OPINION OF THE LORD DRUMMOND YOUNG. Outer House Court of Session.17th December 2002.

[1] The defenders are main contractors who have undertaken to design and construct a building project. The pursuers were engaged as subcontractors to the defenders to carry out the design and installation of proprietary roofing to all buildings and wall cladding to certain buildings. The contract between the parties is contained in a Construction Sub-contract based on the SBCC Scottish Building Contract with Contractor's Design September 1995 Revision as amended by a standard form of sub-contract produced by the defenders.

[2] It is accepted by the parties that during the course of the execution of the contract disputes arose between them. Janey L. Milligan, of JLM Construction Dispute Resolution, accepted appointment as adjudicator under a referral notice served by the pursuers dated 7 February 2002. The adjudicator issued her decision on 14 May 2002. In that decision, she awarded the pursuers an extension of time under their subcontract, and also awarded them reimbursement of loss and expense totalling £639,151.82, inclusive of value added tax. The pursuers have raised the present action in order to enforce the latter part of the adjudicator's award. The defenders deny liability to make payment of the sum awarded by the adjudicator, on two grounds. In the first place, they claim that the contract between the parties prohibits the pursuers from raising any action to enforce an adjudicator's award until either the actual completion date of the last phase of the main contract for construction of the project, or the termination of the present parties' subcontract, subject only to an exception where the written consent of both of the present parties has been obtained to such enforcement. In the second place, the defenders rely on the fact that in her decision the adjudicator rejected a contention by the pursuers that they were entitled to an extension of time of 112 weeks, and awarded them an extension of only 46 weeks. Consequently, the defenders maintain, the adjudicator held implicitly that the pursuers were in delay for a period of 66 weeks; that would attract liquidate and ascertained damages at a rate of £75,000 per week. The pursuers had failed to pay such damages, and were accordingly in material breach of contract. Accordingly, in accordance with the principle of retention, the pursuers were not entitled to enforce the adjudicator's award against the defenders.

[3] By way of background, I should state that in July 2002 the defenders presented a petition to the court in which they sought a suspension of further procedure in the present action; that petition was based on the first of the arguments outlined in the preceding paragraph. When that petition first called in court, without representation of the present pursuers, I granted interim suspension. That interim suspension was subsequently recalled by Mr T.G. Coutts Q.C. sitting as a Temporary Judge. Thereafter defences were lodged in the present action, and the pleadings were adjusted. The matter came before me in the form of a debate in which each party challenged the relevancy of the other's pleadings. The debate was combined with a motion for summary decree on the part of the pursuers.

[4] The parties' arguments were deployed against the background of Part II of the Housing Grants, Construction and Regeneration Act 1996, which introduced the concept of adjudication into the law. Section 108(1) of that Act provides that a party to a construction contract has the right to refer dispute arising under the contract for adjudication under a procedure complying with that section. Section 108(2) requires that such a contract should make provision for adjudication procedure. Section 108(3), which is important for present purposes, is in the following terms:

"The contract shall provide that a decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement".

[5] The contract between the parties made detailed provision for adjudication. The relevant provisions are contained in Appendix 8 to the Construction Sub-Contract, which is headed "Sub-contract disputes resolution procedure". Paragraph 2.1 of Appendix 8 provides that if a dispute is referred to adjudication the procedure is to be governed by the ORSA Adjudication Rules-1998 Version 1.2, but subject to a large number of amendments. The ORSA Adjudication Rules are rules promulgated by the Official Referees Solicitors Association, a body of English solicitors who specialise in construction disputes. The Rules are obviously drafted with English law in mind, but the amendments go some

way to bring them into line with Scots law. The material provisions of Appendix 8 and the ORSA Rules are as follows.

First, rule 14 of the ORSA rules provides as follows:

"Decisions of the Adjudicator shall be binding until the dispute is finally determined by legal proceedings, by arbitration (if the Contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement".

