OPINION OF LORD CLARKE : Outer House Court of Session : 3rd March 2003.

Introduction

1. In this commercial action the pursuers seek to recover payment from the defenders of certain sums which they claim are due to them by virtue of a decision, dated 22 October 2002, of an adjudicator acting under the Scheme for Construction Contracts (England and Wales) Regulations 1998 S.I. 1998, No. 649 ("the Scheme"). The background to the issuing of that decision was that the parties had entered into a contract, in terms of which the pursuers agreed to execute, as sub-contractor, certain mechanical works in connection with the alteration and modernisation of research laboratories and associated areas for the University of Reading. The contract was a construction contract within the meaning of Part II of the Housing Grants, Construction and Regeneration Act 1996 ("The 1996 Act"). It is averred by the pursuers, and admitted by the defenders, that the contract, being the domestic contract DOM/1 1980 Edition with amendments, contained no provisions for adjudication and that, accordingly, by virtue of Section 108(5) of the 1996 Act, "the Scheme" applied to the contract. That subsection provides that if a contract does not have provision for adjudication in accordance with sections 108(1)-(4) of the Act "the adjudication provisions of the Scheme for Construction Contracts apply". Section 114(4) of the 1996 Act provides that "where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned". The effect of the foregoing provisions is, inter alia, that the parties in the present case, have a term, implied into their contract, that either of them has the right to refer a dispute arising under the contract for adjudication in accordance with the Scheme.

2. The Scheme sets out, in some detail, how the adjudication procedure can be set in motion and the procedure to be followed by the parties and the adjudicator in the adjudication process. For present purposes, it is particularly important, in my view, to have regard to paragraphs 20 and 21 of the Scheme. They provide as follows:

   "20. The adjudicator shall decide the matters in dispute. He 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. In particular, he may -

   (a) open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive,

   (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,

   (c) having regard to any term of the contract relating to the payment of interest decide the circumstances in which, and the rates at which, and the periods for which simple or compound rates of interest shall be paid.

   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 this paragraph."

3. Paragraph 23(2) of the Scheme then provides that 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". It was a matter of agreement, in the present case, that once an adjudicator has issued his decision under the Scheme that decision may, in Scotland, be challenged by way of petition for judicial review. That was done, for example, successfully in the case of **Ballast plc v The Burrell Company (Construction Management) Limited 2001 S.L.T 1309**. In **Naylor v Greenacres Curling Limited** 2001 S.L.T. 1092, Lord Bonomy recalled an interim interdict and interim suspension granted, ex parte, in a petition for suspension and interdict directed against an adjudicator continuing to act after having been appointed to determine a dispute under the Scottish equivalent of the Scheme with which I am concerned. His Lordship did so, in part, because he considered that what in effect the petitioners were seeking was an exercise by the Court of its supervisory jurisdiction under Rule of Court 58.3(1) and the application, having been brought simply by way of ordinary petition procedure, and not under Rule of Court 58.3, was, therefore, incompetent.

4. In the present case the position is the not uncommon one of a party who has had a decision in his favour pronounced by an adjudicator seeking to have it enforced by the Court, once the other party has failed to pay in terms of it within the mandatory period allowed under the Scheme. The pursuers in this case are seeking payment in terms of the adjudicator's decision and do not seek to challenge it in any respect. They bring a commercial action (and it could as well have been an ordinary action) to have payment enforced in terms of it. The defenders, however, seek to resist payment and recognise that to be successful in doing so, they have to be able to challenge the validity of the decision on grounds which are those arising from the substantive law applicable in applications for judicial review. In Answer 3 they set out averments attacking the adjudicator's decision as being ultra vires. The thrust of the attack is that the adjudicator has failed to exhaust the jurisdiction conferred on him by failing to take into account a set off claim placed before him by the defenders in the adjudication. They then aver in Answer 5 as follows: *"Explained and averred that in respect that the defender challenges the Decision, and wishes and requires to invoke the supervisory jurisdiction of the Court in so doing, the present action should be sisted to allow judicial review proceedings to be raised. In the event that the Court is minded to grant a sist as aforesaid, the defender undertakes to serve the relevant judicial review petition within 3 days of the date of interlocutor granting the sist".*

   Those averments are supported by the following pleas-in-law for the defenders:

   "1. In respect that the defender challenges the pretended decision of the adjudicator, and wishes and requires to invoke the supervisory jurisdiction of the Court in so doing, the present action should be sisted.

   2. Esto the present action is not sisted, the pretended decision of the adjudicator founded upon by the pursuer, having been arrived at by the adjudicator without his exhausting the jurisdiction conferred upon him, should be set aside ope exceptionis.

5. The pursuers, at the earliest stage, in the preliminary hearing procedure, in this commercial action, intimated that they took issue with the defenders' position that a sist should be granted because they wished to attack the adjudicator's decision and could only do so by way of bringing a petition for judicial review. The pursuers' position was that the defenders could, and should, simply seek to have the decision set aside *ope exceptionis* in the commercial action. Both parties sought a debate on the question.

6. At first sight the point, no doubt, has the appearance of a somewhat esoteric and sterile procedural dispute. But it does raise, in my judgment, quite sharp and important questions as to the supervisory jurisdiction of the Court and, when, and how, it requires to be invoked. What is manifest is that standing the popularity of the adjudication procedure in construction contracts and the number of applications that are made to the Court for the enforcement of adjudicators' awards, it is of some importance that parties to such proceedings know what the appropriate procedure is to be adopted in relation to challenges to such decisions. I, accordingly, allowed the parties a debate on these questions.

7. I should say that from the outset both parties were agreed, and proceeded on the basis, that the issue which arose, and the law which fell to be applied, would apply equally as well to decisions of arbiters as they would to decisions of adjudicators under the statutory schemes.

The Defenders' Submissions

8. In opening his submissions, counsel for the defenders focused on the role of the adjudicator under the Scheme. This, he said, came about because there had been conferred on him a decision making power by the operation of the Scheme. He adopted the analysis of Lord Reed in the case of **Ballast,** cited above, where his Lordship saw the decision making power of the adjudicator as one which properly arose out of the contract rather than as a function of a statutory decision maker. At page 1046F to 1046I his Lordship explained his reasoning in that respect as follows: *"Section 108 of the 1996 Act envisages that adjudication procedure may be agreed between the parties, provided that their agreement fulfils the requirements of sub-sections (1) to (4); or, in default, it will be imposed under the scheme promulgated by the responsible minister, in which event the procedure is deemed to be a matter of implied agreement, by virtue of section 114(4). In either event, although the provisions have contractual effect, they cannot be regarded as terms to which the parties have freely agreed: In one form or another, they are compulsory contract terms imposed by statute. Nevertheless, I do not propose to approach the issue in this case on the footing that the adjudicator was exercising a jurisdiction created by statute (or, in other words, exercising statutory powers and bound by statutory duties). First, such an approach would not be warranted if the adjudication procedure had been one expressly incorporated into the contract, since the adjudicator's powers and*

*duties would then be created and defined by contract; and I would not regard it as appropriate or desirable to draw a fundamental distinction between adjudication under contract terms complying with Section 108(1) to (4) and adjudication under the scheme. It is indeed possible that an adjudication might be governed partly by express contract terms and partly by the scheme, since the contract might comply only in part with the requirements of section 108(1) to (4); and that is reflected in terms of section 114(4) ('where **any** provisions of the Scheme for Construction Contracts apply": emphasis added). In the event, it would be unrealistic to treat differently the scheme provisions from the express contractual provisions. Secondly, section 114(4) itself requires the court to give effect to the scheme provisions as implied terms of the contract between the parties".*

