

Opinion of Lord Glennie, Outer House Court of Session, 16th December 2008

- [1] On 24 and 29 August 2007, the parties entered into a contract, in terms of which the pursuers, as Contractor, agreed to carry out certain construction works for the defenders, as Employer, at certain bar and nightclub premises at Princes Street, Falkirk. The contract was on the Scottish Building Contract with Quantities form for use in Scotland 2005 with Contractor's Design Portion, and SBC/Q/Scot (Revised May 2006), March 2007 Edition as amended and supplemented by the parties. The contract provided that, if a dispute or difference arose thereunder, either party was entitled to refer it to adjudication under Part 1 of the Schedule to The Scheme for Construction Contracts (Scotland) Regulations 1998 ("the Scheme") made under Section 114 of the Housing Grants, Construction and Regeneration Act 1996.
- [2] During the course of carrying out works under the contract, the pursuers made a number of interim applications for payment. The present dispute concerns Interim Application No. 21, which the pursuers made on 31 July 2008. In response to that Interim Application, the defenders' quantity surveyor issued Interim Valuation No. 21, which valuation was confirmed by the defenders' architect and contract administrator on 4 August 2008 by Interim Certificate and Direction No. 21. The pursuers were dissatisfied with the amount certified and, on 9 September 2008, served a Notice of Adjudication on the defenders. On 27 October 2008 the Adjudicator made his decision. He held that the pursuers (referred to in the adjudication as "the Referring Party") were entitled to payment from the defenders ("the Respondents") in respect of Interim Application No. 21 in the sum of £444,744.15 plus VAT. It is agreed that VAT on that sum amounts to £77,830.23.
- [3] In terms of paragraph 23(2) of Part 1 of the Scheme, the decision of the adjudicator is binding on the parties, and they are obliged to comply with it, until the dispute is finally determined by legal proceedings, by arbitration (if that is an agreed method of resolving disputes) or by agreement. Accordingly, it was incumbent upon the defenders, if they wished to resist paying the amount determined by the adjudicator, to take steps to challenge his decision. Equally, it was open to the pursuers, if the defenders failed to pay the amount determined by the adjudicator, to bring proceedings for payment. On 30 October 2008 the defenders lodged a petition for judicial review seeking reduction of the adjudicator's decision. On the hearing before Lord Hodge of a motion for interim suspension, a first hearing of the petition was fixed for 25 November 2008. Almost immediately thereafter, the pursuers issued a summons in the commercial court seeking payment of the sums awarded by the adjudicator. Defences were lodged; and at a preliminary hearing on 21 November 2008 it was agreed that there should be a debate in that action to come before the court at the same time as the first hearing in the petition. On 25 November 2008, I heard parties both on the debate in the commercial action and at the first hearing of the petition. For convenience, the argument took place by reference to the issues in the commercial action, it being agreed that if I held in favour of the pursuers in the commercial action, it would follow as a matter of course that the petition would be dismissed. I shall therefore continue to refer to the parties as they are referred to in the commercial action, as "pursuers" and "defenders".
- [4] Although a number of arguments were taken by the defenders in their pleadings, the only one ultimately pressed was that the adjudicator in his decision had exceeded his jurisdiction. Paragraph 12 of the Part 1 of the Scheme requires the adjudicator to decide the matters referred to him in accordance with the relevant terms of the contract and the applicable law. Mr Anderson QC, for the defenders, referred to *West v Secretary of State for Scotland* 1992 SC 385 at 413 where the First Division identified "a failure to understand the law" as something which might amount to an excess of jurisdiction for the purposes of judicial review; but he accepted that, as the law had developed in Scotland in relation to adjudications, not every error of law on the part of an adjudicator made his decision *ultra vires*. Provided that the adjudicator had asked himself the right question, his decision was not to be regarded as *ultra vires* on the ground merely that he gave the wrong answer: see *Gillies Ramsay Diamond v PJW Enterprises Ltd* 2004 SC 430 at paras.[39]-[41] per the Lord Justice-Clerk (Gill). A similar approach has been taken in the English cases: see *C&B Scene Concept Design Ltd. v Isobars Ltd.* [2002] BLR 93 and *Carillion Construction Ltd. v Devonport Royal Dockyard Ltd.* [2006] BLR 15 to which I was referred by Mr Smith for the pursuers. The defenders were obliged to submit in this case, therefore, not just that the adjudicator had erred in law but that he had effectively ignored the contract and decided the case on the basis of what he perceived to be just and reasonable.
- [5] It is necessary to summarise the relevant contract terms. Articles 1 and 2 of the Articles of Agreement provide that the Contractor shall carry out and complete the works for a sum (the "Contract Sum") of £4,547,963.30 "or such other sum as shall become payable under this Contract". Section 4 is headed "Contract Sum and Adjustments" and deals with what is included in the Contract Sum and in what circumstances the Contract Sum may be adjusted. Clause 4.1 of Section 4 provides that the quality and quantity of work included in the Contract Sum is deemed to be that set out in the Contract Bills. I should mention at this stage that included in the contract documents alongside the Contract Bills, which are in the usual form, is a schedule (the "Fit Out Budget Costs schedule"), divided between a "Carcassing Cost Plan" and a "Fit Out Cost Plan", costed respectively at £679,988.00 and £1,100,120.00. The Fit Out Budget Costs schedule has figures in a column headed "Cost Plan" against items such as raised floors, ceilings, ramps, doors, windows, screens, etc., without any of the detailed quantities and prices as are shown against other parts of the work in the Contract Bills and, except in one case, without any express qualification that the figures are provisional. Clause 4.2 provides that the Contract Sum shall not be adjusted or altered otherwise than in accordance with the contract terms. The relevant terms are in Clause 4.3 of Section 4, which sets out in detail how and in what circumstances the Contract Sum is to be adjusted. It provides for adjustments in respect of Variations to the works, as well as for other deductions from and additions to the Contract Sum (for example in