That provision obviously echoes the wording of section 108(3) of the 1996 Act. Next, rule 28A, which was inserted into the ORSA Rules by Appendix 8, is in the following terms:

"Every decision of the Adjudicator shall be implemented without delay. The parties shall be entitled to such reliefs and remedies as are set out in the decision, and shall be entitled to summary enforcement thereof, regardless of whether such decision is or [is] to be the subject of any challenge or review. No party shall be entitled to raise any right of set-off counterclaim or abatement in connection with any enforcement proceedings. The parties agree and bind themselves to each other to docquet every decision with their consent and to registration of the Adjudicator's decision in the Books of Council and Session for execution".

Rule 33 of the ORSA Rules is as follows:

"No Party shall, save in case of bad faith on the part of the Adjudicator, make any application to the courts whatsoever in relation to the conduct of the Adjudication or the decision of the Adjudicator until such time as the Adjudicator has made his decision, or refused to make a decision, and until the Party making the application has complied with any such decision".

Paragraph 2.1 of Appendix 8 contains the following three provisions:

"f) notwithstanding Rules 14 and 33, no party shall, save in the case of bad faith on the part of the Adjudicator make any application whatsoever to a competent court in relation to the conduct of the Adjudication or the decision of the Adjudicator until the earlier of the Actual Completion Date of the last Phase or termination of this Sub-Contract unless and until the prior written consent of both the Sub-Contractor and the Contractor has been obtained.

"g) notwithstanding Rules 14 and 33, no party shall make any application whatsoever to a competent court in relation to the conduct of the Adjudication or the decision of the Adjudicator after that date being the later of, ninety (90) days from the decision of the Adjudicator or ninety (90) days from the Actual Completion Date of the last Phase;

"h) notwithstanding Rules 14 and 33, no party shall make any application whatsoever to a competent court in relation to the conduct of the Adjudication or the decision of the Adjudicator unless it shall involve the pursuit of a claim or counterclaim of a monetary value in excess of £25,000.00 (index-linked) or in the case of claims or counterclaims of a lesser monetary value arising out of the same facts and circumstances an aggregate monetary value of £25,000.00 (index-linked)".

The restriction on court proceedings connected with the adjudication

[6] The defenders' first argument was that, according to the terms of the parties' contract, the pursuers were not presently entitled to raise proceedings to enforce the adjudicator's decision. That argument was based primarily on paragraph 2.1(f) of Appendix 8. Counsel submitted that the restriction on going to court contained in that paragraph was of an all-embracing nature, and covered every sort of action connected with a decision of the adjudicator. Consequently no such action was competent, in the absence of termination of the parties' sub-contract or consent, until actual completion of the last phase of the main contract had been achieved; it was a matter of concession that that date had not yet arrived. Paragraph 2.1(f) should be read with paragraph 2.1(g), which contained a further restriction on proceedings ninety days after the date of actual completion of the last phase of the main contract or, if later, the decision of the adjudicator. Thus, it was said, in the absence of termination of the subcontract or the consent of the parties, any proceedings of any nature relating to the adjudication could only be brought within a ninety day window following the completion of the last phase of the main contract. Rule 28A was of more limited scope; it provided what was to happen once an action relating to an adjudication came into existence. At that stage, the purpose of rule 28A was to ensure that enforcement was possible immediately, and not held up by either counterclaims or proceedings

for judicial review of the adjudicator's decision. Rule 28A did not specify when proceedings might be raised; that was because that matter had been dealt with in paragraph 2.1(f) and (g). In reply, counsel for the pursuers founded on section 108(3) of the 1996 Act and rules 14, 28A and 33. The result of section 108(3) and rule 14 was that an adjudicator's decision was binding when it was pronounced, and it remained binding until such time as matters were finally determined by litigation or arbitration. Consequently an adjudicator's decision gave rise to an obligation to implement the award contained within it. Such an obligation was inevitably matched by a right in the other party to enforce the award; it made no sense to say that something was binding but could not be enforced. Rule 28A fitted into that framework, and provided that every decision of an adjudicator should be implemented without delay. It followed that enforcement could take place immediately. Heads (f) and (g) of paragraph 2.1 were not concerned with enforcement, but with challenges to an adjudicator's decision by way of judicial review. The scheme of the contract was accordingly that any decision of an adjudicator should be implemented immediately, but could only be challenged, in normal circumstances, following completion of the main contract works.

