

OPINION OF LORD CLARKE : Outer House, Court of Session : 12th January 2006

Introduction and Background

- [1] In this commercial action the pursuers seek payment of certain sums which were awarded to them by a decision of an adjudicator, Mr Ian Strathdee, dated 8 October 2004. The Adjudicator's decision, followed an adjudication carried on under a contract for works at Glasgow Harbour which was formed by the defenders' Sub-contract Order form sent by the defenders to the pursuers and received and accepted by the pursuers on or about 14 May 2003. The form of the contract is the defenders standard form of Sub-Contract Agreement June 1998 Edition (Scot) together with eleven schedules thereto.
- [2] The works under the contract comprised, *inter alia*, the provision by the pursuers of all labour, plant, materials and supervision to carry out the ground works, concrete works and drainage works at the defenders' site at Glasgow Harbour. Clause 27 of the parties' contract provided for the resolution of disputes under the contract by reference to adjudication.
- [3] In or about May 2004 the pursuers made interim applications to the defenders for certain payments to them. The claims were payments in respect of the following items;
 - (i) Enabling works carried out by the pursuers associated with composite slabs;
 - (ii) The provision by the pursuers of tower crane banksmen.
 - (iii) Overtime working carried out by the pursuers.
 - (iv) Works carried out by the pursuers in cutting down lengths of reinforced concrete piles.
 - (v) Repayment by the defenders of sums said to have been wrongfully deducted as counter charges for a number of matters by the defenders from the sums paid to the pursuers.

The defenders refused to make payment in respect of any of these items. The pursuers referred the dispute, as to their entitlement to be paid in respect of foregoing sums, to adjudication under the parties' contract. The date of reference of the dispute to adjudication was 19 August 2004, Mr Ian Strathdee having accepted the appointment as adjudicator on 12 August 2004, and the defenders having agreed thereto on 13 August 2004. After certain procedures, a hearing was fixed for 10 September 2004, at which the parties were represented before the Adjudicator. In his decision of 8 October 2004, Mr Strathdee made awards to the pursuers of certain sums in respect of each of the five claims for payment they had made to the defenders. The defenders refused to make payment in terms of the Adjudicator's decision. The present proceedings were accordingly raised by the pursuers.

The present dispute

- [4] On 20 January 2005 I heard an opposed motion by the pursuers for interim decree in respect of four of the awards made by the Adjudicator together with certain interest. I granted interim decrees as sought by the pursuers and refused a motion by the defenders to reclaim against that decision.
- [5] The remaining element of the Adjudicator's decision was his award in respect of the pursuers' claim for payments in respect of overtime work. The defenders sought to resist payment of those sums, initially on the basis of the Adjudicator having exceeded his jurisdiction and because of alleged breaches of natural justice by him in his disposal of this claim. A proof before answer was allowed in respect of this remaining element of the case. The defenders were ordained to lead at the proof. At the proof before answer, the defenders sought to resist payment in respect of overtime work, on the sole ground that the adjudicator had been guilty of breach of natural justice.
- [6] The document, which is 7/2 of process, and which is headed "Statement of Claim", dated 10 August 2004, is a document in which the pursuers set out the matters in respect of which they required the adjudicator's decision. Their claim in respect of overtime is to be found at paragraphs 36 to 39 of the document. Paragraphs 36 to 39 were in the following terms:

"Overtime Working

36. *Clause 3.8 of the Sub-Contract permits TWC to issue instructions accelerating the Sub-Contract Works. Where the acceleration is not due a breach on the part of the Sub-Contractor, then TWC is to pay for the relevant acceleration measures. The Sub-Contract Works commenced on 17/03/03 and in a letter dated 02/07/03..... TWC instructed ACL to implement overtime working.*
37. *The instruction relates to a programme recovery strategy on the part of TWC because of the general delays to the Project. At no time in the period following the issue of the instruction has TWC identified any breach on*

the part of ACL and which could suggest that a disentitlement existed to be paid for the overtime working, either in part or in whole.

38. *ACL has worked overtime pursuant to the TWC instruction and claimed £133,736.32..... accordingly. At first and over a period of eight months, TWC made payments, albeit with deductions but now no payment had been made at all".*

[7] Paragraph 39 of the document then set out the amounts claimed and the payments which had been made by the defenders. The defenders lodged a document with the Adjudicator described as "*Response To Statement of Claim*". It is dated 1 September 2004 and is 7/3 of process. The defenders' position, in that document, as regards the pursuers' basis for claiming payments for overtime is set out at paragraphs 36.1 to paragraph 39. Paragraph 36.1 is to the following effect: "*ACL's claim for overtime working is predicated on the basis that TWC's letter of 2 July 2003..... constitutes an instruction within the meaning of clause 3.8 of the Sub-Contract Conditions which, by operation of that clause, entitles ACL to payment in respect of overtime working, this is denied.*"

At paragraph 36.3 the defenders state "*ACL rely exclusively on TWC's letter of 2 July 2003..... as an order within the meaning of clause 3.8. Although the Adjudicator is requested to consider the entirety of this letter carefully, TWC will draw particular attention to the following:*"

The defenders then went on to make certain contentions as to how the terms of the letter of 2 July 2003 should be construed, their position ultimately being reiterated that the letter did not constitute "an order" within the meaning of clause 3.8 of the parties' contract. The defenders went on to make the further point that the pursuers had produced no vouching for the amounts claimed. The defenders, furthermore, contended that the scope of any instruction, in the letter of 2 July, was, in any event, restricted by what had been said in the letter from the pursuers dated 27 June 2003 to which the defenders' letter of 2 July 2003 was a response, and, in particular, that any work authorised by the letter of 2 July 2003 was in relation to programmes dealing with Cores B1, C1, C2 and C3 of the works being carried out by the pursuers. At paragraph 36.5 the defenders stated: "*TWC qualified their acceptance of ACL's proposal of 27 June 2003 and made it clear that any payment for the overtime resources would be dependent upon ACL providing details of the delay to their works and the proportion thereof which was outwith their control. It is submitted that even if the Adjudicator decides that such an acceptance was an 'order' within the meaning of clause 3.8, it is impossible to determine what sum, if any, would be due to ACL as a result without an examination of why the delays occurred and whether such delays were due to the default of ACL or were caused by matters which were outside their control. ACL have produced no evidence in relation to the causes of the delay their extent, or the identity of the party responsible for such delay. In such circumstances it is submitted that, on any analysis, ACL's claim cannot succeed.*"

The pursuers on 8 September 2003, lodged with the Adjudicator their own response to the defenders' response. That document is 7/4 of process. At pages 10-12 of the document the pursuers dealt with each of the contentions made by the defenders in their response document regarding overtime working. While they noted that the defenders denied that the letter of 2 July 2003 constituted an "*order*" within the meaning of the parties' contract they stated, at page 10, as follows. "*Paragraph 39 of the statement of claim shows TWC did make significant payments between August 2003 and March 2004 in respect of this item.*" The rest of the pursuers' response, however, concentrated on arguments supporting their contention that the letter of 2 July 2003 was an order by the defenders to carry out work in respect of which the pursuers were now entitled to claim overtime payments and how the Adjudicator might be satisfied as to the computation of the sums claimed.

[8] It is clear to me from the content of the documents, to which I have just referred that, at the commencement of the adjudicating process, the dispute between the parties, as identified by both of them, in respect of the pursuers' claim for overtime was whether or not the letter of 2 July 2003, from the defenders, constituted a contractual basis for the pursuers' claim to be paid the sums they sought in respect of overtime and, if it were to be so construed, had the pursuers adequately vouched the sums they claimed as being the sums they were entitled to receive on that legal basis. That was the dispute which the Adjudicator was being asked to decide. It was not, I think, seriously contested, by senior counsel for the pursuers, that the position as far as the written submissions of the parties' placed before

the Adjudicator, and in advance of the hearing of 10 September 2004, was otherwise. In addition to the written contentions set out in the documents, to which I have referred to, various other documents were lodged with the Adjudicator. By facsimile dated 7 September 2004 addressed to the parties' representatives (7/6 of process) the Adjudicator informed them that the meeting between himself and the parties would take place on 10 September 2004. Along with that message the Adjudicator sent a series of questions for the parties to address. In the facsimile message he wrote, in relation to those questions as follows: "I have now reviewed together the Referring Party's Statement of Claim and the Respondent's Response and I enclose a series of questions for the parties. I am aware that some of these questions may become redundant once I review the Referring Party's supporting documentation and later their Reply. The questions are prepared so that I can understand both parties' submissions and I ask both parties to try and answer the questions as soon as possible but certainly at the latest by Friday 10 September 2004".

In the attached list of questions the following appeared under the heading, "**Overtime Working**" appeared the following:

- "1. As a matter of principal (sic) the Referring Party said that the weekend working proposal is an instruction to accelerate the sub-contract works, which is not due to any subcontractors breaches of the subcontract. If the Respondent believes that there were delays caused by subcontractors breaches, then I would like to be informed as to what these delays were, to be able to consider the apportionment that is referred to in the Agreement.
2. I have an A4 landscaped spreadsheet that starts with a brought forward number of hours and then moves on to the 11 January. I do not have the carry forward sheet. I ask the Referring Party to supply that to me and the Respondent.
3. I require that the Referring Party to produce evidence of the overtime payments made to their operatives and staff."

In his facsimile message the Adjudicator wrote:

"I again ask the parties to inform me of who they wish to bring to the meeting on 10 September 2004. The Agenda for the meeting will be based around me checking that I have received answers to all the questions referred to above. I also allow both parties to make a further verbal submission.

