OPINION OF LORD DRUMMOND YOUNG : Outer House, Court of Session. 9th July 2007.

[1] In October 2004 the parties entered into a contract for certain internal and external refurbishment works to be carried out by the pursuer at premises at 7 Orchard Road, St Annes, belonging to the defenders. The terms of the contract were contained in a letter of appointment dated 13 October 2004 issued to the pursuer by project managers acting on behalf of the defenders, which incorporated the defenders' specification, description of works, contract drawings and the JCT standard form of Agreement for Minor Works MW 98 (including Amendments 1-5). The parties were in agreement that the contract was contained in those documents. It is significant for the purposes of the present opinion that the contractor was identified as the pursuer; the letter of appointment, which identified the contractor, was addressed to "John Stirling, M&S Contracts". The contract was a construction contract within the meaning of Part II of the Housing Grants, Construction and Regeneration Act 1996; consequently, in terms of clause 8.1 of the contract either party was entitled at any time to refer any "dispute or difference" arising under the contract to adjudication.

[2] A company known as M&S Contracts Limited was incorporated on 5 November 2004. The pursuer was at all material times the sole director of the company. As will appear, a substantial number of the documents issued for the purposes of the parties' contract either proceeded in the name of that company or were issued to that company. The significance of the company's involvement is a matter of some importance, and I will return to it subsequently. The company was incorporated after the contract between the parties was concluded.

[3] Works were duly carried out under the contract; invoices were issued and payments were made in respect of those invoices. On 11 July 2005 Kerr Baxter Associates, the contract administrators, issued Certificate for Payment No 6, which certified that the sum of £48,667.50 plus VAT was due for payment to the contractor within 14 days of the date of issue of the certificate. In that certificate the contractor was referred to as "M&S Contracts". On 14 July 2005 an invoice for that sum was issued to the defenders by M&S Contracts Limited. Thereafter, Kerr Baxter Associates received a letter dated 19 August 2005 bearing to have been written by G. Stirling on writing paper headed "M&S Contracts Limited"; the letter stated *"As you are aware, we are excessively overdue on Certificate for Payment No 6. This has a valuation date of 4th July 2005 and an issue date of 11th July 2005. The certificate is overdue and has not been paid, which is a breach of the employers contract".*

The writer of the letter went on to state that interest at 5% would be charged, and that under clause 4.8 of the JCT conditions the contractor was entitled to suspend the works in view of the non-payment. By letter dated 2 September 2005 Longworth Consulting Worldwide Limited, a firm of claims consultants who were acting on behalf of the pursuer, gave notice to the defenders of the pursuer's intention to refer to adjudication the defenders' failure to make the payment due in terms of Certificate No 6. That letter bore the heading "M&S Contracts Limited v Westminster Properties Scotland Ltd". Thereafter M&S Contracts Limited served a notice of adjudication dated 9 September 2005 on the defenders stating its intention to refer to adjudication the dispute arising from the defenders' non-payment of the sums certified as due in Certificate No 6.

[4] By letter dated 22 September 2005 to the adjudicator, copied to M&S Contracts Limited, the defenders advised that in view of the date of M&S Contracts Limited's incorporation it could not have been a party to the contract concluded on 13 October 2004. Thereafter M&S Contracts Limited abandoned its adjudication; the decision was intimated by letter dated 24 September 2005 from the company to the adjudicator, which was copied to the defenders. By letter dated 24 September 2005 addressed to the company and the defenders the adjudicator resigned office. The pursuer then served a notice of adjudication dated 26 September 2005 on the defenders stating his intention to refer to adjudication the dispute arising from the defenders' non-payment of sums certified as due in Certificate No 6. Apart from the identity of the referring party, that notice of adjudication is in materially the same terms as the notice of 2 September 2005. By letter dated 27 September 2005 the adjudicator advised the parties that he accepted appointment in respect of the adjudication. The pursuer then served a referral notice dated 27 September 2005 on the defenders, referring to adjudication the dispute arising from the non-payment of the sums certified as due in Certificate No 6. The defenders disputed the jurisdiction of the adjudicator to act in relation to the matters set out in the notice of adjudication of 26 September 2005. Among the grounds on which jurisdiction was disputed was the contention that no dispute had crystallized between the pursuer and the defenders. The adjudicator issued a decision to the parties on 25 October 2005; in that decision he rejected the contention that there was no dispute between the parties in respect of Certificate No 6. In his decision the adjudicator further determined that the defenders should pay the pursuer the sum of £48,667.50 plus VAT of £8,516.81, totalling £57,184.31, pursuant to Certificate for Payment No 6, those amounts to be paid within 14 days of the date of the decision. He further ordered the defenders to pay interest amounting to £1,152.97 on the foregoing sum, continuing interest at a daily rate of £12.67 from 26 October 2005 until payment, and his own fees amounting to £4,773.44, inclusive of VAT.