[7] In my opinion the pursuers are already entitled to enforce the adjudicator's decision of 14 May 2002; they are not obliged to wait until the actual completion date of the last phase of the main contract before doing so. That conclusion is based both on section 108(3) of the 1996 Act and on the construction of the parties' contract, read in the light of that section. The following principles are relevant.

[8] First, a distinction must be drawn between two types of court proceedings that may arise out of an adjudication. The first of these is judicial review of the adjudicator's decision. For this purpose, it seems appropriate in Scots law at least to treat an adjudicator as a species of arbiter; consequently the grounds of judicial review will be those that have long been familiar in relation to arbitrations. Essentially, these relate to the jurisdiction of the adjudicator, whether he has acted within the terms of the reference that has been made to him, and to misconduct on the part of the adjudicator. Judicial review is not possible, however, on the ground that the adjudicator has made an error of fact or law provided that his decision cannot be considered irrational. The second type of court proceedings that may arise out of an adjudication is an action to enforce an adjudicator's award. The nature of the latter type of action is described by Lord Macfadyen in **The Construction Centre Group Limited v The Highland Council,** 2002 SLT 1274, in the following terms (at paragraph [9]):

"It is, in my view important to appreciate the nature of this action. In it, the pursuers do not ask the courts to endorse the correctness of the adjudicator's decision on the merits of the dispute referred to him. Rather the pursuers merely ask the court to recognise that the parties have bound themselves contractually to implement the adjudicator's decision. The pursuers seek a decree from the court, not because they are in the right of the dispute, but because they are contractually entitled to require the defenders to implement the adjudicator's provisional determination of the dispute, whether it be right or wrong".

[9] Secondly, when pronounced, an adjudicator's decision is legally binding on the parties. Such an award is no doubt provisional, in the sense that its effect can be undone by subsequent litigation or arbitration; until then, however, it creates binding legal rights and obligations, which must be given effect. That result is clear in my opinion from the terms of section 108(3) of the 1996 Act. In the present case, section 108(3) is given effect in the parties' contract by rule 14 of the ORSA Rules. In my view rule 14 means precisely what it says; a decision of an adjudicator is binding until it is superseded by litigation or arbitration.

[10] Thirdly, if an obligation arising out of an adjudicator's decision is binding, it must be capable of enforcement. The Latin maxim ubi jus ibi remedium reflects obvious common sense. In the words of **Erskine** (Inst. IV.i 1):

"It would import us little, that rights belonged to us, or that persons stood obliged to us, if there were no method by which we might make those rights effectual, and attain the enjoyment of our property, or compel those who stand bound to us to perform their obligations. If we were left at liberty to do ourselves justice by our own authority, on occasion of every difference with a neighbour, there would soon be an end of government. The judge or magistrate therefore must be applied to, by a proper action".

Consequently the party in whose favour an adjudicator's award is made must be entitled to enforce that award. That is in my opinion an inevitable consequence of section 108(3) of the Act. It is reinforced by an important policy consideration; the main purpose of Part II of the 1996 Act was to improve cash flow in the construction industry, by ensuring that contractors and subcontractors were paid promptly for work that had been completed. That purpose would be wholly frustrated if the awards of adjudicators were not immediately enforceable. The legal position is summarised by Lord Macfadyen in **The Construction Centre Group Limited v The Highland Council,** supra (at paragraph [8]):

"It is in my view well settled that the purpose of the Act was to secure that every construction contract contains provisions which enable the parties to the contract to obtain from an adjudicator in respect of any dispute arising under the contract a speedy decision which is binding and enforceable but at the same time merely provisional pending final determination by litigation, arbitration or agreement.... It follows, in my opinion, that a party who holds an adjudicator's award finding him entitled to payment of a sum of money, either forthwith or at a fixed date which has passed, is ordinarily entitled to take steps to enforce it, and may do so by raising an action for payment of the sum awarded. Not to allow enforcement of an adjudicator's award in that way would, in my view, obstruct the attainment of the purpose of section 108".