If either party wishes to have a witness give me evidence as to what did or did not happen at site or in connection with submission of documents, etc, then I would ask the parties to inform me, by close of business on Wednesday 8 September 2004, the name or names of any witnesses and the type of evidence they wish to give me."

In the event, neither party gave notice that they wished to lead evidence at the hearing. The pursuers' response to the defenders' response, (7/4 of process) was faxed late on 8 September 2004 to the defenders and on 9 September the defenders sent their responses to the Adjudicator's questions to the Adjudicator, a copy thereof being sent to the pursuers. In their response to questions regarding overtime the defenders focused on the terms of the letter of 2 July 2003.

- [9] The defenders gave notice to the Adjudicator, in advance of the meeting of 10 September, that they objected to the late lodging by the pursuers of their reply to the defenders' response and the late lodging of supporting documents, which the defenders contended they did not have sufficient time to consider, prior to the meeting of 10 September. They contended that, for the Adjudicator to rely on this material, to any extent, would amount to a breach of natural justice. The Adjudicator faxed the parties on 9 September and advised them that, *inter alia*, the defenders, at the meeting on 10 September 2004, would be invited to address him on the question of any concerns regarding a breach of natural justice (7/13 of process). In his letter of 9 September Mr Strathdee wrote, *inter alia*, as follows:

"Since, at present, I have already decided that the meeting of 10 September 2004 will be the last opportunity for either party to make submissions to me (since it only allows me seven calendar days thereafter to make and publish my reasoned decision) then I have decided to allow the full representation requested by both parties at that meeting.

At the start of the meeting I will ask both parties to address me concerning any submissions that the Respondent may have over the lack of natural justice due to the timescales for their review and commenting upon the Referring Party's supporting documentation and reply and my list of questions. I will ask the Respondent to lead with their submission. Thereafter, I will give the Respondent the opportunity to comment upon the Referring Party's reply. If anything new comes out of the Respondent's comments I will give the Referring Party an opportunity to comment. Thereafter, I will seek clarification from the Referring Party of anything I do not understand in their reply.

Thereafter I will review the questions I have asked to make sure that I understand both parties' submissions and the answers they are providing."

[10] The meeting with the Adjudicator, held on 10 September 2004, was attended by the following persons. The defenders were represented by Mr Dennis Murray, Mr Thomas Hume, Mr Alan Begg and Mr Simon Foster. Mr Simon Foster is an in-house solicitor, employed by the defenders. The representatives of the pursuers, who attended the meeting were Mr Bob Barrie, Mr Bobby Simpson and Mr Eamonn McInerney. The pursuers were also represented at meeting by Mr George Bell of J G Reid Quantum, who was apparently the pursuers' claim consultant and by Mr Richard Barrie of Messrs MacRoberts, Solicitors. The evidence at the proof, before me, was largely taken up with what transpired, in discussion, at that meeting in relation to the pursuers' claim for overtime. On this matter the defenders led all of the aforementioned persons, who had attended the meeting, on behalf the defenders. The pursuers led only the Adjudicator himself, Mr Strathdee and Mr Barrie of MacRoberts.

[11] The Adjudicator agreed, in the course of the meeting, that the defenders should be given more time to respond to the pursuers' written reply to the defenders' response which was lodged late on 8 September and their supporting material. He also proposed to make a number of orders which the parties' representatives agreed to. They were set out in a document which is 7/9 of process. They were in the following terms: "**List of Adjudicator's Orders**

1. *One Representative from each party to meet to review time of operative per day on DW sheets, NPO records and banksmen records, from the Macaulay Formwork time book, TWC Access Records, Site Dairies, MacAulay Formwork labour payment records, by each representative randomly selecting five samples from each of the three records. To try to reach agreement as to the percentage accuracy of the three records and the levels of the banksmen's wages and overtime payments made to the operatives. By 11.00am on Thursday 16 September, with both parties' position, or an agreed position, as to the percentage accounting of each of the three records and the payments.*
2. *By 3pm on Thursday 16 September, both parties simultaneously to construe and substantiate the meaning of TWC's letter of 2 July 2003.*
3. *Respondents to comment on the Referring Party's reply by 5.00pm 16 September 2004.*
4. *Respondent to comment on the Referring Party's further information by 12 Noon on 15 September 2004.*
5. *Conference call to Parties' solicitors at 10.00am on Friday 17 September 2004.*
6. *Referring Party to comment on Respondents Appendices to the answers by 12 noon on 15 September 2004.*
7. *Extension of time given to the Adjudicator to publish his decision, till close of business on Friday 8 October 2004."*

The meeting took place, on 16 September 2004, between the Adjudicator and a quantity surveyor representing each party to review the records of the pursuers' sub-contractors, Messrs MacAulay, as directed in the foregoing orders. On 16 September 2004, the defenders sent their response in compliance with the second and third orders. That was 7/10 of process. On 15 September 2004, the pursuers' solicitor Mr Barrie, sent a letter to the Adjudicator in compliance with the Adjudicator's second order. Along with that letter was sent a signed affidavit of that pursuers' Mr Eamonn McInerney (7/11 of process). On the 17 September 2004 the Adjudicator sent a letter to both parties (7/23 of process) setting out, *inter alia*, what had transpired at the meeting on 16 September 2004 and also setting out what had been discussed in the conference call he had, with Mr Barrie for the pursuers, and Mr Foster for the defenders. There was some other correspondence between the parties' representatives and the Adjudicator thereafter. On 1 October 2004 the Adjudicator wrote to both Mr Barrie and Mr Foster (7/28 of process) specifying the documents he had received from them on or after 23 September 2004. He then wrote as follows:

"Please find enclosed my Schedule of Correspondence for this Adjudication. I issue this to make sure both parties have received copies of each others letters and submissions. I ask the parties to confirm that the documents listed are all the documents that I should be considering when reaching my final decision and that both parties have had a reasonable opportunity to present their case and evidence. I confirm that I have commenced drafting my reasons and decision."

Notwithstanding the terms of that letter, the pursuers' solicitor Mr Barrie sent a further letter to the Adjudicator, dated 1 October 2004 (7/29 of process) purporting to comment on some of the remarks

made by the defenders in their correspondence with the Adjudicator. On 5 October 2004 Mr Strathdee wrote to the parties (7/31 of process) referring to Mr Barrie's letter of 1 October and said "I consider that although this information has been submitted after I closed the information and evidence that I will rely upon in this Adjudication, but I will allow it since it is really only commentary and doesn't provide much by way of new evidence."

- [12] On 8 October 2004, the Adjudicator issued his decision (7/12 of process). At page 5 of his decision, at paragraph 5, the Adjudicator wrote "The nature of the dispute is as set out in the Referring Party Notice of Adjudication, dated 10 August 2004, and their attached statement of claim."

In relation to the claim for payment for overtime work, the Adjudicator, at page 21 of his decision said this: "The Referring Party's working of weekend overtime was referred to in the Respondent's letter of 2 July 2003, to the Referring Party. The Respondent contends that this was not an instruction, but on the plain reading of the letter, I find an acceptance of a proposal is an instruction.

*I find the instruction was limited to the areas for which the programmes had been prepared, at that time. I also find that there was sufficient evidence thereafter by way of correspondence, further programmes, minutes of meetings and Respondent's interim payment notices, that the Respondent either **verbally instructed the Referring Party to continue working weekends and other areas** or acquiesced and agreed to that additional weekend working in other areas". (my emphasis).*

The Adjudicator then proceeded to set out further reasons for his being able to find that the pursuers were entitled to be paid for overtime working and the quantum of that. He, in the event, only awarded 80% of the sums they claimed, having held that the pursuers were 20% responsible for the delay which necessitated the overtime being worked.

- [13] In brief, the defenders now seek to resist payment of the sum awarded by the Adjudicator in respect of overtime, on the basis that the Adjudicator decided that the defenders were obliged to pay that sum because they had either given verbal instructions to the pursuers to carry out the work or alternatively that they had acquiesced in the pursuers carrying out the work in question, when at no time, prior to the issuing of his decision, was either alternative basis for the pursuers being entitled to be paid the sums in question was ever raised, or discussed, before the Adjudicator, far less were these alternative bases of entitlement matters of which that the defenders were given notice. To decide the parties' dispute on either of these two alternative bases, without the defenders having been given notice of them, far less the opportunity to respond to such a suggested basis of liability on their part, was a breach of natural justice. The Adjudicator's decision, in relation to overtime payments, therefore fell to be reduced *ope exceptionis*.
- [14] As I noted above it was accepted, on behalf of the pursuers, that there was nothing in the relevant written material placed before the Adjudicator by either party that gave notice of the pursuers being entitled, in law, to payment for the overtime in question because either of verbal instructions given by the defenders to carry out such work, or, alternatively, because the defenders had acquiesced in the pursuers carrying out such work. Documents placed before the Adjudicator by the pursuers dealing with the overtime aspect of the parties' dispute insofar as they focused on a legal basis for payment were directed at the status and construction of the letter of 2 July 2003. The pursuers' position, at the proof, was, however, that at the hearing held on 10 September, before the Adjudicator, the pursuers' representatives developed arguments for their entitlement to be paid the sums, sought in respect of overtime, quite apart from the arguments they made in relation to the letter of the 2 July. They claimed such new arguments were made in response to the attitude being taken by the defenders' representatives at the hearing. Senior counsel for the pursuers, however, accepted that if the Court were to hold that, on the evidence, no such additional arguments were put forward, on behalf the pursuers, in the presence of the defenders' representatives, at the hearing on 10 September, the pursuers could not now seek to have that part of the Adjudicator's awarded in respect of the overtime payment. The concession was made because senior counsel accepted that the principles of natural justice did have a role in the context of the conduct of an adjudication of the present kind and, if the defenders had been given no notice, prior to the issuing of the Adjudicator's decision, that they were faced with a claim for overtime based, not exclusively on the letter of 2 July, but alternatively on alleged verbal instructions,

given on their behalf, or acquiescence by them, in respect of the work in question, then a material breach of natural justice would have occurred. The issue, ultimately, therefore for the Court to determine related to what were the contentions put before the Adjudicator in relation to the pursuers' claim for overtime payment at the 10 September hearing and, more generally, what was the scope of the discussion in relation thereto.