9. Counsel for the defenders, however, pointed out that Lord Reed went on to accept that the decisions arrived at by the exercise of the adjudicator's decision making power would be challengable by reference to what his Lordship described as "Wednesbury" standards and by way of judicial review - see 1049D to E. Counsel contended that this approach was clearly correct, having regard to what the First Division said in the leading case of **West v Secretary of State for Scotland** 1992 S.C. 385 as to the requirements to be met before the supervisory jurisdiction of the Court of Session came to be invoked. At page 399 Lord President Hope referred to what was said in the case of **Forbes v Underwood** (1886) 13R. 465, a case which involved the question as to whether the Court of Session alone had the jurisdiction to compel an arbiter to proceed. Lord President Hope, in particular, at page 399, cited the well known passage from the Opinion of Lord President Inglis in that case which was to the following effect: *"The position of an arbiter is very much like that of a Judge in many respects and there is no doubt whatever that whenever an inferior Judge, no matter of what kind, fails to perform his duty, or transgresses his duty, either by going beyond his jurisdiction, or by failing to exercise his jurisdiction when called upon to do so by a party entitled to come before him, there is a remedy in this Court, and the inferior Judge, if it turns out that he is wrong, may be ordered by this Court to go on and perform his duty, and if he fails to do so he will be liable to imprisonment as upon a decree ad factum praestandum. The same rule applies to a variety of other public officers, such as statutory trustees and commissioners, who are under an obligation to exercise their functions for the benefit of the parties for whose benefit these functions are entrusted to them, and if they capriciously and without just cause refuse to perform their duty they will be ordained to do so by decree of this court, and failing their performance will, in like manner, be committed to prison. Now, all this belongs to the Court of Session as the Supreme Civil Court of this country in the exercise of what is called, very properly, its supereminent jurisdiction."*

   Lord President Hope then pointed out that, after considering the position of inferior judges and then of arbiters, Lord President Inglis went on to say as follows: *"Now, all these are considerations which require the most delicate handling by a court that is called upon to enforce under the penalty of imprisonment the duty of the arbiter to go on and close the submission. I can hardly conceive anything more suitable for the interposition of the Supreme Court, or less suitable to the jurisdiction of an inferior judge. It appears to me that the parallel between the position of an arbiter and the position of inferior Judges - Judges in the proper sense of the term - is complete, and the two are quite indistinguishable in this question of jurisdiction".*

10. In the light of these passages from the Opinion of Lord President Inglis in **Forbes v Underwood**, Lord President Hope was of the opinion, at page 399 that: *"The importance of this case for present purposes is that it shows that the principle upon which the supervisory jurisdiction is exercised is not affected by distinctions which may exist for other purposes between public bodies and those who exercise a jurisdiction under a private contract."*

    His Lordship then, at page 400, remarked: *"The scope of the expression 'any inferior tribunal or any administrative body' will be evident from the cases to which we have already referred. The common characteristic is not the nature of the tribunal or body as such but the entrusting to it of a decision-making power or duty which must be exercised within the jurisdiction conferred upon it and is accordingly subject to supervision by the court."*

11. Counsel for the defenders, relied on these passages from Lord President Hope's Opinion in **West** and what his Lordship also had to say, at pages 413 to 414 in that case, to submit that in the present case there had been conferred by the parties to the contract a decision making power, the exercise of which was subject to the supervisory jurisdiction of the Court of Session. In this connection counsel, in particular, emphasised what Lord President Hope had to say, in **West** at page 413 namely that the word "jurisdiction" in this context "best describes the nature of the power, duty or authority committed to the person or body which is amenable to the supervisory jurisdiction of the court. It is used here as meaning simply "power to

decide", and it can be applied to the acts or decisions of any administrative bodies and persons with similar functions as well as to those of inferior tribunals. An excess or abuse of jurisdiction may involve stepping outside it, or failing to observe its limits, or departing from the rules of natural justice, or a failure to understand the law, or the taking into account of matters which ought not to have been taken into account. The categories of what may amount to an excess or abuse of jurisdiction are not closed, and they are capable of being adapted in accordance with the development of administrative law."

12. What the defenders were complaining about in the present case was an abuse of jurisdiction by the adjudicator in his failure to address the whole dispute upon which he was required to adjudicate. In **Ballast** Lord Reed at page 1050 said in relation to the adjudication scheme, with which he was concerned: *"I have come to the conclusion that the scheme should be interpreted as requiring the parties to comply with an adjudicator's decision, notwithstanding his failure to comply with the express or implied requirements of the scheme, unless the decision is a nullity; and it will be a nullity if the adjudicator has acted ultra vires (using that expression in a broad sense to cover the various types of error or impropriety which can vitiate a decision), for example because he had no jurisdiction to determine the dispute referred to him, or because he acted unfairly in the procedure which he followed, or because he erred in law in a manner which resulted in his failing to exercise his jurisdiction or acting beyond his jurisdiction".*

13. The issue between the parties, at this stage, was how could a challenge to the ultra vires nature of the adjudicator's decision be brought by a defender who was being sued in an action for payment of sums which the adjudicator had decided were due to the pursuers. The question was one of competency. The answer to that question turned on a proper application of the relevant rules of Court. The defenders' contention was that the challenge could only be brought by way of a petition for reduction of the decision in question under Rule of Court 58.3(1). The rule provides that: *"... an application to the supervisory jurisdiction of the Court, including an application under Section 45(b) of the Act of 1988 (specific performance of statutory duty), shall be made by petition for judicial review."*

    The wording of the rule, counsel for the defenders submitted, made it compulsory for anyone, including someone in the defenders' position, in the present case, seeking to invoke the supervisory jurisdiction of the Court of Session to proceed by way of petition for judicial review. The pursuers contended that this was not so and that, in a situation like the present, the defenders could invoke the provisions of Rule of Court 53.8 and challenge the validity of the decision *ope exceptionis*. Rule of Court 53.8 is in the following terms: *"Where, in an action, a deed or other writing is founded on by a party, any objection to it may be stated by way of exception, unless the Court considers that the objection would be more conveniently disposed of in a separate action of reduction."*

    Counsel for the defenders submitted that having regard to that wording, the pursuers' position on the matter was ill founded. The words "would be more conveniently disposed of in a separate action of reduction" meant that the provisions of this rule could only be employed where it would be competent, as an alternative, to challenge the deed or writing by bringing an action of reduction of the deed or writing in question. But, said counsel for the defenders, in a case like the present the defenders could not, by virtue of the provisions of Rule of Court 58.3(1) bring an action of reduction of the disputed decision but would require to challenge it by way of petition for judicial review. There, accordingly, was no room for Rule of Court 53.8 to be employed by the defenders. That rule was designed to avoid unnecessary actions of reduction having to be brought. It was not designed to avoid the need to bring a petition for judicial review, if the supervisory jurisdiction of the Court of Session was being invoked. This approach to the question was consistent with what Lord Bonomy had decided in **Naylor** above. As was stated in *Clyde & Edward's Judicial Review* at para. 23.05 "Rule 58.3(1) is in mandatory terms so that any application which falls within the scope of the rule will be treated as incompetent if attempted by any other procedure". The defenders, in the present case, if they were to be able to challenge the decision of the adjudicator, required to bring a petition for judicial review to do so. They had, in their defences, set out a prima facie relevant basis for an attack on the adjudicator's decision. The present action should be sisted to allow them to bring their challenge of the validity of the decision upon which the present action was founded.