[5] The pursuer has raised the present action against the defenders for enforcement of the adjudicator's decision. In their defences the defenders contend that no dispute existed between the present parties prior to the notice of adjudication served by the pursuer on 26 September 2005; consequently the adjudicator lacked jurisdiction, and his decision is a nullity. In the course of the incidental procedure in the action a number of other issues arose between the parties, but all of these have now been resolved by agreement. It has been agreed in particular that the parties to the action were the parties to the contract for the refurbishment works at 7 Orchard Road. The only issue that remains for decision is whether a dispute or difference existed between the present parties prior to service of the notice of adjudication.

[6] The material facts were agreed between the parties in a joint minute, and counsel on both sides made it clear that they were anxious that the action should be resolved at debate. For the pursuer, counsel contended that I should grant decree *de plano* in terms of the conclusions of the summons. For the defenders, it was contended that I should pronounce decree of absolvitor in view of the extent of the agreed facts; failing absolvitor I should dismiss the action.

[7] Counsel for the pursuer submitted that a dispute between the parties in relation to the sums certified in Certificate for Payment No 6 arose prior to the start of the adjudication. It might have arisen as soon as the 14-day period referred to in the certificate expired, or possibly shortly thereafter. If that were not so, the dispute arose at a reasonable period following the expiry of the 14-day period; that would certainly have occurred before the notice of adjudication was served on 26 September 2005. At the latest the dispute between the present parties can be said to have arisen on 24 September 2005, when the company, M&S Contracts Scotland Limited, abandoned its adjudication. That was also before the notice of adjudication in the pursuer's name was served. On any of these approaches, however, it is clear that the critical question is whether a "dispute or difference" between the present parties can be said to have crystallized before the notice of adjudication was served on 26 September 2005.

[8] The meaning of the expression "*dispute or difference*" was considered in ***Amec Civil Engineering Ltd v Secretary of State for Transport,*** [2005] 1 WLR 2339. In that case, which concerned provisions in the ICE Conditions of Contract rather than adjudication provisions in the JCT forms, the judge at first instance, Jackson J., reviewed the authorities on the matter and set out the law in a series of numbered propositions; these were accepted as accurate when the matter reached the Court of Appeal, and the judges of the latter court made it clear that they accepted those propositions, subject only to certain additional observations. The propositions are found stated in the opinion of May LJ at paragraph [29], and so far as material are as follows

"1. The word 'dispute'... should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.

2. Despite the simple meaning of the word 'dispute', there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.

3. The mere fact that one party... notifies the other party... of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.

4. The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.

5. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference....

6. If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.

7. If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication".

May LJ, at paragraph [31], commented that the expression "*dispute or difference*" seemed to be less hard-edged than "*dispute*" alone. In addition, he commented that in many instances it will be quite clear that there is a dispute. If the claims are major, it is likely that they will be contested and arbitration may well be probable and necessary. In such cases commercial good sense did not suggest that the clause in question should be construed with legalistic rigidity so as to impede the parties from starting the arbitration proceedings. That tended to favour an inclusive interpretation of what amounted to a dispute or difference.