The evidence given at proof

- [15] As has been noted above the defenders led at the proof. All of the persons representing the defenders, who attended 10 September hearing, gave evidence on behalf of the defenders. The pursuers led only Mr Barrie of MacRoberts, Solicitors, who attended the hearing and the Adjudicator, Mr Strathdee. I accordingly did not hear Messrs Barrie, Simpson and McInerney of the pursuers, and Mr George Bell of J G Reid Quantum, who also attended the hearing on behalf of the pursuers.
- [16] The first witness for the defenders was Mr Simon Foster who, as previously noted, is an in-house solicitor employed with the defenders. He qualified as an English solicitor in 1990. He advised the Court that his role with the defenders is principally to deal with contentious matters. He was responsible for the conduct of the adjudication on behalf of the defenders. He dealt with all the correspondence relating thereto and drafted the written submissions made on behalf of the defenders. In these matters he was assisted by members of the defenders' team who were involved in the Glasgow Harbour Project, including Mr Alan Begg and Mr Tom Hume. His understanding was that the basis of the pursuers' overtime claim was that they contended that there had been a written instruction, issued by the defenders, on 2 July 2003 under and in terms of the parties' contract, directed to the pursuers requiring them to work overtime on Saturdays and Sundays. The overtime claim was to be found in the pursuers' Statement of Claim document (7/2 of process) at paragraph 36 to 39. The letter of 2 July 2003 was the document which is 7/5 of process. The pursuers were claiming that that letter constituted a written instruction in terms of clause 3.8 of the parties' contract. The defenders' response to that was that, in the first place, the letter was not a written instruction in terms of clause 3.8 but was simply a response to a proposal from the pursuers dated 27 June 2003. Secondly, and, in any event, any instruction contained in the letter of 2 July 2003 was restricted in respect of area in which work had to be carried on, and the duration of any such work. Moreover, the question as to who was ultimately responsible for the cost of that overtime work had to be determined by discovering who was responsible for the delay in the progress of the works which had necessitated the overtime being carried out. The pursuers' written reply (7/4 of process) to the defenders' reply was consistent with that being the dispute between the parties. The pursuers were maintaining the letter of 2 July was to be construed as an instruction and not limited in its terms. It was also to be maintained that it was incumbent upon the defenders to establish what fault, if any, there was on the part of the pursuers regarding the delay in the progress of the works to entitle the defenders to avoid payment. That was where battle was joined, before the hearing on 10 September. The Adjudicator's list of questions to the parties were directed to the issues raised in the written submissions. Mr Foster said he himself took very few notes at the hearing. He was doing most of the talking on behalf of the defenders. His colleagues, Messrs Murray and Begg, did take notes. Prior to the hearing, the defenders had raised with the Adjudicator a complaint about the amount of material which had been lodged by the pursuers just before the hearing. At the hearing Mr Foster raised his concern again. He, in particular, complained that the supporting material provided by the pursuers, together with 7/9 of process, had not been provided to the defenders previously and the defenders had been given insufficient time to consider these documents and to comment on them. Mr Foster had complained that this state of affairs was not in accordance with natural justice. The Adjudicator had said he was sympathetic to the defenders' position, in this respect, but, without the pursuers' agreement to extend the time, in which he could issue a decision, he had some difficulty in dealing with the defenders' complaint. The pursuers' solicitor Mr Barrie originally did not agree to any extension of time, but subsequently did so.
- [17] The witness said that the discussion at the hearing, in relation particularly to the overtime claim, began with Mr Strathdee saying that, in his opinion, if he were to construe the letter of 2 July as an order or an agreement binding both parties, whereby the pursuers were instructed to work overtime, but on the other hand if he were to accept that it was subject to restrictions of the areas of site where overtime work

was to be carried out, he would have some difficulty in determining what actually fell to be paid. He, therefore, enquired as to what records might be made available by the parties to indicate what particular operators were working at particular times and where they were working. It was, said Mr Foster, a cornerstone of the defenders' case that the pursuers were not in a position to detail what operatives were working at any particular time, on the site, and where on the site they were working. The Adjudicator repeated that he would have some difficulty in that respect and enquired how that difficulty might be addressed. Mr Foster submitted that he should simply dismiss the pursuers' claim for lack of appropriate vouching. The pursuers' representative opposed any such course being adopted by the Adjudicator. The defenders had made payment in respect of overtime worked. They had apparently been able to value the amount of work in question. The Adjudicator said it was up to him to value the work. Mr Foster said that, at that stage, Mr Barrie, for the pursuers, referred to discussions which took place between the parties' representatives on 1 July 2003 which would support the pursuers' position that the letter of 2 July was not to be construed as being restricted as to where and when the overtime work was to be carried out. Mr Barrie submitted to Mr Strathdee that, in order properly to construe the letter of 2 July, Mr Strathdee would require to make enquiries about what these discussions on 1 July were. Mr Foster said that he took objection to the Adjudicator being invited to make such investigations, because the pursuers' position, to date, had been to peril their case entirely on the terms of the letter of 2 July and they had not suggested that to construe it properly required a reference to previous oral discussions. Nonetheless, the Adjudicator said that he thought it was incumbent upon him to construe the terms of the letter and the previous discussions might be relevant in assisting him in that task. He, accordingly, wanted to have information about these discussions. He gave directions to the parties to provide further written submissions on that matter. That was reflected in point 2 of the Adjudicator's order in 7/9 of process.

- [18] Mr Foster, in examination-in-chief, was adamant that no question of the defenders having allegedly acquiesced in relation to the overtime work now being claimed was ever raised at the hearing. Had any such argument been raised on behalf of the pursuers he would have objected to it being pursued. Had the Adjudicator over-ridden any such objection, Mr Foster said that he would then have required a period of time for the defenders to address any such claim and would have requested that any such case, now being contended for by the pursuers, should be spelt out in writing. Equally Mr Foster, in examination-in-chief, was clear there was no further alternative case, advance on behalf the pursuers, at the hearing, that, whatever be the status and effect of the letter of 2 July 2003, the defenders had given verbal instructions, subsequent to that letter, to the pursuers to carry out the overtime work for which the pursuers now claimed, in its entirety. Again the witness said, had such a basis of a case been made out at the hearing he would have objected to it, as there had been no previous notice given of it. If the Adjudicator had repelled any such objection, Mr Foster said he would have requested written submissions regarding any such case being made, and he would have sought a suitable period of time to enable him to investigate the matter, in particular with anyone from the defenders, who was alleged to have given any such verbal orders. Mr Foster said that in respect of the Adjudicator's first order in 7/9 of process, the Adjudicator met with Mr Begg of the defenders and Mr Simpson from the pursuers to go through the relevant work records. That meeting took place on 16 September 2004. There was then a meeting arranged to try and ascertain how far apart the parties were as to who was on site and when. Both parties then submitted certain points regarding this question. The pursuers, in response to the Adjudicator's second order, lodged an affidavit from Mr McNerney under cover of a letter from Mr Barrie of MacRoberts, dated 15 September 2004 (7/11 of process). The affidavit, Mr Foster contended, dealt only with discussions between Mr McNerney and the defenders', Mr Rahim, which was said to have taken place on 1 July 2003. There was no reference to subsequent alleged verbal instructions or any acquiescence by the defenders. Indeed, paragraph 8 of the affidavit seemed to contradict any case based on overtime being done as a result of verbal instructions.

At paragraph 8 Mr McNerney deponed, *"I also indicated (to Mr Rahim on 1 July) that my superiors were insisting that I was not to commence weekend working without a written instruction to that effect. We are too experienced to get caught out with a verbal instruction to commence weekend working which was not in due course ratified in writing"*.

Mr Foster responded to the order number 2 of the Adjudicator, under cover of a letter of 16 September 2004 (7/38 of process) Mr Foster's response focused on the construction of the letter of 2 July 2003. The witness said that had Mr McInerney's affidavit under MacRoberts' covering letter (7/9 of process) referred to separate issues of verbal instructions and acquiescence, then his response 7/38 of process, would have been radically different. He would have objected to any such case being raised and would have said that if such submissions were now to allowed by the Adjudicator he would require time to consider them and respond to them. Mr Foster said that when he received the Adjudicator's decision, 7/12 of process, he was surprised to read what was said on the second paragraph of page 21, thereof, because the matters referred to there had never been addressed, in written submissions by either party, or at the oral hearing on 10 September. The witness said he was positive that these matters had never previously have been raised.