Pursuers' submission in reply

14. In reply, counsel for the pursuers commenced by submitting that the defenders, in averring a defence of the sort they had, in an action like the present, were not invoking the supervisory jurisdiction of the Court. Moreover, and in any event, the wording of Rule of Court 58.3(1) should not be read as cutting down substantive rights, unless the wording admitted of no other result. In support of the second proposition, which I have just noted, counsel for the pursuers referred me to the House of Lords decision in the English case of **Wandsworth London Borough Council v Winder** (1985) A.C. 461. In that case the defendant had been sued for arrears of rent in respect of a flat let to him by a local authority. The local authority also sought possession of the premises. The defendant sought to defend the proceedings on the basis that the resolutions which the authority had passed in relation to the current rent, which they sought to recover, were invalid and void. The Council sought to have the defence struck out as being an abuse of process since the challenge to the conduct of a public authority could only be done by an application for judicial review under the relevant rules of the Supreme Court (R.S.C. Ord. 53). The authority succeeded at first instance in their application to strike out the defence. The matter eventually came for decision by the House of Lords. The House of Lords held that the defendant was not prevented by the provisions of R.S.C. Ord. 53 from defending the action on the basis that the relevant resolutions were ultra vires and void. It was, the House of Lords held, a paramount principle that the private citizen's recourse to the Courts for the determination of his rights was not to be excluded except by clear words. There was nothing in the language of R.S.C. Ord. 53 which could be taken as abolishing a citizen's right to challenge the decision of a local authority in the course of defending an action like the one in question. The authority, in seeking to have the defence struck out, relied also on the provisions of Section 31 of the Supreme Court Act which provides that an application to the High Court for judicial review "shall be made in accordance with Rules of Court by a procedure to be known as an application for judicial review". The House of Lords held that that statutory provision did not prevent the defendant challenging the validity of the resolutions without making an application for judicial review. R.S.C. Ord. 53 provided for a modern form of procedure for applying for judicial review in England and Wales. It had come into force in December 1977. In delivering the main speech in the case, with which all of their Lordships agreed, Lord Fraser of Tullybelton at page 509 said this: *"It would in my opinion be a very strange use of language to describe the respondent's behaviour in relation to this litigation as an abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellants. In so doing he is seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff. Moreover he puts forward his defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour. Apart from the provisions of Order 53 and section 31 of the Supreme Court Act 1981, he would certainly be entitled to defend the action on the ground that the plaintiff's claim arises from a resolution which (on his view) is invalid: see for example* ***Cannock Chase District Council v Kelly*** *(1978) 1 W.L.R. 1, which was decided in July 1977, a few months before Order 53 came into force (as it did in December 1997). I find it impossible to accept that the right to challenge the decision of a local authority in course of defending an action for non-payment can have been swept away by Order 53, which was directed to introducing a procedural reform. As my noble and learned friend Lord Scarman said in* ***Reg. v Inland Revenue Commissioners ex parte Federation of Self Employed and Small Businesses Limited*** *(1982) A.C. 617, 647G 'the new R.S.C., Ord. 53 is a procedural reform of great importance in the field of public law, but it does not - indeed cannot - either extend or diminish the substantive law. Its function is limited to ensuring 'ubi jus, ibi remedium'. Lord Wilberforce spoke to the same effect at page 631A. Nor, in my opinion, did section 31 of the Supreme Court Act 1981 which refers only to 'an application' for judicial view have the effect of limiting the rights of a defendant sub silentio. I would adopt the words of Viscount* ***Simonds in Pyx Granite Co. Ltd v Ministry of Housing and Local Government*** *(1960) A.C. 260, 286 as follows:*

> *'It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words.'*

The argument of the appellants in the present case would be directly in conflict with that observation.

If the public interest requires that persons should not be entitled to defend actions brought against them by public authorities, where the defence rests on the challenge to a decision by the public authority, then it is for Parliament to change the law."

15. Counsel for the pursuers contended that all of the considerations set out in the passage just cited, which led Lord Fraser to the conclusion he arrived at, were equally applicable in the present case. The pursuers sought payment under a contract. The defenders wanted to maintain that the sums in question were not due. The defenders wanted to assert that, as a matter of right, as a defence to the action. Prior to the promulgation of Rule of Court 58.3(1) there would have been no obstacle preventing the defenders from so doing. The wording of the Rule of Court should not be read as having placed such an obstacle in the defenders' way. By its reference to an "application" it was referring to an originating part of process. It did not touch upon questions of how defective decisions might be challenged as a matter of defence. Counsel maintained that in defending the action on the basis that they did, the defenders were not seeking to invoke the supervisory jurisdiction of the Court, in any event. In this respect I was referred by counsel to what is said in *Clyde & Edwards Judicial Review* at para. 8.16, at p.330, where it is stated "that an act or decision is ultra vires has always been available as a defence in civil and criminal proceedings. Critically, however, in such proceedings the Court does not quash the act or decision if it finds it ultra vires, this power is exclusively possessed by the Court of Session in the exercise of its supervisory jurisdiction". Counsel referred me to the Sheriff Court Rule O.C.R., r.21.3 which provides that in the Sheriff Court when a deed or writing is founded on by a party, any objections to it by any other party may be stated and maintained by exception, without reducing it. Rule of Court 53.8 was consistent with the Sheriff Court Rule in that it does not refer to the deed or writing being reduced *ope exceptionis*. Counsel accepted that it might be a matter for the Court to determine whether, in the present case, it would be more convenient and appropriate that the attack on the vires of the adjudicator's decision should be made by an application for judicial review. The case of **Docherty v Norwich Union Fire Insurance Society Limited** 1974 S.L.T. (Notes) 37 was authority not only for the proposition that the words "deed or writing" in Rule of Court 53.8, applied to decrees and therefore decisions of arbiters and adjudicators, but also that the Court would normally expect one or other party to aver specifically, if this was their position, why it would be more convenient to proceed by way of action of reduction rather than under the provisions of the rule. But the issue before the Court was not whether it would be more convenient or desirable in the present case that the defenders should proceed by way of judicial review. The question which the Court was being asked to decide was whether that was the only way by which the defenders could effectively maintain their defence that the adjudicator's decision was ultra vires. A possible case where it could be said that it would be more appropriate for the challenge to the adjudicator's decision to be made by way of judicial review procedure would be where the decision-maker was being accused of fraud or corruption or the like. In such a case it would be relatively easy, perhaps, to argue that it was desirable and appropriate that the decision maker should be given the opportunity to defend himself by serving a petition for judicial review upon him.

16. The defenders accepted that the law in this area had to be the same whether the decision in question was one of an adjudicator operating under the statutory schemes or an arbiter operating under contract. It had long been recognised that the enforcement of the decision of an arbiter could be resisted, in an action brought for that purpose, on the basis that it was, inter alia, ultra vires and that that resistance, could be taken in the defence to the action, and if, in the event, the defence was successful this would result in the action being dismissed or the defender being assoilzied. An example of this occurring in the Sheriff Court is the case of **Sundt & Co. v Watson** (1914) 31 S.H. Sh.Ct. Rep. 156. It is, in my view, of some interest to note what occurred in that case. An action had been brought in the Sheriff Court to enforce an award in an arbitration. The defender pleaded that there had been an irregularity in the procedure before the arbiter and that therefore the award, although ex facie valid, ought to be reduced *ope exceptionis*. The Sheriff-Substitute repelled the defence. In doing so he said this: *"The sole question on the pleadings is as to the validity of an award issued by the arbiters in a reference between the parties. The pursuers base their case upon this award, which they produce and seek to enforce and there is no answer to their case if the award is valid. The award is admittedly ex facie valid, and the objections stated by the defenders to its validity are set forth in their pleas in law, and involve, if established, a reduction of the award. If proof be allowed - if indeed the action is to proceed at all - it would be an action of reduction pure and simple, and actions of reduction are expressly excluded by statute from the Sheriff Court. The defender's contention that the award may be reduced ope exceptionis under Rule 50 to the First Schedule to the Sheriff Courts (Scotland) Act 1907, is not, in my opinion, sound, having in view the views expressed by the judges in the Court of Session in* ***Leggat Brothers v Gray*** *1912 S.C. 230 and* ***Donald v Donald*** *1913 S.C. 274. To*

reduce decreet arbitral, which disposes of all matters in dispute between the parties, upon grounds which involve a review of the whole arbitration proceedings as well as a construction of the scope and meaning of the contract of reference, and do this ope exceptionis when action is raised for no other purpose than to enforce the award, does not seem to be the kind of case contemplated by the clause referred to. When the pleadings disclose, as they do here, that the sole questions between the parties is the validity of a deed which is ex facie valid and must be given effect to unless reduced, and the action plainly resolves itself into an action of reduction and nothing more or less, then the proper forum for an action of reduction should be resorted to by the party whose case involves reduction, and that forum is not the Sheriff Court."

