OPINION OF LADY PATON : Outer House C.S. 27th June 2002 on an application for Judicial Review of a decision dated 4 May 2001 of David H. Wilson, F.R.I.C.S., A.C.I.Arb., Adjudicator, in terms of the Housing Grants, Construction and Regeneration Act 1966

Building contract containing an adjudication clause

[1] PJW Enterprises Limited, Glasgow ("the employers") entered into a building contract dated 22 April 1991 with R & R Construction (Scotland) Limited, Glasgow ("the contractors") to carry out an extension to and refurbishment of premises at 40 Stanley Street, Kinning Park, Glasgow. The contract was an SBCC Scottish Minor Works Contract (April 1998 revision), number 6/7 of process. By Clause 10A, the contracting parties undertook to refer any dispute or difference arising under or by reason of breach of the contract to adjudication. Clause 10A.6.5.10 gave the adjudicator the power to award damages and interest thereon.

[2] In the course of the works, the employers and contractors resorted to adjudication on five occasions. The employers were ordered to make certain payments, which they did.

Letter appointing a contract administrator, without an adjudication clause

[3] The employers had also instructed a firm of surveyors, Gillies Ramsay Diamond ("Diamond") to act as contract administrator during the works. The terms and conditions of appointment were contained in Diamond's letter dated 9 July 1998, number 7/1 of process. That letter did not contain an adjudication clause. Nevertheless, if the contract was a construction contract within sections 104 and 108 of the Housing Grants, Construction, and Regeneration Act 1996, the statutory adjudication scheme applicable in Scotland would automatically apply (section 108(5) of the 1996 Act), and one contracting party could oblige the other contracting party to submit to adjudication in relation to any "dispute arising under the contract".

Disputes between employers and contract administrator

[4] In the course of the works, disputes arose between the employers and Diamond, resulting in the termination of Diamond's appointment on 28 January 2000. The employers considered that their contract with Diamond was a construction contract within sections 104 and 108 of the 1996 Act. Accordingly, despite the lack of adjudication clause in the contract, they intimated their intention to refer the dispute to adjudication by a notice of adjudication dated 13 March 2001 number 7/2 of process. In that notice, the employers maintained inter alia that:

"It was an implied term of the parties' contract that [Diamond] would exercise the degree of skill and care to be expected of an ordinarily competent surveyor ... The building contract contained a provision, namely, Clause 5.3, whereby [Diamond] as contract administrator, could issue written instructions. Said provision provides that where instructions are given orally they shall, within two days, be confirmed in writing by the contract administrator.

[Diamond] failed to issue written confirmations (hereinafter referred to as "written instructions") confirming oral instructions issued by them as contract administrator under the building contract.

[Diamond] recognised that re-measurement to reflect the actual quantities involved in the contract works, as opposed to those stated in the specification, would result in substantial savings to [the employers]. [Diamond] ought to have issued written instructions in relation to items they remeasured. They failed to do so as hereinafter narrated ...[There follows detailed specification of losses said to have been sustained by the employers as a result of the lack of written instructions.]

[Diamond] certified 10 September 1999 as the date when in their opinion the works had reached practical completion ... Practical completion of the works was achieved eight weeks after the completion date [16 July 1999].

In terms of Clause 3.3 of the building contract, [the contractors] are obliged to pay or allow to the employers liquidate damages at the rate of £5,000 per week between the completion date and the date of practical completion.

No application for an extension of time was made prior to practical completion being reached. Prior to practical completion being reached, [the contractors] did not notify the then contract administrator in writing that the works would not be completed by the date for completion. After practical completion, on or about 7 January

2000, [the contractors] made application for an extension of the completion date. By letter addressed to [the contractors] dated 11 January 2000, [Diamond] purportedly granted an extension of the completion date of 41 days. They did so without reference to [the employers] or their legal advisers.