- [19] In cross-examination, Mr Foster maintained that it had never been suggested, prior to the Adjudicator's decision letter, that the pursuers had received verbal instructions to do overtime work in respect of areas beyond Cores B and C of the site. Mr Foster accepted that, as a matter of fact, the pursuers did carry out overtime work on areas beyond Cores B and C, but the question was whether or not the pursuers were entitled to be paid for such work. Mr Strathdee's examination of the work records was carried out in relation to other matters, as well as with regard to the overtime claim. It was put to the witness, by senior counsel for the pursuers, that Mr Barrie had made a submission before the Adjudicator, on 10 September, that if the letter of 2 July fell to be read as limited as to areas where overtime work was to be carried out, then it had been supplemented by subsequent verbal communings between the parties. Mr Foster denied that any such submission had been made. Equally he denied that Mr Barrie made any submission before the Adjudicator to the effect that the defenders had acquiesced in the overtime work being carried out. If Mr Barrie and Mr Strathdee now said that such submissions were made, they were mistaken. Mr Foster did not accept that, as it was put to him by senior counsel, it was equally possible that he was mistaken. His position, he said, was supported by the fact that there was no mention of any such submissions in the parties' written submissions or in the Adjudicator's orders. Mr Foster said that he could not agree that entirely different grounds of claim which had been made had simply slipped his attention.
- [20] The next witness, led on behalf of the defenders, was Mr Dennis Murray who is employed as a divisional commercial manger with the defenders. He is a qualified chartered surveyor and has been employed by the defenders since 2004, having worked in the construction industry for 29 years. He informed the Court that he had acted in an overseeing capacity in relation to the Adjudication, with which the present action is concerned, dealing with technical and commercial matters. While it was Mr Foster's responsibility to prepare the written documents in respect of the pursuers' claim, he had understood what they contained and what the pursuers' case was. As far as the pursuers' claim for overtime was concerned, it was based, he said, solely on the letter of 2 July being a contractual instruction to the pursuers to carry out the overtime work in question. The defenders' response was that the letter was merely a qualified acceptance of a proposal made by the pursuers to deal with delays in the progress of the works. The qualified nature of the acceptance covered the need to sort out, in due course, who was to blame for the delay and that any overtime work was to be restricted both with regard to location and duration. Mr Murray attended the meeting on 10 September. The agenda for the hearing he understood to have been set out in 7/6 of process. The witness said that he took some notes during the hearing and confirmed that 7/32 of process is a copy of the notes. The original notes had been pulled out of his daybook and could not now be found. The witness spoke to the commencement of the hearing on 10 September being concerned with the defenders' complaint that the pursuers had lodged their submissions in respect of the defenders' response very shortly before the hearing, not leaving the defenders sufficient time to respond thereto. As far as the pursuers' claim in respect of overtime was concerned Mr Murray said that the discussion about this, at the hearing, focused on the letter of 2 July and its significance. He said also that the pursuers had opened up the need to construe its terms in the light of discussions they said took place on 1 July. This was a new issue for the defenders to consider. That was reflected at pages 4 and 5 of his notes of the meeting. The Adjudicator had requested that the defenders obtain a statement from their former employee, Mr Rahim, about this. His notes, at page 3,

under the subheading "Access to our records", the witness said, were taken up with the issue of how the quantum of any claim might be arrived at. The defenders had a swipe card system operating to indicate what operators attended where and when on the site. The records from this system were at odds with the pursuers' worksheets. The existence of this conflict had culminated in an agreement that the Adjudicator would attend at the site and consider the records available. Mr Murray said that his notes at pages 4 to 5 referred to the discussion about whether, if the letter of 2 July, was to be regarded as an order it was restricted as to scope and duration of work. They also reflect the issue of whether the "subsequent discussions" referred to in the letter of 2 July could be relevantly looked at. Mr Murray recalled that, some days after the hearing, Mr Foster had drawn to his attention the Adjudicator's orders contained in 7/9 of process. He confirmed, in evidence, that his understanding was that these orders referred to the exercise which the Adjudicator was to carry out in relation to work records and also the material he wanted in relation to further submissions regarding the construction of the letter of 2 July.

- [21] When asked, specifically, if at the hearing of 10 September, there had been any discussion about the defenders being obliged, in any event, to pay for overtime because of acquiescence on their part, or verbal instructions given by the defenders, the witness said he had no recollection of any such issues having been raised. His position was that had such issues been raised the defenders' response would have been that the work was done on the basis of the letter of 2 July, which was a qualified acceptance of a proposal by the pursuers. He said that, if the pursuers had sought to argue that there were verbal instructions from the defenders, which went beyond what was said in the letter of 2 July, the defenders would not have acceded to any such contention.
- [22] In cross-examination the witness said that his recollection of the hearing of 10 September was derived from his re-reading through his notes but that these notes were a "run through" of everything said at the hearing, although they did not necessarily set out the order in which they were raised at the hearing. He did not believe that there had been discussion about verbal instructions having been given by the defenders to work overtime or any question of the defenders having acquiesced in any event, in the work being done. He had no recollection of Mr Barrie making submissions in relation to these matters. The witness said that as the discussion at the meeting was a "pretty open" one it was possible that Mr Barrie might have said things which were not picked up by everyone at the hearing and, in particular, he himself might not have picked some matters up and noted them down. Mr Murray was satisfied, however, that the word "*acquiescence*" was not used at the hearing. It was not put to him by senior counsel for the pursuers that the expression "*personal bar*" was used at the hearing. The witness's position was that he did not think he missed any vital or important matter, beyond possibly not hearing, and not noting, a sentence or a word or two. The argument being put forward by the pursuers was based entirely on the letter of 2 July being a written instruction to them to work overtime. Time was taken up with discussing the relevance of discussions, which were said to have taken place between the parties before the letter of 2 July was written, as a aide to construing it. Mr Murray said that if the Adjudicator was now saying that there were additional submissions, made on behalf of the pursuers, regarding verbal instructions and acquiescence, "*brought to the table*" at the hearing, he would not accept that as being the case. He would have expected to recall any such submissions having been made.
- [23] I found this witness to be credible and reliable and someone who was not seeking to exaggerate matters. He fairly recognised that his recollection relied on his notes and that he may well have missed a sentence or so or a word or so which was said during the hearing. His overall evidence, however, was clear as to the limits of the discussion at the hearing.
- [24] The next witness, called on behalf of the defenders, was Mr Alan Begg. He is a chartered surveyor now employed as a commercial manager with Skanska Limited. He was previously employed by the defenders having left their employment in January 2005. As a senior commercial manager, with the defenders, he had been involved in the adjudication to which the present proceedings relate. He was responsible for putting together the various documents which were required by the Adjudicator. He was in day to day communication with Mr Foster, regarding the adjudication. Mr Begg said that the basis of the pursuers' claim, as a whole, was that they had been disrupted in the progress of their works due to faults and failures, which were not their responsibility. They were seeking to be paid for all the overtime

which they had worked at the site. The defenders' position was that they were entitled to be paid for some overtime but not all of it since they themselves had been responsible for some of the delay. The defenders considered that the pursuers were entitled to payment in respect of approximately three weekends of overtime work. The defenders' position was also that any instructions given by the defenders to work overtime, if such were given, were confined to Cores B and C of the site. Mr Begg's understanding of the purpose of the hearing of the 10 September was, in effect, to produce a list of matters which the Adjudicator wished the parties to consider and respond to in some detail. When the discussion came specifically to deal with the question of overtime, Mr Barrie, for the pursuers, had contended that since the defenders had actually paid the pursuers in respect of overtime, it is established that the letter of 2 July was indeed an instruction but the response to that, on behalf of the defenders, had been that the payments made were only interim in nature, and that the defenders were entitled now to claim that they required correction. The witness said that he had taken notes at the hearing. They are 7/33 of process. Those notes, he indicated, at various points, made it clear that the discussion at the hearing was focused on the status and content of the letter of 2 July. The purpose of the meeting which took place on 16 September was to enable the Adjudicator to check the pursuers' payment files to check if they had paid the sums, they were now seeking, to their sub-contractors. That meeting lasted about an hour. Mr Begg himself attended it. He said that the pursuers' records were "*woefully short for audit purposes*". No submissions had been made at that meeting on behalf of the pursuers. The parties' representatives merely answered the Adjudicator's questions regarding records. When asked directly as to whether, at the hearing on 10 September, a submission had been made on behalf of the pursuers that they were entitled to be paid in respect of overtime because of the defenders' acquiescence, Mr Begg was categorical that no such matter was ever raised at the hearing. When asked if, on the other hand, the pursuers had indicated that they were entitled to be paid because of verbal instructions given to them by representatives of the pursuers, subsequent to the letter of 2 July, Mr Begg said that no such case was made. To the contrary, the pursuers' Mr McInerney was adamant that the pursuers would not have accepted any instructions to work overtime which were not in writing. The witness said that, had any submissions been made regarding verbal instructions to work overtime, the defenders would have requested that the Adjudicator make another order to give them time to investigate such a matter. Any such investigation would have required a number of the defenders' team, who would have been in a position to give such instructions to be interviewed.

- [25] As regards the meeting held on 16 September, Mr Begg said that it was concerned with establishing not where the pursuers had worked, but how many hours had been worked by them.
- [26] In cross-examination, Mr Begg said that the Adjudicator was in a difficulty because although he might have been able to identify that overtime was paid for, he could not identify that overtime had been worked from the records he reviewed. The pursuers were arguing, or contending, that the written instruction which they maintained was contained in the letter of 2 July, covered more than Cores B and C, because of verbal instructions given by Mr Rahim, prior to the letter of 2 July, which extended the instruction contained in the letter of 2 July. Mr Begg accepted that the hearing was conducted in a somewhat heated, or passionate, way, from time to time, but he did not accept that, generally speaking, people were talking across each other. He could give no explanation as to why Mr Barrie might now say that the issue of the defenders' acquiescence was raised at the 10 September hearing. The witness's position remained that it was not discussed. Similarly, he could not explain why the Adjudicator might now say that this matter was put to him on behalf of the pursuers. He could not imagine Mr Foster letting a matter such as that slip past, because it was a fundamental issue. Mr Begg said also that he would be extremely surprised if it were now to be said that the pursuers, at the 10 September hearing, had said that they were entitled to be paid overtime, quite apart from what was said in the letter of 2 July, because of some verbal instructions given to them, given their position that they would not have worked without written instructions. If Mr Barrie was now contending that that was the position, this was contrary to what had been his own clients' position. The witness, in cross-examination, accepted that it was possible that he might have missed something at the hearing which he did not note, but the notes were "*taken at the time*".