17. The defender appealed and the Sheriff reversed the judgment of the Sheriff- Substitute. In his note the Sheriff at page 158 said this: *"In the present case the defender does not raise any question of misconduct on the part of the arbiters, but merely that the procedure in the arbitration was not according to law. The only interest that could be suggested they had in the award was with regard to their fees, and that does not seem to me to be sufficient to necessitate their being called to appear in a proceeding for the reduction of the award. The most recent case that deals with this rule of the Sheriff Courts Act is* ***Donald v Donald*** *1913 S.C. 274. The reasons there given for refusing to set aside a will by way of exception in the Sheriff Court do not seem to me to apply to an award of the arbiters in a submission similar to the one set forth in this case. The only parties who have an interest in the award are the parties to the present cause. If the award is set aside by way of exception, then there is an end to it, and the decision would be res judicata in any subsequent proceeding as between these parties. Moreover, there is no doubt that allowing the award to be set aside would prevent the multiplication of procedure and consequent expense. For these reasons I think that it is competent in this Court to set aside the award by way of exception."*

18. Counsel for the pursuers submitted that that case demonstrated that the point was not one of competency and that the approach of the Court should simply be one of proceeding on a case by case basis deciding whether, in particular circumstances, it was appropriate, for reasons of expediency and convenience, that the party seeking to avoid the decision by way of defence, should be directed to raise a petition for judicial review in which reduction of the decision should be sought. All the modern writers appear to proceed on the footing that this approach is the correct one in relation to arbiters' decisions. In the article on Arbitration, written by Lord Hope, for the Stair Memorial Encyclopaedia of the Laws of Scotland, Lord Hope at para. 75, in dealing with modes of challenge of arbiters' awards states this: *"There are three methods which may be used to achieve this result, the choice between which depends on the circumstances. The first and usual method is to seek an order for reduction of the award, a form of process which is competent only in the Court of Session. The application is made by petition by judicial review, the sole purpose of which is to ensure that the arbiter has not exceeded his jurisdiction, power or authority. The effect of the order is to annul the award, which then ceases to have effect for any purpose whatever.*

The second method may be used where an action has been raised to enforce the award. In this case it may be possible to deal with the matter in the defences by seeking reduction of the award ope exceptionis. This procedure is competent both in the Court of Session and in the sheriff court. There is no absolute right to have an award set aside in the Court of Session by this means, since the Court has a discretion to insist upon a separate action of reduction being brought. The sheriff court does not have such a discretion, but it is subject to the limitation that the objection which may be stated and maintained by way of exception is one which the sheriff can finally dispose of and which will supersede the necessity of bringing an action of reduction of the deed which has been challenged. A defence by way of exception has been allowed in the sheriff court against an arbiter's award. The view has been expressed that an objection by way of ope exceptionis is only competent where the objection appears ex facie of the award and is capable of instant verification without resort to a proof. However, it is thought that this view, which is based on an earlier line of authority, has been superseded by the rules to which reference has been made, which provide that 'all objections' may be stated by way of exception; and in modern practice the proper test is the broad one of practical expediency.

Thirdly, it may sometimes be appropriate to proceed by means of suspension and, if necessary, interdict; but it is at least doubtful whether this process is competent in the sheriff court in the case of an arbiter's award, and it is a summary remedy which operates only to the limited extent of staying execution or enforcement of the award. The most satisfactory remedy, therefore, in cases of urgency, is to petition for judicial review and to include among the remedies sought an order for interim interdict."

19. It would be surprising, counsel for the pursuers submitted, if Lord Hope had failed to appreciate that, nowadays, the only means of challenging an arbiter's award was by way of judicial review having regard to the terms of Rule of Court 58.3(1). Reference was also made to Hunter on the Law of Arbitration in Scotland at paras. 16.9-16.11 and Davidson: Arbitration at para. 18.02. Counsel for the pursuers then reminded me that the purpose of the legislation with which the present action was concerned was to provide for a speedy and interim resolution of building contract disputes during the currency of a building contract. It would be regrettable if that purpose was, to some extent, defeated by requiring the proliferation of proceedings if a decision of an adjudicator was to be challenged. Rule 58.3(1) did not define the word "*application*". Counsel drew my attention to the fact that the previous version of the rule viz Rule of Court 260B(1) was in the following terms: *"An application to the supervisory jurisdiction of the Court which immediately before the coming into operation of this rule would have been made by way of summons or petition, shall be made by way of an application for judicial review in accordance with the provisions of this rule."*

    While counsel could offer no explanation as to the reason why the words "by way of summons or petition" had been removed and did not appear in the present rule, he contended that the intention of the rule, in its present form, remained as it had been in the previous version, namely, that it was dealing with the "originating part of the procedure" required to be taken if judicial review is being sought. It should not be construed as applying to pre-existing procedures where decisions of arbiters, and the like, could be set aside *ope exceptionis* on the grounds that they were illegal or ultra vires in accordance with the substantive law applicable in judicial review cases. Counsel for the pursuers, accordingly, invited me to repel the defenders' first plea-in-law.

The Defenders' Reply

20. In reply counsel for the defenders submitted that it appeared to emerge from what counsel for the pursuers had said that he accepted that if the defenders were to "initiate" a challenge to the adjudicator's decision this would require to be done by the bringing of a petition for judicial review. That was an important concession because of the wording of Rule 53.8. As he had previously pointed out that Rule contemplated a defence *ope exceptionis* being taken only where challenge, by way of action of reduction, could also be taken as an alternative. But the bringing of an action of reduction was not open to the defenders as the pursuers themselves conceded. An initiating attack on the adjudicator's decision had to be taken by way of petition of judicial review. It was not enough for counsel for the pursuers to seek to get over this difficulty by suggesting that it only arose if one read the wording of Rule of Court 53.8 over-narrowly. The House of Lords decision in the case of **Wandsworth L.B.C. v Winder** was not helpful in deciding a question which involves interpretation of the Rules of the Court of Session. Moreover the approach of their Lordships in that case, in holding that the plaintiff's position in seeking to have the defence struck out involved a curtailment of the defendants' rights did not fit the present case. There was no question of the defenders' substantive rights being excluded as a result of the submissions made by them. The question was simply a question as to how procedurally the vindication of these rights could be competently pursued. The defenders need to have the adjudicator's decision reduced according to Scots Law principles and rules of procedure. That could only be done in relation to a decision of the kind with which the present action was concerned, by way of petition of judicial review. In this connection counsel drew my attention to what Lord Fraser had said in **Brown v Hamilton District Council** 1982 S.C. (H.L.) 1. That case had decided that a decision of the local authority under the Homeless Persons Legislation could not be set aside by way of a declarator pronounced in the Sheriff Court, challenging its validity and that, indeed, such an action was incompetent. At page 46 Lord Fraser said: *"A mere declarator that the decision was one which they were not entitled to reach does not get rid of the decision, nor can it open the way for the housing authority to reach a different decision if, on further consideration of the matter in light of the Court's decision on matters of law, it thinks fit to do so. In a case such as this, where the housing authority is both the decision-making authority and the decision-implementing authority, the proper procedure is for the decision to be reduced so that a different decision, creating different legal rights for the private party in the position of the respondent, can be made. The view which was taken by the majority of the Second Division involves treating a decree of declarator by the sheriff either as being in substance a decree of reduction, in which case it would be granted without jurisdiction, or as a mere brutum fulmen, having no compulsive force, in which case it would be futile and ought not to be pronounced."*

21. Counsel for the defenders, relying on that passage, submitted that for defenders to resist payment of the sums in question they required to "get rid" of the adjudication decision and that could only be done by "proper" reduction. To achieve this required the defenders to invoke the supervisory jurisdiction of the Court of Session and this could only be done by bringing an application under Rule of Court 58.3(1). At the present time there was no such application by the defenders.