Gavin Ramsay of [Diamond] had been present at a meeting on 23 November 1999 at which [the employers'] solicitor expressed the view that it was questionable as to whether, under the building contract, an application for an extension of time could competently be made after practical completion had been certified ...

In the course of an adjudication between [the employers] and [the contractors], the adjudicator held that he was bound by the extension of time purportedly granted by [Diamond]. [There follows detailed specification of losses said to have been sustained by the employers as a result of the purported grant of extension of time, for example, loss arising from delayed payment of liquidate damages]..."

[5] The employers' notice of adjudication ends with a narration of the termination of Diamond's appointment as contract administrator on 28 January 2000, and the need to engage another firm to complete the administration of the building contract, giving rise to liability for additional professional fees "occasioned as a direct and foreseeable result of [Diamond's] breaches of the parties' contract. They were occasioned by [Diamond's] repeated failures to exercise the degree of skill and care to be expected of an ordinarily competent surveyor". The redress sought by the employers included an order from the adjudicator that they were entitled to payment from Diamond of £46,187, or such other sum as the adjudicator thought proper.

[6] By referral notice dated 16 March 2001, number 6/4 of process, the employers referred the dispute to the adjudication of David H. Wilson of Wilson Associates, Glasgow. The referral notice repeated the issues summarised in the notice of adjudication number 7/2 of process.

[7] Various procedural steps then followed. In particular, Diamond, by fax dated 27 March 2001, advised Mr Wilson that in their opinion the dispute was "not a dispute under the contract but was an action for professional negligence in delict". Diamond invited Mr Wilson to resign. By fax dated 27 March 2001, Mr Wilson advised Diamond that he considered that the dispute was a dispute under the contract, and that he had the necessary jurisdiction to proceed. Diamond responded by a fax dated 30 March 2001, reiterating their position that the dispute was not a dispute under the contract, but rather an allegation of negligence. They further stated that, even if the dispute were truly a contractual dispute, it was the same or substantially the same dispute as one which had already been the subject of four previous adjudications. In either event, Mr Wilson should resign. By letter dated 13 April 2001, Mr Wilson repelled both arguments.

[8] An oral hearing before Mr Wilson took place on 19 April 2001. Evidence was led from two witnesses, Jack McKinney (for the employers) and Gavin Ramsay (for Diamond). Submissions were made by legal representatives for both the employers and Diamond. In broad terms, Diamond submitted that the adjudicator was being asked to decide disputes which were the same or substantially the same as disputes dealt with in previous adjudications; that the employers had not yet suffered loss; that the role of a contract administrator could not be described as work under a "construction contract" (and therefore the matter did not fall within the 1996 Act and could not be the subject of adjudication); that the adjudicator did not have the power to award damages; that Diamond had not failed to issue written instructions; and that Diamond had acted correctly in granting the extension of time.

Adjudicator's decision and reasons

[9] On 4 May 2001, the adjudicator issued a decision number 6/1 of process. Said decision stated inter alia:

"7.01 From the information I have received and ascertained on the matters in dispute within the timescale imposed, it is my decision that the referring party [the employers] have suffered loss as a result of breach of an implied term of the contract between the parties. It is my decision that the respondents [Diamond] have in some circumstances not exercised the degree of skill and care to be expected of an ordinarily competent surveyor. As a result the referring party are entitled to damages in respect of some, though not all, of the items claimed. A breakdown of the referring party's entitlement is included in the reasons for the decision.

Accordingly I decide that:-

The referring party is entitled to payment by the respondents of the sum of twenty nine thousand one hundred and nineteen pounds, eighty pence (£29,119.80), excluding VAT, with the due date for payment as the date of this decision and the final date for payment seven days from the date of this decision. Interest is not payable on the above amount ..."

[10] The reasons for the decision were contained in a separate document number 6/2 of process, and provided inter alia:

"1. ..The current adjudication is not concerned with a dispute which is the same as previous adjudications ...

