OPINION OF LORD KINGARTH : OUTER HOUSE COURT OF SESSION : 12th July 1999:

1). The respondents contracted to execute certain works for the petitioners in a number of different construction contracts. They made claims for payment under four of these contracts. These claims were disputed. These contracts were for the upgrading of a lift and stair installation at Granite House, Stockwell Street, Glasgow, an office fit-out at the fifth floor, Clydeway Centre, Glasgow, a further office fit-out at Clydeway Centre, Glasgow and a lift and stair installation at Clydeway Skypark, Glasgow. The respondents gave notice of their intention to refer these disputes for adjudication under and in terms of section 108 of the Housing Grants, Construction and Regeneration Act 1996. Section 108 (so far as relevant) provides:

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

For this purpose "dispute" includes any difference.

(2) The contract shall -

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;

(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;

(e) impose a duty on the adjudicator to act impartially; and

(f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

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

2) John Despenser Spencely, M.A., B.Arch, R.I.B.A., M.R.T.P.I., P.P.R.I.A.S., F.C.I. Arb., was duly appointed as adjudicator, accepted office and conducted adjudications in respect of the disputes. These came to be known as Adjudications A, B, C and D. On 13 May 1999 he issued Final Decisions in each case. In Adjudication A he ordered the petitioners to pay to the respondents the sum of £36,358.03 within 14 days, together with interest. In Adjudication B he ordered the petitioners to pay to the respondents the sum of £110,350.13 within 14 days, together with interest. In Adjudication C he ordered the petitioners to pay to the respondents the sum of £8,231.02 within 14 days, together with interest. In Adjudication D he ordered the petitioners to pay to the respondents the sum of £19,896.28 within 14 days, together with interest.

3) The matter came before me for First Hearing in a petition in which the petitioners, by way of judicial review, sought reduction of these Final Decisions.

4) One of the main arguments advanced by the petitioners before the adjudicator was that the petitioners were not due to make payment to Riverbrae of the sums sought in each of the adjudications in that Riverbrae's claims were extinguished as they fell due by way of compensation under the Compensation Act 1592. In particular the petitioners claimed to be entitled to the operation of compensation in respect of debts due to them in the form of liquidated and ascertained damages of (1) £28,500 for delay in completion of retail units at Houldsworth Street, Glasgow, (2) £127,933 in respect of delay in completion of over-cladding works at the Clydeway Skypark, Glasgow and (3) £25,821 in respect of delay in completion of a car park at the Clydeway Centre, Glasgow. They also claimed compensation in respect of an alleged overpayment arising out of a contract at Dumbarton Road, Stirling. These were different contracts from the four contracts which gave rise to the disputes before the adjudicator. The respondents did not accept before the adjudicator that any of the sums claimed by the petitioners were due. In each of his decisions the adjudicator rejected the petitioners' claims to compensation in the following terms:

"I find that the Compensation Act cannot be invoked to extinguish, as at the date they came into existence, those claims which are the subject of this adjudication. My reasons for this finding are as follows:

The Compensation Act applies only to liquid claims which do not require investigation and proof. In the case of the sums asserted by the respondent... investigation of the circumstances surrounding each claim would be

required. The applicant intimated that these claims would be disputed. For the purposes of the operation of compensation, such claims cannot therefore validly be used to extinguish the claims which are the subject of this adjudication.

Furthermore the Compensation Act requires each party to be debtor and creditor in the same capacity. The Hamiltonhill Estates contract was not between Riverbrae Construction Limited and Allied London & Scottish Properties plc, but between Riverbrae Construction Limited and Hamiltonhill Estates Limited."

The Hamiltonhill Estates contract referred to was that relating to works at Dumbarton Road, Stirling.

5). In the petition, the petitioners plainly sought to challenge the decision of the adjudicator in this respect, at least as regards the three claims for liquidated and ascertained damages. In the course of the hearing before me, however, counsel for the petitioners indicated that this no longer formed the basis upon which the decisions were challenged. He explained that although the petitioners did not accept that the decisions which had been made in this connection were right (in particular - although this was not developed - having regard to what was said to be a lack of specification of the respondents' position that these claims were disputed), it was accepted that these were not errors of law which could be said to have led to the adjudicator to exceed his jurisdiction, not being errors going to the root of the question for his determination. In short, counsel accepted that this was not a matter in relation to which the petitioners could seek to invoke the court's supervisory jurisdiction by way of judicial review.

