OPINION OF LORD MACFADYEN : OUTER HOUSE COURT OF SESSION **:** 18th November 1999.

1. Following the issue of my Opinion of 10 November 1999, I heard the parties By Order on 12 November in order to discuss what substantive order I should make to give effect to my decision that the adjudicator's decision of 17 September was to a substantial extent beyond his jurisdiction as a result of his erroneous construction of the word "plant" in s105(2)(c) HGCRA 1996.

2. I have held that the adjudicator erred in his construction of "plant" and as a consequence treated as falling within his jurisdiction aspects of the dispute between the parties which did not truly do so. The defenders do not, however, maintain that the whole of the parties' dispute fell outside the adjudicator's jurisdiction. Although they maintain that only a relatively small part of the dispute was within his jurisdiction, they accept that part of it was. The question which now arises is whether I should give effect to my decision by reducing the adjudicator's decision *in toto* or whether I should enter upon the question of the extent to which the decision was *intra vires* and therefore attracts the temporary binding effect conferred by para 23(2) of Part 1 of the statutory Scheme.

3. Mr Cowie, who appeared for the defenders when the case called By Order, submitted that I should give effect to my decision by granting decree of reduction of the adjudicator's decision in terms of the first conclusion of the Counterclaim. The effect of so doing, he submitted, would be to enable the adjudicator to review, in light of the sound construction of "plant", the extend to which his previous decision could stand, and issue a new decision dealing with that part of the dispute which was properly within his jurisdiction. The court could not, he submitted, grant partial reduction, because the valid part of the adjudicator's decision was not clearly severable from the invalid part (Irons and Melville, *The Law of Arbitration in Scotland*, 409).

4. Ms Patterson, for the pursuers, drew my attention to para 19 of Part 1 of the Scheme, which sets a timetable within which the adjudicator must reach his decision. The primary period is twenty eight days after the date of the referral notice, although there is scope for a substitute period of forty two days if the referring party so consents. There is also scope, in para 19(1)(c), for *"such period exceeding twenty eight days after the referral notice as the parties to the dispute, after the giving of that notice, agree"*.

5. In the present case, Ms Patterson pointed out, the adjudicator's decision was given at the very end of the period laid down in para 19(1)(a). The pursuers had not consented to the longer period of forty two days. The parties had not agreed on a longer period under para 19(1)(c).

6. If the adjudicator's decision was reduced, there was no time for him to review the position and issue a new decision. The alternative to my granting reduction was for me to hear submissions identifying that part of the adjudicator's decision that was within his jurisdiction, and enforce it to that extent only, by granting decree for payment in the pursuers' favour restricted to the sum reflecting the *intra vires* part of the decision. In my view either of the two suggested courses would be competent. It would, in my view, be open to me to regard the adjudicator's error as to the scope of his jurisdiction as undermining the validity of his decision as a whole, despite there being parts of it that might have been made to the same effect if he had not erred as to his jurisdiction. It would therefore be open to me to reduce the whole of the adjudicator's decision. Alternatively, it would in my view be open to me to approach the matter from the pursuers' rather than the defenders' point of view, ask myself to what extent the decision was *intra vires*, and grant decree for payment enforcing that part of the decision that was valid and could properly be given the statutory temporary binding effect.

7. In selecting which of those courses to follow, it seems to me that I ought to give weight to practical considerations. I therefore ask myself which course is likely to enable the pursuers more quickly to obtain enforcement of that part of the decision that is *intra vires*. I also ask myself whether the adjudicator is better placed than I am to review the detail of his decision and determine which parts of it can stand with the proper construction of "plant". Both of these considerations seem to me to point to reduction as the preferable course. If I were to address the matter of the extent to which the adjudicator's decision was *intra vires*, there would require to be another hearing before me, and it seems to me that any such hearing would probably require to be more elaborate than the further hearing, if any is needed, before the adjudicator.

8. If there had been any doubt about the competency of returning to the adjudicator, I would on that account have preferred to deal with the outstanding issue myself. I do not, however, consider that there is any such doubt. Although the time limit set by para 19(1)(a) of the Scheme has expired, there is nothing to prevent the parties from agreeing to an extension of time under para 19(1)(c). Mr Cowie indicated that the defenders were willing to agree to such an extension. Moreover, as Mr Cowie pointed out, there would be nothing to prevent the pursuers from making a fresh referral to adjudication, if for any reason the existing referral could not be resuscitated. In the result, therefore, I shall sustain the defenders' first plea-in-law in the counterclaim, and grant decree of reduction in terms of the first conclusion of the counterclaim. That done, I shall sustain the defenders' second plea-in-law in the defences, and grant decree of dismissal in respect of the first, second and third conclusions of the summons.