2. As matters stand ... there is no doubt that [the employers] suffered loss.

3. ..At times [Diamond] acted as an agent, while at other times acting in a quasi-judicial manner. Both functions were, however, carried out under an agreement for professional services. A purposive approach should be taken here: a contract administrator is clearly involved in construction contracts.

4. ...the adjudicator is given authority by the statute to make an award in respect of damages, if that is the nature of the dispute before him and the appropriate redress.

5. . [Diamond], in their failure to issue appropriate instructions, have failed to exercise the degree of skill and care to be expected of an ordinarily competent surveyor. [The employers] have suffered loss as a result of breach of an implied term of the contract between the parties [as the employers had to pay the contractors the original contract price, despite having carried out less work than the contract required. The employers] are entitled to damages [as detailed]...

6. ..It is my opinion from the evidence placed before me and my reading of the building contract, that [Diamond] were not correct in granting an extension of time after practical completion had been achieved. There should have been an element of doubt in [Diamond's mind], especially after [the employers'] solicitor expressed the view to [Diamond] that it was questionable whether an extension of time could be competently made after practical completion had been certified. It is my opinion that [Diamond] should have taken advice before granting an extension of time, apparently they did not do so. As a direct result of [Diamond] issuing an extension of time when they did not have the power to do so, [the employers] have been involved in several items of additional costs ...It is my decision that [Diamond] in issuing an extension of time when they did not have the power to do so, have failed to exercise the degree of skill and care to be expected of an ordinarily competent surveyor ..."

[11] Accordingly the damages totalling £29,119.80 awarded by the adjudicator comprised the following: (a) £14,914.53 in respect of over-payments made to the contractors, arising from the lack of written instructions; (2) £4,705.27 in respect of bank overdraft costs and additional legal fees incurred as a result of an incorrect grant of extension of time; (3) £9,500 in respect of losses and costs incurred on the early termination of Diamond's contract.

Judicial review of adjudicator's decision

[12] By petition lodged in the Court of Session on 24 May 2001, Diamond sought judicial review of the adjudicator's decision, contending that:

1. The contract to administer was not a "construction contract" within the Housing Grants, Construction and Regeneration Act 1996. Mr Wilson therefore had no jurisdiction.
2. The statutory scheme did not permit the adjudicator to make an award of damages. In any event, the employers had not sustained a loss.
3. When dealing with certain aspects of the dispute, Mr Wilson failed to take into account submissions made on behalf of Diamond, and therefore failed to take into account certain material considerations.
4. In any event, Mr Wilson had failed to give intelligible reasons for rejecting Diamond's submissions.

Arguments presented on behalf of Diamond

The contract to administer was not a construction contract within the Housing Grants, Construction and Regeneration Act 1996: Mr Wilson therefore had no jurisdiction.

[13] Counsel for Diamond submitted that Mr Wilson had no jurisdiction. The letter appointing the contract administrator number 7/1 of process contained no adjudication clause. The obligatory *"adjudication by default"* provision contained in section 108(5) of the 1996 Act applied only to construction contracts, as defined by section 104 of the 1996 Act. Diamond's appointment was not a construction contract. In

particular, a contract administrator acting in terms of the letter of appointment dated 9 July 1998 number 7/1 of process was not "carrying out construction operations" within section 104(1)(a) of the 1996 Act, nor was he *"providing labour"* within section 104(1)(c). Further, in relation to section 104(1)(b), counsel submitted that the contract administrator was not *"arranging"* for others to carry out work: he was taking decisions about parties' rights under the contract, for example, by granting extensions of time, or by issuing instructions. So far as section 104(2)(a) was concerned, counsel submitted that contract administration was not *"surveying work"*. A contract administrator was the man in the middle. He had to determine parties' rights. It was wrong that such a man should have claims made against him. It was one thing for an adjudicator to order that a contractual payment should be made; it was quite another matter to have claims for damages for professional negligence being decided by an adjudicator. There was no Scottish authority supporting the latter concept, while in England, nothing of relevance had reached the Court of Appeal. A contract to administer was not therefore a construction contract within the 1996 Act, and Mr Wilson had no jurisdiction. His decision dated 4 May 2001 number 6/1 of process should be reduced.

