OPINION OF LORD BRODIE : OUTER HOUSE, COURT OF SESSION : 6 May 2003

Introduction

[1] The petitioners in this application for judicial review are Haden Young Limited. The petitioners are the respondents in an arbitration in which the second respondents in this petition, McCrindle Group Limited, previously William McCrindle & Son Limited, are the claimants. This application is for judicial review of a decision of Mr James Dinsmore, the arbiter in that arbitration, dated 29 April 2003. Mr Dinsmore is named as first respondent to the petition. The petition was presented to me, in terms of Rule of Court 58.7, on 2 May 2003, when I heard an application, on behalf of the petitioners, for interim interdict. Mr Glennie, Q.C. and Mr Cowie, Advocate, appeared on behalf of the petitioners. Mr McNeill, Q.C. appeared on behalf of the second respondents. The first respondent was not represented but I was told that he had been advised of the petitioner's intention to make this application. His clerk, Mr Alan MacKay W.S., was present in court but only as an observer. Mr MacKay did not seek to participate in the hearing.

[2] In the petition, the petitioners seek reduction of a decision of the first respondent made on 29 April 2003, which was the first day of a six week diet of proof before answer in the arbitration. The decision of the first respondent was to refuse a threefold motion made to him on behalf of the petitioners, but not, in consequence, to discharge the diet. That motion was that the first respondent should: (1) refuse to allow to be received a Minute of Amendment for the second respondents; (2) ordain the second respondents to amend their pleadings in the arbitration to take account of a decision of the first respondent (on what was referred to as the "Preliminary Issue"), expressed as revised findings, issued on 7 March 2003; and (3) refuse to allow the second respondents to produce expert reports from (a) Mr Robin Crawford (described in the petition as Mr Robert Crawford), and (b) Mr John Knubley (with the result that the authors of these reports could not be led as witnesses in the arbitration). The application before me was for interim interdict of the first respondent proceeding further with the arbitration process until the petitioners had had the opportunity to address the issues raised in the Minute of Amendment and the two expert reports. At my request, those acting for the petitioners produced a suggested form of interlocutor which it was their intention to invite me to pronounce. This was in the following terms: *"For interdict of the first respondent from proceeding with the diet of proof before answer in the arbitration between the petitioners and the second respondents until such time as (1) the petitioners have had a proper opportunity to consider the expert reports as so advised; and (2) the petitioners have had a proper opportunity to answer the second respondents' Minute of Amendment and there has been such further procedure before the first respondent in respect of the Minute and Answers and, if appropriate, the pleadings so amended as he may direct having regard to submissions made to him by the parties in respect thereof."*

Thus, the complaint of the petitioners was not specifically directed at the first respondent's admission of the experts' reports late and his allowance of the possibility of late amendment but, rather, at this admission and with this allowance without a balancing, by reference to the petitioners' interests, struck by discharge or postponement of the commencement of the diet fixed for 29 April 2003.

[3] The decision of 29 April 2003 was pronounced by the first respondent after he had heard submissions both from Mr Barrie, the solicitor acting for the second respondents, and Mr Glennie for the petitioners. I was provided with two copies of the transcript of these submissions, prepared from a shorthand note of the proceedings. I have assumed the copies to be identical, other than in relation to pagination. I have referred to the copy, extending to 73 pages and including a front page headed Report of Proceedings. The transcript confirms what was I told in the course of the hearing before me, that these submissions were made over a period of about two and a half hours (with a brief adjournment in the course of that period). Having heard submissions, the first respondent adjourned for over an hour. After the adjournment the first respondent announced a brief but reasoned decision. The decision appears at pages 67 to 69 of the transcript. It also appears as a note, a copy of which was put before me by Mr Glennie (the "Note of Decision"). I understood that the Note of Decision had been prepared by the first respondent, during the adjournment, in the light of the submissions which had been made to him. On the arbitration being reconvened, the first respondent then read it out by way of announcement of his decision. As is indicated by the transcript, counsel for the petitioners, after a

further short adjournment, advised the first respondent and the representatives of the second respondents that it was the intention of the petitioners to apply forthwith to this Court for judicial review of first respondent's decision. The first respondent agreed to allow time for that to happen. I was advised that once the likely timetable for the hearing of the application for interim interdict had been identified, the first respondent agreed to adjourn the diet of proof before answer until 6 May 2003 at 10 am.

