OPINION OF LORD DRUMMOND YOUNG : Outer House : Court of Session. 11 April 2003

[1] The first defenders are an unincorporated joint venture which has been set up to design and construct the new Edinburgh Royal Infirmary and Medical School at Little France. The second, third and fourth defenders are the companies participating in the joint venture. A company known as Zenith Contract Interiors Limited was engaged as subcontractor to the defenders to carry out plasterboard partitioning works in the new Infirmary and University Medical School. Subsequently a provisional liquidator was appointed to that company, and the sub-contract works were then novated from Zenith to the pursuers by way of a novation agreement dated 22 December 2000. Under the novation agreement, the pursuers assumed all of the responsibilities and liabilities of Zenith under the sub-contract as if the pursuers had been named as subcontractor from the outset.

[2] The sub-contract in question contained provisions for adjudication in terms of the Housing Grants Regeneration and Construction Act 1996. The relevant provisions are contained in Appendix 8 to the Construction Sub-Contract, which is headed *"Sub-contract disputes resolution procedure"*. Paragraph 2.1 of Appendix 8 provides that if a dispute is referred to adjudication the procedure is to be governed by the ORSA Adjudication Rules-1998 Version 1.2, but subject to a large number of amendments. The ORSA Adjudication Rules are rules promulgated by the Official Referees Solicitors Association, a body of English Solicitors who specialise in construction disputes. The present action relates to the power of the adjudicator to make awards of expenses. That matter is governed by one of the amendments to the Rules. That amendment introduced a new clause 21A which, so far as material, provides as follows: *"The Adjudicator may require any Party to pay or make contribution to, the legal costs of another Party arising in the Adjudication..."*.

[3] A dispute arose between the parties, and it was referred to adjudication by Bryan G. Porter. After Mr Porter accepted appointment as adjudicator, the adjudication proceeded in accordance with the ORSA Rules as amended by the parties. Mr Porter produced his decision on 4 September 2002. He found various sums to be due to the pursuers by the defenders. In the last paragraph of his decision, he dealt with the expenses of the adjudication in the following terms: *"In respect of the parties' costs I order that ERJV are liable for one half all Deko's costs of and incidental to this adjudication including Deko's legal costs"*.

That award of expenses was explained in the note of reasons for his decision as follows:
"Whilst it may be customary for the award of costs to follows success and whilst it may be considered that Deko have in overall terms been successful, much of the time spent in connection with this adjudication was taken up with matters for which Deko were wholly unsuccessful. Accordingly I have decided that Deko must accept a significant element of the adjudicator's fees and expenses and I have apportioned them equally between the parties....
"Within the redress sought I am requested by the referring party [the pursuers] to order that ERJV are liable for all costs of and incidental to this adjudication including Deko's legal costs. Whilst the respondents have argued that I have no authority to make such an award, the referring party have correctly pointed out that in terms of amended Rule 21A of the ORSA Rules contained at Appendix 8 of the parties' sub-contract, I have that authority. For the same reasons given by me for apportioning my fees and expenses I have decided that Deko are entitled to recover the costs of the adjudication including legal costs but that recovery is to be abated to reflect the time spent on matter for which Deko were wholly unsuccessful. Accordingly I order that ERJV are to pay Deko one half of all Deko's costs of and incidental to this adjudication, including Deko's legal costs".

[4] Thereafter the pursuers raised the present action, in which they claimed payment of the whole of the sums found due by the adjudicator plus interest and value added tax on those sums. They also claimed an amount that was said to represent one half of the expenses of the adjudication. The pursuers enrolled a motion for summary decree for payment of the whole of those sums. That was opposed by the defenders, and I heard parties' arguments on the question of whether summary decree should be granted in accordance with the whole of the adjudicator's decision. Subsequently, however, parties informed me that they had reached agreement on all the matters in dispute apart from the claim for expenses. In these circumstances the present opinion is confined to the question of the expenses of the adjudication.

