

Judicial review of a decision of an adjudicator dated 4 May 2001

OPINION OF LORD JUSTICE CLERK : 2nd Division, Inner House Court of Session. 24th December 2003.

Introduction

[1] This is a reclaiming motion from an interlocutor of Lady Paton dated 27 June 2002 in a petition for judicial review of a decision of an adjudicator appointed under the Housing Grants, Construction and Regeneration Act 1996 (the 1996 Act).

Statutory provisions

The 1996 Act

[2] Section 104 of the 1996 Act provides *inter alia* as follows:

"104. (1) In this Part a 'construction contract' means an agreement with a person for any of the following -

- (a) the carrying out of construction operations;*
- (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise; ...*

(2) References in this Part to a construction contract include an agreement -

- (a) to do architectural design, or surveying work ... in relation to construction operations."*

Section 108 of the Act provides *inter alia* as follows:

"108. (1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose 'dispute' includes any difference ...

(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement ...

- 1. If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.*
- 2. For England and Wales, the Scheme may apply the provisions of the Arbitration Act 1996 with such adaptations and modifications as appear to the Minister making the scheme to be appropriate.*

For Scotland, the Scheme may include provision conferring powers on courts in relation to adjudication and provision relating to the enforcement of the adjudicator's decision."

Section 111(4) provides as follows: *"Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than -*

- a. seven days from the date of the decision, or*
- b. the date which apart from the notice would have been the final date for payment, whichever is the later."*

Section 114(4) provides as follows: *"Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provisions agreed by the parties, they have effect as implied terms of the contract concerned."*

The 1998 Scheme

[3] The Scheme for Construction Contracts (Scotland) Regulations 1998 (SI No. 687) and the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI No. 649) give effect to section 108(5) in the case of a non-compliant contract. The procedural rules for adjudications are in Part 1 of the Schedule to each set of Regulations. The paragraph numbers to which I shall refer are those of Part 1. The two Schemes have a common statutory basis (1996 Act, s. 114) and are identical except in relation to practical matters on which the systems differ (1996 Act, s. 108(6)). For example, paragraph 24 of the Scheme for Scotland provides for registration of the decision for execution in the Books of Council and Session; whereas paragraph 24 of the Scheme for England and Wales imports the procedure for enforcement of orders (Arbitration Act 1996, s. 42) that would apply in arbitral proceedings.

The Scottish Scheme provides *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 ...

- (3) The notice of adjudication shall set out briefly ...*
- (c) the nature of the redress which is sought ...*

12. *The adjudicator shall -
(a) act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract ...*
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.*
20. (1) *The adjudicator shall decide the matters in dispute and may make a decision on different aspects of the dispute at different times.
(2) The adjudicator may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute and, in particular, he may ...
(b) decide that any of the parties to the dispute is liable to make a payment under the contract (whether in sterling or some other currency) and, subject to section 111(4) of the Act, when that payment is due and the final date for payment ...*
21. *In the absence of any directions by the adjudicator relating to the time for performance of his decision, the parties shall be required to comply with any decision of the adjudicator immediately on delivery of the decision to the parties in accordance with paragraph 19(3) ...*
23. (1) *In his decision, the adjudicator may, if he thinks fit, order any of the parties to comply peremptorily with his decision or any part of it.
(2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it, until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties.*

The appointment of the petitioners as contract administrators

- [4] The petitioners and reclaimers are a firm of building contract surveyors. The respondents instructed them to act as contract administrators of a building contract that the respondents proposed to place for the extension and refurbishment of premises at 40 Stanley Street, Glasgow (the contract works).
- [5] The terms of the petitioners' appointment were set out in a letter from the petitioners to the respondents dated 9 July 1998. The professional services specified in that letter included the initial site survey; preparation of detailed scale plans for use in applications for statutory consents and in budget costings, and for tendering purposes; preparation of draft scheme drawings and a draft specification; preparation of a pre-tender budget; issuing of tender documentation; appraisal of tenders; monitoring and administration of the contract, including site visits and site meetings; preparation of valuations and the issuing of certificates of payment; certification of practical completion and agreement of final accounts; and supervision of the contractor during the defects liability period. The fee payable to the petitioners was specified as being in accordance with the RICS Scale of Charges for Building Services - Building Works, abated to 10%. The terms of appointment did not contain an adjudication clause. Therefore if this was a construction contract (1996 Act, ss. 104, 108), the Scheme applied to it (*ibid*, s.108(5)).