Submissions of parties

[4] In seeking to persuade me to grant interim interdict in the terms proposed, or in substantially similar terms, Mr Glennie began by drawing my attention to authorities which affirmed the competency of an application to this Court for judicial review of an arbiter's conduct of an arbitration - ***Shanks & McEwan (Contractors) Ltd*** **v** ***Mifflin Construction Ltd*** 1993 SLT 1124 and ***ERDC Construction Ltd and HM Love & Co*** 1996 SC 523. He did not, however, anticipate that this would controversial. Mr McNeill confirmed that that, indeed, was not controversial. Mr Glennie immediately accepted, however, that it was not for the court simply to substitute its discretion for that of the arbiter. The principles to be applied by the court were those which are set out in ***West*** **v** ***Secretary of State for Scotland*** 1992 SC 385. The grounds for review were the familiar ones, summarised by Mr Glennie as: ***Wednesbury*** unreasonableness, breach of natural justice, procedural unfairness, and being obviously wrong.

[5] Mr Glennie turned to the history of the matter. The arbitration related to a sub-contract between the petitioners and the second respondents for the carrying out of pipework associated with a new jetty at R.N.A.D Crombie. The work was completed in about 1990. The arbitration was commenced in about 1992 or 1993. It proceeded under reference to formal pleadings, supplemented by a number of Scott Schedules (in the form of tabular assemblies of specific allegations and defences to these allegations - see e.g. Keating *On Building Contracts* (6th edition) pages 480 to 487). Production 6/1 in the petition process is a Closed Record (as further amended) in the arbitration. A debate was heard by the then arbiter, Mr George Robertson, in July 1997, on what Mr Glennie described as a discrete issue. In January 2000 Mr Robertson, at his request, was replaced as arbiter by the first respondent. By interlocutor of 11 December 2001, the first respondent fixed 14 May 2002 as a diet of proof before answer in relation to all issues. Following a procedural hearing on 26 February 2002, the first respondent pronounced an interlocutor, intimated by letter from his clerk, dated 7 March 2002, (production 6/3 in the petition process) requiring, *inter alia*, the exchange of all expert reports by 16 April 2002. The letter of 7 March 2002 includes this paragraph: *"While not specifically noted in the interlocutor the arbiter had noted that it is now unlikely at least on the basis of the present intentions of parties that the Claimants will lead the evidence of Mr John Knubley referred to in their List of Expert Witnesses or that the Respondents lead evidence from a welding expert."*

Expert reports were exchanged in April 2002. They included a report by Mr Carrick, a quantity surveyor, for the petitioners, and a report by Mr David Spence for the second respondents. At a procedural meeting on 2 May 2002 a number of questions arose on which senior counsel then representing the second respondents undertook to provide clarification. One of these questions was whether the second respondents were going to amend their pleadings in the light of the changes to the second respondents' position intimated in Mr Spence's report. On 21 May 2002 the petitioners were advised that the second respondents had dispensed with the services of their entire legal team. There was a motion to discharge the diet of proof before answer fixed for 22 May 2002. With a view to utilising some of the time allocated for this diet, the first respondent fixed a preliminary proof on the status of certain documentation (the "Preliminary Issue", mentioned in paragraph [2] above). Thereafter the first respondent fixed the diet of proof before answer commencing on 29 April 2003. The decision of the first respondent on the Preliminary Issue was announced as proposed findings on or about 19 December 2002, and as revised findings, issued on 7 March 2003. These revised findings, with a covering letter from the first respondent's clerk, are production 6/8 in the petition process. One aspect of the decision on the Preliminary Issue was the subject of a request by the second respondents that the first respondent should state a case for the opinion of the Court under section 3 of the

