

JUDGMENT OF SHERIFF PRINCIPAL R A DUNLOP QC : Sheriffdom of Tayside Central and Fife, Perth : 15th December 2003.

The Sheriff Principal, having resumed consideration of the cause, refuses the appeal and adheres to the sheriff's interlocutor of 7 May 2003 complained of; finds the defenders and appellants liable to the pursuers and respondents in the expenses of the appeal; allows an account thereof to be given in and remits the same, when lodged, to the auditor of court to tax and report; remits to the sheriff to proceed as accords.

- [1] This is an appeal against the sheriff's interlocutor of 7 May 2003 in which he granted summary decree in terms of crave 3 of the Initial Writ. The action between the parties arises out of a referral to adjudication in terms of the Scheme for Construction Contracts (Scotland) Regulations 1998 (hereinafter referred to as "the Scheme"), the Scheme having been made in furtherance of the powers contained in the Housing Grants, Construction and Regeneration Act 1996 (hereinafter referred to as "the Act"). In terms of Section 108 of that Act a party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with that section. Such a procedure may be contained within the contract itself, provided that it complies with the requirements of Section 108 of the Act, but if the contract does not so provide the adjudication provisions in Part 1 of the Schedule to the Scheme shall apply. That was the position in this case.
- [2] In terms of the opening paragraph of Part 1 of the Schedule to the Scheme the adjudication is initiated by any party to a construction contract ("the referring party") whether or not any other party to the contract concurs. Paragraphs 9(1) and (2) of Part 1 of the Schedule provide:-
"(1) An adjudicator may resign at any time on giving notice in writing to the parties to the dispute.
(2) An adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication."
- [3] The defenders maintained and still maintain that the subject matter of the referral to which this action relates was the same as that which had been previously determined. They had taken up this position before the adjudicator and had challenged his jurisdiction on this ground. The adjudicator however decided that the dispute referred to him was not substantially the same as the dispute previously referred to adjudication and proceeded to determine it. He issued his decision on 15 March 2001, in terms of which he determined the value of the defenders' final account in the contract, determined the value of the deductions which the pursuers were entitled to make in respect of damage caused by the defenders, and finally required payment by the defenders to the pursuers of the sum of £1922.70, being one half of the adjudicator's total fees and VAT in respect of the adjudication. It is towards the recovery of this latter sum that crave 3 in the Initial Writ is directed.
- [4] The purpose of the action is to obtain a decree to enable the pursuers to enforce the adjudicator's decision. The defenders' position is that that decision is a fundamental nullity since the dispute referred to in the adjudication was the same or substantially the same as one which had previously been referred to adjudication and in which a decision had been taken. That issue has still to be argued out and the correctness or otherwise of the defenders' position was not an issue either before the sheriff or in the appeal. The pursuers contended however that, whether or not the adjudicator's decision was a fundamental nullity, nevertheless the adjudicator was entitled to payment of his fees and expenses and that the parties were jointly and severally liable for payment of those fees and expenses to him. They found on the provisions of paragraph 25(1) of Part 1 of the Schedule to the Scheme, which is in these terms:- "*The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses incurred by him and the parties shall be jointly and severally liable to pay that amount to the adjudicator.*"
- [5] On the other hand the defenders' position is that entitlement to fees and expenses is conditional on the issuing of a decision and that a decision which is ultra vires is no decision at all, with the consequence that there is no entitlement to fees or expenses.
- [6] It was the common position of the parties that this issue depended upon the proper construction of the statutory provisions set out in the Scheme and that it had not been the subject of judicial consideration before this case. It was also common ground that any decision on a dispute which was the same or substantially the same as one which had previously been referred to adjudication and in

which a decision had been taken was a fundamental nullity and that for an adjudicator to proceed in such circumstances was to exceed his jurisdiction.