The building contract

- [6] On 22 April 1999 the respondents entered into a building contract with R & R Construction (Scotland) Limited (the contractor) for the contract works. The contract was in the form of the SBCC Scottish Minor Works Contract (April 1998 Revision). It is not disputed that the contract works constituted "construction operations" in terms of the 1996 Act (ss. 104(1)(a); 105(1)).

The respondents' claim against the petitioners

- [7] During the course of the contract works, there were disputes between the respondents and the contractor on which there were five adjudications. As a result of these adjudications, the respondents became liable to the contractor for certain additional payments. The respondents alleged that this liability was caused by breaches of contract on the part of the petitioners. By notice dated 28 January 2000 the respondents terminated the petitioners' appointment.

- [8] By notice dated 13 March 2001, the respondents required adjudication on a claim by them against the petitioners for £46,167 as damages for the alleged breaches of contract. They alleged that the petitioners had failed to issue certain written instructions to the contractor and had wrongfully granted an extension of time to the contractor after the date of practical completion, and on these grounds were in breach of an implied term of the contract that they should exercise the degree of skill and care to be expected of an ordinarily competent surveyor. The petitioners submitted that they had been entitled to award the extension when they did; that all instructions for the relevant variations, although not contained in formal written instructions, were recorded in the site minutes; and that they had not been in breach of their contractual duty in either respect.

The adjudication

- [9] Mr David H Wilson FRICS ACI Arb was appointed as adjudicator. He received written and oral submissions from the parties and took legal advice from the firm of McGrigor Donald, Glasgow. At a hearing on 19 April 2001, senior counsel for the petitioners gave the adjudicator certain legal references on the question of the extension of time and on the legal test for the question of breach of contract, together with a detailed note of his submissions on the facts. On 4 May 2001 the adjudicator issued his decision, the operative part of which is as follows:

7.0 THE DECISION

1. From the information I have received and ascertained on the matters in dispute within the timescale imposed, it is my Decision that the Referring Party [sc the present respondents] have suffered loss as a result of breach of an implied term of the contract between the Parties. It is my Decision that the Respondents [sc the present petitioners] have in some circumstances not exercised the degree of skill and care to be expected of an ordinarily competent surveyor. As a result the Referring Party are entitled to damages in respect of some, though not all, of the items claimed ... "

The adjudicator found the petitioners liable to the respondents in damages in the sum of £29,119.80, excluding VAT.

- [10] For the purposes of this appeal, the relevant part of the adjudicator's statement of reasons is that relating to breach of contract. The adjudicator held that under the Scottish Minor Works form of contract the correct procedure for making adjustments to the lump sum was to issue contract instructions under the relevant clauses. On this point he seems to have decided that only formal written instructions would suffice. He held that the petitioners had failed to issue such instructions in respect of twenty items amounting to £31,931.73 for which the respondents had been found liable to the contractor in one of the previous adjudications. He then said:

"It is my decision that the [petitioners], in their failure to issue appropriate instructions, have failed to exercise the degree of skill and care to be expected of an ordinarily competent surveyor."

On the question of the extension of time, he said:

"It is my opinion from the evidence placed before me and my reading of the building contract, that the [petitioners] were not correct in granting an extension of time after practical completion had been achieved. There should have been an element of doubt in the minds of the [petitioners], especially after the [respondents'] solicitor expressed the view to the [petitioners] that it was questionable whether an extension of time could be competently made after practical completion had been certified. It is my opinion that the [petitioners] should have taken advice before granting an extension of time, apparently they did not do so."

As a direct result of the [petitioners] issuing an extension of time when they did not have the power to do so, the [respondents] have been involved in several items of additional costs ...

