OPINION OF LORD MACFADYEN : Outer House, Court of Session. 10th November 1999

Introduction :

1. In September 1998 the pursuers entered into a contract with the defenders to carry out certain works at the building known as P1 at the defenders' site at Annan, Dumfriesshire. They aver that the work was duly carried out, but that disputes arose in relation to the sums due in terms of invoices submitted by them which the defenders refused to pay. On the view that most of the works were construction operations carried out under a construction contract within the meaning of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"), the pursuers referred the disputes to adjudication. After sundry procedure the adjudicator issued a decision in which he ordered the defenders to pay the pursuers £284,046.98 (exclusive of VAT), with interest at 2% above base rate from 11 April 1999 until payment. The pursuers now in this action seek to enforce payment of the principal sum awarded by the adjudicator, the VAT due thereon, and interest.

The Statutory Framework :

2. It is convenient to begin by noting the statutory provisions which form the context of the present action. Part II of the 1996 Act is headed "Construction Contracts". Section 108(1) provides that:
   "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."

3. Subsections (2) to (4) set out various requirements which should be satisfied by the contract in relation to the procedure for adjudication. Those include (in subsection (3)) a requirement that there should be a provision that: *"the decision of the adjudicator is binding until the dispute is finally determined ...".*

4. Subsection (5) then provides that: "If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply".

5. The result is that if a construction contract does not make provision for adjudication, adjudication is nevertheless available in accordance with the Scheme. There are in fact two Schemes, one for England and Wales (Schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998, S.I. 1998 No. 649) and one for Scotland (Schedule to the Scheme for Construction Contracts (Scotland) Regulations, S.I. 1998 No. 687). Part of the adjudicator's decision was concerned with identifying which Scheme applied to the present case, but as matters have developed, nothing now turns on that.

6. The right to refer a dispute to adjudication is conferred on a party to a construction contract, and the expression "construction contract" is defined in s104. For present purposes it is sufficient to note that
   Section 104(1) provides inter alia that:
   "In this Part a 'construction contract' means an agreement with a person for any of the following-
   the carrying out of construction operations ...".
   Section 104(5) provides that:
   "Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations.
   An agreement relates to construction operations so far as it makes provision of any kind within subsection (1) or (2)."
   Section 105 sets out the definition of "construction operations". Section 105(1) provides *inter alia* that:
   "In this Part 'construction operations' means, subject as follows, operations of any of the following descriptions-
   (a) construction ... of buildings, or structures forming, or to form, part of the land (whether permanent or not);
   (b) *construction ... of any works forming, or to form, part of the land, including ... industrial plant...".*
   Section 105(2) then provides *inter alia* that:
   "The following operations are not construction operations within the meaning of this Part-
   (c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is-
   (ii) the production, transmission, processing or bulk storage (other than warehousing) of ..pharmaceuticals ...".
   Paragraph 23 of Part 1 of the Schemes provides:
   "(1) 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.
   (2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it, until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties."

Procedure in the Adjudication :

7. On 13 August 1999 the pursuers served on the defenders notice that they intended to refer the disputes to adjudication. At the same time they applied to the Institution of Civil Engineers for an adjudicator to be appointed. On 17 August Mr J. D. Carrick was appointed adjudicator.

8. The manner in which he conducted the adjudication is summarised in section 3.0 of his decision of 17 September 1999 (No. 6/1 of process). A meeting was held on 3 September at which parties' representatives made submissions *inter alia* on the issue of whether and if so to what extent the disputes related to the carrying out of construction operations within the meaning of section 105. In brief, the pursuers' contention on that issue was that the works to which the disputed invoices related were construction operations within the meaning of section 105, and that accordingly the contract, so far as it related to those works, was a construction contract within the meaning of section 104, and was one in respect of which they were entitled to seek adjudication. The defenders' contention was that, since the primary activity on their site was the production, transmission, processing or bulk storage of pharmaceuticals, and since the works (or at least a very high proportion of them) constituted the assembly or installation of plant on that site, or the erection of steelwork for the purpose of supporting or providing access to such plant, the works fell within the exception created by section 105(2)(c)(ii), and accordingly the contract was not a construction contract within the meaning of section 104, and the adjudicator had no jurisdiction to make an order which would have the binding effect given to an adjudicator's decision by paragraph 23(2) of Part 1 of the Scheme. Following the meeting on 3 September, the adjudicator issued a document entitled "Interim Statement of View" (No. 6/23 of process). Further procedure then followed, and the adjudicator's decision was issued on 17 September.