[5] The pursuers' claim for expenses is for the sum of £21,219.03. That is said to represent half of the expenses incurred by the pursuers in the course of the adjudication. In the summons the pursuers make the following averments:

"The Pursuers have incurred the following costs:

- *The Pursuers engaged the services of a claims consultant, Mr Ernest Bayton. Mr Bayton rendered invoices dated 14 January, 27 May and 26 August 2002, in terms of which the total figure of £2,041.70 was due to Mr Bayton by the Pursuers.*
- *The Pursuers obtained the assistance of Mr G. I. McManus, surveyor, in preparation of the adjudication proceedings. In terms of his invoice dated 11 September 2002 the sum of £2,475.00 was due by the Pursuers.*
- *The Pursuers engaged DLA, Solicitors, as legal advisers in the preparation of and conduct of the adjudication. In terms of DLA's invoice dated 26 June, 29 July and 13 September 2002, the sum of f 31,095 was due to DLA.*
- *The Pursuers incurred internal costs in the sum of £3,112.92.*
- *50% of half shared Adjudicator's fee in the sum of £3,713.44".*

At the hearing of the pursuers' motion for summary decree, they accepted that the last of those sums was not due, as the adjudicator's decision did not require any such payment. The claim for expenses is accordingly restricted to the other four heads.

[6] Counsel for the defenders' attacked the pursuers' claim for the expenses of the adjudication on two grounds. In the first place, he submitted that any award of expenses by the adjudicator must be based on Rule 21A of the amended ORSA Rules. While that rule clearly gave the adjudicator power to award the costs of the adjudication, the power so conferred was confined to legal costs, in the sense of costs analogous to judicial expenses; no power was conferred to require a party to pay any other expenses. That, counsel submitted, was a sensible construction of Rule 21 A. In particular, it avoided the result that a party could recover legal expenses no matter how unjustified or excessive they might be. If the power to award expenses was so confined, it must be presumed that the adjudicator intended to act *intra vires,* and his decision should be construed accordingly. On that basis, his award of expenses should be restricted to expenses analogous to judicial expenses. The sums claimed by the pursuers appeared to go beyond the scope of judicial expenses; in particular, the pursuers' internal costs would not be recoverable, and the fees incurred to Mr Bayton and Mr McManus might not be. In the second place, counsel for the defenders submitted that any award of expenses made by an adjudicator was liable to taxation, and that a party in whose favour an award was made should not entitled to enforce the award until his account of expenses had been taxed by the Auditor of Court. In relation to arbitration, it had been established that the expenses of the arbitration are determined on the same principles as the expenses of litigation, and should always be taxed. Reference was made to ***Bell on Arbitration****, 2nd ed,* and paragraph 430, and ***Irons & Melville, The Law of Arbitration in Scotland****,* at 228-229. The same approach, it was submitted, should apply to adjudication.

[7] In response to the defenders' first argument, counsel for the pursuers' submitted that, even if the power to award expenses contained in Rule 21 A was confined to judicial expenses, all that could be said was that the adjudicator had misapplied the law to the facts of the case. That did not go to the jurisdiction of the adjudicator, but was merely an error of law. An error of law that did not go to jurisdiction would not be a good reason for refusing to enforce an adjudicator's award. In response to the defenders' second argument, counsel for the pursuers submitted that the question of taxation had not been raised before the adjudicator. There was no provision either in the parties' contract or in the ORSA Rules which empowered the adjudicator to remit an account of expenses to taxation. The position of an adjudicator was different from that of an arbiter, in that an adjudicator's award was provisional in nature. If an award were merely provisional, there would be practical sense in not submitting accounts of expenses to taxation.

[8] In my opinion the adjudicator was not entitled under Rule 21A to make any award of expenses other than those analogous to judicial expenses. The adjudicator's decision must be construed accordingly, and in my opinion the award of expenses made by him is confined to expenses analogous to judicial expenses. I am further of opinion that any award of expenses by an adjudicator is subject to taxation

by the Auditor of Court. Consequently any proceedings for enforcement should be based on an account of expenses that has either been taxed or is agreed between the parties. I am accordingly of opinion that the present claim for expenses is irrelevant, as it is not based on a taxed account of expenses and has not been agreed between the parties.