[11] It follows in my opinion that any attempt to delay the enforcement of an adjudicator's award by more than a short period is prohibited by section 108(3). Any such delay must be justified by practical considerations, such as the need to find the necessary funds to meet the award. On that basis, a delay of perhaps four weeks or thereby might be justified. Beyond that, however, the policy of the Act seems clearly to be that a party against whom an adjudicator's award is made should make immediate payment in terms of the award. Section 108(3) is mandatory in its terms; it provides that *"The contract shall provide that a decision of the adjudicator is binding..."*. I am accordingly of opinion that any provision of a contract that is incompatible with the binding nature of an adjudicator's award is legally ineffective. For the reasons discussed in the last paragraph, I consider that any attempt to prevent enforcement of an adjudicator's award is in essence a denial of the binding nature of that award. If, therefore, paragraph 2.1(f) of Appendix 8 has the effect contended for by the defenders, and prohibits enforcement of an adjudicator's award until the actual completion of the last phase of the main contract, it is incompatible with section 108(3), and is accordingly of no legal effect. On that basis by itself I would reject the defenders' argument that the contract prohibits enforcement of an adjudicator's award until the period described in paragraph 2.1(f).

[12] I would reach the same result, however, on the construction of the parties' contract. In my opinion paragraph 2.1(f) of Appendix 8 must be construed as relating only to judicial review of an adjudicator's decision, and not to proceedings to enforce such a decision. Two separate considerations point to such a conclusion. In the first place, it seems clear that the provisions of a building contract must be interpreted so far as possible in a manner that is consistent with section 108. Section 108 has no bearing on the availability of judicial review, and in my opinion it would be open to parties to a contract to allow proceedings for judicial review to be delayed until the conclusion of the contract, provided that immediate enforcement is available. Paragraph 2.1(f) refers *to "any application... in relation to the conduct of the Adjudication or the decision of the Adjudicator"*. The reference to the conduct of the adjudication must clearly relate to judicial review rather than enforcement, since the adjudicator's conduct may be challenged by way of judicial review but would have no bearing on the right to enforce an award, at least in the absence of successful judicial review. The reference to the decision of the adjudicator is wider, and if it had stood by itself, without the context provided by section 108(3), I would have construed it as relating to enforcement as well as adjudication; in the ORSA Rules the word "decision" is used to designate an adjudicator's award, and the enforcement of an award by legal proceedings seems clearly to amount to an *"application... in relation to"* such a decision. In the context of section 108(3), however, I am of opinion that the reference to the "decision" of the adjudicator in paragraph 2.1(f) must be restrictively construed, and confined to proceedings for judicial review of such a decision. In that way and conflict with section 108(3) can be avoided. That is not in my opinion an unnatural construction of the wording used. Judicial review extends beyond the conduct of the adjudicator in the narrow sense, and may extend to the decision itself; if, for example, the decision is

ultra vires of the remit to the adjudicator, or is ambiguous or unclear, it will be subject to judicial review. Against the background of section 108, I am of opinion that a restriction of paragraph 2.1(f) to judicial review is the most obvious and natural construction of the provision.

[13] In the second place, I am of opinion that rule 28A of the ORSA Rules, inserted by paragraph 2.1(9)(ix) of Appendix 8, negatives any argument that paragraph 2.1(f) prohibits immediate enforcement. Rule 28A begins by stating that every decision of the adjudicator shall be implemented without delay. That plainly contradicts any argument that implement of a decision can be postponed, and if implement cannot be postponed, I am of opinion, for the reasons discussed in paragraph [10] above, that enforcement cannot be postponed either. The rule continues by stating that the parties are to be entitled to such reliefs and remedies as are set out in the decision, and are to be entitled to summary enforcement thereof, regardless of whether the decision is the subject of challenge or review. That too clearly contradicts any suggestion that enforcement is to be postponed. It is an elementary principle of construction that the provisions of a contract are, so far as possible, to be read together. In my opinion there is no incompatibility between rule 28A and paragraph 2.1(f) provided that the latter provision is construed in the way suggested above, by restricting it to judicial review and excluding enforcement. Counsel for the defenders submitted that rule 28A was intended to prevent counterclaims and defences, but had nothing to do with the question of when enforcement proceedings could be raised; the latter was dealt with in paragraph 2.1(f). In my opinion that ignores the very clear opening words of rule 28A, which provide for implement without delay. It also ignores the first part of the second sentence of the rule, which confirms the parties' entitlement to the remedies set out in the decision; in my opinion that necessarily entails that the remedies are enforceable at once. Counsel for the defenders further submitted that, if rule 28A and paragraph 2.1(f) were incompatible, paragraph 2.1(f) was the later of the two provisions, and should accordingly prevail. In my opinion the rule that, in cases of contradiction, the later of two provisions of a contract should prevail is one to be applied only in extreme cases. If reconciliation is possible, that is the course that must be followed. In the present case, I am of opinion that reconciliation is possible.