[9] Some assistance in the construction of the word "*dispute*" is found **in *Fastrack Contractors Ltd v Morrison Construction Ltd,*** [2000] BLR 168, where Judge Thornton QC stated (at paragraph [20]) that a "*dispute*" is "*whatever claims, heads of claim, issues, contentions or causes of action are then in dispute which the referring party has chosen to crystallize into an adjudication reference*". If a jurisdictional challenge is mounted, it is necessary to consider what was actually referred, and that involves a careful characterization of the dispute referred. That exercise is not to be determined solely by the wording of the notice of adjudication, since that document, like any commercial document having contractual force, requires to be construed against the underlying factual background. At paragraph [27] of the same case Judge Thornton stated that a "*dispute*" can only arise once the subject-matter of the claim, issue or other matter has been brought to the attention of the opposing party and that party has had an opportunity of considering and admitting, modifying or rejecting the claim or assertion.

[10] The expression "*dispute or difference*" occurs in forms of construction contract that, with certain modifications, are in use both in Scotland and in England and Wales. The approach to the interpretation of the expression that is used

in the two foregoing cases is in my opinion wholly consistent with Scots law and should be followed in Scotland, at least in relation to the standard forms of construction contract. In essence, that approach is as follows. The word *"dispute"* is an ordinary word, and should be given its ordinary meaning. The notion of a *"difference"* is slightly wider than that of a *"dispute"", "*, but once again the word is in common use and should be given its ordinary meaning. The fundamental feature of a *"dispute or difference"* is an element of disagreement as to the parties' rights and obligations. That can appear from the express terms of the parties' correspondence or by implication from their conduct. Such an implication may appear from the mere failure of the respondent to act, but in such cases it must be clear in all the circumstances that there is a disagreement between the parties as to their respective rights and obligations. If there has been prior correspondence that identifies an area of disagreement, the inference that a dispute or difference exists between the parties may readily be drawn from their conduct. In the absence of prior correspondence, it may not be so easy to draw such an inference. Where the conduct of the respondent is relied upon to yield the inference that a dispute or difference exists, it must be clear that such conduct, for example a failure to pay, has not been the result of mere lack of funds or administrative oversight. If that is the only reason for the failure to pay, it cannot be said that there is anything in the nature of a disagreement between the parties as to their respective rights and obligations.

[11] The first contention for the pursuer was that a dispute between the present parties over the sum certified in Certificate No 6 arose on or shortly after the expiry of the 14-day period referred to in the certificate. The origin of that 14-day period is found in clause 4 of the contract conditions. Clause 4.2.1 provides that the contract administrator must, at intervals of four weeks, certify progress payments of 95% of the total value of the work executed and the value of materials and goods reasonably and properly brought upon the site. The clause continues with a statement that *"The final date for payment by the Employer of the amount so certified shall be 14 days from the date of issue of the certificate"*. Clause 4.4 provides that, not later than five days after the issue of a certificate of payment pursuant to clause 4.2.1, the employer is to give a written notice to the contractor specifying the amount of the payment proposed to be made in respect of the amount stated as due in the certificate. Not later than five days before the final date for payment of the amount that is due the employer is authorized to give a written notice to the contractor specifying any amount proposed to be withheld or deducted from that notified amount, the grounds for such withholding or deduction, and the amount of the withholding or deduction attributable to each ground. If no such notice is given by the employer, the employer must pay the amount stated as due in the certificate.

[12] Counsel for the pursuer submitted that clauses 4.2 and 4.4 impose a tight contractual timetable which permits the employer to state by notice what sum it was prepared to pay or withhold. If there is such a contractual structure, he submitted, there is no need for the contractor to make a claim as such. The question of whether the sum certified was payable arose as soon as the certificate was issued by the contract administrator, because at that point the employer had 14 days to consider its position; if the employer did not give notice specifying a proposed withholding or deduction, with grounds, it was obliged to pay the amount stated in the certificate. Consequently the case was not one where the employer could simply sit on the matter; if no action is taken within the 14-day period the sum certified becomes due.

[13] The pursuer's argument on this point was attractively presented, but I am of opinion that it reads too much into the terms of clauses 4.2 and 4.4. The purpose of those clauses is to provide a mechanism for interim certification of payments, and in so doing to provide a mechanism for identifying disputes as to the amount that is actually due following each certificate. The critical point about that mechanism, however, is that it involves the giving of a written notice specifying the amount that the employer proposes to pay and a further written notice specifying any amount proposed to be withheld or deducted, together with the grounds for such withholding or deduction. Thus, on the contractual scheme, any disagreement that emerges as to the parties' respective rights and obligations should appear in writing. It follows that the mere failure to pay is not enough to give rise to a *"dispute or difference"*. Such failure could be due, for example, to lack of funds or a simple administrative oversight or a communication's going astray. In these circumstances it could not be said that there was anything of the nature of a disagreement between the parties as to their respective rights and obligations.