It is my decision that the [petitioners] in issuing an extension of time when they did not have the power to do so, have failed to exercise the degree of skill and care to be expected of an ordinarily competent surveyor ... "

In this confused conclusion it is not clear whether the adjudicator held the petitioners to have been in breach for granting the extension when there was a doubt about their power to do so or for granting it when they did not have the power to do so. These extracts are as much as there is by way of reasoning in support of the decision.

- [11] In an appendix to his statement of reasons, the adjudicator set out a "List of documents received from the parties and taken into consideration in reaching my decision." Item 16 of the list is "Information handed over at the oral hearing on 19 April 2001 from both parties including copies of court decisions, etc."

The petition for judicial review

[12] The petitioners seek reduction of the adjudicator's decision. Before the Lord Ordinary counsel for the petitioners submitted (i) that the reference to adjudication was incompetent because the contract between the parties was not a "construction contract" within the meaning of the 1996 Act; (ii) that the Scheme did not empower the adjudicator to award damages; (iii) that the respondents had sustained no loss; and (iv) that the decision was invalidated by the failure of the adjudicator to take into account material considerations, namely certain submissions made to him on behalf of the petitioners, and by his failure to give intelligible reasons.

The decision of the Lord Ordinary

[13] In the interlocutor reclaimed against, the Lord Ordinary refused the prayer of the petition. She found against the petitioners on all four points. On the fourth point, in particular, she was inclined to the view that the decision of an adjudicator was not open to challenge by way of judicial review (para [64]); but if it was, she considered that the decision in this case was not reviewable (para [65]). Her reasons were that it was within the remit of the adjudicator to make a decision on a question of professional negligence if that question was raised by one of the parties (paras [67]-[70]); that she was not persuaded that the adjudicator had failed to take account of relevant material, including that submitted by counsel for the petitioners (at para [71]); and that, provided that the decision was *intra vires*, it was irrelevant whether the decision, or part of it, was erroneous (at paras [72]-[75]).

[14] The Lord Ordinary then considered the adjudicator's reasons in detail. On the question of extension of time, and on the question of lack of written instructions, she considered that his reasons did not justify a finding of professional negligence (at paras [79] and [82]). Nevertheless, she held that since these were errors made *intra vires*, they could not be corrected in proceedings for judicial review (at para [83]).

The reclaiming motion

[15] Counsel for the petitioners have renewed the submissions made to the Lord Ordinary and have added a further point by amendment, namely that the court is entitled to review the decision complained of on the ground of error of law, even if the error is made *intra vires*.

The issues in the reclaiming motion

1. *Whether the contract between the parties was a "construction contract"*

[16] The adjudicator did not have to decide this point because the petitioners admitted in their answers to the Referral Notice (Ans. B4) that the parties' contract was a construction contract. In my view, that admission was rightly made. I consider that the services specified in the petitioners' letter of appointment, which I have summarised, constituted "arranging for the carrying out of construction operations" (s. 104(1)(b); cf *Fence Gate Ltd v Jas R Knowles Ltd*, [2001] 84 Con LR 206, at paras [3], [6]). I also consider that the petitioners' work was in essence "surveying work ... in relation to construction operations" (s. 104(2)(a)), for example in carrying out a site survey, preparing plans and making valuations. I am confirmed in this conclusion by the fee scale agreed in this case, which shows that the parties treated the petitioners' services as building surveyors' work.

(2) *Whether the adjudicator has power to award damages*

[17] The Lord Ordinary held that the adjudicator had power to award damages, because the words "dispute arising under the contract" (s. 108(1); Scheme, para 1) were wide enough to cover that remedy; and because the wording of para. 20(2), which confers on the adjudicator certain specific powers, did not exclude it.

[18] Counsel for the petitioners argued that adjudication is a specialised form of arbitration (*Deko Scotland Ltd v Edinburgh Royal Joint Venture Ltd*, 2003 SLT 727, at para [9]). Unlike an English arbitrator (*Heyman v Darwins Ltd*, [1942] AC 356), an arbiter has no power to award damages unless that power is expressly conferred on him by contract or by statute (*Aberdeen Rly Co. v Blaikie Bros.* (1853) 15 D (HL) 20; *Mackay v Barry Parochial Board* (1883) 10R. 1046; *McAlpine v Lanarkshire and Ayrshire Rly Co.* (1889) 17 R. 113; *Stair Memorial Encyclopaedia*, Reissue vol. 1, *Arbitration*, para. 50). In this case neither the contract nor the statute conferred that power. Section 108(1) of the 1996 Act, read with paragraph 20(2)(b) of the Scheme, limited the adjudicator's powers to that of deciding questions

of liability "to make a payment under the contract." This view was confirmed by the reference in the paragraph to section 111(4) of the 1996 Act, which related to the withholding of a payment due under the contract.