The significance of retention

[14] The defenders' second argument was that the principle of retention applied. The adjudicator had rejected a contention for the pursuers that they were entitled to an extension of time of 112 weeks, and awarded them an extension of only 46 weeks, which represented a delay of 66 weeks. In her decision, the adjudicator had made reference to the pursuers' liability for delays that had occurred in the progress of the subcontract works. Clause 4 of the parties' contract contained a provision for liquidate and ascertained damages (described as Sub-Contract Liquidated Damages) in the event of late completion. The amount of such damages was ultimately agreed between the parties at £75,000 per week. Consequently a sum of £4,950,000 was due by the pursuers to the defenders. The obligation to pay that sum arose out of the adjudicator's award relating to extension of time. That award and the award that the pursuers now sought to enforce were contained in the same decision. Consequently they were the counterparts of each other, and the pursuers were not entitled to enforce the part in their favour without fulfilling their obligation to pay liquidate and ascertained damages. In reply, counsel for the pursuers submitted first that the obligation to pay liquidate and ascertained damages did not arise at the date of the adjudicator's decision; nothing in the decision required any payment by the pursuers. Consequently there was no obligation unfulfilled by the pursuers at the date when the award in their favour was made, and the principle of retention did not arise. Secondly, counsel pointed out that in a subsequent decision the adjudicator had decided that the provision in the parties' contract for liquidate and ascertained damages was truly a penalty, and accordingly was not binding. In view of that decision it was unrealistic for the defenders to base a retention argument on the liquidate and ascertained damages clause; the adjudicator's decisions had to be read together, and if the question of an award of liquidate and ascertained damages had arisen in the decision on which the pursuers founded it would have been refused, for the reasons contained in the second decision. Thirdly, counsel submitted that, if delay in payment occurred, the remedy lay in interest, not in damages. That was because delay in payment was not of itself a breach of contract. Reference was made to **President of India v Lips Maritime Corporation**, [1988] AC 395. It followed that any failure

on the part of the pursuers to pay liquidate and ascertained damages was not of itself a breach of contract, and did not give rise to a right of retention. Fourthly, counsel founded on rule 28A, which excluded any right of set-off, counterclaim or abatement in connection with any proceedings to enforce a decision of an adjudicator. It was submitted that that provision prevented the defenders from exercising a right of retention in respect of the obligation to pay liquidate and ascertained damages.

[15] The classic statement of the principle of retention is that of LJC Moncreiff in **Turnbull v McLean & Co**, 1874 1 R 730, at 738:

"I understand the law of Scotland, in regard to mutual contracts, to be quite clear: 1st, That the stipulation is on either side by the counterparts and the consideration given for each other; 2nd, that a failure to perform any material or substantial part of the contract on the part of one will prevent him from suing the other for performance; and, 3rd, that when one party has refused or failed to perform his part of the contract in any material respect, the other is entitled to insist for implement, claiming damages for the breach, or to rescind the contract altogether -- except in so far as it has been performed".

To similar effect is LJC Inglis in **Johnston v Robertson**, 1861, 23 D 646, at 656:

"Every action on a mutual contract implies that the pursuer either has performed, or is willing to perform, his part of the contract; and it is therefore always open to the defender to say that under the contract a right arises also to him to demand performance of the contract before the pursuer can insist in his action".

