OPINION OF LORD MALCOLM OUTER HOUSE, COURT OF SESSION : 7th March 2008

[1] The petitioners entered into a sub-contract with the respondents whereby they would provide certain specialist services in connection with pipework relating to the construction of a floating jetty at Coulport. By joint deed dated 1 and 11 July 2005 they appointed an arbiter to adjudicate. The express powers given to the arbiter were:

(a) to award payment of any sums due and payable

(b) to award any damages due in respect of any breach of contract

(c) to require security for his fees and outlays

(d) to appoint a clerk, and

(e) to require payment of his fees and outlays on an *interim* basis.

The arbiter asked the parties to agree a set of arbitration rules, but they were unable to do so. The arbitration proceeded in terms of the said express powers, supplemented by the arbiter's powers as implied at common law.

[2] After sundry procedure, and in particular after a hearing following a lengthy amendment and answers procedure, the arbiter pronounced an interlocutor on 26 September 2006 which, so far as relevant for present purposes, provided that the petitioners would be liable for the expenses of the amendment procedure, to be taxed by the Auditor of the Court of Session on a party/party basis; allowed the respondents' agents an additional fee; sanctioned the cause as suitable for the employment of senior counsel; and certified three individuals as skilled witnesses who had carried out investigations on the instructions of the respondents. Subsequently a debate took place on certain preliminary pleas. Thereafter the arbiter issued a final draft opinion dated 18 May 2007, in which he indicated an intention to dismiss the bulk of the petitioners' claims.

[3] At a first hearing in this application for judicial review both parties proceeded upon the basis that the application could be determined at this stage. (The petition was also served on the arbiter and the Auditor of Court, but they did not enter appearance.) The petitioners' submissions were set out in a Note of Argument. This opinion is based on those submissions, as elaborated upon at the hearing, and the responses thereto on behalf of the respondents. The first complaint related to the interlocutor of 26 September 2006. The submission for the petitioners was that the arbiter had no power to make the award of expenses contained in that order. It was accepted that he has an implied power to deal with expenses, however this power can only be exercised in a final decree arbitral. In support of this, Mr Anderson submitted that the award of expenses should be regarded as a part award by the arbiter, and that he has no power to make a part award. Particular reliance was placed upon the decision in ***Taylor Woodrow Construction (Scotland) Limited v Sears Investment Trust Limited*** 1992 SLT 609. Reference was also made to the cases of ***Pollich v Heatley*** 1910 SC 469, ***Grampian Regional Council v John G. McGregor (Contractors) Limited*** 1994 SLT 133, and ***Farrans (Construction) Limited v Dunfermline District Council*** 1988 SC 120 (and to certain passages from various textbooks). If, contrary to the primary submission, the arbiter did have power to make the award of expenses, it was submitted that this power did not extend to an additional fee and certification of skilled witnesses, nor to the remit to the auditor for taxation. On the last matter, the arbiter required to fix the amount of the expenses himself.

[4] In my opinion these submissions are not well founded. The primary argument assumes that an award of expenses is part of the arbiter's award. However, an award of expenses is not part of the arbiter's award, and thus, even if there is a limitation on the issuing of part awards, this has no relevance to the decision under challenge. As Lord President Dunedin explained in ***Pollich v Heatley*** at 482

"The matter of expenses is not part of the submission. There may be cases in which special power is given to an arbiter to dispose of expenses, but that really is pleonastic. The matter of expenses is incidental to the conduct of the case, and there is an inherent power in the tribunal to grant them."

Thus it was decided that a failure to deal with expenses did not render an award reducible on the ground that the submission had not been exhausted. In my view there is no sound basis for the proposition that the arbiter's implied power to deal with expenses can be exercised only at the very end of the arbitration. An arbiter has considerable discretion as to the procedure to be adopted in an arbitration. As part of this discretion, his general power to deal with expenses includes the ability to deal with the expenses of particular chapters of the case at the time, for example, with regard to responsibility for the costs of a minute of amendment and answers procedure. It makes sense that issues of this kind should be determined there and then as a matter *"incidental to the conduct of the case"*. Further, in the absence of express restriction, I see no reason why the power to deal with expenses should not extend to additional fees and the certification of skilled witnesses. These are issues which frequently arise when expenses are being considered. Any practice in the Court of Session that a decision on certification should not be taken before allowance of a proof (see ***APC Limited v Amey Construction Limited & Others*** [2007] CSOH 129) has not been extended to this arbitration by the agreement of the parties to it. It follows that there is no basis for holding that the arbiter's general procedural discretion and his implied power to deal with expenses are similarly restricted.

[5] In any event, even if the award of expenses complained of were to be regarded as a part award, I note that the majority of the Inner House in ***Lyle v Falconer*** [1842] 5 D 236 observed that an arbiter has an implied power to grant *interim* awards. If that is correct, it would be surprising if the same did not apply to part awards. There is little by way of authority on the matter, and no doubt it is advisable that the parties should make the matter clear in the Deed of Submission. However, while it should be made plain that a part award is not a final award (in

order to avoid any question of it being treated as a final award which does not exhaust the submission) in my opinion an arbiter has an implied power to deal with the remit to him on a staged basis. On the face of it, this falls within the broad procedural discretion which all arbiters possess. It will always be open to parties to limit the arbiter's powers by express provision in the submission.