9. The adjudicator deals with the issue as to whether the works in question were construction operations in section 4.0 of his decision. As he records, it was common ground before him that the primary activity on the defenders' site is the production, processing or bulk storage of pharmaceuticals. The question was therefore whether or not the work carried out by the pursuers was assembly or installation of plant or the erection of steelwork to support or provide access to plant. Competing submissions were made by the parties as to the proper construction of the word plant. In the event, the adjudicator preferred the pursuer's submissions. Having resolved that issue in that way, he proceeded to consideration of the merits of the pursuers' claim, and made the award which I have already indicated.

The Subsequent Legal Proceedings :

10. Following the adjudicator's decision, both parties resorted to legal proceedings. On 24 September the defenders presented a claim in the Technology and Construction Court of the Queen's Bench Division of the High Court of Justice in London, in which they sought a declaration that the adjudicator was not entitled to inquire into or decide the question of his own jurisdiction where the defenders contended that the works were not construction operations, and that his decision was not a decision within the meaning of section 108(3) and was therefore not binding on the parties. On 29 September the present action was raised. In their defences the defenders averred that, since the adjudicator had purported to act under the English Scheme, the High Court of Justice was the more convenient forum for the determination of the issues between the parties, and pled that since proceedings were pending in that court, the present action should be sisted. They also pled that the adjudicator's decision was invalid, and presented a counterclaim concluding for reduction of it. When the case called for debate on 29 October, however, the defenders did not seek to maintain their plea of *forum non conveniens*. It is therefore unnecessary for me to say any more about it. Of consent, I repelled the defenders' first plea-in-law.

The Validity of the Adjudicator's Decision :

11. In seeking in this action to enforce the adjudicator's decision, the pursuers rely on the binding effect conferred on an adjudicator's decision by paragraph 23(2) of Part 1 of the Scheme, and the obligation thereby placed on the parties to comply with that decision until the dispute is finally determined. The defenders' position is that paragraph 23(2) gives binding effect only to a decision validly made by an adjudicator within the scope of his jurisdiction as defined in the 1996 Act, and that they are entitled to resist enforcement of the adjudicator's decision on the ground that he misdirected himself as to the proper scope of his jurisdiction, and as a result purported to make a decision which fell outside his jurisdiction.

They argue that the adjudicator misdirected himself as to the meaning of the word "plant" in section 105(2)(c), and as a consequence treated as falling within the scope of "construction operations" works which properly fell within the scope of the exception in section 105(2)(c)(ii). The result of that error was that a very substantial proportion of the award made by the adjudicator related to matters which were beyond his jurisdiction.

(a) Defenders' Submissions :

12. In presenting his submissions for the defenders, Mr Howlin first advanced the proposition that it was competent for the court to set aside the adjudicator's decision if it was shown to be invalid in respect that it was founded on a misconstruction of the statutory provisions which defined the scope of his jurisdiction, and as a result purported to deal with matters with which the adjudicator had no power to deal. He accepted that it was not open to the court to review an *intra vires* decision of an adjudicator. To hold otherwise would subvert the statutory purpose of adjudication, which was to secure that payment was not held up by disputes. The principle, Mr Howlin said, was "pay now, argue later". But that did not apply when the adjudicator had mistaken the scope of his jurisdiction.

13. Mr Howlin relied in the first place on authorities dealing with the setting aside of *ultra vires* decisions of statutory decision-makers. These, he submitted, were helpful despite the fact that an adjudicator's jurisdiction might be said to rest on contract or implied contract (see section 114(4) of the 1996 Act) rather than directly on statute. He referred to ***Watt* v *Lord Advocate*** 1979 SC 120, per Lord President Emslie at 130, and to ***Anisminic Ltd* v *Foreign Compensation Commission*** [1969] 2 AC 147. In ***Anisminic*** Lord Reid (in a passage adopted by Lord Emslie in ***Watt*)** said (at 171B-E):

"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. ... But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it or decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

14. Later in his speech, his Lordship said (at 174B-C): *"The Order requires the commission to consider whether they are satisfied with regard to the prescribed matters. That is all they have to do. It cannot be for the commission to determine the limits of its powers. Of course if one party submits to a tribunal that its powers are wider than in fact they are, then the tribunal must deal with that submission. But if they reach a wrong conclusion as to the width of their powers, the court must be able to correct that - not because the tribunal has made an error of law, but because as a result of making an error of law they have dealt with and based their decision on a matter with which, on a true construction of their powers, they had no right to deal."*

15. Lord Pearce said (at 194F): *"It would lead to an absurd situation if a tribunal, having been given a circumscribed area of inquiry, carved out from the general jurisdiction of the courts, were entitled of its own motion to extend that area by misconstruing the limits of its mandate to inquire and decide as set out in the Act of Parliament."*