- [19] Counsel for the respondents submitted that since section 108(1) of the 1996 Act entitled a party to a construction contract to refer "a dispute arising under the contract" for adjudication, and since paragraph 1 of the Scheme (*supra*) entitled a party to give notice of his intention to refer "any dispute arising under the contract," the legislation impliedly covered a claim for damages. If the respondents had a right to damages for breach of contract, the adjudication system should, in principle, provide a remedy. The 1996 Act should be interpreted and applied uniformly throughout the United Kingdom.
- [20] In my opinion, the submissions for the petitioners on this point are unsound. I do not agree with the observation of the Lord Ordinary in *Deko Scotland Ltd v Edinburgh Royal Joint Venture Ltd* (*supra*) that adjudication is a form of arbitration. Section 108(6) and paragraph 24 of the Scheme for England and Wales suggest the contrary. Adjudication has certain superficial similarities to arbitration; but in my opinion it is a *sui generis* system of dispute resolution. Whereas arbitration is a form of conclusive resolution of disputes, an adjudication is a form of provisional resolution only. Adjudication does not oust the jurisdiction of the courts or of an arbiter. Its primary purpose is to regulate a dispute *ad interim*, pending a definitive resolution of it by litigation, arbitration or agreement. The provisional nature of an adjudication is linked with the short time limits within which the process has to be concluded (Scheme, para. 19, *supra*). On that view, I consider that a Scottish adjudicator is not subject to the common law limitation on the powers of an arbiter.
- [21] In any event, whatever the juridical status of adjudication, I am of the opinion that, by necessary implication, the legislation confers on the adjudicator the power to award damages (*Garvie's Trustees v Still*, 1972 SLT 29, Lord Justice Clerk Grant at p. 36). Paragraph 20(2)(b) of the Scheme, to which counsel for the petitioners referred, deals with the limited and specific question whether a sum awarded by the adjudicator is to be paid immediately or at a later date, or is to be paid in sterling or in another currency; but paragraph 1(3)(c) suggests that the adjudicator can grant redress on a wider basis than that. The statutory references to adjudication of "a dispute under the contract" (s. 108(1)) and of "any dispute under the contact" (Scheme, para. 1) must comprehend a dispute on a claim that there has been a breach of the contract. The power to adjudicate on such a dispute implies, in my view, the power to award damages if the breach is proved. Without such a power, the scheme would be unworkable. That conclusion has the satisfactory result that the United Kingdom legislation on adjudication can be applied uniformly in both jurisdictions on this important point (cf *Income Tax Commissioners for City of London v Gibbs*, [1942] AC 402, Viscount Simon LC at p. 414; *Lord Saltoun v HM Adv General for Scotland*, (1860) 3 Macq 659; *Stair Memorial Encyclopaedia*, vol. 12, *Interpretation of Statutes*, para. 1188).

(3) Whether the respondents have sustained loss

- [22] Counsel for the petitioners submitted that the adjudicator had awarded damages in respect of a loss not recognised by the law of Scotland. His decision was binding on the parties only until the dispute was finally determined by litigation, arbitration or agreement (1996 Act, s. 108(3); Scheme, paras 21 and 23(2)). Paragraph 12 obliged him to decide the case in accordance with the applicable law. In Scots law, all damages arising from a legal wrong had to be sued for in one action (*Stevenson v Pontifex & Wood*, (1887) 15 R 125). A party was not entitled to sue for damages in respect of a liability to a third party that was yet to be incurred (*Duncan's Trs v A & P Steven*, (1897) 24 R 880). The adjudicator had no power to award interim damages. Such an award could be made only in personal injury cases in the special circumstances in which the Rules of Court allowed it (RC 43.11).
- [23] In my opinion, the authorities relied on by the petitioners are beside the point. In *Stevenson v Pontifex & Wood* (*supra*) the pursuer sued for damages for breach of contract in addition to those awarded to him earlier for the same breach. In the present case, any decision made in a litigation or an arbitration would be in substitution for the decision of the adjudicator. *Duncan's Trs v A & P Steven* (*supra*) related to a claim for relief in respect of a liability that had yet to be established. That is not the nature of the respondents' claim. An adjudicator's award, although provisional in the sense that I have