Administration of Justice (Scotland) Act 1972. The first respondent agreed to do so. The parties agreed that the issue which was the subject of the stated case need not affect the diet fixed for 29 April 2003. A procedural hearing was held on 27 March 2003. The first respondent's interlocutor following that hearing is production 6/7 in the petition process. In terms of that interlocutor, the first respondent, *inter alia*, allowed the second respondents to lodge a Minute of Amendment on or before 7 April 2003, subject to the production of a witness statement, allowed Mr Robin Crawford to be added to the second respondents' list of expert witnesses, ordered a witness statement from Mr Crawford to be lodged by 4 April 2003, and, in respect that Mr Knubley had been intimated as an expert witness on pipework, ordered the production of his report also by 4 April 2003. Mr Glennie explained that although Mr Knubley had been previously named on a witness list in 2002, no expert report from him had been produced, given the indication that he was not to be called. An expert report from Mr Crawford (production 6/4 in the petition process) and an expert report from Mr Knubley (production 6/5 in the petition process) were duly produced by 4 April 2003 and the second respondents' Minute of Amendment was duly lodged by 7 April 2003. The petitioners' expectation, Mr Glennie explained, was that, having regard to the first respondent's decision on the status of documentation, the Minute of Amendment would reduce the sum claimed in the arbitration. The Minute of Amendment in fact increased the sum claimed. On 11 April 2003 there was lodged a revised report by Mr Spence (production 6/9 in the petition process) with a view to explaining the alterations in the figures. The revised report, however, referred to the earlier version of Mr Spence's report for its reasoning. Mr Glennie reminded me that inconsistency as between the pleadings and that earlier version of Mr Spence's report was the reason for the second respondents, through their then counsel, undertaking to clarify their position as to whether they would amend.

[6] This late admission of expert evidence and, additionally, the proposed late amendment of the pleadings were, Mr Glennie submitted, prejudicial to the petitioners' ability to respond to the claim. An element in the second respondents' claim related to loss of contribution to overheads. Up until the lodging of Mr Crawford's report, the material in support of this had been scanty. Accounts had been lodged for the McCrindle Group but Mr Glennie was not aware of any documents being lodged which allowed an analysis of the cost of overheads as a percentage of the turnover of the second respondents having been lodged. None of the underlying material for Mr Crawford's report had been lodged. The petitioners' expert, Mr Carrick, was not an accountant, but he had made some broad assumptions as to overhead recovery. Mr Glennie explained that while the petitioners had attempted to have Mr Crawford's report excluded, they had consulted with a forensic accountant with a view to meeting what was contained in it. However, it would be two weeks before they had a preliminary report from their forensic accountants, and that report might well identify the need for additional work. In the absence of detailed material supporting the second respondents' claim for under-recovery of overheads, the petitioners could afford to take a relatively relaxed view. The game, as Mr Glennie put it, was changed with the lodging of Mr Crawford's report. With that, the only way forward, consistent with fairness, was to allow to the petitioners a proper opportunity to consider and answer the report and its underlying supporting material before insisting that the petitioners proceed with the proof. Mr Glennie's position was the same in relation to Mr Knubley's report. Until the lodging of that report no one had given expert pipework evidence other a quantity surveyor. Mr Carrick, for the petitioners, had made certain assumptions about the welding of pipes but he had advised, having seen production 6/5, that it raises issues which he had not previously considered and which he was not competent to consider. Mr Glennie referred me, by way of example, to that part of Mr Knubley's report which dealt with Scott Schedule 012. In relation to Mr Knubley's report, the petitioners were still trying to find an expert to assist. Again, it was Mr Glennie's submission that if the first respondent decided that this report should be admitted, then he should have adjourned the diet of proof to a date which allowed the petitioners sufficient time to consider their case in the light of this new material. Mr Glennie referred me to the Note of Decision. In that part of it which deals with the two expert reports, the first respondent recognises that the reports came regrettably late and that, at the least, they would necessarily disrupt the petitioners' consideration of the case against them. The first respondent had previously in the Note of Decision observed that the arbitration had been dogged by postponements