- [7] The solicitor for the appellants summarised the principal contentions underpinning the appeal as follows:
- a. that an adjudicator must resign where the dispute is the same or substantially the same as one which has been previously decided;
 - b. that an adjudicator who fails to do so will not enjoy jurisdiction to decide the dispute between the parties;
 - c. that in the event of him making a decision in such circumstances he will be regarded as acting *ultra vires* and the decision will accordingly be a fundamental nullity; and
 - d. that an adjudicator derives his entitlement to a fee from the issuing of a decision and thus where there is no valid decision there is no entitlement to a fee.
- [8] He referred to *Ballast plc v The Burrell Company (Construction Management) Limited* 2001 SLT 1039 and specifically to the comments of Lord Reid at paragraph 39 that the decision of an adjudicator will be a nullity if he has acted *ultra vires* as for example "because he had no jurisdiction to determine the dispute referred to him." Reference was also made to the case of *Baldwins Industrial Services plc v Barr Limited* (unreported Judge Kirkham - Technology & Construction Court 6 December 2002), *Carillion Construction Limited v Devonport Royal Dockyard Limited* (unreported Judge Bowsher - T&CC 27 November 2002) and *Deko Scotland Limited v Edinburgh Royal Joint Venture and Others* (unreported Lord Drummond Young 11 April 2003), none of which appear to me to have any particular significance for the issue that I have to decide. Reference was also made to *Vigers Brothers Limited v Montague L Meyer Limited* (1938) 62 Lloyds LR 35 which concerned the actings of an Arbitrator which had led to a decision which included a decision on the expenses of the arbitration. It was pointed out that in this case the Arbitrator had been found to be acting beyond his powers and that his whole decision therefore fell to be set aside, including his decision in relation to expenses.
- [9] The solicitor for the appellants also contrasted the provisions of paragraphs 9(1) and (2) of Part 1 of the Schedule to the Scheme and drew attention to the fact that paragraph 9(4) made provision for the adjudicator's fees only in the event that he required to resign in terms of paragraph 9(2). Paragraph 9(4) is in the following terms:-
- "Where an adjudicator resigns in the circumstances mentioned in sub-paragraph (2), or where a dispute varies significantly from the dispute referred to him and for that reason he is not competent to decide it, that adjudicator's fees and expenses shall be determined and payable in accordance with paragraph 25."*
- [10] He submitted that the specific reference to paragraph 25 in paragraph 9(4) supported the view that paragraph 25 was not a free standing provision entitling the adjudicator to expenses irrespective of whether he had jurisdiction or not. He also submitted that had paragraph 25 been directed to that sort of situation it would have been unnecessary to make reference to it in paragraph 9(4). Finally he drew attention to the fact that paragraph 25 was in a section headed "Effects of the Decision". He submitted, under reference to White & Willock on the *Scottish Legal System* 3rd edn. page 254 and *DPP v Schildkamp* 1971 AC 1, that I was entitled to have regard to this heading as an aid to the interpretation of Section 25. He submitted that this heading was consistent with the defenders' contention that a decision must be issued before an entitlement to fees will arise.
- [11] In responding to the appeal the solicitor for the pursuers repeated the submission that he had made to the sheriff which is recorded at pages 3 and 4 of the sheriff's note. He sought to make a distinction between the nullity of a decision and any nullity of the process by which that decision had been reached. He submitted that there was nothing inconsistent between the finding that a decision was null for want of jurisdiction and an entitlement to the fees and expenses of being engaged in the process that led to the purported decision. He accepted that in terms of paragraph 25 the adjudicator's entitlement to be paid a fee was dependent upon the issue of a decision. In this case the adjudicator had issued a decision and was entitled to a fee notwithstanding that at a later date that decision may be found to have been a fundamental nullity. He submitted that Clause 25 had a very specific effect and that is that an adjudicator, who decides to issue a decision, is entitled to his expenses whether the issuing of that decision was right or wrong.