described, creates a liability that is immediately enforceable (Scheme, paras 23-24; *Construction Centre Group Ltd v Highland Council*, 2002 SLT 1274, at para. [8]; *A v B*, 2003 SLT 242, at para. [10]) and remains so until the award is overturned or varied in a litigation or an arbitration, or by the parties' agreement (*Macob Civil Engineering Ltd v Morrison Construction Ltd*, *supra*, at pp. 97-99; *C & B Scene Concept Design Ltd v Isobars Ltd*, [2002] BLR 93, at para [23]). This is not an interim award on any view. So long as it is undisturbed, it has the effect of a decree. The party against whom it is made is therefore in a real sense in a position of loss. That, in my view, was the position of the respondents when they claimed damages in the present adjudication.

(4) The adjudicator's decision

- [24] Counsel for the petitioners submitted that it was apparent on the face of the adjudicator's decision that he had failed to take into account relevant material submitted to him; that his reasons were unintelligible; and that he had erred in law in finding that the petitioners had been guilty of professional negligence. The Lord Ordinary concluded (at para [71]) that the adjudicator appeared to have taken into account all of the material placed before him. She did not reach a definite conclusion as to the soundness of his decision on the written instruction and extension of time points. Her overall conclusion was that any error of law that the adjudicator had made had been made within the scope of his jurisdiction and that such an error was not a ground for judicial review.
- [25] The Lord Ordinary also suggested the possibility that the decision of an adjudicator should not be the subject of judicial review at all (at para [64]). Counsel for the respondents have not argued for that view, which I think goes too far. In my view, the court has a jurisdiction to review a decision of an adjudicator that proceeds on an erroneous exercise of jurisdiction; for example, where the adjudicator has exceeded his jurisdiction (eg *Homer Burgess Ltd v Chirex (Annan) Ltd*, 2000 SLT 277; *Joinery Plus Ltd v Laing Ltd*, [2002] BLR 184) or has failed to exercise it (*Ballast plc v The Burrell Co (Construction and Management) Ltd*, 2001 SLT 1039; *affd.* 2003 SLT 137), or has exercised it fraudulently or in breach of natural justice. In each such case, the decision can be classified as being *ultra vires*. Whether the court has a jurisdiction to review a decision that proceeds on an *intra vires* error of law is a separate question which I shall discuss later.

(i) Failure to take relevant material into account

- [26] At the hearing before the adjudicator, senior counsel for the petitioners submitted that the petitioners had been entitled to award the extension of time. He relied for that on a decision of the Court of Appeal (*London Borough of Merton v Stanley Hugh Leach Ltd*, (1985) 32 BLR 51) and on a commentary on one of the standard forms of contract (Chappell and Powell Smith, *The JCT Minor Works Form of Contract*, 2nd ed., p. 156), copies of which he gave to the adjudicator. He also submitted that even if the petitioners were not entitled to grant the extension, and even if they had failed to issue written instructions, it did not follow that they were in breach of contract on either basis. He referred the adjudicator to the criteria laid down in *Hunter v Hanley* (1955 SC 200) by which the question of professional negligence was to be judged.
- [27] Counsel for the petitioners submitted that the adjudicator's failure to discuss these references in his decision indicated that he had failed to take them into account. Since the first two references were critical to the issue of extension of time, and since the third set out the legal principles on which professional negligence was to be judged, his failure to explain how he had applied them invalidated the decision.
- [28] I agree with the decision of the Lord Ordinary on this point. Assuming that the petitioners' objection is relevant, I consider that it has not been made out. Although the adjudicator does not mention the references that were given to him, it would be wrong to conclude from that that he failed to take them into account. It was his duty to consider any relevant information submitted to him by either party (Scheme, para. 17) and it should be assumed that he did so unless his decision and his reasons suggest otherwise. They do not. On the contrary, in the appendix to his statement of reasons (*supra*) he indicates that he took the references into account. Whether or not he understood their significance is another matter.