6). Instead the argument presented focussed on the decisions made by the adjudicator to order payment within 14 days (which argument I allowed to be heard, although not without some hesitation, in that it appeared to be a development of the case made).

7). In their written submissions before the adjudicator, the petitioners - in addition *inter alia* to their claim to compensation - also argued, apparently as a subsidiary position, that the adjudicator should order that the petitioners be allowed to place any monies due to the respondents on deposit receipt in the joint names of the parties, pending resolution of all disputes between them. In addition to the claims under the four contracts already referred to, the petitioners indicated that the respondents had failed to fulfil contractual obligations incumbent upon them in respect of a number of other projects and that they had failed to provide health and safety information due by them to the petitioners, again at other projects. Against that background, what was said by the petitioners in their Defences was

"In light of the numerous foregoing failures of the applicant to fulfil contractual obligations owed by it to the respondent, the respondent is apprehensive that the applicant is financially unable to meet is obligations. In the circumstances the respondent requests that, should the adjudicator be minded to make any order for immediate payment of the sums claimed by the applicant, that the respondent be allowed to place any such monies on deposit in the joint names of the parties pending resolution of all disputes between them."

8). In each of his decisions, the adjudicator recorded his decision on this matter as follows:

"I find that I have no power to direct that sums awarded to the applicant should be placed on deposit in the joint names of the parties.

My reasons for this finding are as follows:

This is not a power given to me by the Act or the Scheme. It is not a term of the contract between the parties."

9). On behalf of the petitioners it was argued that the adjudicator had failed properly to apply his mind, as required by regulations which governed the matter ("the Scheme"), to the question of whether he should indeed make orders for payment on the petitioners thus peremptorily. The clear purpose of the Act was to enable monies to be transferred quickly when disputes arose in construction contracts. Nevertheless, it was clear that, as part of a "quick fire" process, the adjudicator had wide powers. These suggested that he was in a different position from a judge or arbiter whose focus essentially was to decide upon representations made by the parties. It was agreed that in respect of each contract the appropriate regulations which applied (by virtue of section 108(5) and (6)) were the Scheme for Construction Contracts (Scotland) Regulations 1998 (1998 S.I. 687). Reference was made to Regulation 12 (providing that the adjudicator was to act impartially in carrying out his duties and to do so in

accordance with any relevant terms of the contract and that he was to reach his decision in accordance with the applicable law in relation to the contract), to Regulation 13 (providing that the adjudicator might take the initiative in ascertaining the facts and the law necessary to determine the dispute and that he was to decide on the procedure to be followed in the adjudication, further providing that he might request any party to the contract to supply him with such documents as he might reasonably require, meet and question any of the parties to the contract and their representatives, make such site visits and inspections as he thought appropriate, carry out any tests or experiments, obtain and consider such representations and submissions as he required and, subject to notification, appoint expert assessors or legal advisers), to Regulation 14 (which provided that the parties were to comply with any request or direction of the adjudicator in relation to the adjudication), to Regulation 15 (giving the adjudicator certain powers if any party failed to comply with any request, direction or timetable), to Regulation 17 (which provided *inter alia* that the adjudicator was to consider any relevant information submitted to him by any of the parties to the dispute), to Regulation 20 (which provided that the adjudicator was to decide the matters in dispute and might make a decision on different aspects of the dispute at different times, and that further that he might take into account any other matters which the parties to the dispute agreed should be in the scope of the adjudication), and to Regulation 21 (which provided that in the absence of any directions by the adjudicator relating to the time for performance of his decision, the parties were required to comply with any decision). In particular, and centrally, reference finally was made to Regulation 23(1) which (so far as relevant) provides:

"In his decision, the adjudicator may, if he thinks fit, order any of the parties to comply peremptorily with his decision or any part of it."