respect of Provisional Sums and Approximate Quantities in the Contract Bills). There is no express reference here to the Fit Out Budget Costs schedule. Variations are dealt with in section 5. In clause 5.2 of that Section it is made clear that Variations valued under the contract for the purpose of adjustments to the Contract Sum require to be instructed by the Architect or Contract Administrator or subsequently sanctioned by him in writing. Clause 3.12 of Section 3 states that such instructions have to be in writing. Clause 3.14.4, as amended, provides that no addition to the Contract Sum can be claimed by reason of any sanction given by the Architect or Contract Administrator "unless the Contractor shall have requested such sanction from the Architect/Contract Administrator in writing within 14 days of the commencement of the relevant work."

- [6] Interim Application No.21 was accompanied by a spreadsheet giving a breakdown of the sums claimed. This spreadsheet started with a Main Contract Summary, showing the Contract Sum broken down under different headings, and then listed additions and omissions resulting from re-measurement. No difficulties arise from this. Heading 3 was "Architects Instructions", divided into "A. Architect's Instructions", "B. Instructions Confirmed in Site Minutes" and "C. Instructions Confirmed by Architect's letter/ drawing issue". For present purposes nothing turns on A and B. However, amongst the items listed under head C were a number which had no reference to any letter or drawing. These were items within the ambit of the Fit Out Budget Costs schedule. The Employer contended that there was no basis in terms of the contract for the Contractor to claim these sums. The contract was a fixed price contract subject to the agreed machinery for price adjustment. These claims for additional payment did not fall within the agreed price adjustment provisions.
- [7] In the Referral Notice, in terms of which the dispute was referred to the adjudicator, the pursuers claimed payment of a balance of £840,501.87 allegedly owing to them, as set out in their Interim Application No.21. Their main complaint was that, in arriving at a valuation in respect of that Interim Application, the respondents had altered their approach from that adopted in dealing with earlier Interim Applications. That change of approach, as I understood it, was that there was now a refusal to certify additional sums referable to the items and figures set out in the Fit Out Budget Costs Schedule on the basis that the Contract Sum adjustment mechanism did not give the pursuers any right to seek payment of such additional sums. The pursuers contended that that schedule comprised "merely a series of items (each of which could be described as a trade section of the fit out works) with a sum against each item entered in a column headed 'Cost Plan'." They said that after commencement of the works, the defenders issued on an on-going basis Bills of Quantities relative to those items for pricing by the pursuers. The pursuers priced and returned the Bills of Quantities as requested. Thereafter, following any necessary discussion and negotiation, the defenders accepted the priced Bills of quantities and instructed the pursuers to proceed. All the Interim Applications to date had included claims for work done on the basis of the prices set out and agreed in these post-commencement Bills of Quantities and had been valued on the basis that such work was properly to be included. The question of personal bar was raised. The Response by the defenders bore out this analysis of where the dispute lay. The defenders argued that the contract was a lump sum fixed price contract and that no change could be made to the Contract Sum unless the requirements of the contract were met. They said that the pursuers required to demonstrate "that any adjustment to the Contract Sum is by way of instructed Variation sanctioned in writing by the Architect/ Contract Administrator or by way of other mechanisms noted in Clause 4.3." The valuation had been prepared on this basis. The fact that previous Interim Valuations and Certificates had included amounts referable to the sums in dispute was no obstacle to the matter being re-visited at a later stage. Thereafter in the parties' submissions the dispute focused largely on whether or not the contract was a "lump sum fixed price" contract as the defenders alleged. The pursuers in their Reply to the defenders' Response, pointed out that the Fit Out Budget Costs consisted of a series of allowed sums for items on which they had no input, and pointed out that Bills of Quantities had been issued by the defenders for the works referred to after execution of the contract, and the pursuers had carried out the work on this basis. There was a Response by the defenders taking the same point that instructions had to be in writing and retrospective sanction had to comply with clause 3.14.4 as amended.
- [8] The adjudicator held that the pursuers were entitled to payment in respect of Interim Application No 21 in the sum of £444,744.15 plus VAT and interest. In his Reasons for his decision the adjudicator dealt with the above point in Section 6, under the heading "Contract Formation (Lump Sum?). In short, his reasoning was as follows. The SBCC form used was a fixed price contract with adjustments only by express provisions of the contract. Although clause 4.1 said that the quality and quantity of the work included in the Contract Sum was deemed to be that set out in the Contract Bills, that was not in fact the case, since part of the work was set out by way of the Fit Out Budget Costs schedule which contained, instead of descriptions of quality and quantities, a brief description of elements of the structure with lump sums set against each. After the contract was let, the defenders produced Bills of Quantities for each element of the Fit Out Budget Costs based on drawings produced as the design developed, and the pursuers priced those Bills. Those priced Bills were used for the previous Interim Applications and Certificates. Against this background, the adjudicator made the following findings:
- "6.7 I consider that the form of contract used by the parties was not appropriate as the information available at tender stage was insufficient to produce detailed Contract Bills for all the work required to be included in the contract and that in order to circumvent the problem with the lack of information and presumably to enable a quick start on site, the parties would appear to have substituted the cost plan [viz. the Fit Out Budget Costs schedule] in lieu of the Contract Bills required by the form of contract.
- 6.8 In view of the parties differing views on the matter, it is necessary for me to decide whether both parties, at the stage of entering into the contract, considered that the [Fit Out Budget Costs schedule] was to be adjusted only