- [27] The last of the witnesses led on behalf of the defenders was Thomas Hume. He had worked with the defenders for over 15 years until he left them in January 2005 to work for another company. During his employment with the defenders he was employed as a commercial manager and was involved in the Glasgow Harbour Contract. He was also involved in the adjudication, assisting Mr Foster in the collation of the defenders' response, to the pursuers' claim, and gathering the appropriate information. The basis of the pursuers' claim, as he understood it, was that they were entitled to be paid for all the overtime in question because of the effect of the letter of 2 July. The defenders' response had been that they did not accept that the content of that letter gave the pursuers an entitlement to the whole of the sums they were now claiming. In advance of the hearing on 10 September, which he had attended, Mr Hume had seen the Adjudicator's letter 7/6 of process which set out the agenda for the meeting. The particular questions which the Adjudicator wished discussed at the meeting on the issue of overtime was what was said under Heading C "*Overtime Working*". At the 10 September hearing, Mr Hume took no notes. He was, he said, "*the keeper of the defenders' documents*" and assisted Mr Foster in responding to questions. The discussion regarding the pursuers' overtime claim was focussed on what was intended by the letter of 2 July and what had been discussed between the parties prior to it being sent. The Adjudicator wanted to have statements from the pursuers' Mr McInerney and the defenders' Mr Rahim in relation to these matters. The Adjudicator also arranged for a meeting at the site to look at the pursuers' work records. Mr Hume said that at the 10 September hearing, had a claim based on the defenders' acquiescence been raised, Mr Foster would have picked this up and would have asked for an opportunity to respond. When asked, in examination-in-chief, if a submission had been made that, in any event, there were verbal instructions to the pursuers, subsequent to the letter of 2 July, which entitled the pursuers to be claim and be paid overtime, Mr Hume said that he did not believe any such submission was made and had it been made, the response from the defenders would have been that "*Taylor Woodrow does not give verbal instructions*". While he did not attend the meeting on 16 September, at the site offices, with the Adjudicator, he understood that its purpose was simply to check the hours worked on site during the relevant period, but not to check whether the work had actually been carried out.
- [28] In cross-examination, the witness said that he was certain if submissions had been made, on behalf of the pursuers, in relation to acquiescence and verbal instructions, subsequent to the letter of 2 July, Mr Foster would have picked these up. Moreover, had anything in relation to such matters been said, then what was said would have registered with himself. He could not account for the fact, if fact it be, that the solicitor for the pursuers was now claiming that submissions about these matters were made by him.
- [29] I should say, at this juncture, that I found not only this witness but all of the defenders' witnesses to be credible and reliable. They each, in their own, and different, ways, gave clear and coherent evidence. It did not seem to me that they were seeking to overstate their position and their testimony was entirely supportive of the essentials of the defenders' case. They were not shaken, in cross-examination, in any material respect as to their recollection and understanding of what had transpired at the hearing on 10 September. Their evidence, I regret to say, was to be contrasted with that of the two witnesses led on behalf of the pursuers, the Adjudicator, Mr Strathdee, and Mr Barrie of Messrs MacRoberts both of whose evidence I found, at times difficult to follow and understand. Such was the nature of their evidence and the manner of their giving of it, that at times I found it difficult to note that evidence. I accordingly, with the agreement of both sides, ordered that the evidence of these witnesses be transcribed.
- [30] Mr Strathdee advised the Court that he had probably been involved in about 100 adjudications to date, including 15-20 where he had been the adjudicator. He said that he endeavoured to keep up to date with the case law in relation to adjudication. He understood, he said, that "*every step or every decision or every order or every instruction you give, you have to take into account that it does not breach natural justice.*" That, he said, meant that an Adjudicator had "*to be even handed between the parties, to allow both parties within the constraints given in the timescale of adjudication to present the evidence that matches the case that is put forward by way of the notice of adjudication, to make sure it is only that case that is put forward and not something further, to allow both parties as much time as possible to deal with all the matters that are raised in the notice of adjudication.*"

[31] Mr Strathdee recalled that, at the commencement of the hearing on 10 September, he dealt with a complaint by representatives of the defenders that there would be a breach of natural justice if he were to consider documents produced by the pursuers late, without giving the defenders time to consider them and to respond thereto. That matter was dealt with by the pursuers agreeing to an extension of the time for the adjudication procedure, which would give the defenders time to consider the material in question and to respond thereto, if so advised. Mr Strathdee accepted that when the overtime claim came to be considered, at the hearing, there was much discussion regarding the meaning and effect of the letter of 2 July and there *"were submissions made by both parties as to what this document meant"*. In examination-in-chief, the witness was asked to explain his written decision in relation to overtime, in 7/12 of process. His position, as I understood it, ultimately was that he had, in the first place, construed the letter of 2 July to be an instruction to work by the defenders but only in relation to the cores which the defenders, in their submissions, said it was confined to. He then appeared, it seemed to me, to conflate two sets of discussions or communings between the parties. As has been observed, there was a question as between the parties as to what extent a previous letter of 27 June and discussions thereafter could be referred to as an aid in construing the letter of 2 July. However, in his evidence, the witness referred to reliance on discussions subsequent to the letter of 2 July as giving a basis for the overtime actually worked by the pursuers and beyond the cores mentioned above. He said that Mr McNerney for the pursuers had referred to these discussions, subsequent to the 2 July letter, at the hearing and had made such a reference in the presence of all of those attending the hearing. Mr Strathdee said that he asked the pursuers' representatives who had been on the site at the relevant time a specific question as to whether anyone from the defenders had told them to stop working on cores, other than B and C. He said his recollection was that Mr McNerney said to him that Mr Rahim of the defenders told him to work overtime on cores in addition to Cores B and C. He was also advised that *interim* payments had been made in respect of overtime worked at cores other than B and C. This point had been particularly made by Mr Barrie. Mr Strathdee said that the substance of Mr Barrie's submission was as follows: *"He said that that (ie the interim payments made by the defenders) proved Taylor Woodrow were agreeing to pay overtime in excess of just the two cores and the period of time referred to in the two letters 27 June and 2 July and he said that because Ardmore knew they were being paid, they didn't require to request a written instruction or some other document and if they had known they weren't being paid they would have stopped overtime and asked for a written instruction and his submission was they didn't feel that was required because payment was coming through."*

Mr Strathdee added that he remembered Mr McNerney saying to him that if he hadn't been paid he would have instructed the overtime to be stopped. Mr Strathdee also said that he remembered Mr Barrie making a submission regarding overtime and instructions being given to the pursuers to work in areas other than Cores B and C. The witness said that his inclination was to say that, prior to the meeting, he had no notice that the pursuers' case was going to be based, to any extent, on verbal instructions. According to the witness, his view, at the end of the hearing, was that the pursuers' case, if he was against them as to the construction of the letter of 2 July was as follows. They were saying that they had received verbal instructions from the defenders to work overtime on cores other than B and C and for a longer period than indicated in the correspondence of 27 June and 2 July. Everybody knew that they were working that overtime and that they had been paid in respect of overtime work at areas other than Cores B and C and for a longer period than the defenders were now maintaining was referred to in the letter. The principal purpose, said Mr Strathdee, at the subsequent meeting on 16 September, was to ascertain whether the pursuers' sub-contractor had worked in cores beyond B and C and for the period now claimed by the pursuers. The evidence which he said entitled him to reach the conclusion he did about the pursuers' entitlement to payment of the overtime was Mr McNerney's affidavit, the applications made by Mr McNerney to the defenders for payment and the payments actually made to the pursuers by the defenders. Mr Strathdee disagreed with the defenders' contentions in the pleadings that neither party made submissions to him regarding verbal instructions or acquiescence on the defenders' part. In particular he said he was asking questions at the site meeting on 16 September as to the period of overtime and the information he obtained from the pursuers' sub-contractors' applications for payment, he said, showed him exactly what overtime was being worked. Mr Strathdee's position

seemed to be that because the defenders were aware of this evidence they knew the case being made against them.