and interruptions. He did not suggest that these were the responsibility of the petitioners. He did not suggest that delay consequent upon the late lodging of reports was in any way the fault of the petitioners. Why then, Mr Glennie asked rhetorically, should the need to avoid delay be brought into consideration? It may be that the expert evidence would not be led by the second respondents for a little time. However, the need to cross-examine factual witnesses would arise from the outset. The first respondent had recognised the need to take measures to avoid the prejudice to the petitioners consequential on the late introduction of this material and had suggested that factual witnesses might have to be recalled in order that they give evidence on overheads and welding at a later stage in the diet of proof before answer. However, this, submitted Mr Glennie, fails to take account of the possible prejudice to the petitioners of being deprived of the opportunity of conducting the cross-examination of a witness on the whole of the case at one time. It also fails to take into account the prejudice to the petitioners of having to consider a new case simultaneously with conducting the proof. Mr Glennie also submitted that the petitioners were unfairly prejudiced in not being allowed sufficient time to answer the Minute of Amendment in relation, for example, to the type of welding necessitated by the sub-contract between the parties. As is averred in the petition, the arbitration between the parties was one in which the parties have insisted on formal proceedings. That gave rise to a legitimate expectation that the petitioners would be given an opportunity to know what case was being made against them and that by the terms of the pleadings. In the event of an alteration in the second respondents' position, the petitioners were entitled to have time to consider such an alteration and, if so advised, to debate the relevancy of the pleadings as they might be amended. That last point had been made to the first respondent in submission on 29 April 2003. Mr Glennie referred particularly to pages 20C to D, 38C to 39D, and 47C of the transcript. The first respondent had, by his decision of 29 April 2003, effectively refused to allow debate. Among the matters which the petitioners might have wished to take to debate was the effect of the proposed alterations to the pleadings on the global delay claim put forward by the second respondents. Denying the petitioners the opportunity to insist upon debate was contrary to their legitimate expectations and unfair.

[7] In conclusion, Mr Glennie recognised that the petitioners' application was for judicial review and that, accordingly, if they were to be successful, they had to satisfy the court that the decision complained of was unreasonable in the sense articulated by the court in ***Associated Provincial Picture Houses* v *Wednesbury Corporation*** [1948] 1 KB 223 or obviously wrong or based on flawed reasoning. In relation to the expert reports, having recognised that there was prejudice consequent upon their admission in the sense of disruption of the petitioners' consideration of the case against them and not having suggested that there was any fault on the part of the petitioner, the first respondent was obviously wrong to allow that prejudice to be sustained simply because the arbitrations had been dogged by postponements and that it was desirable to proceed. This court is entitled to ask - did the first respondent give sufficient weight to the prejudice to the petitioners? It was also entitled to ask - was there any reason to give weight to the need for expedition in the progress of the arbitration, given the responsibility for such delay as might result? The court should conclude that the first respondent took into account a consideration (delay in the progress of the arbitration) which he should not have taken into account. Looked at over all, no reasonable arbiter, having regard to the inevitable prejudice to the petitioners in this arbitration, would refuse the petitioners sufficient time for consideration where the only ground for not doing so was the desire to avoid further delay, where it is not suggested that the petitioners were to blame for such delay. An arbiter had a duty of fairness. It is a breach of natural justice if he fails to discharge it. In relation to the Minute of Amendment, the arbitration was conducted by reference to a conventional court type procedure. There therefore arose a legitimate expectation that such procedure would be followed and not departed from without some clear indication being given to parties that this was to be the case. That legitimate expectation had been disappointed by the first respondent's decision of 29 April 2003. When the various strands of argument were taken together, the petitioners' case was, so Mr Glennie submitted, overwhelming.

[8] Mr McNeill, on behalf of the second respondent, urged me to refuse the application for interim interdict. There was, he submitted, an extremely high test for the petitioners to satisfy in order for them to obtain the remedy sought. They simply did not get to that stage. Mr McNeill accepted that the

averments in the petition had to be taken *pro veritate* but the second respondents firmly refuted the proposition that the arbitration had been conducted on "traditional terms" insofar as pleadings were concerned. There were pleadings, which incorporated other material, and there had been a debate, but there was heavy dependence on expert reports, all of which had been lodged, and he was surprised to hear it suggested that this was an arbitration based on pleadings. Mr McNeill reminded me of the over all time-scale. Work on the sub-contract had started some 15 years ago. The arbitration had started some 10 years ago. It could not be said that the petitioners had not contributed to delay in its progress. There had been an earlier application of judicial review in relation to the identity of the arbiter. The petitioners' first plea-in-law was to the effect that the arbitration was premature. The court was being invited to substitute its decision for that of an arbiter who had been involved for three years and who had very detailed knowledge of the issues. The arbiter had made the decision which was now attacked after hearing submissions over two and a half hours and having, thereafter, adjourned for more than an hour to consider them. It was slightly surprising, so Mr McNeill submitted, that so little attention had been paid, in Mr Glennie's submissions to the court, to the first respondent's Note of Decision. It was this to which Mr McNeill turned.