by variation instruction, the [defenders'] position, or by the revised sums derived from the priced bills of quantities post contract after the design had been finalised, the [pursuers'] position.

6.9 After reviewing the submissions ... and the statements of the parties and their representatives at the Hearing it is clear that, at the stage of entering into the contract, the parties were in agreement with [the pursuers'] position as outlined above. ...

...

6.11 [The defenders] now say that whatever the parties thought was the contractual position at the time of entering into the contract is irrelevant and that the clauses in the contract should be strictly applied. In normal circumstances I would accept that position but [the defenders'] interpretation of the contract suggests, in essence, that no matter how varied the quality or quantity of the [Fit Out Budget Costs schedule], no adjustment of the Contract Sum is possible because there is little, if any, specification or quantities attached to the [Fit Out Budget Costs schedule] and that it is not possible to ascertain if the quality or quantity in the bills of quantities priced post contract differs from that in the [Fit Out Budget Costs schedule]. I am reluctant to construe the contract in this way for obvious reasons of reasonableness.

6.12 [The defenders themselves do] not apply the conditions of contract strictly in that [they have] allowed sums as variations without a written instruction for additional work identified in minutes of meetings ... and for additional work identified in letters or on revised drawings ...

6.13 In view of [the defenders'] acknowledgement that a revised drawing, in itself, may be a variation instruction, I have taken the view that the drawings produced post contract, upon which the bills of quantities were prepared and priced, may be construed as variation instructions. I acknowledge that these post contract drawings have not been presented to me in this adjudication but it is clear that both parties were aware of these drawings by the existence of the priced bills of quantities on which they are based."

He therefore valued the variations to the Fit Out Budget Costs schedule in the same manner as other variations in coming to his decision. He also went on in para.6.15 to say that he would, if he was wrong in that reasoning, have applied the principle of personal bar to the circumstances described above and found for the pursuers (in the amount which he determined) on that basis.

[9] Mr Anderson submitted that in this reasoning the adjudicator had simply ignored the contract and decided the issues between the parties on the basis of what he considered was reasonable. He referred to the last sentence of para.6.11 in particular: "I am reluctant to construe the contract in this way for obvious reasons of reasonableness". It was clear from this that he was putting that above the contract. In the paragraphs leading up to and including para.6.7, the adjudicator had found that the contract was, as the defenders contended, a fixed price lump sum contract. He then simply ignored that because it drove him to a result which he did not consider reasonable. This amounted to an excess of jurisdiction. It was not for the adjudicator to decide whether the contract was appropriate or not, nor whether the result of applying the contract terms was reasonable.