22. With regard to the modern writers on arbitration, referred to by the pursuers, counsel for the defenders submitted that none of these had addressed the argument that he had advanced, in the present proceedings, that because of the wording of Rule of Court 53.8, since it was not open to the defender to bring an action of reduction, it was necessary to bring a petition for judicial review and have the decision declared a nullity and reduced thereunder. The effect of the Sheriff Court decision in the case of **Sundt** had, in counsel's submission, been removed by the law as set out in **West** and, in any event, did not sit well with what was said in **Forbes v Underwood** and **Brown v Hamilton District Council**. The Court should resist being attracted by the submission made by the pursuers that the decision as to whether a petition for judicial review should be brought or not, rather than allowing a defender to resist enforcement in his defence, in a case like the present, should be dealt with, on a case by case basis, under reference to questions of convenience and expediency. Clarity and certainty was what was required in relation to the proper procedure to be adopted in such disputes.

23. For all of the foregoing reasons counsel for the defenders renewed his motion that the Court should sustain the defenders' first plea-in-law and sist the action to enable the defenders to raise judicial review proceedings.

Supplementary Discussion

24. Having taken the matter to avizandum, it came to my attention, in examining the material placed before me by counsel, and in relation to certain of the issues raised, that I had not been addressed fully, on certain matters, which might have a bearing on the decision which I require to reach in this case. These matters were as follows.

    1. Little, if anything, had been said as to what, in our system of law, is meant by the expression *ope exceptionis* and the effect of a matter being raised successfully *ope exceptionis* in a defence to an action.

    2. There was a line of Inner House authority (referred to briefly by Lord Hope in his Article on Arbitration) in relating to decisions of arbiters, which is mentioned in the writings of the modern works on arbitration and which is fully discussed in Irons & Melville on Arbitration, which seems to draw a distinction between the class of cases on the one hand where an objection can be taken to an arbiter's decision *ope exceptionis* and another class of cases where a separate action of reduction is necessary. It seemed to me that it was necessary to consider whether that line of authority remained good law or not and, if it did, what bearing it had on the question raised before me.

    3. It also appeared to me that there were echoes of the distinction just referred to in some of the modern English authorities where questions of this kind were raised, eg. **R. v Wicks** (1998) A.C. 92 and **Boddington v British Transport Police** (1999) 2 A.C.143 and that it may be appropriate to have regard to those authorities.

    Having given parties notice of these concerns, I invited their representatives to make submissions to me in relation thereto. I am grateful to counsel on both sides of the bar, first for the ready and efficient way in which they agreed to consider these points and, secondly, for their very helpful submissions in relation to these matters.

25. Both parties were at one in submitting that the effect of seeking to resist the effect of deed or writing *ope exceptionis* was not to reduce the deed. To that extent it is, strictly speaking, not correct to speak of reduction *ope exceptionis*. Neither Rule of Court 53.8 nor the relevant Sheriff Court Rule uses that expression. The expression *ope exceptionis*, under reference to its role in Roman law, is described in *Trayner's Latin Maxims* as follows (at page 425): *"- By force of exception. An exception is a kind of defence, but the distinction between defences and exceptions is practically disregarded in the practice of our law. In the civil law (where it originated) an exception was a reason set forth by the defender why he should not be condemned to pay or perform that which the pursuer claimed, founded upon some equitable ground, and of which the strict law could take no*

cognisance. For example by the civil law no question was made as to how a stipulatio arose; its existence, if admitted or proved, was sufficient to entitle the stipulator to action thereon, and decree against the promissor. But many exceptions might be stated by the promissor, on account of which the stipulator could be defeated on equitable grounds, although at strict law he was entitled to judgment. It might be accepted that the stipulation was forced or extorted from the promissor under fear (exceptio metus causa) or that the sum for which the promissor had given his obligation had never been paid to him (exceptio non numeratae pecuniae). When, therefore, an exception was pleaded before the praetor he inserted it in the formula which he sent to the judex who tried the case, and as that formula directed decree to be given, except (or unless) the stipulator had been guilty of the fraud, etc, averred, hence arose the name of exception. Even in the time of Justinian, however, the word came to mean, as it does with us, any defence other than a denial of the right of action, urged by the defender before the magistrate or judge. A single instance may illustrate the distinction between defence and exception, as held in Scotland, although, as we have said the distinction is practically disregarded. If A suing B for the price of certain goods ordered by and delivered to him, be met with the statement that the goods were never either ordered or delivered, this was a defence; but if B, admitting the receipt of the goods pleads that he has already paid the price thereof to A, this is an exception".

Notwithstanding the fact that reduction of the deed or writing is not effected when exception to it is successfully taken in a defence to an action, the phrase "reduction *ope exceptionis*" has been used by persons of high authority from time to time. For example, in **Brown v Hamilton District Council** at page 45, Lord Fraser said: *"The Sheriff Court has no jurisdiction to grant decrees of reduction of the appellant's decision. It has a limited jurisdiction to reduce deeds or decisions ope exceptionis under Rule 5 of Schedule 1 of the 1907 Act but it has no general power to grant decrees of reduction". (my emphasis)*

(It appears that his Lordship should, in any event, have referred to Rule 50 rather than Rule 5 of the Schedule). But in any event when one considers the actual wording of the Rule, which was to the following effect: *"When a deed or writing is founded on by any party in a cause, all objections thereto may be stated and maintained by way of exception, without a necessity of bringing a reduction thereof";* it is clear that the provision is no warrant for saying that the sheriff when sustaining such an objection, would be reducing the deed or writing in question.

26. The distinction between awards of arbiters to which objection may be taken *ope exceptionis* and those which require to be reduced is discussed in Irons & Melville at pages 358-359. At page 358 the writers say this: *"The question as to what is a competent objection to an award, capable of being stated by way of defence or ope exceptionis to an action, is usually tested by whether the objection appears ex facie of the award or procedure, and be capable of instant verification without resort to a proof; or whether it be extrinsic of the award and procedure - requiring proof to establish it. The general rule is that in the former case objection may be stated by way of defence or ope exceptionis, while in the latter reduction will be necessary.*

The question was specifically raised in the case of ***Whitehead v Finlay*** *16 Nov 1833, Fac.Dec,vol.IX, p.38; see also 11 S170, by a plea that it was incompetent to maintain objections by way of defence, ope exceptionis, to an action for implement of a formal decree - arbitral, on the ground that the decree was ultra vires, and that an action of reduction was necessary. The Court on appeal, adhered to the Opinion of the Lord Ordinary (Fullerton) and held that the objection to the decree was pleadable ope exceptionis. The objection in this case was that the parties sisted 'as trustees' had been decerned against personally. Lord Fullerton in his Note there said: 'If the objection to a decree-arbitral is forgery, fraud, corruption or any other objection which is extrinsic, not appearing from the terms of the decree itself, which is in all respects formal, and where extraneous evidence is to be adduced to support the objection, a process of reduction is necessary. But where the objection is not of that character, and is to be proved from the terms of the decree itself, the same have often been discussed by the Court as reasons of suspension merely'".*

The writers then at page 359 went on to say: *"The point was again raised in a comparatively recent case, where, in an action for implement of an award, averments of corruption were inter alia stated by way of defence; but the Court there expressly held that while it is competent in an action for implement to inquire whether the actings of the arbiters or oversman have been ultra fines compromissi, or ultra vires, averments of corruption cannot be made except by way of an action of reduction".*

Both counsel for the pursuers and counsel for defenders were agreed that any such distinction had gone because of the provisions of the relevant Rules of Court both in the Sheriff Court and in the Court of Session, which, in the case of the Court of Session, had been promulgated after the passages from Irons &

Melville were written. This point is made by Lord Hope in the passage at para.75 of his article on Arbitration cited above and to which I have already referred. Counsel for the pursuers drew my attention to the fact that the Act of Sederunt bringing into effect, for the first time, as a matter of Court rule, the predecessor of what is now to be found in Rule of Court 53.8 was passed in 1907, some 4 years after the work on Arbitration by Irons & Melville was published. The significance of the passing of the Act of Sederunt was pointed out by Maclaren on Court of Session Practice at page 679 when he said: *"Down to the year 1907 there seems to have been only two statutes which in express terms dealt with the rights of challenge, ope exception in the Court of Session, of void or voidable deeds or writings; and both these statutes had reference to bankruptcy proceedings".*

The two Acts which the writer was referring to were the Act of 1621 and the Bankruptcy (Scotland) Act 1856. Nevertheless it is clear that prior to the passing of the 1907 Act of Sederunt, the Court of Session was, in certain cases, prepared to allow a challenge to a deed or writing *ope exceptionis*. The practical effect of the 1907 Act of Sederunt, it was submitted, was to sweep away distinctions such as were discussed in Irons & Melville and to allow, as a matter of competency, challenge to a deed or writing *ope exceptionis* in all cases.