- [32] In cross-examination, the witness agreed that Mr Foster had made complaints about possible breaches of natural justice at the hearing on 10 September, in particular in relation to late submission of documents by the pursuers. Mr Foster had also objected to Mr Strathdee seeking information about alleged discussions prior to the letter of 2 July in order to interpret it. The witness also, after some persuasion, eventually accepted that in the pursuers' Notice of Adjudication and their Statement of Claim, 6/3 and 7/2 of process, the pursuers' basis of case was that the letter of 2 July was an instruction to work overtime and it was not limited, in any respect with regard to area and/or time. He, furthermore, accepted that there was no mention in these documents of a claim based on verbal instructions. He also accepted that the word "acquiescence" did not appear in these documents but went on to say that he read into these documents, at a stage he could not remember, that if the pursuers had made application in respect of overtime work and recovered payments in relation thereto, that involved "passive assent" by the defenders that the pursuers were being paid for whatever overtime they worked. Nevertheless Mr Strathdee agreed that 7/3 of process, the defenders' response, appeared to be predicated on the submission that the pursuers' claim was based on a written instruction said to be given by the letter of 2 July. After some further prevarication and hesitation, Mr Strathdee accepted that the nature of the dispute between the parties was set out in the pursuers' Notice of Adjudication and their attached Statement of Claim and that neither of these documents referred to a claim based on acquiescence and/or verbal instructions. Moreover he accepted that in his letter of 7 September to the parties, 7/6 of process, in which he indicated the matters he wished addressed at the hearing fixed for 10 September, there was no reference to verbal instructions or a case of acquiescence. The witness said he had taken notes of what was discussed at the hearing but having looked at them, the part dealing with overtime was fairly scant and he had not produced them to anyone. The witness agreed that, in retrospect, he should have written far more detail regarding the parties' submissions on overtime. Later, in his cross-examination, Mr Strathdee said that he had heard no submission made on behalf of the pursuers, in which the word "*acquiescence*" was used. What he had heard from Mr Barrie was that the pursuers were verbally instructed by the defenders to work on cores in addition to Cores B and C; that they were not stopped from working on these cores, that they had applied for payment and been paid and that Mr McInerney had said that if the pursuers had not been paid they would have stopped working. In answer to a question from the Court, the witness said that while he had heard no submission in which the word "acquiescence" was used he, himself, had used the word in his decision and by its use he meant he had heard evidence of "passive assent" on the part of the defenders and he also believed that Mr Barrie had made submissions in relation to the fact that the pursuers were allowed to continue working overtime in areas beyond Cores B and C and had been paid for that work. He had not considered it necessary, prior to issuing his decision to raise with the defenders the question as to whether they had understood that a case based on passive assent had been made against them. It was put to the witness that, at the hearing of 10 September, the pursuers contended, for the first time, that the letter of 2 July should be construed by reference to the discussions referred to in it. He agreed with that and also agreed that he considered it appropriate to invite the parties to make fuller submissions in writing to him on that point. That being so, he was asked, why did he not consider it appropriate to invite the parties to make written submissions on a case based on verbal instructions or acquiescence. His response was to say that Mr Foster had heard the submissions and the evidence in relation to this matter. He said he was pretty sure that Mr Foster had responded to these submissions but he could not remember exactly what he said. Mr Strathdee accepted that, in any event, he could not be satisfied that Mr Foster fully understood the submissions. In reply to a question from the Court, Mr Strathdee said that he based his decision on the pursuers' entitlement to the overtime payments on either acquiescence or verbal instruction because *"I only have the evidence of Mr McInerney and I didn't have the evidence of Mr Rashim (sic) and it wasn't categoric I didn't think"*. Later on he said: *"I think there were some verbal instructions for some of the areas and the other areas they just continued to provide the catch-up programmes and work overtime and passive assent that Taylor Woodrow allowed them to work overtime and continued to pay them for it."*

Mr Strathdee said that he had found it strange that Mr McNerney in his affidavit did not refer to verbal instructions being given after 2 July. Ultimately the witness accepted that it was possible that he had misinterpreted what was being submitted by the pursuers, at the hearing, and that, in particular, it was quite possible that he had confused what was being said as to the construction of the letter of 2 July with what he thought was a separate basis of claim, namely, verbal instructions and acquiescence. Mr Strathdee accepted that there was no evidence placed before him as to how much overtime had been worked on each core. He agreed that it was easier for him to reach a decision on the calculation of the quantum of the claim by adopting the approach he did, that is by saying that there had been acquiescence or verbal instructions to work overtime in cores beyond B and C than would have been the case had he simply accepted that the defenders' approach to the construction of the letter of 2 July was correct.

- [33] The next witness for the pursuers was Richard Barrie. He advised the Court that he was a partner in MacRoberts, Solicitors, and that he had experience of being involved in between 50-70 adjudications. He had not played any part in the drafting of the pursuers' Notice of Adjudication and their Statement of Claim. His remit, he said, "*was to be in the wings as it were on the basis that should any legal issues arise, I might be able to offer assistance*". He thought he might have seen the pursuers' response to the defenders' response (7/4 of process) before it was submitted and may have had some input into its drafting. Mr Barrie confirmed that he had attended the hearing on 10 September and that at the beginning of the hearing time had been taken up when Mr Foster complained of a potential breach of natural justice if the adjudicator were to allow in documents of the pursuers, which the defenders said they had insufficient time to consider. Mr Barrie's position was that the defenders' position did not become completely clear until the hearing on 10 September, and in particular, he maintained that at that hearing, for the first time, the defenders were saying that, even if the letter of 2 July fell to be regarded as a contractual instruction, it was limited to certain cores and the pursuers could not recover in respect of overtime worked on other cores. The witness said that he was absolutely clear that the question of verbal instructions, subsequent to the letter of 2 July, and acquiescence were discussed at the hearing. He said he himself made two submissions in relation to personal bar on the part of the defenders. The first was to the effect that the defenders could not now claim that the letter of 2 July was not a written instruction within the terms of the contract, having allowed the pursuers to do the work to which it related and having paid them for it. The second submission was that, in any event, Mr McNerney had made it clear that the pursuers had accepted verbal instructions to work on cores in addition to Cores B and C. At one point in his examination-in-chief Mr Barrie said that he had a concern that, in relation to the second submission, the defenders might be entitled to say that the pursuers were straying outwith the terms of the Notice of Adjudication. He said: "*I had a concern at the meeting that the respondents might attempt to argue hang on a minute, your case is based on a written instruction of 2 July, we now seem to be moving on to what might be described as a different basis, a different head of claim, in other words, we are entitled to recover an element of overtime on the back of verbal instruction.*"

Mr Barrie then ventured to suggest that he had put forward a third submission to the effect that the defenders gave verbal instructions which augmented or varied the 2 July written instruction and that the defenders were personally barred for asserting otherwise and that there had been, or there would, be clear prejudice to the referring party, if that was allowed. He said he used the phrase "*personal bar*" and remembered specifically mentioning "*prejudice*" "*because I knew that that was a necessary ingredient*". He considered that Mr Strathdee had understood these submissions.

- [34] The witness said that he recognised the pursuers would be in difficulty if they were found to be entitled to paid overtime only in respect of Cores B and C because they did not have detailed records as to those working on which cores on the Saturdays and Sundays in question. He did not, however, mention this difficulty to anyone at the meeting. It was Mr Barrie's position, in examination-in-chief, that when Mr McNerney said at the hearing that the pursuers had been instructed to work on cores beyond B and C, nobody from the defenders demurred or disagreed. He said that he had fully expected the pursuers to win their principal argument that the letter of 2 July constituted a written instruction and moreover that it was an instruction to work on all cores. He was surprised, and disappointed, on receiving the Adjudicator's decision to discover that the pursuers had lost on the second point. Mr Barrie, at one stage,

in his evidence, said that there was no "*shadow of a doubt*" that submissions were made on behalf of the pursuers at the hearing that the defenders had issued verbal instructions subsequent to the letter of 2 July. He said he had no recollection of himself making a submission on what the Court would regard as a plea of acquiescence. His submission, he said, was based on personal bar. On being referred to the exact wording of the Adjudicator's decision, Mr Barrie said that he had assumed that Mr Strathdee had heard the submissions made on personal bar and had simply used the word "acquiescence" in that sense. The witness also said that he would not have accepted that the pursuers' position was confined to what is set out in the Notice of Adjudication and Statement of Claim if that argument had been put forward by Mr Foster at the hearing. His view was that "the claim for overtime was for an amount of money and it was open to the referring party to develop whatever arguments or basis for this".

- [35] In cross-examination, Mr Barrie gave what I considered to be somewhat evasive, and certainly rambling, answers to questions put to him about his contention that it was the defenders who made a new argument or new arguments at the hearing for the first time. Having been taken by the solicitor advocate for the defenders through the defenders' written submissions given to the Adjudicator prior to the hearing, Mr Barrie, in cross-examination, was asked to explain why, in Mr McNerney's affidavit, which he had assisted in preparing, there was no mention of verbal instructions having been given quite separate from the letter of 2 July. The witness in reply, indulged in a long rambling and evasive answer to what were quite straightforward questions. Ultimately his position was that he simply did not accept that the content of Mr McNerney's affidavit was inconsistent with the position which is now being said was advanced by the pursuers' representatives at the hearing. Mr Barrie advised the Court that the discussion, at the hearing, regarding overtime, had taken up to about two hours and that his general submission based on personal bar was "a constant thread". On the other hand the submission which was peculiar to the question of verbal instructions he thought might have taken up a couple of minutes. He said that he had taken notes at the hearing but that they had only extended to three or four lines. He fundamentally disagreed, he said, with a suggestion that there was no discussion regarding verbal instructions or acquiescence at the hearing. He was satisfied, at the hearing, that Mr Strathdee had understood his "personal bar" submission and that the pursuers had won the argument on that point.
- [36] In re-examination, Mr Barrie said that he became alive to the defenders' argument that, in any event, the letter of 2 July was restricted in time when he saw the defenders' reply document but that he did not become aware that they were also arguing that any work instructed by virtue of the letter was restricted as to location until about 11am at the 10 September hearing.