(ii) *Unintelligibility of reasons*

- [29] Counsel for the petitioners argued that paragraph 22 of the Scheme obliged the adjudicator, if required to do so, to give reasons for his decision. The adjudicator's reasons were not proper, intelligible and adequate (*Wordie Property Co Ltd v Secretary of State for Scotland*, 1984 SLT 345, Lord President Emslie at p. 348; *Save Britain's Heritage v No 1 Poultry Ltd*, Lord Bridge of Harwich at pp. 166-167) on either aspect of the claim. They were unintelligible. They failed to deal with the substantial points put to him relating to the principles laid down in *Hunter v Hanley* (*supra*). Although the adjudicator took legal advice (cf. Decision, paras. 5.10 and 5.19), his decision did not disclose the nature of that advice. The informed reader could have no confidence that he had asked himself the right questions. The Lord Ordinary was right to hold that the adjudicator had failed to give proper and adequate reasons for his finding of breach of contract in either respect. His errors were material. They invalidated the decision.
- [30] The Lord Ordinary did not deal with this objection in detail. She looked at the case more broadly and concluded that it involved no more than an *intra vires* error of law arising from the inadequacy of the adjudicator's reasons for his finding of professional negligence.
- [31] In my opinion, a challenge to the intelligibility of stated reasons can succeed only if the reasons are so incoherent that it is impossible for the reasonable reader to make sense of them. In such a case, the decision is not supported by any reasons at all and on that account is invalid (*Save Britain's Heritage v No 1 Poultry Ltd*, *supra*). In my view, that cannot be said in this case. The adjudicator has understood what questions he had to answer. He has reached certain conclusions in law on those questions which, however erroneous, are at least comprehensible. Even if the question is one of the adequacy of the reasons, I am of the opinion that the reasons are sufficient to show that the adjudicator has dealt with the issues remitted to him and to show what his conclusions are on each (*Save Britain's Heritage v No 1 Poultry Ltd*, *supra*, at p. 167)

iii. *Error of law*

- [32] In petitions for judicial review of the decisions of adjudicators, this court has consistently adhered to the view that it cannot review a decision on the basis of an *intra vires* error of law (eg *Homer Burgess Ltd v Chirex (Anman) Limited*, *supra*; *Karl Construction Ltd v Sweeney Civil Engineering (Scotland) Ltd*, 2001 SCLR 95; *Watson Building Services v Harrison*, 2001 SLT 846; *Ballast plc v The Burrell Co (Construction and Management) Ltd*, *supra*; *SL Timber Systems Limited v Carillion Construction Limited*, 2002 SLT 997; *Barr v Law Mining Ltd*, 2003 SLT 488; *Deko Scotland Ltd v Edinburgh Royal Joint Venture Ltd*, *supra*). It is not disputed that the legislation in this case gives the adjudicator power to decide questions of law (s. 108; Scheme, para. 1). The new issue in this reclaiming motion raises the fundamental contention that, notwithstanding these decisions, the remedy of judicial review is available in respect of errors of law even if they are made *intra vires*. Before that issue can arise, we must first decide whether the adjudicator erred in law at all.
- [33] The adjudicator had to decide whether the petitioners had failed to issue written instructions as the Minor Works form of contract required and whether they had erred in awarding the extension of time when they did; and, if they were wrong in either respect, whether on that account they were in breach of the relevant implied term. The adjudicator has failed to give convincing reasons for having rejected the submissions for the petitioners on either the written instructions point or the extension of time point; but in my view it is unnecessary to pursue those matters, because they are overtaken by the adjudicator's conclusions on breach of contract.
- [34] The respondents base their claim on breach of an implied term of the contract rather than on negligence; but that distinction is immaterial. The implied contractual obligation of skill and care imputed to the petitioners is co-extensive with their duty of skill and care *ex delicto*.
- [35] The adjudicator says that he did not hear "evidence in the conventional sense" (statement of reasons, p.1) and he does not say that he received any expert evidence on the question of professional negligence. Having found against the petitioners on both of the contentious points, he drew the sweeping conclusion that they had failed to exercise the degree of skill to be expected of an ordinarily competent surveyor. That was a serious judgment to make. His reasons for making it are