As is clear from these statements of the law, the principle of retention involves a bar on the raising of legal proceedings. Once legal proceedings have reached the stage of decree, however, the principle has no application. When decree is pronounced by a court, that decree is obligatory in its own right, without reference to the contract or other legal ground on which it proceeded. Consequently there is no room for invoking a failure to perform a term of the contract as a reason for refusal to implement the decree. The same is true, in my opinion, where a dispute has been referred to arbitration and decree arbitral has been pronounced. In this case the decree is obviously referable to the underlying contract, in that the jurisdiction of the arbiter is based on an arbitration clause in the contract. An arbitration clause is in a special position, however. It is not normally affected by a breach of contract: **Heyman v Darwins**, [1942] AC 356. Arbitration may accordingly be invoked by a party who is, or is alleged to be, in breach of contract: **ibid**. Likewise, it will normally be impossible to plead retention as a defence to the invocation of an arbitration clause, because the right of retention is founded on a breach of contract. It follows that, when decree arbitral is pronounced, a plea of retention cannot be taken against the decree. The result is accordingly the same as with a court decree.

[16] The decision of an adjudicator is in my opinion in exactly the same position as a decree arbitral. Adjudication is based on a term of the parties' contract, in the form of either an express term or the terms of the Scheme for Construction Contracts, as applied by section 108(5) of the 1996 Act. The functions of an adjudicator are essentially similar to those of an arbiter. The major difference is that an adjudicator's decision is only provisional, and may be undone by subsequent arbitration or litigation. Nevertheless, in terms of section 108(3) the parties' contract must provide that decisions of the adjudicator are binding until the final determination of the dispute. In my view that gives such decisions the same force as the awards of an arbiter for the purpose of the application of the principle of retention. The result is that a plea of retention cannot be taken against the decision of an adjudicator once the decision is pronounced. The position is different, however, while the adjudication process is still continuing. At that point, the party against whom an award is sought may take any pleas or defences that are relevant to the claim made against him. Those include a plea of retention, if the conditions for the application of the principle exist. On this matter, I respectfully agree with the views expressed by Lord Macfadyen in **The Construction Centre Group Limited v The Highland Council**, supra. At paragraph [19] he states:

"I agree with the view... that the scope of an adjudication is defined by the notice of adjudication, but I also agree that any ground that may be founded on by the responding party to justify his position also falls within the scope of the adjudication.... [I]f the notice raises the issue of whether a particular sum is due by the employer to the contractor, it seems to me to be axiomatic that the adjudicator must entertain any relevant defence on

which the responding party wishes to rely in arguing that the sum is not due. In particular, it seems to me... to be clear that an employer who claims to be entitled to liquidate damages and seeks to retain a sum that would otherwise be due to the contractor against that claim, is in principle entitled to put that contention forward before the adjudicator. In my view, an adjudicator who held otherwise, and declined to permit the responding party to raise the issue of retention would be misdirecting himself".

In that case the pursuers had referred a claim to arbitration, and the adjudicator made an award in their favour. The defenders did not assert any right of retention as a defence to the claim in the adjudication, but asserted such a right, based on a liquidate damages clause, when the pursuers sought to enforce the adjudicator's award. Lord Macfadyen held that the question of retention could have been raised in the course of the adjudication, but that the defenders had chosen not to do so. Had they done so, they would have been entitled to insist that the adjudicator entertain it. He continued:
"The fact that the defenders chose not to advance their retention argument before the adjudicator does not, in my view, entitle them to rely on it now for the purpose of depriving the adjudicator's award of the enforceability which the Act and the parties' contract conferred upon it. Moreover, although the defenders cannot, in my opinion, exercise their right of retention against the adjudicator's award, the consequence is not that they have lost the right of retention. It remains exercisable against any future sum falling due to the pursuers under the contract".

[17] In my opinion that statement of the law is directly applicable to the present case. The defenders could, had they wished, have asserted that they were entitled to liquidate and ascertained damages if the adjudicator failed to award the pursuers the full extension of time that they claimed in the adjudication. They did not do so, however. They contested the extension of time claimed by the pursuers, and clearly enjoyed some success in reducing the extension claimed. Nevertheless, disputing entitlement to an extension of time is not the same thing as making a claim for liquidate and ascertained damages; a claim to such damages raises distinct issues, including the question of whether the sum of liquidate damages is a penalty. Had a claim for liquidate and ascertained damages been made before the adjudicator when she was considering the decision that forms the subject matter of the present proceedings, it is clearly likely that her decision on the matter would have been the same as in her later decision, when she decided that the liquidate and ascertained damages clause in the parties' contract imposed a penalty. Whether or not that is so, the issue of liquidate and ascertained damages was not raised before the adjudicator. Nor was a right of retention put forward as a defence to the pursuers' claim. In these circumstances the defenders cannot now assert a right of retention in proceedings for enforcement of the adjudicator's award.