[14] As the argument developed, counsel confirmed that Diamond was advocating severance from the rest of the contract of (a) the contract administration element of the contract: cf. dicta in **Homer Burgess Ltd. v. Chirex (Annan) Ltd.,** 2000 S.L.T. 277, at page 284E; and (b) the items in respect of which Diamond had performed a quasi-judicial role and had been held to be negligent. On a proper construction, section 104(1)(b) did not include someone acting in a quasi-judicial function. The reference to *"surveying work"* in section 104(2)(a) had to be tested against the background of section 104(1)(b). It was not appropriate to take a broad construction of section 104 so as to include contract administration. The dicta in **Fence Gate Ltd. v James Knowles Ltd.** (TCC 25/01 SF 102200, released 31 May 2001) were purely obiter. In the present case, the contract for contract administration did not fall within the definition *"construction contract"*. Accordingly the 1996 Act did not apply, and Mr Wilson had no jurisdiction.

The statutory scheme did not permit the adjudicator to make an award of damages.

[15] Counsel submitted that section 108(1) of the 1996 Act referred to "a dispute arising under the contract". The question was whether that phrase was wide enough to include awards of damages. Neither the letter of appointment dated 9 July 1998, nor the statutory scheme (the Scheme for Construction Contracts (Scotland) Regulations 1998 S.I. 1998 No.687) specifically empowered the adjudicator to make an award of damages. In Scots law, an arbiter had no power to award damages, unless such a power was expressly conferred upon him: paragraph 448 of the Stair Encyclopaedia Vol.2; **Aberdeen Ry. Co. v Blaikie Bros**. (1853) 15D. (H.L.) 20; McAlpine v Lanarkshire & Ayrshire Ry. Co. (1889) 17 R. 113. English law was different: **Heyman v Darwins Ltd.** [1942] A.C. 356, at pages 366-367. Scots law was quite clear about the lack of power of an arbiter to award damages, and the Scots statutory scheme for adjudication should be construed against that background. Paragraph 20(2)(b) of the scheme was definitive. A *"payment under the contract"* was a very different concept from damages such as were claimed in the present case. Counsel had been unable to find any authority deciding whether the adjudication scheme permitted an adjudicator to award damages. The present case was therefore of some importance to insurers of professional organisations. None of the authorities cited by counsel for the employers contained the words "*payment under the contract*". If counsel for the employers were correct, an agreement to go to adjudication which expressly excluded any power to award damages would not be Act-compliant. The statutory scheme would be obligatory (section 108(5) of the 1996 Act), and parties who had agreed that they did not want an adjudicator to have the power to award damages would be subjected to the very thing which they did not want. The adjudication scheme, with its emphasis on speedy resolution of disputes and its requirement that the adjudicator issue a decision within 28 days of the referral notice (paragraph 19 of the scheme) was not a suitable procedure within which to weigh up questions of professional negligence, potentially involving complex issues of professional behaviour, causation, and remoteness. In response to the hypothetical problem posed by counsel for the employers (viz. a professional person seeking payment of fees by means of an adjudication, yet the client wishing to question the standard of the professional's services), counsel for Diamond suggested that the adjudicator could simply decide

whether poor professional services amounted to a repudiatory breach of contract, and then refuse to make any order for payment of fees against the client (rather than having to resort to the mechanism of assessing and awarding damages against a professional).

In any event, the employers had sustained no loss.