27. The approach of the defenders in relation to this question was a little different in its focus. Counsel for the defenders submitted that the approach of the Court in such cases as **Whitehead v Finlay**, cited above, and **Thomson v Munro** (1882) 19 S.L.R.739, prior to the passing of the Act of Sederunt, had been to seek to avoid unnecessary actions of reduction. That rationale was reflected in the Act of Sederunt and was confirmed by what Lord President Dunedin said, under reference to the Act of Sederunt, in the case of Oswald v Fairs 1911 S.C.257 where his Lordship at page 264 was to the following effect: *"The provision in the recent Act of Sederunt is a very valuable one in the way of dispensing with useless process - that is to say, instead of having to sist an action in order that an action of reduction may be raised as a separate process, it is now possible to make good a defence which depends upon reduction at once ....."*.

(Again one might observe, with due deference, that the use by Lord President Dunedin of the expression "reduction" in the last line quoted, may tend to mislead since neither the Act of Sederunt 1907, nor its present equivalent in Rule of Court 53.8 suggests that the defence *ope exceptionis* results in actual reduction of the deed or writing in question). While counsel for the defenders conceded that the effect of the Act of Sederunt of 1907 was to sweep away the distinction between the two classes of cases discussed in Irons & Melville, he, nevertheless, submitted that, since the taking of an objection *ope exceptionis* did not result in the deed or decision to which objection is taken, being reduced, it was necessary, in a case like the present, for defenders seeking to resist enforcement of the decision to have the decision reduced.

28. As for English authority, counsel for the defenders sought to rely, by analogy, on the House of Lords decision in the case of **R. v Wicks** (1998) A.C.92. There is potentially, to be seen in that case a distinction similar, though not identical perhaps, to that drawn in the law set out in Irons & Melville as discussed above. The distinction in English law would appear to be between cases of procedural invalidity on the one hand and substantive invalidity on the other. The former could not, it seems, be relied upon by a defendant in defending himself, whereas the latter could. In that case the question was whether a defendant in criminal proceedings was entitled to challenge the validity of an enforcement notice issued under the relevant Town and Country Planning legislation, where the notice had not been set aside on appeal, or quashed on judicial review. While it is true that their Lordships in that case saw some difficulty in approaching such questions on the basis of whether or not the challenge to the decision or act was relying on a procedural rather than substantive invalidity, they did, as I read their speeches, continue to recognise that distinction as part of the relevant law. What they did, however, was to say that, in a case like the one before them, which arose out of a particular statutory framework, the question as to whether a defendant could challenge the validity of an act done under statutory authority, which had not been quashed or set aside, depended on the true construction of the statute in question and the application of the substantive/procedural invalidity distinction, or test, was subject to what the intention of the legislature came to be seen to be on such questions. In the case before their Lordships, the planning legislation contained an elaborate code with detailed provisions regarding appeals. Having regard to those provisions of the code, their Lordships held that Parliament had excluded the possibility of challenge being taken, in criminal proceedings, to an enforcement notice, on the footing that it had been motivated by bad faith, bias or other procedural impropriety, where it had not been set aside on appeal or quashed on judicial review.

It is, perhaps, of some interest to note that Lord Nicholls at page 107, in discussing the difficulties which arose in defining the boundary between procedural and substantive invalidity observed as follows: *"One possible way ahead, therefore, is to abandon the attempt to define a boundary. Rather, the guiding principles should be that prima facie all challenges to the lawfulness of an impugned order may be advanced by way of defence in the criminal proceedings, but that the criminal court should have a discretionary power to require an unlawfulness defence to be pursued, if at all, in judicial review proceedings".*

Counsel for the defenders sought to pray in aid the approach of the House of Lords in **Wicks**, in support of the position adopted by the defenders before me. In the present case section 108(3) of the 1996 Act provided that a construction contract must, in order to comply with the Act, provide that a decision of an adjudicator is binding until the dispute is finally determined by legal proceedings, arbitration or agreement. In addition paragraph 23(2) of the 1998 Scheme provides that: *"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 or by agreement between the parties".*

Counsel emphasised the words "they shall comply with it" and submitted that the statutory provisions indicated that Parliament had intended that the decision of an adjudicator required to be quashed if a party, who otherwise is bound by, it is to resist complying with it.

29. The position in English law has developed further since the decision in **Wicks**. In **Boddington v British Transport Police** (1999) 2 A.C.144 the House of Lords held that a defendant was not precluded from raising, in a criminal prosecution, the contention that a bye-law or an administrative act, undertaken pursuant to it, was ultra vires, and unlawful, without his having had the bye-law or Act set aside on judicial review. The House of Lords, furthermore, held that, in this respect, there was no distinction to be drawn between the substantive and procedural invalidity. In distinguishing the case of **Wicks**, the Lord Chancellor (Lord Irvine of Lairg) said this, at pages 161-162: *"The particular statutory schemes in question in **R. v Wicks** (1998) A.C.92 and in the **Quietlynn** case (1988) 1 Q.B.114 did justify a construction which limited the rights of the defendant to call the legality of an administrative act into question. But in my judgment it was an important feature of both cases that they were concerned with administrative acts specifically directed at the defendants, where there had been clear and ample opportunity provided by the scheme of the relevant legislation for those defendants to challenge the legality of those acts, before being charged with an offence".*

30. At the end of the supplementary submissions which counsel had been invited by the Court to make, there was some discussion as to where matters might proceed if I were to repel the first defenders' first plea-in-law and to hold that, as a matter of competency, it was not necessary for a defender, in a case like the present, if he was to resist enforcement of an adjudicator's decision, to seek to have the decision reduced by successfully pursuing judicial review proceedings. Counsel for the pursuers, in that context, advised me that it was not the pursuers' position that the Court had no power or discretion to decide that the particular circumstances of a particular case made it more appropriate or expedient that the decision or act in question should be made subject to the judicial review proceedings. That could arise, for example, where it was considered appropriate that the adjudicator, arbiter or other decision maker should have the opportunity to defend his decision or, indeed, his reputation, where charges of lack of honesty, or the like, were being levelled against him. Nevertheless the defenders' stand was not one that it would be, in the circumstances of the present case, more expedient that the decision should be reduced in judicial review proceedings. It was that no other course was available to the defenders if they were to resist enforcement of the decision. If the Court took the view that the defenders' plea of competency failed but felt that, nevertheless, there may be something to be said for the defenders being directed, because of the circumstances of the case, to proceed by way of judicial review, the pursuers would wish an opportunity to discuss this point as there were considerations, counsel for the pursuers submitted, which might argue against such a course being adopted in the case like the present.