16. Lord Wilberforce (at 209A) quoted Farwell LJ in **Rex v Shoreditch Assessment Committee, Ex parte Morgan** [1910] 2 KB 859 at 880 to the following effect: *"... it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure".*

17. Mr Howlin then turned to authorities dealing directly with adjudication. He referred first to ***Macob Civil Engineering Limited* v *Morrison Construction Limited*** [1999] BLR 93. In that case it was argued that an adjudicator's decision was invalid on the ground that the adjudicator was guilty of procedural error in conducting the adjudication in breach of the rules of natural justice in certain respects. It was common ground that the contract was a construction contract within the meaning of the 1996 Act. Dyson J held (at 99) that:

"a decision whose validity is challenged is nevertheless a decision within the meaning of the Act [&] the Scheme",

but Mr Howlin pointed to an earlier passage in the judgment (at 98) which was to the following effect:

"At first sight, it is difficult to see why a decision purportedly made by an adjudicator on the dispute that has been referred to him should not be a binding decision within the meaning of s108(3) of the Act, paragraph 23(2) of Part 1 of the Scheme and clause 27 of the contract. If it had been intended to qualify the word 'decision' in some way, then this could have been done. Why not give the word its plain and ordinary meaning? I confess that I can think of no good reason for not so doing, and none was suggested to me in argument. If his decision on the issue referred to him is wrong, whether because he erred on the facts or the law, or because in reaching his decision he made a procedural error which invalidates the decision, it is still a decision on the issue. Different considerations may well apply if he purports to decide a dispute which was not referred to him at all."

18. Mr Howlin relied in particular on the last sentence of that passage as leaving open the submission which he made in the present case.

19. The next case on which Mr Howlin relied, also a decision of Dyson J in the Technology and Construction Court, was ***The Project Consultancy Group*** **v** ***The Trustees of the Gray Trust*** (16 July 1999, unreported). In that case the defendants sought to resist an application for summary judgment to enforce the adjudicator's decision on the ground that the adjudicator had no jurisdiction to make it. Part II of the 1996 Act does not apply to contracts entered into before 1 May 1998 (section 104(6)). The adjudicator decided that the contract had been concluded on 10 July 1998 and that he accordingly had jurisdiction. The defendants' contention was that the contract had been made in April 1998, and that the adjudicator therefore had no jurisdiction. The claimant founded on the *dictum* in *Macob* (at 99) that "a decision whose validity was challenged was nevertheless a decision within the meaning of the Act and the Scheme". Dyson J, however, pointed to the earlier passage in his judgment (at 98) which I have quoted, and added (in paragraph 6 of his judgment):

"In my view different considerations apply where the adjudicator purports to make a decision which he is not empowered by the Act to make. One example of this would be where an adjudicator decides a dispute arising under a contract which is not a construction contract within the meaning of section 104(1) of the Act. In that event, there is no right to refer the dispute for adjudication under section 108(1), since it is not a dispute falling within the scope of that sub-section. It is only a party to a construction contract who has the right to refer a dispute under the contract for adjudication. It is only such a contract that is required by sub-section (3) to provide that the decision of the adjudicator is binding until the dispute is finally determined."

20. Having rejected (in paragraph 8) a submission that to allow a defendant to resist enforcement proceedings by arguing that the adjudicator had no jurisdiction would frustrate the intention of Parliament that adjudicators' awards should be honoured pending final resolution of the dispute, Dyson J concluded (in paragraph 9) that:

"... it is open to a defendant in enforcement proceedings to challenge the decision of an adjudicator on the grounds that he was not empowered by the Act to make the decision."

21. Mr Howlin's submission was that in paragraph 6 of that judgment Dyson J had identified a sound example of a situation in which it was open to a defender to resist enforcement proceedings on the ground that the adjudicator's decision was not one on which statutory binding effect was conferred.

22. The second main branch of Mr Howlin's submissions concerned the meaning of the word *"plant"* in section 105(2)(c). If the adjudicator misconstrued that word, the result was that he misconstrued *"construction operations"*, held the contract to be a *"construction contract"* in respects in which it was not, and thus made a decision which purported to be a decision to which binding effect was given by section 108 of the Act and paragraph 23(2) of Part 1 of the Scheme when in fact it was not. The interpretation of *"plant"* was thus at the heart of the question whether the decision was valid. "Plant" is not defined in the 1996 Act. In accordance with ordinary principles of statutory construction, Mr Howlin submitted, it ought therefore to be given its ordinary meaning in the English language. In addition, it required to be borne in mind that the word "plant" and the phrase "plant or machinery" have been used in legislation for well over a century, and have been the subject of a tract of case law. Parliament must be assumed to have been aware of the construction previously placed on the expressions when using them again in the 1996 Act, and must be assumed, in the absence of a special definition, to have intended to use them in the meaning