[14] As matters progressed, however, the defenders failed to dispute the amount due in Certificate No 6, whether using the contractual mechanisms or otherwise, and failed to make payment of that amount. Importantly, they failed to give any reason for their non-payment. Correspondence passed, albeit in the name of the company; I deal with the significance of this feature in the following paragraphs. In that correspondence, however, neither the defenders nor their contract administrators gave any indication that they were unable to pay through, for example, lack of funds, or had simply overlooked the need to pay. The fact that correspondence passed is significant, because it gave the defenders a good opportunity to explain their failure to pay, and they failed to make use of that opportunity. It also tended to eliminate the possibility that a letter had simply gone astray. The contractual structure is significant to this extent: as explained in the preceding paragraphs, clauses 4.2 and 4.4 were intended to identify any problems arising out of a certificate within a fairly short time, and if no such problems are identified but payment is not made the natural inference is that the employer disputes any obligation to make the payment. In the whole circumstances, I am of opinion that the inference must be drawn that a genuine disagreement existed between the parties as to their respective rights and obligations following the issue of Certificate No 6. The pursuer contended that the full amount stated in the certificate was due; the defenders disputed that that sum was due. In the light of the correspondence, I am of opinion that such an inference should have been drawn by the beginning of September 2005; at the latest, I consider that it must have

been drawn by 24 September 2005, when the company abandoned its adjudication. In either event a disagreement as to the parties' rights and obligations under Certificate No 6 existed before the present pursuer served notice of adjudication. On that basis I am of opinion that a *"dispute or difference"* existed prior to the start of the adjudication.

[15] The correspondence in July, August and September 2005 passed generally in the name of the company, M & S Contracts Limited. Thus the invoice for the sum due under Certificate No 6, issued on 14 July 2005, was in the name of the company. Likewise, the letter of 19 August 2005 addressed to the contract administrators, referred to in paragraph [3] above, was typewritten on the writing paper of the company. For the defenders it was contended that these documents, and other documents which proceeded in the company's name, should be read according to their strict terms; because they proceeded in the company's name, they could not affect the legal position as between the defenders and the pursuer as an individual.

[16] If the doctrine of separate corporate personality is applied with its full rigour, the defenders' argument is clearly correct. I am nevertheless of opinion that this is too simplistic an approach. In commercial practice, it is not unusual to discover that the niceties of the doctrine of separate corporate personality are ignored. Where, for example, a contract has been concluded in the name of an individual trader but the individual then transfers his business to a company, it is frequently found that correspondence after the transfer proceeds in the name of the company rather than the individual, despite the fact that it is the individual who is the contracting party. In such a case, if the correspondence is construed literally as proceeding in the name of the company, the result is likely to be nonsensical, as the company is not a party to the contract to which the correspondence obviously relates. That contract is in the name of the individual. In these circumstances the only sensible inference will normally be that the company, in conducting the correspondence, is acting as an *ad hoc* agent for the contracting party, the individual. That is in my opinion in accordance with the obvious intention of the parties. A similar inference can readily be drawn in cases involving a group of companies where a contract is in the name of one company but correspondence is conducted by another company in the group. An analysis in terms of *ad hoc* agency allows the contracting party to remain in place as the subject of the contractual rights and obligations; at the same time the correspondence is allowed to bear the meaning that was obviously intended by the parties, as relating to the rights and obligations arising under that contract. This analysis is, however, subject to one important limitation: it applies to correspondence, invoices, contractual notices and the like, where no special formality is expected; where, however, matters enter a formal process such as litigation or adjudication, formality is expected and the correct party must be named. I return to this matter at paragraph [20] below.