Decision

31. The present case, is concerned with the decision of an adjudicator under the statutory schemes introduced by the 1996 Act and the 1998 Regulations. While the present case arises under the English Act and the English Scheme, there is, in place, a similar regime for Scotland. The issue before me is how, in Scots law, procedurally such decisions might be challenged by defenders against whom actions for their enforcement

are taken. The questions raised, however, by that issue, have, in my judgment, implications which go far beyond the context in which they were raised and, in particular, involve the means by which the validity of any kind of act or decision which emanates from a person or body, which according to the law set out in **Forbes v Underwood** and **West v Secretary of State for Scotland** are subject to the supervisory jurisdiction of the Court of Session, might be challenged. Such persons have, since at the least the time of the decision in **Forbes v Underwood**, been held to include arbiters. I can find no good reason, having regard, in particular to the law as set out by Lord President Hope in **West** as to why adjudicators should be excluded from the class. Their position is clearly analogous, in many respects, to that of arbiters. For more than 100 years the Courts in Scotland have allowed the awards or decisions of arbiters to be challenged as being invalid by defenders against whom proceedings for their enforcement have been brought. Moreover those challenges have taken place both in the Sheriff Court and in the Court of Session. The challenges were allowed in the Court of Session before it became a matter governed by the rule, which was the predecessor of the present Rule of Court 53.8. As far as the Sheriff Court is concerned section 11 of the Sheriff Courts (Scotland) Act 1877 provided for the setting aside in the Sheriff Court "*ope exceptionis*" without the need of raising an action of reduction. Since that provision various versions of the Sheriff Court Rules have been to the same effect, the present one being Rule 21.3. As is pointed out in MacPhail, Sheriff Court Practice (2nd Edition) at para.12.69 it has been held competent to state, in the Sheriff Court, objections to arbiter's awards in a whole series of cases, which are therein cited. As has been seen, the argument that an action of reduction was required to remove the arbiter's decision or award before an action for its enforcement can be resisted was rejected by the Sheriff in the case of **Sundt & Co** and the correctness of that decision has never, it seems, been challenged in any subsequent case. All the modern writers on arbitration are at one that it is competent to take an objection *ope exceptionis* to an arbiter's award in an action for its enforcement (and that any previous distinction between ex facie invalidity and extrinsic invalidity no longer applies). One of the cases cited and relied upon in the case of **Sundt & Co** was **Nivison v Howat** (1883) 11 R.182. In that case a pursuer raised an action in the Sheriff Court for implement of an arbiter's award. The defender defended the action on the basis that the award was invalid for a number of reasons. The sheriff-substitute and, in turn, the sheriff upheld the validity of the award and granted decree in favour of the pursuer. The defender appealed to the Court of Session. The defender also brought, in the Court of Session, a suspension of a threatened charge on an interim decree. Shortly, thereafter, the defender raised an action for reduction of the award in the Court of Session. Both the application for the suspension of the interim decree and the action for reduction came before the Lord Ordinary, Lord Lees. The Lord Ordinary granted the suspension. In relation to the action of reduction the pursuer sought dismissal of it on, among other grounds, the fact that it was unnecessary as the defender was already challenging the validity of the award in the Sheriff Court proceedings. The plea of *lis alibi pendens* was taken by the pursuer. Lord Lees granted decree of dismissal of the action of reduction. In his note, at page 189, he said: *"I am not prepared to say that the plea of lis pendens will apply, to the effect of it excluding a reduction, in every case in which a deed or writing, has been founded on in a Sheriff Court action still in dependence and has been objected to by the defender in that action. There are cases in which a party may have a good title and interest not only to set aside a deed as the ground of a particular action, but also have decree of reduction pronounced against it generally. In the present case, however, the pursuer of the reduction has set forth no title or interest to challenge the award, excepting that of defending himself against action upon it by the other party submitter. Nor has he alleged any ground of reduction which requires that the arbiter or oversman should be called as defenders. In point of fact they are not called, and must be assumed to be free from any imputation of personal misconduct such as makes them necessary parties to the challenge. The case is that of a reduction to maintain a defence which can be maintained without reduction, and not that of a reduction necessary to the maintenance by way of defence of any of the objections stated".*

Both interlocutors of Lord Lees were reclaimed. The Inner House, therefore, had before it the appeal from the Sheriff and the two reclaiming motions in relation to the suspension and the dismissal of the action of reduction. In the event no argument was advanced in relation to the two reclaiming motions. The Inner House upheld the Sheriff's decision as to the validity of the award. As far as the position regarding the action of reduction was concerned the Court simply assoilzied the defenders to that action from the conclusions. The decision of Lord Lees that the action of reduction was unnecessary was, accordingly, not reversed or, in any respect, disapproved of by the Inner House. That decision was arrived at some 3 years

before the decision in **Forbes v Underwood** when Lord President Inglis gave his opinion regarding the role of the Court of Session in exercising its supervisory jurisdiction over arbiters. It is important, in my judgment, to mark carefully the words used by Lord President Inglis in the passages in question from his Opinion which I have cited above. The case was concerned, on its facts, with the question as to who could compel an arbiter to proceed. It was held that as failure by such a person, who was like an inferior judge, to obtemper a Court decision directing him to carry out his function, could result in imprisonment, it was only appropriate that such orders should be pronounced only in the Supreme Civil Court. The case had nothing to say, accordingly, about how a person who is faced with proceedings for the enforcement of a decision, or an award, made by an arbiter, may challenge its validity and, in particular, it is no authority for the proposition that, contrary to what was decided in the recent case of Nivison, that must be by way of separate proceedings of reduction. The case of **Brown v Hamilton District Council** was also not dealing with the rights of a defender, or an accused person, to defend himself against the enforcement of illegal decisions or actings or how their position might competently be vindicated. What **Brown** decided was that the review of decisions or acts of inferior courts, local authorities and other bodies, was something that belonged to the exclusive jurisdiction of the Court of Session and, in particular, that a mere declarator of invalidity as has been sought in that case, having no compulsitor force, was insufficient to get rid of the decision. The remedy of reduction alone would do that and as reduction was only available in the Court of Session, the challenge taken in **Brown** by way of declarator in the Sheriff Court was incompetent. The second ground of the decision just referred to was described by Lord Fraser, at page 45, as the "narrower" reason for their Lordships' decision. As previously noted, in discussing this reason his Lordship said: "the Sheriff Court has no jurisdiction to grant decrees of reduction of the appellant's decision. It has a limited jurisdiction to reduce deeds or decisions *ope exceptionis* under Rule 5 of Schedule 1 of the 1907 Act but it has no general power to grant decrees of reduction". In reaching his decision on the first ground, i.e. the position of the supervisory jurisdiction of the Court of Session, his Lordship was relying on the passage from the Opinion of Lord President Inglis in **Forbes v Underwood** cited above. There was nothing in Lord Fraser's speech in **Brown**, which, in my judgment, indicated that, in the light of it, the long line of authority, whereby decisions of arbiters, and the like, may be challenged by way of defence *ope exceptionis* was to be over-ruled. His Lordship expressly referred to the position in the Sheriff Court but did not go on to suggest that this would require to be re-examined in the light of the decision that their Lordships were handing down in **Brown**. That no such consequence flows from the decision in **Brown** is reflected in what the writers of the leading textbook on judicial review have to say in their work. At paragraph 8.16, pages 331-332 Clyde & Edwards are to the following effect " .... in Scotland, the exclusivity of the judicial review procedure does not preclude judicial review issues arising outside judicial review. Where the substance of the action is a private right or the issue is raised as a properly pleaded defence, the exclusivity of judicial review is not a ground for insisting that questions as to the legality of a decision-maker's decision only be raised in judicial review". I pause to observe that if the defenders' submission, in the present case, is sound, that statement of the position is either unsound, or would require to be qualified. Standing the authorship of that passage I would be slow to reach the conclusion that it requires to be regarded as either misconceived or needs significant qualification. The writers go on to say "The exclusivity of the judicial review procedure relates to the power of the court and to the effect of the remedy which can be obtained. It affects neither the power of the court to exercise its ordinary jurisdiction in an ordinary action nor its power to hear a properly pleaded defence to a claim (or in the case of a criminal court, a criminal prosecution)". At an earlier passage in the same work, para.8.16 at page 330, the writers make the following important observations "That an act or decision is ultra vires has always been available as a defence in civil and criminal proceedings. Critically, however, in such proceedings the court does not quash the act or decision if it finds it ultra vires; this power is exclusively possessed by the Court of Session in the exercise of its supervisory jurisdiction".