ascribed to them by authority. The line of authority cited by Mr Howlin included the following cases: ***Blake* v *Shaw*** (1860) Johns. 732 (70 ER 615); ***Yarmouth* v *France*** (1887) 19 QBD 647, at 651-2 and 658; ***J. Lyons & Co. Ltd.* v *Attorney-General*** [1944] 1 Ch 281, at 687; ***Hinton (Inspector of Taxes)* v *Maden & Ireland Ltd.*** [1959] 1 WLR 875, per Lord Reid at 889-890 and Lord Denning at 896; ***Jarrold (Inspector of Taxes)* v *John Good & Sons Ltd.*** [1963] 1 WLR 214 at 220-221; ***Commissioners of Inland Revenue* v *Barclay Curle & Co. Ltd*** 1969 SC (HL) 30, per Lord President Clyde at 38, and Lord Reid at 51; ***Bridge House (Reigate Hill) Ltd* v *Hinder (Inspector of Taxes)*** (1971) 47 TC 182; and ***Schofield (Inspector of Taxes)* v *R. and H. Hall Ltd*** (1974) 49 TC 538. From them it could be seen that the question of whether a particular thing was plant was to be answered by reference to function. Plant was anything by means of which the operations of the business were performed, as distinct from the setting or premises in which the operations took place (*CIR* **v *Barclay Curle*** per Lord Reid at 51). Holding the dry dock which was the subject of dispute in ***CIR v Barclay Curle*** to be plant, Lord President Clyde (at 38) put the issue thus:

"*The dock ..., in my view, performs an active role, similar in character to the role of machinery. Moreover, as the Special Commissioners found, the whole of the parts of this dock form one unit. They held it to be established that the pumps and machinery 'were an integral part of the dock as a functioning entity. The remainder of the dock would have been useless to the company without them and, similarly, they would have been useless without the remainder of the dock.' ... On the facts of this case it appears to me to be clear that the concrete sides and floor of this dry dock were not merely the setting in which the company's business was carried on, but were in a very real sense part of the apparatus which they used in order to carry out their business.*"

23. Before the adjudicator the practical issue was whether *"plant"* in section 105(2)(c) included or did not include pipework linking various pieces of equipment. As he recorded in his Interim Statement of Views, the majority of the work carried out by the pursuers was pipework. If such pipework was the installation of plant, the bulk of the pursuers' work fell within the exception in section 105(2)(c). If not, it fell within the scope of section 105(1). In the course of the proceedings before the adjudicator reference was made to the ordinary meaning of the word "plant", to the absence of a definition in the 1996 Act, to the definition of plant in MF/1 (the standard form conditions which were incorporated in the parties' contract), to ***CIR* v *Barclay Curle*** and ***Schofield* v *Hall***, and to certain passages in Hansard. At page 7 of his decision, the adjudicator records that he found no assistance in the 1996 Act or in the Schemes. He rejected the attempt to rely on the definition of plant in the conditions of contract (in which respect Mr Howlin accepted that he was right). He therefore considered what he regarded as "the competing views of utilising Hansard or utilising the Inland Revenue cases". His reasoning in preferring a narrow construction of "plant" which excluded pipework is to be found partly in his Interim Statement of Views and partly in his decision. In the Interim Statement of Views he said (at page 6):

"[A]s a practitioner of many years in engineering, I have difficulty associating pipework with the concept of plant or machinery. To me, in the ordinary use of the English language, plant or machinery represents a device of [? or] a piece of apparatus in which part of the process is effected. The pipework, electrical supplies or the buildings that house the items of plant are not unique to the process industry and could feature in any common or garden building or civil engineering project. Reading the contents of Section 105(2) in a more holistic manner I also have difficulty with the word 'assembly'. I have never heard this expression applied to pipework. The normal expression is 'fabrication'. ... [R]eferring to Hansard, I find support for the point of view that I have adopted. It seems to me that their Lordships are endeavouring only to exclude the specialist elements of process plant. ...

I have had difficulty coming to terms with the primary point made by the [defenders], i.e. that one should look to tax cases for a definition in another statute that did not exist when these tax cases were decided. If one makes the quantum leap of encompassing these tax cases within the consideration of [the 1996 Act] then I believe substantial difficulties would result. In the present dispute, virtually everything on the site at Annan would fall within the definition of plant. Had it been the intentions of the drafter of [the 1996 Act] to provide such a liberal definition then they would not have required to incorporate any reference for example to steelwork as that would simply have been part of the 'plant' involved in the process engineering."

24. In his decision (at pages 7-8) he said:

"If I were to ... take cognisance of the Inland Revenue cases I would immediately run into a contradiction with the Hansard statements and also, in my opinion, the wording of the Statute. If I came to the wide meaning of plant

within Inland Revenue cases the words 'assembly' and 'installation' would be completely redundant as would any reference to steelwork supporting or providing access.