[6] As mentioned earlier, Mr Anderson placed particular reliance on the decision in *Taylor Woodrow*. However, all that was decided in that case was that if an arbiter refused to make an *interim* award, on the ground that it was incompetent, the court has no power to fill the gap and make such an order by way of summary decree. The court was not asked to review the arbiter's decision, the focus being on the powers of the court. The extent of the arbiter's powers was not before the court for decision. Further, it can be noted that the case was concerned with an *interim* award, properly so called, which can be distinguished from a part award. A part award is final in respect of the matters covered by it. Whatever concerns there might be about the implied power of an arbiter to make an *interim* order, which by definition might be superseded or altered in the final judgment, why should an arbiter, who by implication is clothed with all the powers necessary to allow him to carry out the task entrusted to him, and who is granted a very wide discretion as to procedural matters, be deprived of the ability to issue part awards? Mr Anderson made reference to the arbiter's express power to require payment of his fees and expenses on an *interim* basis. He submitted that the parties having made this express provision, it should be assumed that the arbiter had been given no power to make other forms of *interim* or part awards. In my view, this does not follow. The express power is dealing with a wholly separate matter, namely the parties' responsibility for the arbiter's fees. It cannot be concluded from this provision that it was agreed that the arbiter should be required to deal with all other matters at the same time in a final decree arbitral. All that said, and as discussed above, I do not categorise the order complained of as a part award. Rather, as Mr Ellis for the respondents suggested, expenses are *sui generis* in the sense that they fall outside the matters remitted to the arbiter for his determination. As the Lord President put it in *Pollich*, they are "incidental to the conduct of the case."

[7] Further and in any event, in a Note to the arbiter in the lead up to the relevant hearing, the then senior counsel for the petitioners expressly conceded that the arbiter could make an award of expenses as taxed in respect of the amendment procedure. It seems plain that, at least to this extent, the parties approached the hearing in agreement as to the arbiter's powers. It would not now be open to the petitioners to renege on that agreed position. No root and branch objection as to the powers of the arbiter was taken until after the subsequent taxation, when one suspects that the auditor's determination of the recoverable expenses for the amendment and answers procedure at the substantial figure of £195,500 prompted the current complaint. In so far as the petitioner invited me to review the merits of the arbiter's decision on expenses, I decline to do so, this being a matter which falls outwith the supervisory jurisdiction of the court. In the result I reject the challenge to the interlocutor of 26 September 2006.

[8] The second ground of attack related to the final draft opinion of 18 May 2007, which the arbiter issued after a debate on the relevancy of both parties' pleadings. The final draft was issued to allow for stated case proceedings, which are now pending before the Inner House. The arbiter indicated that he intended to dismiss the bulk of the petitioners' claims. The submission for the petitioners now (again there was no such objection at the time) is that it was not open to the arbiter to reach this decision. Mr Anderson correctly conceded that, even without express powers, an arbiter can dismiss all or part of a claim on the ground of irrelevancy. Indeed the petitioners unsuccessfully asked for such a decision in respect of parts of the respondents' pleadings. As I noted it, the submission was that, in the absence of express powers, the arbiter must proceed to a proof if it is appropriate to the determination of the issue, and then issue a final decree arbitral. The essential complaint was that, rather than reach a decision on the relevancy or otherwise of the petitioners' pleadings in the arbitration, the arbiter had regard to the content of reports by intended witnesses for the petitioners, and then, without hearing either these witnesses or any other parts of the petitioners' evidence at a proof, he improperly assumed that the evidence in support of the petitioners' case was deficient, and thus the claims should be dismissed at this stage. However, according to Mr Anderson a proof is essential to the justice of the case.

[9] In response, the submission for the respondents was that, on a proper interpretation of the arbiter's opinion, and with the then agreement of the parties, the arbiter had simply looked at expert reports in order to identify the true nature of the case being put forward by the petitioners. Contrary to the implication of the petitioners' submission, the arbiter had not prejudged any disputed issues of fact or opinion. Having instructed himself as to the nature and content of the case presented by the petitioners, he then ruled that much of it was irrelevant and should not be remitted to probation. The arbiter was fully entitled to reach that decision.