[16] Counsel further submitted that, in any event, an award in an adjudication was merely provisional, and was subject to ultimate resolution by a court or an arbiter. Thus in the present case, the over-payment of £14,914.53 which the employers had been obliged (as a result of a previous adjudicator's ruling) to pay to the contractors might well be recoverable in the end of the day. What had been determined by the previous adjudicator was only a provisional loss. Awards in adjudications were provisional, temporary. Matters would be explored in a litigation or arbitration at the end of the day: paragraph 23.2 of the scheme. It was a fundamental principle of the law of damages that damages should be assessed once and for all: **Stevenson v Pontifex & Wood** (1887) 15R. 125. Bearing in mind that fundamental principle, it could not be said that the employers had suffered a "*loss*" of £14,914.53, entitling them to damages. Contrary to the employers' submission, Stevenson set out a fundamental principle, not a mere practice or procedural rule in the Court of Session. No difficulty of principle arose if an adjudicator were held to be unable to award damages, as Diamond contended. Difficulties of principle would arise however if an adjudicator purported to award damages. It was a wholly unsatisfactory role reversal if a party whom the adjudicator had ordained to pay damages was forced to attempt to recover these sums in a subsequent litigation.

When dealing with the question of extension of time, and the question of written instructions, Mr Wilson failed to take into account submissions made on behalf of Diamond, and therefore failed to take into account certain material considerations. In any event, Mr Wilson failed to give intelligible reasons for rejecting Diamond's arguments.

[17] Extension of time: Counsel referred to Clause 3.2 of the building contract between the employers and the contractors, number 6/7 of process. That clause was in the following terms: *"If it becomes apparent that the works will not be completed by the date for completion inserted in Clause 3.1 hereof ... for reasons beyond the control of the contractor ... then the contractor shall thereupon in writing so notify the ... contract administrator who shall make, in writing, such extension of the date for completion as may be reasonable ..."*

[18] Counsel also drew attention to some notes (number 6/3 of process) which had been used by Diamond's counsel at the oral hearing before the adjudicator on 19 April 2001. At that hearing, counsel for Diamond had referred to a textbook Chappell & Powell Smith on JCT Minor Works Form of Contract (a commentary on the English forms) at page 153, and also to the case of London Borough of Merton v Stanley Hugh Leach Ltd. (1985) 32 B.L.R. 51, especially pages 89-90. The purpose of referring to these authorities was to demonstrate that it was recognised in surveying practice that some surveyors might accept a notice requesting an extension of time even after the date of practical completion. Against that background, and under reference to **Hunter v Hanley**, 1955 S.C. 200; **Maynard v West Midlands Regional Health Authority** [1984] 1 W.L.R. 634; **Royal Brompton Hospital NHS Trust v Hammond** and others, 2001 Vol.76 Con.L.R. 148; **Watt v Lord Advocate** 1979 S.C. 120; **Homer Burgess Limited v Chirex (Annan) Limited** [2002] B.L.R. 124; **Ballast plc v The Burrell Company (Construction Management) Ltd**., 2001 S.L.T. 1039; and **Anisminic Ltd. v Foreign Compensation Commission** [1969] 2 A.C. 147 at page 171, counsel argued that the adjudicator had failed in several respects and that Diamond were entitled to have the adjudicator's decision reduced: (1) The adjudicator had made no reference to the authorities referred to at the oral hearing, or to what these authorities seemed to establish. (2) He appeared to have left out of account the material considerations raised by the authorities: otherwise he could not have reached the view that it must be professionally negligent for a surveyor to accept and grant a request for an extension of time after the date of practical completion. He had thus failed to take into account material considerations. (3) In any event the adjudicator appeared not to have addressed the correct questions for professional negligence, namely (i) was there an established practice, (ii) had Diamond departed from that practice; (iii) would no ordinarily competent surveyor acting with reasonable care and skill have done what Diamond did. (4) Further, even if the adjudicator had taken all material considerations into account

and had asked himself the right questions, his reasons (as expressed in the decision and reasons numbers 6/1 and 6/2 of process) were obscure and did not satisfy the test in **Wordie Property Co. Ltd. v Secretary of State for Scotland**, 1984 S.L.T. 345.