Finally, as a practitioner of a significant number of years experience within process engineering, plant or machinery to me brings a mental picture of a piece of apparatus, probably with moving parts, in which the process is effected. It certainly does not conjure up a picture of building or civil engineering works, perforations through walls and cover plates or electrical or fluid conduits between items of plant nor I have to say does it conjure up pictures of steelwork supporting or giving access to items of plant."

25. Mr Howlin submitted that the adjudicator's reasoning was erroneous, and had led him to misconstrue the word "plant" and thus treat as falling within the scope of the adjudication work which did not do so. He submitted, in the first place, that the adjudicator's refusal to rely on the case law was misguided. He had treated the line of authority cited to him as if it were concerned with a special meaning of "plant" for the purposes of tax law, when in fact it was concerned with the ordinary meaning of the word (***Hinton* v *Maden and Ireland Ltd*** per Lord Reid at 889). As a result he had failed to apply the appropriate functional approach and to ask himself whether the pipework was an integral part of the process plant as a functioning entity, part of the apparatus used to carry on the defenders' business. If he had done so, he would have seen that the pipework connecting the individual items of plant was itself part of the plant, without which the individual items would be unable to perform their function. In the second place, the adjudicator's reliance on Hansard was inappropriate. The conditions for resort to Hansard laid down in ***Pepper* v *Hart*** [1993] AC 593 were not satisfied. The legislation was not ambiguous or obscure, and its literal meaning did not lead to absurdity. On the contrary, the word "plant" had a well established meaning settled by authority before it was used in the 1996 Act. Thirdly, in so far as the adjudicator had relied on his own understanding, as an experienced process engineer, of the word "plant", it appeared that he had allowed his view of its meaning to be coloured by the associated word "machinery". His comments on the redundancy of the words "assembly" and "installation" made no sense. The result of these flaws in his approach to the construction of "plant" was that the adjudicator had held that the term did not include pipework, and that the bulk of the pursuers' work therefore within the scope of adjudication. As a result of that error the adjudicator had made a decision which, for the most part, he had no power to make.

(b) Pursuers' Submissions :

26. Ms Patterson's submissions for the pursuers fell into two parts corresponding to the two main parts of Mr Howlin's submissions. She submitted in the first place that the adjudicator had not erred in his construction of the word "plant"; and in the second place that even if he did fall into error in that respect, the error was not one which took him outside the scope of his jurisdiction, and was therefore not one which entitled the court to set the decision aside and deprive it of the binding effect which the legislation conferred on an adjudicator's decision pending final determination of the dispute.

27. So far as the interpretation of "plant" was concerned, Ms Patterson submitted that the adjudicator was correct for the reasons which he gave. He had correctly rejected the defenders' submission that he should interpret the statutory language by reference to the contractual definition of "plant" in MF/1. He was entitled to apply his own experience as a process engineer in arriving at his understanding of the word "plant" when used in a statutory context dealing with process engineering, such as section 105(2)(c). If in his experience the expression "plant" was not used in engineering, or in particular in process engineering, to connote pipework, he was entitled to rely on that in interpreting section 105. He was correct in noting that "plant" did not connote building or civil engineering works (decision, page 8). He was entitled to take account of the fact that the language of section 105(2)(c) ("assembly" and "installation") was not in normal engineering usage applied to pipework, and that different language ("fabrication") would be normal usage in that context. There was sufficient in the adjudicator's reasoning to justify interpreting "plant" in the way that he did.

28. In any event, Ms Patterson submitted, even if the adjudicator was in error in his interpretation of "plant", it did not follow that the decision was not one which had the statutory binding effect until final resolution of the dispute. The defenders accepted that the adjudicator was entitled, indeed obliged, to address the question of the scope of his jurisdiction if that question was raised by the submissions made to him. In doing that, he had to consider whether the disputes between the parties arose under a construction