32. With regard to the specific position relating to challenges of decisions of arbiters, the writers on arbitration since the case of **Brown** have not considered that the challenge to such decisions as being ultra vires can only be by way of judicial review in the Court of Session, or that it involves inevitably an application to the supervisory jurisdiction of the Court of Session. I, therefore, find no support in the case law, nor in the writers, for the position taken by the defenders in this case on the question of competency. They, of course,

focused, to a very great extent, in their submissions, in this respect, on the precise wording of Rules of Court 53.8 and 58.3(1). Their argument, in this respect, had a beguiling attraction, at first sight. Whatever may have been the position previously, after the coming into force of Rule of Court 58.3(1) (and its predecessor) a party seeking to challenge a decision or act as being ultra vires could not do so by way of ordinary action of reduction but had to proceed by way of petition by judicial review under Rule of Court 58.3(1). Accordingly, so the argument continues, since the provisions of Rule of Court 53.8 providing for objections to be taken to deeds or writings were predicated on such procedure being an alternative to "a separate action of reduction", there was no room for the defenders to invoke the Rule. I am satisfied, however, that this argument is misconceived for the following reasons.

33. Firstly, and most importantly, in my judgment, counsel for the pursuers was well founded in submitting that in seeking to defend an action by challenging the validity of an act or decision upon which it is based, a party, like the defenders, is not making an application to the supervisory jurisdiction of the Court of Session. It is important, in this respect, to keep in mind what is embraced in and what is meant by the expression "supervisory jurisdiction". As is clear from the judgment of Lord President Inglis in **Forbes v Underwood** it is the jurisdiction which entitles the power of one Court, and one Court alone, to direct decision-makers and decision-takers and certain other bodies to carry out their duty and to carry them out according to their powers. Only the Court of Session has that power. As it is put in Clyde & Edwards at para.8.15, page 329: *"Undoubtedly it is competent for the sheriff to rule on the ultra vires acts of a public authority in order to dispose of the action before the Sheriff Court. But in doing so, the sheriff is not exercising a power of review. The sheriff cannot instruct the decision-maker on what the law requires, quash decisions which it has made, or stop it from taking steps beyond its powers. These remedial actions are exclusively for the Court of Session in the exercise of its supervisory jurisdiction in judicial review".*

The second reason for holding that the defenders' position is misconceived is this. It focused on the need for reduction, or as counsel for the defenders put it, "proper" reduction but such a focus can distract from what is the real question, viz, whether the defender needs to invoke the supervisory jurisdiction of the Court of Session to defend himself in the present action. Once again the writers of Clyde & Edwards, illuminate our path and they do so at para.8.14 at page 328. There they opine that there is nothing to prevent a person for raising an action for damages for loss, injury or damage arising out of alleged unlawful decisions or acts by a body which is subject to the supervisory jurisdiction of the Court of Session, even though Rule of Court 58.4 provides that a remedy of damages is available in judicial review proceedings. The writers then state "the problem of the remedy of damages exemplifies that the nature of the remedy is an unsure guide to the scope of judicial review". In a case like the present the defenders, in my judgment, do not need the decision to be quashed by way of its reduction. They simply need to have available to them the shield that has been available in the Courts in Scotland for at least well over 100 years (and in the Court of Session for over 150 years), by pleading, in defence, its invalidity. That is precisely how the Court proceeded in the case of **Whitehead v Finlay** and in the other cases discussed above. What Rule of Court 58.3 (and its predecessor), did was to provide the sole means by which an application to the supervisory jurisdiction of the Court of Session can be made as that jurisdiction is described and discussed in **Forbes v Underwood**, and in **West v Secretary of State for Scotland** and by the writers in Clyde & Edwards in the passages cited above. It did not, in my judgment, innovate on the settled law in relation to how a defender may defend himself. Following the approach of the House of Lords in the case of **Wandsworth London Borough Council v Winder** (and a similar approach can be seen also in their Lordships' decision in the case of **Boddington**) it does not seem to me that the wording of Rule 58.3(1) can, or should be read, to have the effect of curtailing, by imposing additional procedural hurdles, well established rights of defenders to defend actions brought against them which rely on decisions or acts, by challenging the validity of the decision or act in question, without the need to resort to have the decision or act reduced by way of judicial review.

34. For completeness I should say that in his submissions, counsel for the defenders relied on certain obiter passages in the case of **Donald v Donald** 1913 S.C.274 and certain comments made in relation to that case by Maclaren on Court of Session Practice at pages 600-681 to support the proposition that, at least in respect of the Sheriff Court Rule regarding defences by way of exception, such cannot be competently prayed in aid when the exception being taken is to the validity of the document or deed in question which

forms the whole basis of the action. In MacPhail on Sheriff Court Practice (2nd Edition) at para.12.69, it is submitted that there is no reason to read the Rule as impliedly qualified in that way. I would respectfully agree with what is said in MacPhail on this matter. As is pointed out in that work there have been many cases in which objection has been successfully taken to deeds or decisions which formed the whole basis of the pursuers' case.

35. It has to be accepted that the result of the defenders successfully taking an objection *ope exceptionis*, without having the decision reduced, would be to leave some unfinished business which might not always be all together satisfactory. While the issue as between the parties to the action would be *res iudicata*, the decision itself still stands. The adjudicator cannot himself revisit it, at the invitation of the pursuers, or, indeed, the defenders for that matter. Moreover, where the attack on the decision involves allegations of dishonesty or fraud or corruption, or the like, against the adjudicator it may be necessary to allow the adjudicator to defend himself (as was expressly recognised by Lord Lees in the case of **Nivison** and by the sheriff in the case of **Sundt & Co**). In the latter situation that opportunity could, it seems, only, nowadays, be provided for the adjudicator, if a petition for judicial review seeking to attack his decision were raised and he was called upon to enter appearance for any interest he may have in the matter. But these considerations only point to the expediency or appropriateness of bringing proceedings for judicial review in particular cases. They do not in themselves support a proposition that defenders can only defend themselves competently in cases like the present by way of proceedings for judicial review to have the decision reduced.

Conclusion

36. I should make these final observations. It does not seem to me appropriate to describe the attack that the defenders seek, in this case, to make as being collateral in nature. That is an expression that is used in Clyde & Edwards at para.8.16 at page 329. As Lord Fraser, however, said in relation to the defence being put forward in **Wandsworth L.C.B.C. v Winder** at page 508: *"I do not consider that the question of invalidity is truly collateral to the issue between the parties .... It the whole basis of the respondent's defence and it is the central issue which has to be decided"*.

    I consider that those remarks are equally applicable to describe the defenders' position in the present case.

37. Lastly I cannot desist from remarking that I doubt if the promoters of the legislation regarding adjudication in construction contracts, envisaged that its operation would spawn the amount of litigation that it has to date, and that it would give rise to the need to decide questions of law and procedure of the kind that have arisen in the present case. Such litigation clearly may defeat the overall purpose of the regime to provide for speedy and binding ad interim resolutions of disputes during the currency of construction contracts, but they are, I suppose, the inevitable result of challenge of such decisions, on judicial review grounds, not having been excluded by law.

38. In the whole circumstances I shall, for the foregoing reasons, repel the defenders' first plea-in-law. As to future procedure in the case, there remains open the question, as to whether it would be expedient or appropriate, nevertheless, for the question of the validity of the decision of the adjudicator to be made the subject of separate proceedings by way of petition for judicial review. On that matter I will allow the parties to address me, if so advised, as they requested at the conclusion of the debate. In any event, the future progress of this case will generally require to be determined and I shall have the case put out By Order for that purpose.

Pursuers: Smith; MacRoberts
Defenders: Borland; Masons