[10] I do not accept that this is the correct analysis of the adjudicator's reasoning. It seems to me that the adjudicator, in paras.6.1 - 6.11, approaches the question as one of construction. He does not find that the contract is a lump sum fixed price contract. He simply finds that the form used was a form for a lump sum fixed price contract. He then points out that, despite the terms of clause 4.1, not all the work was set out in the Contract Bills. It is in light of these observations that he says in para.6.7 that the form of contract used was inappropriate. That does not mean he is disregarding it. Rather, as he makes clear in para.6.8, he looks to see whether on a proper construction, the parties are to be taken to have agreed that the Fit Out Budget Costs schedule was to be adjusted (a) only by variation instruction or (b) by the revised sums derived from the priced bills of quantities post contract after the design had been finalised. The former was the defenders' position, the latter was that of the pursuers. Having heard parties' submissions and oral statements, he answered this question in favour of the pursuers: para.6.9. That is where he reaches his decision. In para.6.11 he explains further why he rejects the defenders' contentions on this point. He says, in effect, that the defenders' are adopting an over-literal construction which produces a wholly uncommercial result. I am conscious that I am paraphrasing what he says, but this seems to me to convey the essence of his reasoning. He would be reluctant to construe the contract in a way that produces so unreasonable a result. That is a perfectly legitimate consideration to take into account in considering the proper construction of the contract: see *L. Schuler A.G. v Wickman Machine Tool Sales Ltd.* [1974] AC 235 at 251. I do not consider that his remarks about "reasonableness" at the end of para.6.11 can properly be understood as showing that he was disregarding the terms of the contract. Whether or not the adjudicator gave the right answer, and I should not be taken as even hinting at any disagreement with it, he clearly asked the right question, namely what was the proper construction of the contract, and answered it. He did not seek to replace the contract terms with his own notions of what was reasonable. I therefore reject this challenge to the adjudicator's decision.

[11] Had I not rejected the defenders' argument on this point, I would still have had to decide whether to grant decree for the amount awarded or reduce the decision. In para.6.15 the adjudicator indicates that he would, in any event, have upheld the pursuers' argument on personal bar. That is, so it seems to me, an alternative ground of decision. It was one to which he was entitled to come. For that reason, I would in any event have rejected the challenge to the decision and found in favour of the pursuers.

[12] I should add that Mr Anderson also pointed out that, in so far as in para.6.13 of his reasons the adjudicator relied on the drawings (which were not before him, but were admitted to exist) as constituting written instructions, he went beyond the arguments raised by the pursuers at the adjudication. Mr Smith accepted that this was correct. It

does not seem to me that this affects my conclusions on the issue argued before me. Mr Anderson rightly did not raise this as a discrete point justifying reduction of the decision, and I consider that it does not contaminate any other aspect of the adjudicator's reasoning. Indeed, it proceeds on the premise, contrary to his conclusions on construction, that a written instruction was required before the additional sums could be allowed.

- [13] The consequence of my decision is that I would propose to grant decree in favour of the pursuers in the commercial action in the sums claimed in the first and second conclusions; and to refuse the prayer of the petition for reduction of the decision. However, in accordance with the agreement of the parties, I shall put both cases out By Order before pronouncing any such decrees.

Pursuers: S. Smith; MacRoberts
Defenders: Anderson, Q.C., Simpson; Dundas & Wilson

Castle Inns (Stirling) Ltd (t/a Castle Leisure Group), Re Application for Judicial Review [2008] ScotCS CSOH_178

- [1] This petition is for reduction of a decision of an adjudicator dated 15 September 2006 pursuant to s.108 of the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (Scotland) Regulations 1998. The first hearing in the petition came before me on 25 November 2008 at the same time as a debate in commercial action CA144/08. That was an action by Curot Contracts Limited, trading as Dimension Shopping, against the present petitioners for decree in terms of the adjudicator's decision.
- [2] The commercial action raised the same points as were raised by the petition and parties were agreed that the disposal of the petition should follow the result of the debate in the action. I have today issued an Opinion in that action. My reasoning applies equally to this petition.
- [3] For the reasons set out in that Opinion I would be minded to refuse the prayer of the petition. However, in accordance with the agreement of the parties, I shall put the matter out By Order before pronouncing any final interlocutor.

Petitioners: Anderson, Q.C., Simpson; Dundas & Wilson
Respondents: S. Smith; MacRoberts