[17] Such an analysis is in my opinion entirely in accordance with the general principles that apply to the construction of documentation issued under commercial contracts. The present case relates to the interpretation of letters and other documents that have been sent in order to assert or discuss the parties' rights and obligations under a contract. I consider that the principles applicable to the construction of such documents are essentially the same as those that apply to the construction of the contract itself. As with the contract, such documentation must be construed objectively, according to the standard of a reasonable third party. It must be construed in context. In construing post-contractual documentation, the most important feature of the context will normally be the contract itself, because such documentation is intended to assert, implement, debate or otherwise deal with the parties' rights, obligations, powers and liabilities under that contract. The context may, however, include the surrounding circumstances, for the purpose of discovering the facts to which the documentation refers and its commercial objectives. The principle here is essentially the same as that applicable to the construction of a contract itself, as laid down in such cases as ***Charrington & Co Ltd v Wooler***, [1914] AC 71, at 80 per Lord Kinnear and at 82 Lord Dunedin, ***Prenn v Simmonds,*** [1971] 1 WLR 1381; ***Reardon Smith Line Ltd v Hansen-Tangen,*** [1976] 1 WLR 989, ***Bovis Construction (Scotland) Ltd v Whatlings Construction Ltd,*** 1994 SC 351, at 357 per Lord President Hope, ***Bank of Scotland v Dunedin Property Investment Co Ltd,*** 1998 SC 657, at 665 per Lord President Rodger, at 670-671 per Lord Kirkwood, and at 676-677 per Lord Caplan, ***Waydale Ltd v DHL Holdings (UK) Ltd (No 2),*** 2002 SLT 224, at 229 per Lord Hamilton, and ***Glasgow City Council v Caststop Ltd,,*** 2002 SLT 47, at 56 per Lord Macfadyen. The contract and the correspondence must be construed as a totality. As with a commercial contract, post-contractual correspondence and other documentation should be given a commercially sensible construction; that is an example of the wider rule that construction that yields a reasonable result should be preferred over one that does not: ***Glasgow City Council v Caststop Ltd,*** *supra*, at 56-57 per Lord Macfadyen.

[18] For present purposes the most important of these principles is the need to construe post-contractual correspondence and other documentation in the context of the contract to which it relates. In the light of that consideration, the most natural interpretation of such documents is that they relate to the rights and obligations that arise under that contract, and therefore to the parties to that contract, since they are the only persons who have rights and obligations under the contract. On that basis, if a letter proceeds in the name of a company or individual who is not a party to the contract, the context strongly indicates that it is meant to relate to the rights and obligations of the contractual parties. The most straightforward means of achieving that result is through the concept of *ad hoc* agency. That result is further supported by the principle of objective construction; in my opinion a reasonable third party who examines a letter proceeding in the name of a non-party would naturally construe it as relating to the parties to the contract, provided that the contract itself was sufficiently clearly identified in the letter. Further support for the same result may be found in the surrounding circumstances; where the writer of the letter is obviously connected with the party to the contract, as with a company that has succeeded to a sole trader or two companies within the same group, the inference is that one is writing on behalf of the other. Finally, the

inference that the letter or other documents is issued on behalf of the contracting party is strongly supported by the principle that documentation should be given a commercially sensible construction. If a letter that obviously relates to a contract is not construed as relating to the parties to that contract, the result is likely to make no sense in either legal or commercial terms.

[19] The foregoing analysis must in my opinion apply to the documents that were issued in July and August 2005. Thus the invoice of 14 July 2005, although it proceeds in the name of the company, M&S Contracts Ltd, must be construed as issued on behalf of the pursuer. It is clear that the invoice related to the contract for the refurbishment work at 7 Orchard Road, St Annes; under that contract it was the pursuer who was the contracting party; consequently the pursuer was the only person who had any right to issue an invoice. Likewise, the letter of 19 August 2005 sent to Kerr Baxter Associates, the defenders' contract administrators, must be construed as issued on behalf of the pursuer, even though it was on the company's writing paper. The letter referred specifically to 7 Orchard Road, St Annes, and named the defenders. It indicated that payment was overdue on Certificate No 6, and pointed out that that constituted a breach of contract on the part of the employer. There is no doubt that it related to the contract between the pursuer and the defenders. Once again, because the pursuer was the contracting party, the letter could only make sense in the contractual context if it was written on his behalf. A similar analysis can be applied to the other documents that passed during July and August. It is in the light of those documents that I have concluded that a *"dispute or difference"* existed between the parties to the action by the beginning of September 2005.