contract within the meaning of section 104. The effect of section 104(5) was that a contract might be (i) wholly a construction contract, or (ii) wholly not a construction contract or (iii) partly a construction contract and partly not. The adjudicator was therefore driven to looking at the items of work individually, to see whether they were construction operations within the meaning of section 105. That in turn led him to the need to consider the scope of the exception in section 105(2)(c)(ii) founded on by the defenders, and thus to the need to interpret the word plant as used in that provision. All of that was something that the adjudicator required to do in addressing the task conferred on him by his appointment as adjudicator. While it was recognised that there might be circumstances in which an adjudicator acted wholly without jurisdiction, and that in such a case the party ordered by him to make payment might resist enforcement of his decision by challenging its validity, that was not the situation here. The defenders were not saying that the adjudicator had no jurisdiction at all. They were saying that he had erred in the view which he took as to which of the disputed items arose under a construction contract within the meaning of section 104. That sort of error was not the sort which the defenders were entitled to rely on at this stage as a defence to enforcement proceedings. There were parameters within which an adjudicator was entitled to err without depriving his decision of the temporary binding effect conferred by section 108(3) of the 1996 Act and paragraph 23(2) of Part 1 of the Scheme. Any error on the part of the adjudicator in his construction of the term "plant" was an error within those parameters. It was an *intra vires* error rather than an *ultra vires* one. Particularly in light of the need, generated by the terms of section 104(5), to address the question of whether items of work which were the subject of dispute were construction operations on an item-by-item basis, it would be destructive of the purpose of adjudication if error of the sort here alleged by the defenders were allowed to constitute ground for resisting enforcement.

29. In the circumstances, therefore, the defenders' fourth plea-in-law should be repelled, and decree should be granted *de plano*.

(c) Discussion :

30. The process of adjudication in construction contracts is a creature of statute. It depends fundamentally on section 108(1) of the 1996 Act, which confers on a party to a construction contract a right to refer a dispute arising under the contract to adjudication. The legislative device adopted in the 1996 Act was to set out certain requirements which should be satisfied by construction contracts by way of making provision for adjudication procedure; and to reinforce that by providing, in section 108(5), that where a construction contract does not comply with those requirements the adjudication provisions of a Scheme made by subordinate legislation shall apply. Where they apply the provisions of the Scheme have effect as implied terms of the contract (section 114(4)). Despite its being clothed in contractual form, however, the scope of adjudication procedure is, in my opinion, to be determined by reference to the statute and the subordinate legislation.

31. The measure of the right of one party to the construction contract to refer a dispute for adjudication is, at the same time, also the measure of the competence of the adjudicator to make a decision which has the effect conferred on the decision of an adjudicator by the 1996 Act or the Scheme, and the measure of the implied contractual obligation of the other party to submit to the decision as having such effect. In other words, the right of a party to a construction contract is confined to referring for adjudication a dispute arising under that contract; it is only a dispute arising under a construction contract that may be referred for adjudication; the adjudicator's jurisdiction is therefore confined to disputes arising under the construction contract; and it is only a decision by the adjudicator on a dispute so arising that is rendered binding on the other party pending final determination of the dispute.

32. Whether a decision which bears to be the decision of an adjudicator has the effect set out in paragraph 23(2) of Part 1 of the Scheme therefore turns on whether it is a decision on a dispute arising under a construction contract. That in turn depends on the proper application of the definition of "construction contract" set out in section 104. Since the definition of "construction contract", in all its branches, makes reference to "construction operations", attention is thus directed to whether the works which gave rise to the dispute are "construction operations" within the meaning of section 105. Since a contract might in part relate to construction operations and in part to works which were not construction operations, it was necessary for the legislation to regulate the application of adjudication procedure to such mixed contracts.

The solution adopted was to provide (in section 104(5)) that the adjudication provisions would apply to such a contract only in so far as it related to construction operations. It therefore becomes necessary to consider on an item-by-item basis whether a contract relates to construction operations and is therefore to that extent a construction contract in respect of which the right to refer to adjudication arises. In carrying out that process it is necessary to have regard to the definition of "construction operations" set out in section 105. Part of that definition is inclusive, and part is exclusive. The issue which arose in the present case was whether the works that gave rise to the dispute (or rather a substantial proportion of them) fell within one of the exclusions set out in section 105(2). That in turn demanded that attention be focused on the meaning of the exclusion expressed in section 105(2)(c)(ii), and in particular on the meaning of the word "plant" as used in that provision.

33. It was not disputed by the defenders in the debate before me that in that situation it was necessary for the adjudicator, when the parties were in dispute before him as to whether some of the works constituted construction operations, to apply his mind to that question, and to reach a view on it. That was a necessary preliminary step which he required to take before making his decision on the matters referred for adjudication. If he had decided that the works in question fell wholly within the scope of construction works, he would have proceeded to a decision on the whole matter. If he had decided that none of the works were construction works, he would have declined to proceed with the adjudication. If he had decided (as he in fact did) that some of the works were, and some were not, construction operations, he would have proceeded to a decision on the aspects of the dispute relating to those that were. In that sense it was inevitable that the adjudicator should address the question of the scope of his jurisdiction, and come to a conclusion on that matter. The legitimacy of his doing so is in my view clearly supported by part of the passage which I have quoted above from the speech of Lord Reid in *Anisminic* at page 174B-C. What matters for present purposes, however, is not whether the adjudicator was entitled to make a decision on that matter, but whether any such decision on his part has the temporarily binding character identified in paragraph 23(2) or, on the other hand, is open to review at the instance of the defenders in defence to enforcement proceedings taken by the pursuers.

