the concept of acquiescence was not used in that way. The argument was rather directed towards the concept of

unfairness, which obviously lies at the heart of natural justice. The submission was that, when a court considers the general question of the fairness of the procedure adopted by the adjudicator, it should have regard to whether the party alleging unfairness or its representative has acted in a manner calculated to suggest that the procedure followed by the adjudicator was accepted as fair. In the present case, therefore, the court should have regard to the failure of the defender's legal representatives to object at once to the procedure taken by the adjudicator when it was intimated to the parties.

[32] In some cases there might be considerable force in such an argument. If parties or their representatives lead an adjudicator to believe that the procedure that he intends to follow is fair, the appropriate conclusion may be that the procedure was indeed fair, because there was an opportunity to object to it which was not taken. Nevertheless, two further considerations are in my opinion relevant. In the first place, for reasons already discussed, I consider the role of natural justice to be of the greatest importance. Consequently I would be reluctant to derogate from the *audi alteram partem* rule except in a case where the procedure proposed by the adjudicator was clearly accepted as fair, whether expressly or by implication. In the second place, if too much importance is attached to a failure to object to a proposed procedure, that may place an undue burden on the parties' advisers. In particular, the significance of a proposed procedure may not be immediately apparent. Moreover, the rapid time limits that apply in an adjudication affect the parties and their advisers as well as the adjudicator, and there may not be a great deal of time to consider the fall implications of the procedure that has been proposed. For these reasons I am of opinion that it is only in a clear case that acquiescence, in the sense in which that concept is used by the pursuer, should be relevant to the issue of weather has been a breach of the principles of natural justice.

[33] In the present case, I am of opinion that there has not been sufficient acquiescence on the part of the defender's advisers to hold that the proposed procedure was accepted as fair. It is true that they did not react to the adjudicator's fax of 10 June 2003, which indicated his intention to seek further advice. Nevertheless, the main purpose of that fax was to seek an extension of time from the pursuer, and it would in my view the understandable if the defender's advisers had failed to appreciate the possible significance of such advice. Indeed, the law on the application of the principles of natural justice to adjudication has not so far been considered in Scotland, and therefore the possibility of a breach of those principles was perhaps not at the forefront of the defender's advisers' thoughts on the fax. Overall, I do not think that there is a sufficiently clear acceptance that the procedure proposed by the adjudicator was accepted as fair. I am accordingly of opinion that the conduct of the defender's representatives does not negate the existence of a breach of the principles of natural justice, in the manner described in paragraph [25] above.

Conclusion

[34] In the foregoing circumstances, I conclude that the defender has stated a relevant defence to the pursuer's claim to enforce the adjudicator's decision. It follows that the pursuer has not satisfied the test for summary decree, namely that the question of law that arises as to the relevancy of the defender's averments admits of a clear and obvious answer in the pursuer's favour. In these circumstances I will refuse the pursuer's motion for summary decree. I will have the case put out by order to enable further procedure to be discussed. In conclusion, I should express my thanks to counsel for both parties for their very clear and comprehensive arguments; I have found these to be of great assistance in preparing this opinion.

Pursuer: Borland; Masons
Defender: Howie, QC; MacRoberts