[20] On 2 September 2005 Longworth Consulting wrote to the defenders giving notice of an intention to refer a dispute to adjudication. The letter was headed *"M&S Contracts Limited v Westminster Properties Scotland Ltd"*. The heading continued with a reference to 7 Orchard Road, St Annes, and the details of the letter indicated that it was the contract for the refurbishment work at that address that was the subject of the letter. Nevertheless, the text of the letter referred throughout to the company. This letter is, I think, in a different position from earlier correspondence. It is a notice of intention to refer a dispute to adjudication. Adjudication is a form of provisional dispute resolution, and the letter is accordingly similar in its import to a solicitor's letter written prior to litigation. At this stage, and in any subsequent adjudication or court proceedings, I am of opinion that an analysis in terms of *ad hoc* agency is not an appropriate inference. When litigation or adjudication is threatened, the communings between the parties take on a formal aspect, and precision is required in the name of the party making the claim. That inevitably negates the inference that one person is acting on behalf of another; a formal claim must be made by or in the name of the person who has the right that is claimed. That is why in litigation, if an action is raised in the name of the wrong party, the normal response will be a plea of no title to sue. In my opinion an analogous argument can be presented in an adjudication. A similar response can be made to a letter that threatens litigation or adjudication. At that point, the intervention of formal proceedings for resolution of the dispute requires formality, and that includes precision in the identification of the parties. Consequently the inference cannot be drawn that a company is acting for the individual who is truly the contracting party, or that one group company is acting for the other company which has in fact concluded the contract.

[21] At this stage too, if a claim is intimated or presented in the name of the wrong party, formal objection would normally be taken, whether through a plea of no title to sue or otherwise; that in fact happened in the present case, since by letter dated 22 September 2005 to the adjudicator the defenders' agent pointed out that the company had been incorporated after the contract was concluded and hence could not be a party to the contract. Before litigation or adjudication is threatened, however, there is no obvious reason other than a concern for strict accuracy for the recipient of a letter or other document to point out that it proceeds in the name of the wrong party, provided that there appears to be some sort of relationship between the person responsible for the letter and the other party to the contract. That explains why contractual correspondence before the stage of a formal claim is frequently allowed to proceed in the name of the wrong party. I should add that there are cases where a party to a contract sues on the contract in respect of losses suffered by another person to whom, for example, the pursuer has transferred the subject matter of the claim. In such cases the pursuer can in a sense be regarded as suing on behalf of that other party, but he clearly has title to do so because he is the party to the contract; indeed, that is why the other party cannot sue. Such cases are accordingly quite different from the situation presently under discussion.

[22] It follows that the writer of Longworth Consulting's letter of 2 September 2005 purported to act for the wrong party; the company was not a party to the contract. That is clearly the result of an error, but the effects of the error are confined to the letter and the subsequent attempt to raise adjudication proceedings in the name of the company. The result is that the letter and the subsequent referral notice were a legal nullity and cannot be saved by the concept of *ad hoc* agency. The error was discovered fairly rapidly, however, and was accepted by Longworth Consulting; the adjudication was abandoned, and the decision to do so was intimated by letter dated 24 September 2005. The adjudicator resigned office. On 26 September 2005 fresh adjudication proceedings were raised in the name of the present pursuer. At that stage, at the very latest, I am of opinion that a "dispute or difference" had crystallized between the pursuer and the defenders. They were the parties to the contract. Certificate No 6 had been issued under that contract. The defenders had not paid the sum due in terms of that certificate; nor had they indicated why they had failed to make payment. In those circumstances, the inevitable inference is in my opinion that the amount due under the certificate was disputed. That clearly involved a disagreement between the parties as to their respective rights and obligations, which is the essential criterion for a "dispute or difference".