34. In my opinion the temporarily binding quality accorded to decisions of an adjudicator by paragraph 23(2) is accorded only to decisions on matters of dispute arising under a construction contract. The question whether a particular dispute does arise under a construction contract is a preliminary issue which the adjudicator must address, but it is not itself a dispute arising under a construction contract. I am therefore of opinion that a decision by an adjudicator as to whether a particular dispute or a particular aspect of a dispute falls within his jurisdiction is not one which is exempted by paragraph 23(2) from review in proceedings such as the present action.

35. I reach that conclusion as a matter of construction of the relevant statutory provisions. The same conclusion is, however, in my view supported by the authorities which deal with decisions by statutory decision-makers. I do not consider that the fact that the process of adjudication is clothed in contractual terms renders such authority inapplicable. Despite the form in which the statutory intent is expressed, an adjudicator is in my view in substantially the same position as any other statutory decision-maker, at least so far as the power of the courts to review whether he has acted within his jurisdiction is concerned. It is, therefore, in my opinion, relevant to have regard to the guidance given in cases such as *Watt* and *Anisminic*. An application of the principles expressed in those cases supports the conclusion that if an adjudicator falls into error of law as to the scope of his jurisdiction, and as a result purports to issue as an adjudicator's decision a decision which relates to a matter to which the statutory adjudication procedure does not properly apply, it is open to the court in proceedings such as these to set aside the decision, or at least to decline to give it the temporary binding effect which statute gives to a valid decision of an adjudicator.

36. In coming to that conclusion I also derive support from the views expressed by Dyson J in ***The Project Consultancy Group*** **v** ***The Trustees of the Gray Trust***. The respect in which the adjudicator's decision in that case was beyond the proper scope of his jurisdiction was somewhat different, but the passage which I have quoted above from paragraph 6 of Dyson J's judgment figures an example which is close to the circumstances of the present case. I would add, however, that I wish to reserve my opinion as to the

soundness of the distinction which Dyson J drew between the effect of an assertion that the decision of the adjudicator was one which he was not empowered to make, and the effect of an assertion that the decision of the adjudicator was invalid on some other ground such as breach of the rules of natural justice. Although that point does not bear directly on the matter which I have to decide, I have some difficulty in reconciling Dyson J's distinction with what was said in *Anisminic*, for example by Lord Reid at 171C. Moreover, although I have expressed my views in terms of the effect of an error in law on the part of the adjudicator as to the scope of his jurisdiction, since that is what is alleged to have happened in the present case, I do not wish to be taken to have decided that an error of fact on the part of an adjudicator which resulted in his purporting to make a decision on a matter outside his jurisdiction would not have the same effect. I reserve my opinion on that matter too. For the purposes of the present case, it is sufficient that I am of opinion that if, as the defenders allege, the adjudicator erred in his construction of the term "plant" in section 105(2)(c) and consequently purported to issue a decision on matters which fell outside his jurisdiction, that is a relevant defence to the present action.

37. In coming to that conclusion, I bear in mind that the policy of the legislation is to prevent payment being delayed by lengthy dispute resolution procedures. I bear in mind, too, that the item-by-item approach to whether disputes are within the adjudicator's jurisdiction which is the necessary consequence of section 104(5) may make jurisdictional disputes quite common. These considerations do not, however, in my opinion justify allowing decisions which are truly beyond the powers of the adjudicator to take effect and be enforced as if they were within his powers.

38. I turn, therefore, to the second issue in the case, which is whether the adjudicator did fall into error in his construction of the expression "plant" in section 105(2)(c). In my opinion he did. There are in my view four aspects of his error. They relate (i) to his treatment of the authorities cited to him, the so-called tax cases, (ii) to the assistance which he derived from Hansard, (iii) to the weight which he attached to his own experience of the use of the expression "plant" in the context of process engineering, and (iv) to the analysis he made of the language of the statutory provision.

39. In my opinion, in the absence of a statutory definition, the language of section 105 should, if possible, be given its ordinary meaning in the English language. As I understand his reasoning, the adjudicator did not reject that proposition. What he failed to recognise, however, was that the authorities cited to him were not concerned with giving "plant" some special meaning applicable in the esoteric context of tax law, but were concerned to identify and explain the ordinary meaning of the word. That the cases are concerned with the ordinary meaning of the word is expressly stated by Lord Reid in ***Hinton* v *Maden and Ireland Ltd*** at 889. The other ground on which the adjudicator declined to rely on the authorities, namely that they were decided before the 1996 Act was enacted, is also in my view misconceived. On the contrary, the fact that the word had been authoritatively construed in a long line of cases before the 1996 Act was passed yields an inference, in my view, that in using the same language in that Act without giving the word any special definition, Parliament intended that it should be given its established meaning.