[18] I should add two further points. First, the pursuers placed some reliance on section 111 of the 1996 Act, which requires that notice of intention to withhold payment must be given if a party to a construction contract is to be entitled to withhold payment after the final date for payment of a sum due under the contract. The pursuers submitted that such a notice would be required if a party to a construction contract were to rely on a defence of retention to resist a claim for payment by the other party. In my opinion it is not necessary for the pursuers to rely on section 111 in the circumstances of the present case. Nevertheless, I consider that there is some force in this submission of the pursuers. Secondly, on the subject of retention, counsel made reference to the speech of Lord Jauncey in **Bank of East Asia Limited v Scottish Enterprise**, 1997 SLT 1213. That case emphasises that it is a matter of construction of the parties' contract whether obligations are to be regarded as reciprocal, so that performance of one obligation can be withheld because of breach of the other. Nevertheless, I do not understand the case to challenge the well-established statements of principle contained in **Turnbull v McLean** and **Johnston v Robertson**, which have for long been regarded as authoritative statements of the general principle of the mutuality of contractual obligations: see **Gloag**, Contract, 592. Indeed, I do not understand Lord Jauncey to challenge the proposition that the obligations of one party and the obligations of the other are presumed to be reciprocal in the absence of an indication to the contrary. In the present case, the question of reciprocity does not in my opinion arise as a live issue between the parties, since retention cannot operate following the issuing of a decree or award.

[19] The last three paragraphs deal with the first and second submissions of counsel for the pursuers. Counsel further submitted that a right of retention could not arise out of a failure to pay liquidate and ascertained damages timeously, since such a failure was not a breach of contract and consequently could not give rise to a right of retention. In my opinion this argument is not correct. A right of retention arises because one party fails to perform its obligations under a contract. If one party completes late, in breach of its obligations under the contract, and is in consequence liable to pay liquidate damages, that is sufficient to entitle the other party to plead retention in respect of a claim for the contract price. That was established in **Johnston v Robertson**, supra, where the pursuer sued for an alleged balance of the contract price and certain other matters. The defender pled that the pursuer had completed late, thereby giving rise to an obligation to pay liquidate damages under the parties' contract. It was held that the defender might raise the defence of retention, which LJC Inglis described in the terms quoted above at paragraph [15]. To similar effect is **Macbride v Hamilton and Son**, 1875, 2 R 775, a case where the defender was found entitled to plead retention on the basis of a claim for common-law damages for late completion. In my opinion the decisions in these cases are conclusively against the pursuers' argument. Counsel for the pursuers relied on the decision of the House of Lords in **President of India v Lips Maritime Corporation**, supra, in which it was held that failure to pay liquidate damages (in the form of demurrage) was not a breach of contract. It is unnecessary for present purpose is to decide whether failure to pay liquidate damages amounts to a breach of contract in Scots law; it is clear, on the authority of the two cases cited above, that a failure to pay liquidate damages is a sufficient basis for the assertion of a right of retention.