Decision

- [12] In my view the general thrust of the submissions for the respondents is to be preferred.
- [13] The Scheme is applied by effectively importing its terms into the contract between the parties, who are accordingly taken to have accepted that one party may initiate a referral of a dispute to adjudication without the concurrence of the other party. Assuming, in the first place, the existence of a "construction contract" (about which there is apparently no controversy), it is difficult to see how the adjudicator in this case could not be viewed as a validly appointed adjudicator, albeit subject to a duty to resign from that office if the circumstances set out in paragraph 9(2) of Part 1 of the Schedule applied. Indeed the provisions of paragraph 9(2) assume a validly appointed adjudicator. It is not in dispute that the existence of the circumstances set out in that paragraph bears on the scope of the adjudicator's jurisdiction and may found an attack against his ultimate decision. As the learned sheriff points out however, under reference to *Ballast plc v The Burrell Company (Construction Management) Limited*, the decision of an adjudicator may be equally liable to attack if he has jurisdiction which he fails to exercise (excepting of course his right to resign in terms of paragraph 9(1)).
- [14] In my view this points to a situation in which an adjudicator, validly appointed, may be called upon to make a decision about whether the dispute is or is not the same or substantially the same as one which has already been adjudicated. In other words the structure of the Scheme envisages that this is a decision which he may require to make in the normal course of events. While the defenders may have grounds for complaining that the adjudicator should have resigned in terms of paragraph 9(2), equally the pursuers would have grounds for complaint had the adjudicator resigned in purported reliance upon paragraph 9(2) when the circumstances in which that paragraph applied did not exist. Section 108 of the 1996 Act gives a party a statutory right to have a dispute referred to adjudication and in my view the exercise of that right would be frustrated if the adjudicator resigns in terms of paragraph 9(2) when there are no grounds for doing so.
- [15] If an adjudicator in good faith falls into error on this question and continues to act in circumstances in which he ought to resign, nevertheless in my view he remains in post as a validly appointed adjudicator, unless and until he either resigns or is stopped from acting by the court. While I reach this view upon a consideration of the terms of the Scheme as a whole, that view seems to accord with the approach of the court in *Naylor v Greenacres Curling Ltd* 2001 SLT 1092 and *Sim Group Ltd v Jack* 2002 SLT 847 at 850K.
- [16] **Prima facie** one would expect an adjudicator to be remunerated according to the work undertaken by him in that capacity. In the circumstances that I have already outlined, the adjudicator in this case made a decision in good faith about whether the conditions referred to in paragraph 9(2) existed and concluded that they did not. That was a decision that, in terms of the Scheme, was one that he was called upon to make. I can think of no reason why the defenders could not have sought judicial review of that decision. Had their contention been well founded, they could have obtained an order interdicting the adjudicator from continuing to exercise a jurisdiction which, according to their submission, he no longer possessed. No steps were taken to prevent the adjudicator from continuing to act and, in view of his decision on the absence of the conditions referred to in paragraph 9(2), no doubt he took the view that he had a duty to continue. As the learned sheriff points out, it would be intolerable if he should be deprived of his fees because his decision in this regard turns out on examination by the courts to be mistaken. I would be slow to accept that that is the consequence of such an erroneous decision unless no other view of the Scheme was possible.
- [17] The sheriff has taken the view that the adjudicator's entitlement to fees in terms of paragraph 25(1) is a free standing one, which exists independently of his decision and irrespective of its validity. Subject to my comments in the next paragraph, in my view that approach is the correct one. It seems to me that a distinction can be drawn between the process upon which the adjudicator is engaged and the product of that process, namely the decision on the merits of the dispute referred to him. That decision may ultimately be found to be a nullity, but so long as the adjudicator has in good faith remained in post in my view paragraph 25 gives him a right to be remunerated for his work in that capacity.

- [18] I am not diverted from that conclusion by the submissions made by the solicitor for the appellants concerning the provisions of paragraph 9(4) and the heading of that part of the Schedule containing paragraph 25. The whole purpose of the appointment of the adjudicator is that he should determine the dispute referred to him. It is to be expected therefore that paragraph 25 should be found in that part of the Scheme dealing with the effects of the decision, since it is the issue of the decision that exhausts the referral process and it is at that stage that the adjudicator becomes entitled to determine his fee. In my view it is because of that association that special provision is made in paragraph 9(4) for the circumstances in which the referral does not run its full course, thus making it clear that the adjudicator is nevertheless entitled to be remunerated for the process on which he has been engaged up until that point. However these provisions say nothing about the ultimate validity of the decision issued by the adjudicator, but instead look to the work that is actually undertaken by him in that capacity in exhausting the referral process before him. While the right to determine his fees may only arise on the occasion of his issuing a decision, or exceptionally in terms of paragraph 9(4), nowhere can I find warrant for the proposition that those fees are in effect conditional on the validity of that decision. The fact remains that a decision was issued, thus bringing to an end the process in respect of which the adjudicator was appointed and marking the first occasion on which he could determine the reasonable amount of the fees and expenses incurred by him in that process.
- [19] So far as concerns the case of *Vigers Brothers Ltd v Montague L Meyer Ltd*, I recognise that there are, at least superficially, certain similarities with the present case. Nevertheless in my view it can be distinguished principally on the ground that there was no provision in the contract between the parties similar to that contained in paragraph 25. Furthermore in that case the arbiter had never been lawfully appointed and this is to be contrasted with the circumstances of the present case in which the adjudicator was validly in post, albeit confronted with an argument that he should resign from that post. Accordingly I find nothing in *Vigers Brothers* which detracts from the conclusion that I have reached.
- [20] For all these reasons I am satisfied that the sheriff's construction of the provisions of the Scheme was the correct one and that in a question between the parties on the one hand and the adjudicator on the other the parties are jointly and severally liable to the adjudicator for such reasonable fees as he shall determine. The pursuers' claim under this head is one of relief. There was no argument addressed to me that, as between the parties, there was any basis for suggesting that each was not liable for an equal share of those fees. Nor was there any argument that, assuming the sheriff's construction of the Scheme to have been correct, summary decree should not have been granted. In all these circumstances I shall simply refuse the appeal and adhere to the sheriff's interlocutor.

Parties were agreed that the expenses of the appeal should follow success.

Act: Wallace, Solicitor

Alt: Dean, Solicitor.