[23] For the defenders it was submitted that, in order to convert a contractual entitlement into a *"dispute"*, it was necessary both for the entitlement to be communicated to the other party and for it to be made clear, by words, conduct or otherwise, that it was not accepted that there was any such entitlement. In the present case, it was submitted, the pursuer did not in terms communicate his entitlement to the sums specified in Certificate No 6 prior to 26 September 2005, when the pursuer intimated that he intended to refer a dispute to adjudication. That was too late, however. In this connection, counsel referred to certain passages in *Fastrack Contractors Ltd* v *Morrison Construction Ltd, supra*, in particular at paragraphs [20] and [27]. In the latter paragraph it was stressed that the subject matter of a claim, issue or other matter must be brought to the attention of the opposing party in order that that party might have an opportunity of considering and admitting, modifying or rejecting the claim. Counsel also referred to the opinion of Rix LJ in ***Amec Civil Engineering Ltd* v *Secretary of State for Transport***, *supra*, where at paragraph [68] it was pointed out that adjudication was an additional provisional layer of dispute resolution pending final litigation or arbitration; there was accordingly a legitimate concern to ensure that the point at which this additional complexity has been properly reached should not be too readily anticipated.

[24] I do not doubt that, for a *"dispute"* to arise, it is necessary that a contractual claim should be communicated to the other party and that the other party should, expressly or impliedly, make it apparent that he rejects the claim in whole or in part. Whatever the form in which the parties' attitudes are conveyed, the substance of the matter must always be that there is a disagreement between the parties as to some aspect of their contractual rights and duties. In the present case, I am of opinion that the existence of a disagreement as to the pursuer's entitlement under Certificate No 6 was apparent by the beginning of September 2005, or at latest as soon as the adjudication proceedings in the name of the company came to an end on 24 September. The pursuer had asserted a claim, and the defenders, despite the contractual time scale and the documents sent to them, had failed to make payment and had failed to advance any reason to explain such non-payment. In my opinion that is sufficient for the inference that the defenders disputed the pursuer's claim. If that were not so, a party could adopt the tactic of simply failing to respond to repeated invoices, claim letters and the like, and thus substantially delay any reference to adjudication. No doubt an ultimatum procedure could be used, but I do not think that there should be any need to go as far as that; silence for a sufficient period in the face of a letter of claim can be sufficient to yield the inference that the claim is disputed. I am conscious that adjudication is a provisional procedure. Nevertheless, one of its major purposes is to ensure contractual cash flow, and that could easily be frustrated if the courts were to impose unduly strict conditions on the raising of adjudication proceedings.

[25] Counsel for the defenders also relied on the fact that documents such as the invoice of 14 July 2005 and the letter to the contract administrators of 19 August 2005 bore to come from M&S Contracts Ltd, not the pursuer. He submitted that the pursuer had acted in his capacity as the sole director of the company when invoices were issued and claims were made in correspondence and in the adjudication proceedings. The result was that the claim should be understood as the company's, not the pursuer's. In any event, counsel submitted that the certificate at which the pursuer founded, Certificate No 6, required to be construed against the background of the parties' actings. So construed, the reference to "M&S Contracts" in the certificate should be understood as a reference to M&S Contracts Ltd. In effect, therefore, counsel argued that the contractual documentation properly referred to the company, and that if any agency relationship existed it was through the pursuer's office as a director of the company.

[26] This argument is ingenious, but in my opinion it must be rejected. The fact that the contractual documentation in July and August 2005 proceeded in the name of the company can in my view be readily explained by the notion of *ad hoc* agency, as explained above at paragraphs [16]-[19]. The essential point is that the pursuer, not the company, was the contracting party. If the documents are treated as proceeding from the company, that can only make sense if the company is substituted for the pursuer as the contracting party. That would require novation, however, and nothing of the sort is averred. Moreover, novation involves the substitution of one contracting party for another in respect of both rights and obligations. That normally requires the clear agreement of the other party to the contract. Such agreement is not to be inferred lightly. It is, in any event, contrary to the agreed facts in the present case. When adjudication proceedings were raised in the name of the company, the defenders, by letter to the adjudicator dated 22 September 2005, pointed out that the company could not have been a party to the contract because it had been incorporated after the date when the contract was concluded. That is only consistent with view that the pursuer's rights and obligations had not been novated to the company. By contrast with novation, *ad hoc* agency leaves the contracting parties in place. That feature makes it a much more natural inference. So far as Certificate No 6 itself is concerned, it refers quite clearly to "M. & S. Contracts", which was the trading name of the pursuer. Novation would be required before that could be understood as referring to the company, and in the circumstances of the case that seems to me to be a most improbable inference.