The parties' submissions

- [37] In opening his submissions, the solicitor advocate for the defenders, reminded the Court that the defenders were now relying solely on their case based on breach of natural justice. His motion was that the defenders should be assoilzied from the third conclusion of the summons.
- [38] In essence the case raised one simple issue between the parties and it was, as to whether or not, at the hearing, on 10 September, Mr Strathdee, as the pursuers averred, received submissions in relation to verbal instructions being given after the 2 July 2003, by the defenders to the pursuers to work overtime or in relation to actings or representations by those acting on the part of the defenders, after the 2 July which amounted to acquiescence. There was a stark conflict between the parties' witnesses in relation to that question. I was invited to prefer the evidence of the defenders' witnesses relating to the key issue, to that of the pursuers' witnesses. In so inviting me, and before analysing the evidence in careful detail, the defenders' solicitor advocate submitted that I should find that the defenders' witnesses gave their evidence in a clear and straightforward way and limited themselves to answering the questions put to them. That is a submission which, as I have noted above, accords with my own view of the evidence of these witnesses. Mr Wall said that the position of the defenders' witnesses was to be contrasted to that of Mr Strathdee and Mr Barrie both of whom in their evidence strayed frequently beyond the questions asked and, in the case of Mr Barrie, even anticipated questions which were not being asked. Mr Wall emphasised that, as it was clear that Mr Foster had taken objection to the late lodging of documents by the pursuers and their seeking to have the letter of 2 July interpreted by reference to prior oral communings between the parties, it would have been very strange indeed, if he had not objected to new

bases of claim being advanced, by the pursuers, of which no notice had been given in their Notice of Adjudication and Statement of Claim. Mr Foster was adamant that no such new bases of case had been put forward at the hearing. The defenders' witnesses Messrs Murray, Begg and Hume, in the critical aspects of their evidence, as to what occurred at the hearing, were all consistent with what Mr Foster had said in this respect. The notes taken by Messrs Murray and Begg of what occurred at the meeting were wholly consistent with the defenders' position in the case. Mr Begg, who had attended the meeting on 16 September with the Adjudicator, had no recollection of the Adjudicator raising any question of acquiescence or verbal instructions being issued by the defenders, at that meeting. The purpose of that meeting was simply to ascertain the quality of the financial records. In relation to Mr Strathdee's evidence, the defenders solicitor advocate pointed out that he had said that Mr McNerney had said that he was to receive verbal instructions to carry out overtime work on areas beyond Cores B and C. That was a different thing from saying that any such instructions were issued. Mr Strathdee said, in evidence, that he thought there was something in the pursuers' written submissions touching on the question of acquiescence. That was clearly established not to be so and was typical of his evidence in which he was really trying to justify, *ex poste facto*, what he had said in his decision. While Mr Barrie had said that he had used the expression "personal bar" at the hearing, and had referred to the question of prejudice to the pursuers, Mr Strathdee did not say that Mr Barrie used these expressions. There was a further material difference between Mr Strathdee's position and that of Mr Barrie. Mr Strathdee said that the pursuers had initiated submissions based on acquiescence and verbal instructions. Mr Barrie's position was that these matters only emerged, from the pursuers' side of things, when it became clear that the defenders were contending that the pursuers had been overpaid and were not entitled to be paid, at all, for overtime. In cross-examination the Adjudicator had accepted that he had required to issue written orders after the hearing on 10 September, touching on new matters which had been raised at the hearing. Yet nothing was said in those orders regarding acquiescence and verbal instructions on the part of the defenders. His only explanation for that state of affairs was that he thought the position in respect thereof was clear. He did, however, accept that he himself had taken no steps to ascertain if the defenders had understood what he himself understood Mr Barrie was now contending.

- [39] In relation to Mr McNerney's affidavit, Mr Strathdee tried, in evidence, firstly to maintain that it was consistent with the pursuers advancing a case based on acquiescence and/or verbal instructions but he then went on to say that he was surprised by what was said in the affidavit because it was not consistent with what was said at the hearing.
- [40] In relation to Mr Barrie's evidence the defenders' solicitor advocate said that it was clear that Mr Barrie was anxious to try to explain why it was that there was two new issues raised at the hearing for the first time. This had led him into giving somewhat complicated and involved evidence. He was clearly wrong in contending, as he did, that these matters were raised, on behalf of the pursuers, at the hearing, for the first time, simply because of a new position being adopted by the defenders. It was clear, from the defenders' written responses to the pursuers' Statement of Claim, that the so called position now in question was one of which they had advance given notice prior to the hearing. Mr Barrie had maintained that there were two strands to his submission based on personal bar. The first was that the verbal instructions, augmented or varied the letter of 2 July. Mr Strathdee, however, never referred to this approach being adopted by the pursuers. Mr Barrie's evidence was that personal bar was a running theme throughout his submissions, but Mr Strathdee's evidence seemed to be that there was a set piece on acquiescence. As regards Mr McNerney's affidavit Mr Barrie simply refused to accept that, on face of it, it appeared to contradict or at least was not wholly consistent with what he claimed was said at the hearing. The parties' respective contradictory positions could be tested by reference to the contemporaneous notes of the hearing, produced by the defenders, what was contained in the parties' written submissions, Mr McNerney's affidavit, and the accompanying letter from Messrs MacRoberts. These were all entirely consistent with the two matters of acquiescence and verbal instructions not being raised at the hearing as a separate basis for the pursuers' overtime claim. If these matters were mentioned, at all, then the most plausible explanation was that they were mentioned in relation to the construction to be placed on 2 July letter. It was a matter for comment that the pursuers had chosen not to lead as witnesses, the representatives of the pursuers who attended the hearing, other than Mr Barrie.

Again it was a matter for comment that Mr Barrie gave no explanation as to why if these fresh matters had been raised, they were apparently not responded to, on behalf of the defenders.

- [41] In conclusion Mr Walls referred me to Lord Drummond Young's discussion of the role of natural justice in adjudication to be found in his Opinion in the case *Costain Limited v Strathclyde Builders* 2004 SLT 102. To be contrasted with what the defenders claimed the Adjudicator had done in the present case, the defenders' solicitor advocate referred to how the Adjudicator had dealt with matters in the case of *Palmac Contracting Limited v Park Lane Estate Limited* (2005) EWHC Technology 231, as described at paragraphs 39 and 40 of the judgment.
- [42] In reply senior counsel for the pursuers invited me to sustain the pursuers' fourth plea-in-law, and to grant decree in terms of the third conclusion of the summons. The onus, senior counsel submitted, was on the defenders to establish that there had been a breach of natural justice. *Prima facie*, it was to be assumed that the Adjudicator had conducted himself properly. In judging of the question the case raised, one had to have regard to the strict time limits under which the Adjudicator was operating, and the complicated questions of fact and law put to him. The Court should not countenance points of natural justice being taken simply to avoid or delay payment of the Adjudicator's awards. Reference was, in this connection, to the decision of the Court of Appeal in *Amec Projects Limited v White Friar City Estate Limited* (2005) BLR 1 (particularly at page 8 para. 22). Nevertheless senior counsel for the pursuers did recognise that the defenders' case was a very straightforward one and was to the effect that the issues of verbal instructions and acquiescence were not raised at the hearing and no evidence in relation to them was discussed. Senior counsel accepted if the Court came to the conclusion that that indeed was the position then there had been a breach of natural justice of such a character as to mean that the Adjudicator's award, regarding overtime, was unenforceable. Understandably senior counsel also accepted that he was not in a position to raise any question as to the credibility of Mr Foster or any of the other witnesses for the defenders. All he could argue for was that the defenders' witnesses were mistaken in what they thought they heard at the 10 September hearing or that they had missed the points being made. Senior counsel submitted that the evidence of Mr Strathdee and Mr Barrie was, at least to some extent, consistent, in that they both, in effect, spoke to a submission being made on behalf of the pursuers at the hearing that if the pursuers did not succeed in their case based on the construction of the letter of 2 July, they were still entitled to be paid for the overtime worked because they had worked on the basis of subsequent verbal instructions and had been paid by the defenders for work done after they had finished work on Cores B and C. If such a submission had been made, and was appreciated by Mr Strathdee, then it did not amount to a breach of natural justice if the actual words used were not either picked up by the defenders' witnesses or properly understood by them. The Adjudicator was entitled to assume that professional advisers would pick up material points made. Only if he had reason to believe that the points were actually being misunderstood could there be any responsibility on his part to ask the defenders' representatives if they required clarification and to seek comments on what had been said. Mr Strathdee in evidence, however, had said that it had not occurred to him at the time that Mr Foster had not got the points which were being made against the defenders' position. There was no reason for the Adjudicator to go off on his own, in the present case, and to formulate a basis for the pursuers' claim not discussed before him, particularly where the defenders' representatives had already made complaints to him about possible breaches of natural justice. What Mr Barrie's evidence amounted to was that he said, or submitted, to the Adjudicator that even if the pursuers were wrong in their argument as to the effect of the letter of 2 July, they were entitled to be paid for the work claimed. Mr Strathdee, in effect, said that this was what was put to him. Senior counsel accepted that the pursuers' case stood or fell on what was said and discussed at the meeting of 10 September but he did contend that the width of the pursuers' Statement of Claim would have permitted the points in relation to verbal instructions and acquiescence to be raised at that hearing. It was really nothing to the point if Mr Barrie had raised these matters due to a misunderstanding on his part as to when the defenders had explained their position fully. Nor did much turn on the content of Mr McNerney's evidence or the covering letter from Mr Barrie since these were addressing specific points raised in the orders the Adjudicator had made in respect of matters upon which he required further help. If the Court were to hold that submissions on verbal instructions and acquiescence were

never made, at the hearing, that simply could not square with the truthfulness of Mr Strathdee and Mr Barrie. The Court should find it improbable that given their respective positions they would have been untruthful. Mr Strathdee had said that at the hearing Mr Foster appeared to be having no difficulty in picking up the points being made. If he was to be believed then in that respect the fact that he did not give the defenders an opportunity to clarify their position did not impugn his decision.