unsatisfactory. A question of professional negligence depends on recognised criteria set out in cases such as *Hunter v Hanley* (*supra*, Lord President Clyde at p. 205). It is pre-eminently one that depends on the opinions of professional men having expertise in the relevant professional discipline (eg *Royal Brompton Hospital NHS Trust v Hammond and Ors.* (No. 7), [2001] 76 CLR 148).

- [36] The adjudicator has failed to specify what degree of skill and care he thought was applicable in this case or to provide a cogent reason why the petitioners' allegedly wrong decisions amounted to a breach of contract. It is my impression that he had little grasp of the subject. He seems to have taken the naive view that wrong decisions by the petitioners, if that is what they were, constituted professional negligence *per se*. In my view, he has made an error of law. I agree with the Lord Ordinary's conclusion on this issue (at paras. [78]-[82]). The question is then whether, in proceedings of this nature, the court can provide a remedy.
- [37] The Lord Ordinary proceeded on the basis that an *intra vires* error of law made by the adjudicator was not reviewable by the court (at paras [72]-[75], [83]). Counsel for the petitioners submitted that *Anisminic v Foreign Compensation Commission* ([1969] 2 AC 682) made obsolete the traditional distinction, recognised in Scotland since *Watt v Lord Advocate* (1979 SC 120, at p. 131), between an error of law as to jurisdiction and an error of law made *intra vires*. In consequence of *Anisminic* (*supra*), the court could now review an *intra vires* error of law on the part of a statutory decision-maker (*ibid*, Lord Reid at pp. 171B-F, 174B-F; Wade and Forsyth, *Administrative Law*, 8th ed., pp. 270-274). Subsequent decisions of the House of Lords had confirmed that principle (*In re Racal Communications Ltd*, [1981] AC 374; *O'Reilly v Mackman*, [1983] 2 AC 237; *R v. Hull University Visitor, ex p. Page*, [1993] AC 682; *Boddington v British Transport Police*, [1999] 2 AC 143). Two possible exceptions to the general rule in *Anisminic*, namely decisions of inferior courts of law and peculiar jurisdictions such as those of university visitors and ecclesiastical courts (Wade and Forsyth, *ibid*) had no bearing on the present case. In the previous adjudication cases that had raised this point, this court had considered that the scope of judicial review was confined to errors as to jurisdiction; but in those cases the extended *Anisminic* approach had not been argued for or considered.
- [38] In my opinion, the decisions founded on by counsel for the petitioners are irrelevant to this case. All of them are decisions in the field of public law relating to errors of law committed in the exercise of statutory jurisdictions. In my view, adjudication is not truly an aspect of public law. The adjudicator's powers are conferred by statute, but he is not a statutory decision-maker. Although created and made compulsory by statute, adjudication is in essence a contractual dispute resolution process the terms of which either form part of the contract as express terms (s. 108(5)) or have effect by virtue of the Scheme as "*implied terms of the contract concerned*" (s. 114(4)). On this point my view differs from that of the Lord Ordinary in *Homer Burgess Ltd v Chirex (Annan) Ltd* (*supra*, at p. 284A and 284L) and is, I think, in line with that of the Lord Ordinary in *Ballast plc v The Burrell Co (Construction and Management) Ltd* (*supra*, at paras [37]-[38]).
- [39] Paragraph 12 of the Scheme, on which the petitioners rely, does not assist them. It requires the adjudicator *inter alia* to decide the case in accordance with the applicable law; but that, in my view, is a requirement that he should decide it in accordance with the proper law of the contract (cf. s. 104 (6), (7)), and not on some other basis such as his own idea of an equitable solution. It does not mean that his decision is judicially reviewable if he makes it in accordance with the applicable law but applies that law erroneously.
- [40] In this case Parliament has specifically provided other means of redress for *intra vires* errors of law, namely arbitration, litigation or agreement (s. 108(3); Scheme, para. 23(2)). In my view, those means of redress are exhaustive. That, I think, is a satisfactory conclusion. The availability of judicial review as a remedy for an adjudicator's *intra vires* error of law would subvert the purpose of adjudication. If the courts were to interfere with a decision of an adjudicator on that ground, they would be adding a significant common law qualification to what is a statutory construct; they would be providing an opportunity for the kind of delay that the system is designed to prevent, and they would be providing a remedy which Parliament could have expressly provided but, it seems, chose not to.