[9] The only express power to make awards of expenses that is conferred on the adjudicator is that found in Rule 21 A. That power was expressly founded on by the adjudicator when he made an award of expenses in favour of the pursuers. Consequently the scope of his award must be determined by reference to that power. Rule 21A provides that the adjudicator may require a party "to pay... the legal costs of another Party arising in the Adjudication". The word "costs" is obviously derived from English procedure, and clearly means the same as expenses in Scottish procedure. The power to award costs is qualified in two significant respects: such costs must be "legal" costs, and they must arise in the adjudication. The reference to "legal" costs must be intended to have some force. It is obvious that the successful party cannot expect to recover any costs whatsoever that it may incur in connection with an adjudication, no matter how extravagant or unreasonable those costs may be. Some limit must be placed on the costs that may properly be recovered. In litigation, the expenses recoverable are confined to judicial expenses. In an arbitration, the expenses recoverable are generally restricted to those analogous to judicial expenses: see ***Irons & Melville***, *op. cit.*, 228. The reason for this rule is obvious: an arbitration is a procedure closely analogous to litigation, and judicial expenses are the general standard that determines what expenses are properly recoverable. In my opinion exactly the same reasoning applies to adjudication. In Scots law at least an adjudication is a form of arbitration. It involves a procedure whereby parties agree to submit their dispute to the decision of a named individual rather than resort to court proceedings. That agreement may be found in an express adjudication clause in the parties' contract, or such a provision may be implied by the Housing Grants Regeneration and Construction Act 1996. However the agreement to go to adjudication is created, however, the critical features of an arbitration are present. The only distinction is that an adjudicator's award is merely provisional, and may be undone by subsequent litigation or arbitration. That does not, however, affect the conclusion that adjudication possesses the critical features of arbitration, and is therefore a form of arbitration. It follows that any award of expenses in an adjudication should normally be confined in the same way as an award of expenses in an arbitration, that is to say, by reference to the same standard as judicial expenses. Against that background I am of opinion that any express or implied power to award costs or expenses in an adjudication should be restricted to expenses analogous to judicial expenses unless there is clear wording to the contrary.

[10] In the present case the reference to *"legal"* costs in Rule 21A is in my opinion intended to achieve the normal result, namely that the power to make an award is restricted to costs analogous to judicial expenses. The word "*legal"* of itself suggests such a restriction. Moreover, Rule 21A goes on to refer to costs "arising in the Adjudication". The juxtaposition of the expressions "legal" and "arising in the Adjudication" strongly confirms the notion that any award of such costs is to the confined to costs properly incurred in the course of the adjudication, according to established legal standards. The obvious standard by reference to which such costs can be assessed is that of judicial expenses. My conclusion is accordingly that the adjudicator's power to award costs is confined to expenses analogous to judicial expenses. His award, the terms of which are set out in paragraph [3] above, must be construed accordingly. It follows that the pursuers' entitlement is restricted to expenses of the adjudication analogous to judicial expenses.

[11] If an award of expenses by the adjudicator is confined in that way, it is obvious that some means must exist for determining what heads of expenses are and are not recoverable. In litigation that means is taxation by the Auditor of Court. The same procedure is used in arbitration. Frequently an express power to have expenses taxed will be contained in the submission to arbitration, but it appears from the older Scottish textbooks on arbitration that such a power will be implied in any event: ***Bell,*** *op cit,* paragraph 430; ***Irons & Melville***, *op cit,* 228-229. The reason for implying such a power is a practical one: taxation is the most convenient method of determining which of the expenses incurred by the successful party are properly to be recoverable on the same principles as judicial expenses. In my opinion exactly the same reasoning applies to adjudication. Consequently I conclude that in any

adjudication there is an implied power to have any award of costs or expenses taxed by the Auditor of Court.

[12] In the passages cited in the last paragraph from the works of *Bell* and *Irons & Melville,* it is stated that expenses awarded by an arbiter should always be taxed during the subsistence of the arbitration, and a specific sum included in the award in respect of expenses. While that may be good practice, and will make enforcement of the award very straightforward, I do not understand that it is essential. In my opinion it is competent for an arbiter to make an award of the expenses of the arbitration, as taxed by the Auditor of Court. Such an award would be sufficiently definite to be enforced, and that in my view is the criterion for the competence of an award of expenses by an arbiter. Support for that conclusion is found in ***Younger v Caledonian Railway Company***, 1847, 10 D. 133, at 136 per LJC Hope, in the article on arbitration in the ***Stair Memorial Encyclopaedia***, *Vol 2,* at paragraph 449, and in *Fraser on Arbitration* at paragraph 17.08. This point is likely to be of particular importance in adjudication, where speed is of the essence and consequently it will not usually be desirable to have an account of expenses taxed before the adjudicator's decision is issued. In such a case, the adjudicator may simply make an award of the taxed expenses of the adjudication in favour of one party. Thereafter the remaining parts of the adjudicator's decision may be enforced immediately. Before the award of expenses can be enforced, however, either the successful party's account must be agreed or it must be remitted to the Auditor for taxation. Until either agreement has been reached or taxation has been completed, the proper amount of the award of expenses cannot be known with certainty. Consequently enforcement will not be possible. It is only when the account has been agreed or taxed that proceedings can be raised to recover the amount of the expenses in question. In the present case, the sums claimed by the pursuers, which are set out in paragraph [5] above, have not been taxed. It follows that this part of the pursuers' claim is irrelevant.