[19] An alternative way of looking at the adjudicator's failure to take material considerations into account was that he had failed to exhaust his remit by deciding all necessary questions: cf. **Ballast plc v The Burrell Company (Construction Management) Ltd**., 2001 S.L.T. 1039; **Anisminic Ltd. v Foreign Compensation Commission** [1969] 2 A.C. 147; the Stair Encyclopaedia, Vol.2, paragraph 481; **FD Properties Ltd. v The Lord Advocate**, 15 October 1993, Lord Penrose, unreported.

[20] Written instructions: The adjudicator also appeared to have failed to take into account certain material considerations, namely that written instructions had been issued, sometimes in the form of site minutes, and sometimes in the form of documents entitled Contract Instruction. In relation to site minutes, counsel referred to items 33 and 38 of counsel's notes number 6/3 of process, and documents numbers 6/8 and 6/9 of process respectively. The adjudicator had made no reference to these written documents, even if only to say that he did not consider them to comprise written instructions, and why he had reached that conclusion. Prima facie, the adjudicator appeared to have failed to take these material considerations into account when he decided that Diamond had failed to issue written instructions: see pages 9-10 of the reasons number 6/2 of process. The admission referred to at page 10 of the reasons had been qualified to the extent that the site minutes and contract instructions were being presented as *"written instructions"*. Counsel submitted that an employer's instruction issued in the presence of the contract administrator and recorded in the site minutes was sufficient. Counsel accepted that the facts relating to item 38 (the lining of the external wall) were less clear, but if necessary this court could grant a partial reduction.

[21] Counsel further submitted that the adjudication scheme expressly required the adjudicator to take into account parties' submissions and the law, and then to give intelligible reasons. Parliament had not intended justice to be sacrificed to speed. Where the adjudicator failed in his duties, the court could review his decision. Lord Reed in **Ballast plc v The Burrell Company (Construction Management) Ltd**., 2001 S.L.T. 1039, at page 1049C, made it clear that adjudications in Scotland could be judicially reviewed. **R. v Hull University Visitor, ex parte Page** [1993] A.C. 682, cited by counsel for the employers, was distinguishable in that the court's decision in that case was not restricted by the express obligations imposed on adjudicators by the adjudication scheme. Counsel accepted that a jurisprudence relating to judicial review of adjudications might develop north of the border in a way very different from developments south of the border, but pointed out that since West v Secretary of State for Scotland, 1992 S.C. 385, at page 413, the public element (still a prerequisite in English judicial review) was no longer a prerequisite in Scotland.

[22] Counsel reiterated that the adjudicator had clearly not applied the full rigour of the Hunter v Hanley test for professional negligence. Although prima facie the adjudicator had used correct professional negligence terminology, it was far from clear that he had properly understood and applied the test for professional negligence. Accordingly it was far from clear that he had acted within his jurisdiction. In particular, the case of **London Borough of Merton v Stanley Hugh Leach Ltd**., cit. sup., demonstrated that it was possible for an ordinarily competent surveyor exercising reasonable care and skill to grant a late extension of time.

Arguments presented on behalf of the employers

Whether a construction contract

[23] Counsel for the employers submitted that Diamond's letter of appointment dated 9 July 1998 number 7/1 of process was a construction contract. It mattered not whether Diamond's approach was based on the contract as a whole (as appeared to be the case from the wording of the petition) or whether they were now refining their argument by suggesting that the contract administration element of the contract fell to be severed in terms of section 104(5). On either view, the contract was a construction contract.