- [41] I therefore conclude that, provided that the adjudicator asks himself the correct question, his decision is not reviewable in this process on the ground that he has answered the question incorrectly (*Bouygues (UK) Limited v Dahl-Jensen (UK) Limited*, *supra*, Buxton LJ at paras 3 and 11; *Sherwood & Casson Ltd v Mackenzie*, *supra*; *Barr v Law Mining*, *supra*, at p. 494K; *C & B Scene Concept Design Ltd v Isobars Ltd*, *supra*, at para [30]; cf *Codona v Showmen's Guild of Great Britain*, 2002 SLT 299, at para [16]; Clyde and Edwards, *Judicial Review*, para 22.4).
- [42] In contrast with cases such as *Watt v Lord Advocate* (*supra*) or *Joinery Plus Ltd v Laing Ltd* (*supra*), where the decision-maker failed to understand the question that was remitted to him, in this case it is apparent that the adjudicator has at least answered the questions put to him in the notice of referral. Accordingly, I agree with the Lord Ordinary that the fact that the decision was erroneous on the question of professional negligence gives the petitioners no redress in proceedings of this kind.
- [43] In dealing with the problems that it was devised to solve, the legislation has created a new set of problems. For example, where the adjudicator erroneously rejects a party's well-founded claim or defence (*Sherwood & Casson Ltd v Mackenzie*, (2000) 2 TCLR 418), the subsequent vindication of that party's position may be rendered futile by an intervening bankruptcy (eg *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*, [2001] 1 All ER (Comm) 1041). The risks of injustice that are inherent in the Scheme, not least those arising from the speed of the process, demand a high standard of expertise from adjudicators and their advisers. It is unfortunate that in this case the adjudicator's decision has been inept. As a result of the decision, the petitioners are liable to pay a substantial sum, which they can seek to recover only in proceedings that may be expensive and protracted, and they have been found guilty of professional negligence. But an outcome of that kind is no novelty in the law of Scotland. At common law, an arbiter's decision made *intra fines compromissi* is final and unchallengeable, however erroneous it may be (*Mitchell v Cable*, (1848) 10 D 1297, Lord Jeffrey at p. 1309). That has always been one of the risks of arbitration. The petitioners at least have the opportunity to challenge the adjudicator's decision in ordinary litigation now that the interim position has been established.

Severability

- [44] Counsel for the respondents submitted that if the decision was defective in any respect that was reviewable, the court could and should reduce only the offending part of the decision (*Homer Burgess Ltd v Chirex (Annan) Ltd*, *supra*, at p. 287C). Since I am of the opinion that the decision cannot be reviewed in this process, I express no view on this point.

Interlocutor

- [45] I propose that we should refuse the reclaiming motion.

OPINION OF LORD MACFADYEN

- [46] I agree that the reclaiming motion should be refused for the reasons given by your Lordship in the chair.
- [47] I would add only one observation. On further reflection, and in the light of the views expressed by Lord Reed in *Ballast plc v The Burrell Co (Construction Management) Ltd* 2001 SLT 1039 and the fuller argument presented in the present case, I agree that I was wrong, in *Homer Burgess Ltd v Chirex (Annan) Ltd* 2000 SLT 277 at 284K, to treat an adjudicator as being in substantially the same position as a statutory decision-maker. The circumstances of the present case make it clear that it is important to distinguish the position of an adjudicator from that of a statutory decision-maker.

OPINION OF LORD CAPLAN

- [48] I entirely agree with the Opinion of your Lordship in the chair and have nothing useful to add.

Act: RA Smith QC, Charteris; Simpson & Marwick, WS
Alt: Howie QC, Smith; MacRoberts