Decision

- [43] It is now settled law that adjudicators have to observe principles of natural justice in reaching their decisions. Nevertheless, as the case law has developed, the courts have taken a realistic and pragmatic approach to such questions by emphasising that the nature of the process, and in particular the strict time limits within which adjudicators are constrained to operate, require that insubstantial or technical, breaches of natural justice should not be taken merely to delay or avoid payment and the taking of such points should certainly not be encouraged by the courts. (See *Amec Capital Projects supra*). On the other hand, the integrity of the adjudication system, and confidence in its operation will, in my judgment, be best protected by the courts ensuring as best they can, that broad standards of fair play operate in relation to the making of decisions by adjudicators. These decisions can often involve requiring the immediate payment of very considerable sums of money, and notwithstanding their *interim* character, they can very materially affect the interests of parties. It is trite to say that one of the key principles of fair play operating in relation to a decision making process like that of adjudication, is that each side is made aware of the case that has been made against them and has an opportunity to respond to it. In the present case, senior counsel for the pursuers, quite properly, in my opinion, did not submit that there would have been no breach of natural justice, of a substantial and material character, if the defenders satisfied the Court that no discussion, at all, had taken place at the 10 September hearing regarding the possibility of the pursuers' overtime claim being good because of the defenders' acquiescence in matters and/or because of verbal instructions issued on their behalf subsequent to the letter of 2 July. His position, on behalf of the pursuers, was that these matters had been raised at the hearing and either had not been heard by the defenders' representatives, or alternatively, the defenders' representatives had not grasped their potential significance.
- [44] It is clear to me from the evidence that I heard that the hearing on 10 September, attended as it was by ten persons, took the form of an open-ended discussion rather than anything that remotely represented a court or arbitration hearing. I am satisfied also that Mr Strathdee probably did not control, or structure, the process of the meeting with any great skill or authority. That may not have proved a problem if the meeting had been restricted to a discussion and argument about matters of which notice had been given prior to the hearing in either of the parties' written submissions, or other documentary material, relied on by them, and placed before the Adjudicator. But in this case, I am satisfied (and ultimately I do not think that it was seriously maintained on the part of the pursuers otherwise) that there was no prior notice given, in any written material, upon which the pursuers based their claim, of any case beyond that which depended on the construction and effect of the letter of 2 July and certainly there was no notice of any case based on acquiescence or verbal instructions, independent of that letter of 2 July. It is important, it seems to me, to recognise that the case based on acquiescence and/or verbal instructions would almost certainly have involved evidential questions of what was said and done by the defenders' representatives, and when and where and, by whom, such things were said and done. There was no question, it seems, of the defenders being in a position to investigate these matters, prior to the hearing, far less were they in the position to put their evidential position in relation thereto before the Adjudicator. Again that would not have mattered had the Adjudicator given the defenders the opportunity to place such evidence before him and make representations thereon prior to issuing his decision. He did not do so. It is one of the noteworthy things about the case that although the Adjudicator did seek further information and guidance, after the conclusion of the hearing from the parties, he did not do so in relation to any case based on acquiescence or verbal instructions of which there had been no notice prior to the hearing. That appears to call for an explanation, if it be that such issues were raised at the hearing. No explanation, which I considered to be satisfactory, was forthcoming from the Adjudicator.

- [45] The gulf between the evidence of the pursuers' witnesses and the evidence of the defenders' witnesses as to what was discussed at the 10 September hearing was ultimately profound. I have no hesitation in holding that all of the defenders' witnesses were being truthful in their evidence. That means, therefore, that either submissions, in relation to a case based on acquiescence and/or verbal instructions, were never raised at all, or were raised in such a way that all four of these witnesses failed either to hear these matters being touched upon or failed to understand their significance. Making every due allowance for the nature of the hearing that took place and my impression, formed to a significant extent by seeing and hearing Mr Strathdee, in the witness box, that his conduct and control of the meeting was probably not altogether tight, I have reached the conclusion that it is highly improbable that all four of the defenders' witnesses failed to hear, or misunderstood, submissions on the lines which Mr Strathdee and Mr Barrie, in their somewhat different ways, said in evidence, were made openly at the hearing on 10 September. None of the defenders' witnesses struck me as a person who was likely to have misheard or misunderstood the significance of any such submissions. In particular, the defenders' solicitor, Mr Foster, struck me as a highly astute, clear-headed individual who was highly jealous of his clients' interests in the matter. This was, after all, a person who had made strenuous objections, at the outset of the hearing, to the late alteration of, or addition to, the material being relied upon by the pursuers and indeed to their suggestion that the Adjudicator should look behind the letter of 2 July. I think it highly unlikely that this witness, at least, would not have immediately been aware of the potential significance of the kind of lines of thought, spoken to by Mr Barrie and Mr Strathdee, and which, they said, were developed on behalf of the pursuers, at the hearing, and I consider that if Mr Foster had been so aware of the significance of such lines of thought he would have immediately, and indeed strenuously, objected to such lines being developed at all or, at the very least, being advanced without an opportunity being given for the defenders to explore them. The defenders' witnesses' recollection in relation to these matters is supported by the notes taken by Mr Begg and Mr Murray. These notes give the impression that the writers thereof were alive to points of importance being raised and were noting these. The existence of these notes and their content is in contrast with the position of Mr Strathdee and Mr Barry, neither of whom said they had notes which could assist in the matter. I am reasonably satisfied that, had what Mr Barrie and Mr Strathdee said in evidence was discussed at the hearing in relation to acquiescence and verbal instructions been raised, some note would have been made, to some extent at least, of these points by either Mr Murray or Mr Begg, or both, in their notes.
- [46] It is a matter of agreement that, at the hearing, Mr Foster objected to the argument that the pursuers were making that the Adjudicator could look behind the words of the letter of 2 July to interpret it. Mr Barrie suggested that an affidavit from Mr McInerney should be obtained as to the context in which that letter was written. The Adjudicator agreed. One of the orders in 7/9 was directed to that issue. Otherwise the orders were addressed to matters of vouching. Again, it is to my mind highly improbable that Mr Foster, having taken his stance, at the hearing, on what material could be looked at to support the construction of the letter of 2 July advanced by the pursuers, would not have taken an equally robust stance if a quite separate basis of claim had been introduced at the first time at the hearing. Although Mr Strathdee, in his evidence, seemed to be suggesting that, in any event, the question of verbal instructions and/or acquiescence came up in some shape or form at the site meeting on 16 September, senior counsel did not, in his submissions, seem to support the pursuers' case, to any material extent, by reference to any such evidence. In any event, I am satisfied that that particular meeting was designed simply to check the work records for the pursuers in relation to the quantification on their claim and that there was nothing in the way of submissions or evidence led on behalf of the pursuers regarding the defenders having acquiesced or issued verbal instructions. Mr Begg, who attended that meeting, gave clear evidence to that effect, which I accept.
- [47] As to the evidence of the pursuers' witnesses, Mr Barrie and Mr Strathdee, as to what was said at the 10 September hearing in relation to acquiescence and verbal instructions, I have already indicated that I have found both of them to be less than satisfactory witnesses. Mr Strathdee appeared to be very uncomfortable in giving his evidence. He was confused at times and contradictory in his evidence. What is more his evidence was, in significant detail, somewhat at odds with Mr Barrie's, both as to what was said at the hearing, how it came to be said and the duration of discussions in relation to acquiescence

and verbal instructions. Mr Barrie presented his evidence in a somewhat robust and self-confident manner and I agree with the submissions of the solicitor advocate for the defenders, that it was often evasive and that he frequently sought to anticipate in his answers questions that were never asked. His insistence that he used the words "*personal bar*" in his submissions, that this was a running theme in his presentation and that he repeatedly referred to the word "*prejudice*" in the knowledge that this was an essential component in any case of personal bar, I found to be implausible having regard to the evidence as a whole and was not reflected in Mr Strathdee's evidence. It is a matter of note that senior counsel for the pursuers never put to the defenders' witnesses any of the detail of the evidence that Mr Barrie, in the event, gave and, in particular, never suggested that Mr Barrie had used the expression "personal bar" as a running theme throughout the hearing. Mr Barrie's attempt to suggest that his own letter of 15 September and the affidavit from Mr McInerney were even *prima facie* consistent with the pursuers' case I found to be entirely unconvincing. Ultimately I have come to the clear conclusion that the defenders' witnesses evidence, on the vital question as to what was discussed at the 10 September hearing, in relation to the pursuers' claim for overtime, is to be preferred to that of the pursuers. I agree with the solicitor advocate for the defenders that it appears that Mr Strathdee was indulging, in part, at least, in *ex post facto* rationalisation, or justification, for his decision, when giving evidence in court, and he may well have come to believe that he had heard more or read more than he actually did at the time of the hearing. As regards Mr Barrie, he said that he thought, after the hearing, that the pursuers had won the argument based on the proper construction and effect of the 2 July letter and was disappointed on reading Mr Strathdee's decision to discover that they had lost that argument. It seems to me that he was in evidence, indulging in the putting forward of support and justification for the Adjudicator's decision, in the pursuers' favour, on a different basis which was not addressed at the hearing, arguments he may well have himself come to consider, in any event, to be good ones. But I am satisfied, that, in any event, they were not arguments that were put forward in the way he tried to suggest, at the hearing on 10 September.

- [48] I would like to stress, in conclusion, that I very much hope that this is a rare case, peculiar to its facts. I need no persuasion that, on the whole, the courts should be generally resistant to invitations to pick over Adjudicator's decisions and to analyse over closely, and critically, their procedures (compare *Carilion Construction Ltd v Devonport Royal Dockyard Ltd* (2005) EWCA Civ. 1358). Nevertheless elementary and basic principles of natural justice have to be observed by adjudicators, for the reasons I have alluded to above, and if they behave, in reaching their decisions, in a manner which, on an objective basis, involves a disregard of fair play, the consequence of which appears to have had a substantial and material effect on the adjudicator's decision, then the Court should be prepared to intervene. The present case is, in my judgment, on the facts, one such situation. It involves a clear and substantial breach of natural justice in relation to matters which were determinative of the Adjudicator's decision.
- [49] I shall, for the foregoing reasons, grant the defenders' motion by reducing, *ope exceptionis* that part of the Adjudicator's decision dealing with the pursuer's overtime claim and by assoilzing the defenders' from the third conclusion of the summons.

Pursuers: Howie, QC; MacRoberts

Defenders: Walls, Solicitor Advocate; Pinsent Masons