[9] As appears from the Note of Decision, in relation to amendment of the pleadings, Mr McNeill submitted that the first respondent had recognised that the petitioners had a concern that the pleadings should reflect the first respondent's decision on the Preliminary Issue. The first respondent had recognised that the petitioners had made the point that, in the light of the terms of the Minute of Amendment, prescription might be argued. He had considered the position. He had acknowledged that the arguments for the petitioners were not unreasonable. Nevertheless he had determined that there was a way of proceeding which to his mind was satisfactory and that is what he had adopted. If it be the case that there are new arguments hidden within the Minute of Amendment, as read with the Scott Schedules and expert reports, the first respondent made it clear in the Note of Decision that new claims are not to be allowed. He accordingly dealt with the issue of prescription. In saying that "new" claims should be capable of being dealt with in the petitioners' Answers to the Minute of Amendment, the first respondent was explaining that it would be open to the petitioners to identify what they maintained was a new claim with a view to the first respondent not allowing it. A "new claim", in Mr McNeill's submission, would include an attempt to justify an existing head of claim by reference to a basis not already apparent in the material previously lodged. Thus, in relation to the pleading point, the first respondent had identified the issue and given a reasoned decision on it. It was not a decision that no reasonable arbiter could have reached.

[10] In relation to the expert reports, it was again Mr McNeill's submission that the first respondent had identified the issues and had given reasons for his decision. The decision was neither irrational nor unfair. The decision relied on the first respondent's understanding of the scope of the arbitration. It covered the whole of the sub-contract. It comprehended much more than simply the issues of accountancy and welding. It was the view of the first respondent that there was a body of evidence which could be led and cross-examined, without trenching on accountancy and welding. Accountancy and welding could be dealt with in another way. The first respondent had taken into account the disruption to the petitioners' preparation as a result of the late introduction of the expert reports but it was to be borne in mind that disruption of progress during arbitration by reason of unanticipated developments is a commonplace occurrence. Disruption is not necessarily an overriding factor. That there will, in the opinion of the first respondent, be disruption does not mean that the decision he made was one that no reasonable arbiter could arrive at. The first respondent, in proposing that certain witnesses might have to be recalled in order to give their evidence on overheads or welding at a later date than that on which they had given their evidence on other matters, was doing something similar to what is familiar in the litigation of commercial actions in the Court of Session: discrete parts of a case being dealt with discretely. There was no necessary unfairness involved in a witness not being cross-examined on all matters to which he might speak to, on the one occasion. It is clear from that part of the Note of Decision which deals with the Minute of Amendment that a factor in the first respondent's decision was his desire to maintain the diet of proof before answer. The first respondent makes no explicit reference to this factor when addressing the issues raised by the late lodging of

expert reports but it is fairly clear that this factor flows over into his decision-making in relation to the admission of the reports. What the first respondent did in coming to the decision which is expressed in the Note of Decision was to find a way of maintaining the diet but nevertheless giving the petitioners a way of dealing with the reports. In effect, the first respondent has given the petitioners what they seek in this petition for judicial review: the appropriate time to consider the new material. It is unlikely that the first respondent was laying down a rigid scheme of case management. Rather, he was indicating a general approach which recognised that the petitioners must have sufficient time to obtain expert advice and that they must, consequently, be allowed to delay cross-examination. The first respondent was attempting to balance the need to avoid disruption with the need to maintain expedition.