40. It is not clear to me whether before the adjudicator the defenders argued that it was not legitimate for him to have regard to Hansard. I am of opinion, however, that the conditions laid down in *Pepper* v *Hart* as justifying such reference were not present. Having regard to the existing line of authority, it cannot in my view be said that the meaning of "plant" in section 105(2)(c) is ambiguous or obscure. Nor, in my view, is there any ground for holding that to apply the established meaning of the word in construing that provision would lead to an absurd result. Since the passages in Hansard on which the adjudicator relied were not clearly identified in the debate before me, I am handicapped in judging whether there was justification for the inference which he drew from that material. It does not seem to me, however, judging by what the adjudicator has said, that he found anything that could properly be regarded as a clear statement of legislative intention in favour of ascribing to "plant" a narrow meaning excluding pipework.

41. It was, as I understand it, in his search for the ordinary meaning of the word that the adjudicator had recourse to his own experience of the meaning given to "plant" in the context of process engineering. I have no means of knowing whether the adjudicator was right or wrong in saying that in process engineering usage pipework is not generally regarded as plant. I have an impression that the adjudicator

was allowing his view of what "plant" meant to be unduly affected by its proximity to the word "machinery". In his decision he refers to "plant or machinery" as if the two words were synonyms, whereas the contention by the defenders is not that the pipework was machinery, but that it was plant. In any event, if the adjudicator is right that in process engineering parlance pipework is not regarded as plant, it is in my opinion wrong to conclude from that that the meaning of "plant" in section 105(2)(c) is so restricted. If a special meaning current in a particular industry was what Parliament intended should be accorded to the word in this legislation, then the proper course would have been to enact a special definition. In the absence of such a provision, it is in my view erroneous to apply a special rather than the ordinary general meaning of the word.

42. I have some difficulty in following the points which the adjudicator made by reference to other aspects of the language of section 105(2)(c). Even if he be right that the words "assembly" and "installation" are not words used in relation to pipework, and that the normal expression is "fabrication", I cannot understand his conclusion that if the wider meaning contended for by the defenders is ascribed to "plant", those other words, along with the reference to steelwork supporting or providing access to plant or machinery, are redundant. I have no difficulty in understanding what is meant by assembly or installation in relation to pipework. Nor do I have any difficulty in understanding why separate mention is made of steelwork supporting or providing access to plant or machinery. Applying the ordinary meaning given to "plant" in authority, such steelwork might readily be held not to be plant by means of which the operations of the site owner are carried out, but part of the structure or setting within which the operations are carried out. On that view the need for the separate exclusion of such steelwork from the definition of construction operations is readily understandable.

43. In these circumstances I am of opinion that the adjudicator did fall into error in his construction of the word "plant". Having regard to the general description of the pipework in question as forming the links between various pieces of machinery or equipment, by which ingredients and pharmaceuticals in process of manufacture are conveyed from one stage of the manufacturing process to another, I am of opinion that the pipework was clearly part of the plant being assembled or installed on the defenders' site. Without such pipework, the individual pieces of machinery or equipment would be unable to operate. The pipework is in a real sense part of the apparatus which, once it was installed, the defenders were going to use in order to carry on their business of manufacturing pharmaceuticals. The installation of the pipework was in my opinion an operation which fell within the scope of the exception in section 105(2)(c)(ii), and was accordingly not a construction operation. The disputes relating to that work were therefore not disputes on which the adjudicator had power to make a decision.

Result :

44. If I had held that the defenders were not entitled to challenge the validity of the adjudicator's decision in this process, or that the adjudicator had not erred in regarding the installation of the pipework as a construction operation, I would have granted decree *de plano* in terms of the conclusions of the summons. Mr Howlin did not dispute that if I so held that was the proper result. The proper way to give effect to the conclusions that I have reached is not so clear. While the adjudicator's decision cannot stand to its full extent, the defenders do not maintain that the whole of the adjudicator's decision was beyond the proper scope of his jurisdiction. For lack of time the extent to which the adjudicator's decision was, despite his error as to the meaning of "plant", within his jurisdiction, and how far I could competently address that issue, were matters which were not fully discussed in the course of the debate. It was therefore agreed that, in the event of my decision being in favour of the defenders, I should, without pronouncing any decree, put the case out By Order to enable parties to address me further on how my decision ought to be given effect. I shall accordingly do so.

Pursuer: Patterson; MacRoberts
Defender: Howlin; Morison Bishop, W.S.