10). The submission was that although the adjudicator had dealt with the suggestion made about the joint deposit receipt (and for the purposes of argument it was accepted that the adjudicator's decision on this matter was not open to challenge), he had not further and more widely considered whether he thought "fit" to make a peremptory order of the kind he made. It was accepted that 'peremptorily" in Regulation 23 was not necessarily restricted to time, but consideration of such an order inevitably involved consideration of the time within which it would fall to be complied with. Despite making no decision that the petitioners' claims for liquidated and ascertained damages were unfounded, or that they had no reasonable apprehension as to the financial state of the respondents, the adjudicator did not consider - apart from the particular submission made to him about possible joint deposit receipt - whether a peremptory order was indeed appropriate. A number of suggestions were made as to possibilities he could have considered, all involving no order for immediate payment - in particular, the possibility of making an order for payment pending resolution of the liquidated and ascertained damages claims. In this way the adjudicator had failed to take account of matters he was required to take account of, and had made an error of going to the root of his jurisdiction. Reference was made to ***C.C.S.U.* v *Minister for Civil Service*** 1985 A.C. 374, Lord Diplock at p.410, ***Anisminic* v *Foreign Compensation Commission*** 1969 2 A.C. 147, Lord Reid at p.174, and to *Macob Civil Engineering Ltd* v *Morrison Construction Ltd* 1999 Building Law Reports p.93). His decisions therefore fell to be reduced at least to the extent of the orders made for payment within 14 days. The matter should be remitted to the adjudicator to consider whether he thought fit that such orders be made.

11). Counsel for the respondents submitted that this approach was misguided. The claims which the adjudicator was asked to consider were simple claims by the respondents for payment under the contracts. The Defence to these claims was presented on a number of bases. In particular in each case, it was claimed that since the contract was made before 1 May 1998 the Act did not apply and, secondly, that the dispute between the parties as to whether the Act applied was not a dispute under the contract and accordingly that the adjudicator did not have jurisdiction. The adjudicator was then faced with the argument that the sums claimed had been extinguished by operation of compensation. This was dealt with in a way which the petitioners no longer sought (in this process) to criticise and which could not be criticised. Reference was made to *Gloag on Contract* p.645-646, *McBryde on Contract* paras.22-56 - 22-59 and *Wilson on Debt* para.13.5. The adjudicator thereafter further found that the petitioners had not given Notice of an intention to withhold payment prior to the final date for

payment of the sums due to the respondents, all as required under section 111 of the Housing Grants Construction and Regeneration Act 1996. Then, in his decision, he had plainly addressed - in light of submissions apparently made before him - the question of whether the petitioners had a right of retention in respect of the sums they claimed, including the sums claimed as liquidated and ascertained damages. All of these claims were disputed by the respondents. The adjudicator found that the petitioners had no rights of retention, their claims arising under separate and different contracts. The correctness of this decision was not disputed. This part of his decision was necessarily to be regarded as part of his assessment as to whether to order immediate payment. At no stage before him was it agreed that he should consider the merits of the petitioners' claims and it was not argued that he should. In the event the claims made for liquidated and ascertained damages were now the subject of proceedings in Glasgow Sheriff Court. These were being defended *inter alia* on the basis that the respondents were not responsible for any delays in completion. The adjudicator then dealt with the submission made to him about deposit in joint names of the parties. The way in which he decided that matter was not the subject of attack and could not be. There was no basis for suggesting that in the absence of submissions he was bound to assess whether there might be alternative means available and appropriate for delaying payment by the petitioners to the respondents. Whatever the adjudicator's powers (and here he had issued directions for the production of certain documents and appointed a legal adviser), in these adjudications he had chosen to proceed on the basis of a hearing at which certain evidence was led and then argument made by the parties, who were legally represented and who earlier had made written submissions. The submission by the petitioners appeared to fly in the face of the apparent intention of the Act. In any event, even if the adjudicator had further assessed the appropriateness of an order for immediate payment, it would not, and could not, have made any difference, since he had already decided as a matter of law that the petitioners could not retain the sums they claimed. The adjudicator did not even have sufficient information to enable him to conclude that the apprehensions of the petitioners as to the financial position of the respondents were reasonably based. This claim had originally been made in the Defences, the apprehension being said to arise from the alleged failures of the respondents to fulfil contractual obligations. These obligations were disputed. No evidence was led on this matter, and the short submission of the petitioners at the end of the adjudication remained as it had been in the written case.