[11] Mr McNeill referred to the decision in ***Shanks & McEwan (Contractors) Ltd* v *Mifflin Construction Ltd*** as indicating the approach that the court should take when invited to review an arbiter's decision in relation to matters of procedure. The court should be reluctant to interfere with an arbiter's decision, particularly in relation to the procedure to be adopted in the arbitration. Only manifest unfairness or irregularity, in the *Wednesbury* sense, takes a case out of the category of those where the court should be reluctant to interfere. Here the first respondent, after a lengthy hearing, considered the issues, stated that he wished to avoid prejudice to either party, responded to the arguments put before him, came to a decision and gave reasons which are rational and do not result in manifest unfairness. In relation to the Minute of Amendment, this was not a case where the petitioners maintained before the first respondent that the proposed amendment made the second respondents' claim wholly irrelevant and that there was therefore no point in proceeding. The decision of 29 April 2003 proceeded upon the earlier decision which followed the procedural hearing held on 27 March 2003. Mr Glennie had accepted that he was not in a position to object to the lodging of the Minute of Amendment or the expert reports, *per se*. The challenge was based on the prejudice to the petitioners consequent upon proceeding with the diet of proof before answer. The first respondent had recognised that there would be such prejudice and had sought to identify how that prejudice could be avoided or reduced. In relation to the argument based on legitimate expectation that the arbitration would be conducted in reliance upon the pleadings and that therefore any alteration in the pleadings would give rise to the opportunity for debate, on a factual basis it was not accepted that any such expectation arose but, in any event, this was so wholly within the jurisdiction of the first respondent, as arbiter, that the court should be extremely slow to intervene. On the whole matter there was no *prima facie* case which might justify the court granting interim interdict.

Decision

[12] The parties are not in dispute as to the applicable principles of law. The decisions of an arbiter are subject to the supervisory jurisdiction of this Court. This is quite distinct from the power of an arbiter, conferred by section 3 of the Administration of Justice (Scotland) Act 1972, to state a case for the opinion of the Court of Session, a distinction alluded to by the Lord President in the passage to which I was referred in ***ERDC Construction Ltd and HM Love & Co*** 1996 SC 523 at 528G. Mr McNeill drew my attention to the 25th Act of the Articles of Regulation of 29 April 1695 which restricted the remedy of reduction of decrees arbitral to "*corruption, bribery or falsehood*", but in ***Mitchell* v *Cable*** (1848) 10 D 1297 the court had no difficulty in regarding what Lord Cullen, in ***Shanks & McEwan (Contractors) Ltd* v *Mifflin Construction Ltd*** *supra* at 1129I, characterised as a failure to observe the rules of natural justice, as being comprehended within the expression "corruption", and Mr McNeill did not suggest that there was anything incompetent about this petition. Nor did he take issue with Mr Glennie's reliance on ***West* v *Secretary of State for Scotland*** as a source of the relevant principles to be applied. One of the cases reviewed by in the Opinion of the Court in ***West* was *Forbes* v *Underwood*** (1886) 13 R 465, which relates to an arbitration. In that case Lord President Inglis said, at 467: *"The position of an arbiter is very much like that of a Judge in many respects, and there is no doubt whatever that whenever an inferior Judge, no matter of what kind, fails to perform his duty, or transgresses his duty, either by going beyond his jurisdiction, or by failing to exercise his jurisdiction when called upon to do so by a party entitled to come before him, there is a remedy in this Court."*

That the supervisory jurisdiction of the Court of Session extends to review of the conduct of a private arbiter in procedural matters appears from what was said by Lord Cullen in ***Shanks & McEwan (Contractors) Ltd*** **v** ***Mifflin Construction Ltd*** *supra* at 1129K. It is also consistent with the more general observation found in the Opinion in ***West*** *supra* at 402: *"[The] supervisory jurisdiction may be appealed to in order to insist upon standards of rationality and fairness of procedure in addition to what may have been expressly required by the statute or by the contract by which the limits of the inferior jurisdiction have been defined."*