[10] It is not open to me in judicial review proceedings to enter into the merits of the arbiter's decision to dismiss parts of the petitioners' claim. However that is exactly what I am being asked to do. It was accepted by Mr Anderson that the arbiter has the power to rule on issues of relevancy, and, where appropriate, to dismiss all or part of a claim. Whether the arbiter would be correct to do so in the present case, and any criticisms as to his reasoning as set out in his final draft opinion, are matters for the Inner House to resolve in the context of the stated case now before it. Judicial review is not a method of appealing against an arbiter's decisions on matters of fact or law. Aside from stated case procedure, the arbiter's decisions on such questions are final. In a case concerning a challenge to an arbiter's refusal to allow a proof, Lord Thankerton observed: *"The decision on relevancy is within the sole jurisdiction of the arbiter, whether he decides it on a ground which the court regard as unsound or not"* - ***Robert Brown & Son Limited v Associated Fireclay Companies Limited*** 1937 S.C. (H.L.) 42 at 45. The only subsequent innovation on this was the introduction into our law of stated case procedure. For the purposes of

judicial review the general principle remains sound. Mr Anderson struggled to pitch the argument on the basis of some misconduct or unjudicial conduct which might allow proceedings of the current nature, but in my view no true issue as to the arbiter exceeding his jurisdiction or abusing his powers arises in respect of his proposed dismissal of parts of the petitioners' claim, and thus there is no room for an exercise of the supervisory jurisdiction of this court. While no doubt an arbiter should allow a proof if such is essential to the justice of the case, that is a question for the Inner House to explore and resolve through the stated case procedure. I note that the arbiter poses over twenty questions for the opinion of the court, most of which relate to the proposed dismissal of the petitioners' claims. It is for the Inner House to decide whether the arbiter would err if he acted in terms of the final draft opinion.

[11] The third ground of attack related to alleged real or apparent bias on the part of the arbiter. Before me Mr Anderson presented a short submission as set out towards the end of his Note of Argument. The petitioners complain of a lack of courtesy by the arbiter, and of his dealing with their arguments in the debate in shorter shrift than that afforded to those of the respondents. It seemed to me that even this truncated argument was presented with very little enthusiasm or force by Mr Anderson. In the course of it he referred me to paragraphs 57 to 59 of an affidavit prepared by Mr Gabriel Politakis of the petitioners. In response Mr Ellis submitted that there was nothing which could substantiate any allegation of misconduct of the kind which would justify quashing the arbiter's decisions. Inevitably, in what was a long and complex debate, some submissions required more detailed consideration than others. The issues raised by the petitioners did not require reasoning of similar length to that necessary to do justice to the respondents' submissions. I agree with these submissions. In any event, to my mind I would not necessarily equiparate any deficiency in reasoning with bias, either apparent or real. As to the alleged discourtesy, Mr Ellis, who was present at the time, did accept that at the debate there had been a difference of view between the petitioners' legal representative at the time and the arbiter on whether the petitioners should be allowed to renew an application for *interim* decree at that diet, and that the discussion did become relatively heated. However, this was because the petitioners' representative was resisting a ruling made by the arbiter.

[12] No doubt a heated exchange of views of any kind is undesirable, but in my view it would be excessive to treat this episode as demonstrative of bias, either real or in the mind of an onlooker. In extreme cases, discourtesy by an arbiter may amount to misconduct, even leaving aside issues as to bias, but it was not suggested, nor has it been demonstrated, that this case falls within that category. Paragraph 59 in Mr Politakis' affidavit refers to the incident at the debate. Paragraphs 57 and 58 deal with an earlier hearing when the arbiter was faced with an application by the petitioners for *interim* decree. The application had been presented on the basis that it was clear from the respondents' averments that a sum was due to the petitioners. However, when the hearing began it became plain that the motion was being made by reference to a lengthy Note, much of which was controversial between the parties. The petitioners' then legal representative withdrew from acting in the course of the hearing, and Mr Politakis presented further submissions on behalf of the petitioners, until he withdrew the motion. The arbiter's resistance to allowing the motion to be argued on the basis of issues in dispute is understandable, though clearly it was a matter of concern to Mr Politakis. I am satisfied that it did not amount to bias or any other form of misconduct on the part of the arbiter. There is a clear onus on the petitioners to put forward a relevant and sufficiently specific case of real or apparent bias, or of some other good reason upon which it can be held that the arbiter can no longer do justice or exercise an open mind on the issues before him. I am satisfied that no such case has been made out.

[13] Finally, in so far as the petition attacks the decision of the auditor following upon the taxation, this raises no separate question from those in respect of the arbiter's decision on expenses. The auditor approached his task in accordance with the terms of the remit to him. It can also be noted that the then senior counsel representing the petitioners expressly conceded that the arbiter could make an award of expenses as taxed, and clearly both parties were proceeding on this jointly agreed basis. Since I have decided that the remit was within the powers of the arbiter, it follows that the auditor was not only entitled, but bound to adjudicate upon the matters before him. At one point in the discussion before me there was a suggestion that a submission might be developed along the lines that there is a conflict of interest if and when the auditor's fee is based on a percentage of the taxed expenses. However the matter was not developed, not even to the stage of demonstrating that this system applied in this instance, and there was no notice of it in either the petition or the Note of Argument, thus I say no more about it.

[14] Having rejected all of the challenges to the decisions complained of, I shall dismiss the petition for judicial review, and, in so far as not already dealt with, grant expenses to the respondents.

Act: R.N.M. Anderson; Brodies LLP
Alt: N. Ellis, Q.C.; MacRoberts