[20] The fourth argument submitted by counsel for the pursuers was that the terms of rule 28A were sufficient to prevent the defenders from asserting a right of retention. In my opinion this contention is not well founded. Rule 28A provides that "No party shall be entitled to raise any right of set-off counterclaim or abatement in connection with any enforcement proceedings". The right of retention cannot in my view be categorised as a right of "set-off counterclaim or abatement". As the classic definitions quoted in paragraph [15] above make clear, retention is a right to withhold performance. It must be contrasted with compensation under the Act 1592 c. 143, which involves the setting off of one claim against another, with the smaller claim being pro tanto extinguished: see **Gloag**, Contract, 644; **McBryde**, Contract, 25-28 et seq. It must likewise be distinguished from the balancing of accounts on insolvency. Although that principle has sometimes been explained as an extension of the principle of retention, it is clear that it involves the setting off of one debt against another; the distinction from compensation under the Act of 1592 is that following insolvency liquid and illiquid claims can be set off against each other: see **Gloag**, Contract, 626; **McBryde**, Contract, 25-59 et seq. Both compensation and balancing accounts on insolvency clearly fall within the ordinary meaning of the expression "set-off". Retention, however, is a mere defence to a claim, and does not involve the extinction of any debt. The expression "set-off" accordingly does not apply to it. Nor can retention be regarded as a counterclaim; a counterclaim is a claim actively pursued, by a defender against a pursuer. Nor can retention be considered an "abatement". The effect of a defence of retention is not to reduce the amount of the pursuer's claim; it is rather to suspend the defender's obligation to meet the pursuer's claim until such time as the pursuer implements or indicates willingness to implement its own contractual obligations. It follows that the expression "abatement" does not adequately describe the principle of retention. Indeed retention is a more limited concept than either a counterclaim or a right of abatement. It is a mere defence to a claim for payment, and does not involve any reduction or extinction of the claim against which it is asserted; all that it does is to the bar the party in breach of contract from enforcing the contractual obligations owed to it. Parties to a contract might reasonably expect a provision such as rule 28A to cover retention as well as compensation, balancing of accounts on insolvency, counterclaims and the like. If that result is to be achieved, however, there must be an express reference to retention; in **Redpath Dorman Long v Cummins Engine Company Limited**, 1981 SC 370, it was held that the right of retention could only be excluded by clear and unequivocal words in a contract. If English forms are used uncritically, there is a danger that retention will be overlooked; as I understand English law, it does not have any equivalent to the Scots principle of retention.

Nevertheless, retention is an important feature of the Scots law of contract, and there can scarcely be an excuse for failure to exclude it expressly if that is indeed the parties' intention.

Summary decree

[21] Counsel for the pursuers moved for summary decree in the event that the defenders' challenge to the relevancy of the pursuers' pleadings failed. The test that has been applied to motions for summary decree raising questions of law is that stated by Lord McCluskey in **Mackays Stores Limited v City Wall (Holdings) Limited**, 1989 SLT 835, at 836:

"The test I have to apply at this stage must be to ask myself if the question of law which is raised (the only question being one of law) admits of a clear and obvious answer in the pursuers' favour".

That test was applied by Lord Macfadyen in **The Construction Centre Group Limited v The Highland Council,** supra, at paragraph [2]. In my opinion it is satisfied in the present case. For the reasons discussed above, I am of opinion that the two defences that have been advanced, that based on the terms of paragraph 2.1(f) of Appendix 8 and that based on retention, are not well founded. That conclusion has been reached following a debate which lasted a day and a half. In these circumstances, I am satisfied that the test stated above has been satisfied.

[22] I will accordingly repel the pleas in law relied on by the defenders, namely their first, second, fourth and fifth pleas; these challenge the relevancy and specification of the pursuers' averments, and assert the two defences discussed above, namely that paragraph 2.1(f) imposes a contractual bar on proceedings and that the defenders are entitled to claim a right of retention. I will sustain the pursuers' first plea in law, which challenges the relevancy of the defences, and their second and amended third pleas, which assert their right to declarator and payment in terms of the adjudicator's decision. It follows that I will pronounce decree against the defenders in favour of the pursuers in terms of the pursuers' first conclusion, for declarator that the pursuers are entitled to payment of the amount of the adjudicator's award, and in terms of the pursuers' fourth conclusion, which is for payment of the same sum. I was not addressed on the question of interest on that sum, and I will accordingly reserve that question. I should add that the pursuers' second and third conclusions proceed on the alternative basis that the pursuers' remedy lies not in an action for payment but in the docqueting procedure referred to in the last part of rule 28A. In my opinion the appropriate procedure for enforcement of an adjudicator's decision will normally be an action for payment. While a docqueting procedure may be used by parties, once a matter comes to court an ordinary decree for payment will usually be a simpler and more convenient remedy. In the present case, therefore, I think it appropriate to pronounce decree in terms of the first and fourth conclusions of the summons.

Pursuer: Glennie, Q.C., Biggart Baillie
Defenders: Howie, Q.C., Tods Murray, W.S.