[13] However, as is very familiar, this court, in exercising its supervisory jurisdiction, is not simply re-opening the question which was before what may be described as the inferior tribunal, but which also may be described as the primary decision-maker. That was recognised by Mr Glennie at the outset. As can be seen from the Opinion in ***West,*** there is a distinction between the privative jurisdiction entrusted to the decision-maker on the merits, with which the Court of Session cannot interfere, and the control which may be exercised by the court where the decision-maker refuses to act at all or goes beyond the powers which have been entrusted to him. The conclusion of the Opinion of the Court in ***West*** emphasises, *inter alia*, at 413,

"(a) Judicial review is available, not to provide machinery for an appeal, but to ensure that the decision-maker does not exceed or abuse his powers or fail to perform the duty which has been delegated or entrusted to him. It is not competent for the court to review the act or decision on its merits, nor may it substitute its own opinion for that of the person or body to whom the matter has been delegated or entrusted.

(b) The word 'jurisdiction' best describes the nature of the power, duty or authority committed to the person or body which is amenable to the supervisory jurisdiction of the court. It is used here as meaning simply 'power to decide', and it can be applied to the acts or decisions of any administrative bodies and persons with similar functions as well as those of inferior tribunals. An excess or abuse of jurisdiction may involve stepping outside it or failing to observe its limits, or departing from the rules of natural justice, or a failure to understand the law, or the taking into account of matters which ought not to have been taken into account. The categories of what may amount to an excess or abuse of jurisdiction are not closed, and they are capable of being adapted in accordance with the development of administrative law."

[14] Recognising the applicable principles is one thing. Applying them is another. I am asked to interdict further proceedings in this arbitration until the petitioners have had "a proper opportunity" to consider two expert reports and "a proper opportunity" to answer the second respondents' Minute of Amendment. The contention for the petitioners is that the first respondent, as arbiter, has not given them such proper opportunity. Leaving aside, for the moment, the implications of the use, by the petitioners, of the expression "a proper opportunity", it is clear that what is in issue is a discretionary decision by an arbiter in relation to the procedure to be followed in an arbitration presided over by him. That being so, for all that a court might be inclined to approach questions relating to the procedure to be followed in litigation with the confidence born of familiarity, I consider it appropriate that I should regard the decision made by the first respondent here, with the degree of deference which is due to the decision of a primary decision-maker who has been selected by the parties for his particular expertise. By reference to the more extensive jurisdiction of this Court, the first respondent may be described as constituting or convening an *"inferior tribunal*". That is not to say that it is in any way a second-rate tribunal. Rather, it is the parties' preferred tribunal. Moreover, agreeing with Mr McNeill, I consider that it has to be assumed that the first respondent has a much better understanding of the issues in the arbitration and how they might fairly and efficiently be addressed, than the court can hope to acquire in the course of a hearing of a few hours supplemented by the reading of a few documents. I see what I have described in terms of deference to be consistent with what Lord Cullen in ***Shanks & McEwan (Contractors) Ltd*** recognised as a formidable consideration: that judicial interference in the arbitral process should be kept to a minimum. It should be limited, as Lord Cullen put it, to the extreme situation. This, of course, brings me back to the difficulty of identifying what is unreasonable (I use the expression "unreasonable" to comprehend all of the familiar grounds for review which were identified by Mr Glennie and which, in this case, in any

event, rather blend one into the other). As Lord Cullen explains, if the decision is unreasonable, in this sense, then the extreme situation has been reached.

[15] Having regard to nature of the first respondent's decision, I am not satisfied that it was unreasonable in the requisite sense. As Mr McNeill submitted, for all that the Note of Decision is quite brief, it demonstrates that the first respondent had identified the issues put before him and given reasons for his decision. The first respondent recognised that the late amendment, and the late introduction of expert reports on matters which had previously not been the subject of such evidence, prejudiced the petitioners. He recognised that measures should be taken to avoid that prejudice. He proposed to take them in making the proposals which he did in relation to arrangements for cross-examination, I do not understand the first respondent to have been indicating a comprehensive approach to how prejudice was to be avoided. He specifically states that "[all] facilities should be made available to the [petitioners] to avoid prejudice." I can only read that as an indication that he will be prepared to consider any further measures which might be suggested by the petitioners. I understood Mr McNeill to agree with that reading of the Note of Decision. What these measures might be and whether they are adopted are, of course, for the parties to propose and the first respondent to determine upon. The use, by the petitioners, in their proposed form of interlocutor, of the expression "a proper opportunity", in my opinion, serves to underline that what the court is being asked to do is to interfere in a matter of which it can understand only a little and which is pre-eminently within the province of the first respondent. The remedy which the court is invited to grant is, effectively, the crude one of an indeterminate sist. The first respondent, on the other hand, is able to provide, and, as I understand the Note of Decision, is offering to provide, every practicable procedural facility in order fairly to accommodate the respective interests of each of the parties. It is his responsibility to do so. In my opinion, the court should allow him to do so and should not interfere.