I have come to the clear view that the submissions of the respondents are to be preferred.

12). In the first place I consider it wrong to read the decisions of the adjudicator as if the only point at which he addressed the question of whether it was appropriate to make a finding that the respondents were entitled to immediate payment (or to make an order to that effect) was in relation to the question of potential joint deposit receipt. Instead, in my view, it is clear, having rejected the claim that the respondents' claims were extinguished, and there being no suggestion that he should assess the merits of the petitioners' claims, that his consideration of whether the petitioners could exercise a right of retention was in the context of assessment of whether there was any reason not to find the respondents immediately entitled to the sums they claimed or make an order upon the petitioners to that effect. The question of whether the petitioners had given Notice under section 111 of the Act was also apparently, at least in part, an earlier step in that process. Indeed it seems to me further that it is not even clear that the submission about possible joint deposit receipt was made in the context of whether an order for payment should be immediate. Instead the language in which that submission was first made was that "should the adjudicator be minded to make any order for immediate payment for the sums claimed by the applicant" the petitioners should be allowed to place such monies on deposit in the joint names of the parties etc., (i.e. the suggestion appeared to be made <u>if</u> for other reasons - no doubt related *inter alia* to the question of retention - the adjudicator decided to make an order for immediate payment).

13). In any event, although it is clear that the adjudicator was given wide powers as to how to decide the disputes referred to him (and indeed in an appropriate adjudication that an adjudicator could, as commented by Dyson J. in ***Macob Civil Engineering Ltd,*** conduct an entirely inquisitorial process) and while it is also clear both that he had a discretion as to whether to order immediate payment and that he could have addressed himself competently to a number of potential alternatives, it does not follow

that he was bound to consider alternatives when the only submissions made to him for his consideration in that context, by the party with the interest to make them, were those related to the joint deposit receipt. This, it seems to me, is particularly, but not only, true having regard to the apparent way in which these adjudications were carried out - that is by means of written submissions, followed by a hearing at which the parties' legal representatives presented arguments; a hearing at which it was not suggested that the adjudicator should proceed in any other way. It seems to me that the submission made on behalf of the petitioner would run counter to the purpose of the Act, which was, as indicated by Dyson J. in ***Macob Civil Engineering Ltd***,

"to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement".

14). Further, having decided that the respondents were entitled to payment of the sums they claimed, and that the petitioners could not retain the sums they claimed, and in addition the adjudicator having no duty, and no apparent right, to investigate and assess these latter claims, I consider that he could not logically, or lawfully, have made an order of the type suggested as a possibility - that is postponing payment standing the existence of the petitioners' claims. No legal basis for such an approach at any rate was suggested in argument before me. This is most clearly seen in relation to the primary suggestion apparently made that the adjudicator could have made an order deferring payment pending resolution of the petitioners' liquidated and ascertained damages claims. Such an order would plainly, in effect, have been to sustain the petitioners' claims to retention which the adjudicator had just rejected. Whatever wide powers may be given to adjudicators to facilitate speedy resolution of the disputes before them, no power is given to make decisions contrary to the rights or obligations of the parties arising as a matter of law. Further, although it is unnecessary to go this far, I consider the respondents were right to argue that if the adjudicator had applied his mind further to the question, he would not have had information before him which could reasonably have supported the view that the apprehensions of the petitioners as to the financial standing of the respondents were reasonably based.

15). In these circumstances I consider that it cannot be suggested that the adjudicator failed to take into account matters which he was bound to take into account or that he made any error of law going to the root of his jurisdiction. I therefore refuse to make any of the orders sought by the petitioners.

Petitioners: Davidson, Q.C.; Bird Semple
Respondents: Cullen, Q.C.; Brodies, W.S.