[24] Counsel referred to the functions set out in the appointment letter dated 9 July 1998, and submitted that the contract fell within sections 104(1)(b) and 105. The contract was governed by a scale of fees

relating to building and surveying services. It was an agreement that Diamond should arrange for the carrying out of construction operations by others. It included contract administration work such as issuing instructions and variations, and dealing with applications for payment. The contract was a construction contract without the need for the extension provided by section 104(2). But if one looked at the contract in the context of section 104(2), the contract plainly dealt with "surveying work", to be charged on a scale of fees relating to building surveying services. Surveyors undertook the type of work known as contract administration, as did architects and engineers. Even if the contract administration element was severed from the rest, again, the scale of fees applied. "*Administering the contract*" was part of the function of arranging for others to do works. "*Arranging*" covered a broad range of activities, including securing the proper administration of the contract with efficient organisation and time-tabling of the work, and ensuring that payments were made so that work would continue. Thus even if the severance approach were to be adopted, the severed portion (contract administration) would still qualify as a construction contract, as would the remaining part of the contract.

[25] The work specified in the appointment letter was also surveying work within section 104(2). The activity envisaged was of a kind which surveyors did.

[26] It was wrong to suggest that the adjudication scheme was not intended to include professionals such as surveyors acting as contract administrators. The purpose of the adjudication scheme was to maintain progress under contracts, and to keep cash flowing. A contract administrator's remit encompassed both elements. It was irrelevant that the contract administrator was the "man in the middle" who made decisions about parties' rights under the contract. Resolution of the type of dispute which could arise (for example, an architect wishing the contract administrator to issue a certificate, and an employer objecting to the issue of a certificate) was fundamental to maintaining progress and keeping cash flowing. That was just the sort of subject-matter envisaged for the adjudication scheme. While there was little authority on the question of professionals and adjudication, His Honour Judge Gilliland Q.C. of the Technology and Construction Court in the case of **Fence Gate Ltd. v James R. Knowles Ltd**. (TCC 25/01 SF 102200, released 31 May 2001) at paragraphs 2,3,6,7,11, and 12 envisaged adjudication in the context of contract administration work, and did not suggest that a professional person undertaking contract administration should be excluded from such adjudications. Further, if a professional person could go to adjudication to recover fees, a defence based upon professional negligence and breach of contract must logically be subject to adjudication. The adjudication scheme was intended to cover the whole range of persons involved, from sub-sub-contractor to employer to the professional team, in order that disputes could be resolved on an interim basis to allow the contract to proceed.

Whether an adjudicator has power to award damages

[27] Counsel for the employers submitted that an adjudicator has power to award damages. The Scottish rule that arbiters do not have power to award damages had been much criticised. It was a domestic rule, existing in Scots law only, as English arbiters had power to award damages. This much-criticised, domestic Scots law rule should not be extended to the new statutory adjudication scheme. It had not been parliament's intention to fetter the new scheme in such a way. If the Scots rule were to be so extended, there would be unfortunate consequences, such as variations in the UK-wide adjudication scheme, depending upon whether one was north or south of the border. There would also be duplications of litigations - if, for example, one contracting party who happened to be a professional person went to adjudication for payment of his fees, and the other contracting party wished to complain of the professional's negligence and breach of contract.

[28] Counsel cited **Bouygues (UK) Ltd. v Dahl Jensen (UK) Ltd.,** C.A. [2000] B.L.R. 522, as an example of a claim for damages being entertained in an English adjudication.

[29] Counsel then submitted that the words in section 108(1) - *" the right to refer a dispute arising under the contract"* - were broad and all-encompassing. The Scottish regulations S.I.1998 No.687 were similarly broad, referring in paragraph 1 to "any dispute arising under the contract". A breach of contract was a dispute arising under the contract: cf. **Heyman v Darwins Ltd**. [1942] A.C. 356, at page 366 (foot);

Photo Production Ltd. v Securicor Transport Ltd. [1980] A.C. 827, Lord Wilberforce at pages 844A-B, 845A-B; **Lloyds Bank plc v Bamberger**, 1993 S.C. 570, at page 573; **Compagnie Commercial Andre S.A. v Artibell Shipping Co. Ltd.,** 1999 S.L.T. 1051, at pages 1061K-1062I. It was therefore not correct to say that an adjudicator could not award damages.