[16] Lest I be thought to have overlooked it, I should say that I have had regard to Mr Glennie's argument that the first respondent, by taking into account the previous delays and the further delay consequent upon a discharge of the proof, took into account an irrelevant consideration because, the petitioners having no responsibility for the late amendment and the late lodging of reports, delay was something that the second respondents had brought upon themselves by their dilatory conduct. I do not consider that the first respondent took into account an irrelevant factor in coming to his decision. In my opinion, he was entitled to have regard to the desirability of avoiding further delay, if that was possible, and utilising the available diet, irrespective of which party it was who was responsible for dilatory conduct.

[17] I would add a few words on Mr Glennie's argument based on legitimate expectation. While, with due respect, his other arguments rather ran together into a composite complaint of unfairness or unreasonableness on the part of the first respondent, legitimate expectation can be considered separately. The contention was that as the arbitration had been conducted on the basis of formal pleadings, there arose a legitimate expectation that the conventions associated with litigation conducted under reference to formal pleadings should be observed. I took Mr Glennie to include among these conventions the allowance of time to respond to amendment and (although I did not note him as having said this explicitly) the right to insist on debate as part of the response to an amendment. Mr McNeill disputed, as Mr Barrie had disputed before the first respondent, that that was how the arbitration had in fact been conducted. It strikes me that identifying the exact extent of the *legitimate* expectations of parties as to the reliance that the arbiter will place on the formal pleadings, assuming formal pleadings to have been used, in an arbitration of this sort might be rather difficult. I would accept, on the basis of the material put before me, that both Mr Glennie and Mr McNeill are, to an extent, correct. There are formal pleadings. There has been a debate. The second respondents gave an undertaking, through their former counsel, to clarify whether it was their intention to amend. As matters turned out, they did lodge a Minute of Amendment. Against that, it is clear that the Scott Schedules are important in focusing the issues in dispute and the arguments on each side. Expert reports and witness statements have been lodged. Inevitably, that must have some impact on issues of specification and fair notice. Just what weight is to be given to the pleadings in any

particular arbitration seems to me, as Mr McNeill had argued, a matter pre-eminently for the judgment of the arbiter. Regard might have to be had to any rules which had been adopted for the regulation of the arbitration (I was not referred to any such rules). That said, without further exploration of what might be quite a complicated area of the law, I accept that certain expectations might arise simply from the adoption of formal pleadings in an arbitration. What I do not accept is that it would be legitimate, even in the most formal of arbitrations, for a party to expect that, as a condition of allowing late amendment (either in the sense of a Minute of Amendment being received or of the Record being amended, either in terms of a Minute or in terms of a Minute and Answers) the notional reasonable arbiter would necessarily discharge a diet of proof or, with or without discharge of a particular diet, permit a party to insist on further debate. I accept that he might do so. I do not accept that he necessarily would do so. It is a matter for the discretion of the arbiter. I am therefore not persuaded that such a legitimate expectation can arise, even in a very formal arbitration, without something specific in the way of a promise or indication on the part of the arbiter that he will respond in a particular way in the event of future amendment.

[18] Having regard to the whole circumstances I do not consider that the petitioners have made a *prima facie* case for reduction or interdict. I therefore refuse the application for interdict *ad interim*. I shall, as requested, make an order for service. I shall defer making an order specifying a date for a first hearing until parties have had the opportunity of addressing me in the light of my decision in relation to the application for an interim order. I meantime reserve all questions of expenses.

Petitioners: Glennie, Q.C., Cowie; Biggart Baillie
Respondent: McNeill, Q.C.; Macroberts