[27] In developing his argument, counsel for the defenders referred to a number of specific features of the correspondence and other documentation; these, he said, indicated that the documents in question were truly the documents of the company, not the pursuer. He referred to the sequence of invoices that culminated in that of 14 July 2005. Initially these had proceeded in the name of M&S Contracts, but starting with invoice No 5, dated 21 April 2005, they had subsequently been issued in the name of the company. The VAT number had also been altered. In relation to the letter of 19 August 2006, in which payment of the sum certified in Certificate No 6 had been sought, no reference whatsoever was made to the pursuer as the person entitled. Counsel also relied on the abortive adjudication involving the company. He submitted that when all of these documents were taken together it should be accepted that the company acted as a principal, not an agent. That inference, he submitted, was

strengthened by certain other agreed facts. The contractor's insurance appeared to have been in the name of the company rather than the pursuer as an individual. The notification to the Health and Safety Executive had been signed by an individual who described himself as contract manager for the company, on behalf of the company. Payments made by the defenders had been made into the company's bank accounts. The vans used by the pursuer to carry out the work on the contract bore the company's name from 15 March 2005 onwards. Certain of the invoices from suppliers and subcontractors were issued the name of the company, although it was accepted that other invoices had been issued to *"M&S Contracts";* counsel submitted that in the latter invoices that expression should be treated as referring to the company. Finally, other items of correspondence between the pursuer and the defenders' contract administrators had been conducted in the name of the company. The result of all of these actings was that the pursuer, who was a director of the company, had permitted it to act as principal. Consequently the pursuer was now barred from asserting that he was the principal. Reference was made to statements of the law in the Stair Memorial Encyclopaedia, Agency and Mandate Reissue, paragraph 153.

[28] None of these matters seems to me to alter the obvious inference that the company acted as agent for the pursuer as an individual. The change in the invoices and VAT number can readily be explained by the fact that the company had begun to act as agent for the pursuer in respect of the contract. It is a matter of agreement that all of the first five invoices were paid by cheques issued to either M&S Contracts (the first three payments) or M&S Contracts Ltd (the fourth and fifth payments). That seems to me to indicate that the defenders simply accepted the fact that the administration of the contract was being carried out by the company. The fact that the cheques were paid into the company's bank account was a matter of mere administrative convenience; in any event that would not necessarily be known by the defenders. The fact that the company's vans (and no doubt its employees) were used to perform the contract, and the fact that some invoices from suppliers and subcontractors were issued to the company, are readily explained by the concept of *ad hoc* agency. The same is true of the letter to the Health and Safety Executive. So far as the insurance is concerned, the only document that was available was a letter from the insurance broker to the defenders' contract administrators. The policy itself was not available. Thus it is impossible to know what the precise scope of the insurance was. In any event, if the contract works were in fact being carried out by the company as agent for the pursuer, it might well be appropriate that the insurance was in the company's name. Without the policy it is impossible to be certain. None of the matters relied upon by counsel can in my view be considered as an acceptance that the contract had been novated to the company. Perhaps the strongest point for the defenders is the fact that the original adjudication was raised in the name of the company. That is explained, however, by the simple fact that either the pursuer or Longworth Consulting made a mistake. In these circumstances the argument that the pursuer was barred from asserting that he was the principal seems misplaced; if the company were to act as principal the defenders' agreement would be required, and there is no hint that such consent was either asked for or given.

[29] For the foregoing reasons I am of opinion that a dispute or difference existed between the present parties prior to the service of the notice of adjudication on 26 September 2005. On that basis I will repel the pleas in law for the defenders, sustain the pleas in law for the pursuer and pronounce decree *de plano* in terms of the conclusions of the summons.

Pursuer: S Smith; MacRoberts

Defenders: Richardson; Morton Fraser