[13] That is sufficient for me to reach a decision on the present case. I should, however, take notice of three arguments that were presented for the parties. In the first place, counsel for the defenders submitted that certain of the items in the pursuers' claim were clearly not legal costs, in the sense of costs analogous to judicial expenses, and should accordingly be disallowed by the Court. These were the fees incurred to Mr Bayton and Mr McManus, and the pursuers' internal costs. It does, admittedly, seem unlikely that anything described as *"internal costs"* could amount to expenses analogous to judicial expenses. In the case of the fees incurred to Mr Bayton, a claims consultant, and Mr McManus, a surveyor, however, I do not think that the Court could properly disallow the fees without reference to the Auditor of Court. Fees incurred to experts may form a legitimate part of judicial expenses, and it is normally for the Auditor to decide whether they do in any particular case. Nevertheless, the general approach that I have adopted is that the whole of the pursuers' account of expenses relating to the adjudication must be remitted to the Auditor before any part of it can be recovered by judicial proceedings. In the circumstances I consider it appropriate to leave all questions relating to the disallowance of particular heads of expenses to the Auditor.

[14] In the second place, counsel for the pursuer submitted that taxation of the expenses of an adjudication was inappropriate because the adjudicator's decision was merely provisional in nature. In my opinion the provisional nature of an adjudicator's decision has no bearing on the need for taxation. Taxation is required in order to prevent successful parties to legal proceedings from making excessive claims for expenses. That requirement exists whether or not the result of the legal proceedings is fully determinative of the parties' rights or is liable to be undone by other proceedings.

[15] In the third place, counsel for the pursuer submitted that the defenders' argument that the pursuers should not have been found entitled to more than the taxed expenses of the adjudication amounted merely to a contention that the adjudicator had made an error of law in construing his powers under Rule 21 A. Errors of law, unless they went to the jurisdiction of the adjudicator, were not subject to any form of review by the courts. In my opinion this argument is not correct, for two reasons. In the first place, I consider that any error of law made by the adjudicator in construing Rule 21A goes to his jurisdiction, and is thus subject to review by the Court of Session. The bases on which the Court may review the decisions of an adjudicator must in my opinion be the same as those that apply to an

arbiter; this follows from the proposition, discussed above, that in Scots law an adjudicator is a species of arbiter. It is well established that the decisions of an arbiter cannot be reviewed on the basis of an error of law, including an error in the construction of a document. This is subject to an exception, however, in relation to errors that go to the jurisdiction of the arbiter, and in particular to the issue of whether he has acted in accordance with the terms of the reference that has been made to him. Errors of the nature are subject to review by the Court of Session. The crucial distinction is in my opinion that between ordinary errors of law, including the construction of a document, and errors of law in construing the particular contractual or other provisions that confer on an arbiter the power to act as such. That distinction is fundamental to the law of arbitration, and it is relevant in particular to the question of whether an error of law goes to the jurisdiction of the arbiter and is therefore subject to review or whether it is merely an ordinary error of law that cannot be reviewed by the Court. In the present case, Rule 21A is obviously intended to confer on the adjudicator a power to award the expenses of the adjudication. As such, it is clearly a provision that confers power to act on the adjudicator. On that basis, any error made by the adjudicator as to the construction of the power conferred by that rule would be subject to review by the Court. That power of review would not extend to matters relating to expenses that lay within the discretion of the arbiter, but in my view the power to award *"legal costs... arising in the Adjudication"* amounts to a restriction on his ability to act, and is accordingly subject to review. In the second place, I do not consider that the adjudicator has made any error of law. The award of expenses made by him is quite capable of being construed as an award of taxed expenses, and in my opinion it must be so construed.

[16] For the foregoing reasons, I consider the pursuers' claim for the expenses of the adjudication to be irrelevant on the present state of the pleadings. I will accordingly refuse the motion for summary decree in respect of that claim.

Pursuers: Currie, Q.C.; DLA
Defenders: Borland; Tods Murray, W.S.