[30] Counsel for the employers then raised a possible argument which might be said to be against him, only to dismiss it. The argument was as follows: as an adjudicator's decision could be re-written at arbitration, and as an arbiter had no power to award damages, therefore it must follow that an adjudicator could not have the power to award damages. However counsel submitted that this argument was not sound. Parties could have recourse to an arbitration or to a court in the end of the day. Also the argument would have little weight where a contract had expressly given power to award damages.

[31] In relation to the terms of paragraph 20(2)(b) of the Scottish adjudication regulations (S.I. 1998 No.687), counsel contended that the list in paragraph 20(2) (prefaced by the words "*and, in particular, he may*") was not exhaustive. In any event, "payment under the contract" could mean damages arising under the contract: **Heyman v Darwins Ltd**. [1942] A.C. 356, and the additional authorities above cited. To give the adjudication scheme and paragraph 20 a more restricted meaning as contended by Diamond would hamper the operation of the scheme, and would result in fragmentation of claims and tactical behaviour. Professionals would go to adjudication to recover fees, knowing that the other party could not defend on the basis of poor professional conduct. Disputes involving demands for payment and notices to withhold payment could not be determined. Such consequences could not have been intended by parliament.

In any event, no loss had been suffered

[32] Counsel then turned to Diamond's argument that, in any event, any disbursements made by the employers had been merely provisional, and that the employers' position was protected by the potential for repayment with interest in any ultimate court proceedings or arbitration. Counsel submitted that such an argument was ill-founded. The employers had been obliged to pay £14,914.53 in compliance with the adjudication awards. They had incurred further losses, costs and fees. The employers might go bankrupt, or into liquidation, before managing to recover those sums. Alternatively, for purely company policy reasons, there might be a decision not to attempt to recover the sums. A loss had therefore truly been suffered. The sums lost (or part) might, or might not, ultimately be recoverable. Diamond could not place reliance upon the provisional nature of the loss. The whole adjudication scheme was provisional in one sense, yet the adjudicator's decisions were binding upon the parties until ultimate court or arbitration proceedings: cf. **Bouygues (UK) Limited v Dahl Jensen (UK) Limited,** cit. sup., paragraph 3.

[33] Counsel submitted that the case of **Stevenson v Pontifex & Wood** (1887) 15R. 125 (assessment of damages must be once and for all) merely set out a rule of practice in the Court of Session. But legislation had adopted a different approach, and in terms of paragraph 13 of the scheme, an adjudicator was master of his own procedure. The court in Stevenson had not foreseen the existence of a statutory adjudication scheme with the feature of ultimate review by a court or arbiter. The adjudication legislation superimposed new rules. A dramatic example could be found in **Bouygues,** where all parties were agreed that the adjudicator's calculations were wrong, but, as the adjudicator had been asked the right question, his award could not be reduced, and the matter had to await resolution by a court or an arbiter at the end of the day.

Whether, when dealing with the issues of extension of time and written instructions, the adjudicator had failed to take into account Diamond's submissions, or had failed to give intelligible reasons for rejecting those submissions

[34] Counsel for the employers submitted that the whole purpose of the scheme was to provide a speedy mechanism for the resolution of disputes on a provisional interim basis: **Ballast plc v The Burrell Company (Construction Management) Ltd.,** 2001 S.L.T. 1039, at pages 1047-1048. The adjudicator's determinations were not to be attacked on grounds of error of law, error of fact, or procedural error: cf. **Macob Civil Engineering Ltd. v Morrison Construction Ltd**. [1999] B.L.R. 93; **Bouygues (UK) Ltd.**

v Dahl Jensen (UK) Ltd. [2000] B.L.R. 522; **Sherwood & Casson Ltd. v Mackenzie** (2000) 2 T.C.L.R. 418. The fact that any dispute could be referred to the adjudicator to be dealt with within 28 days of the referral notice meant that mistakes were inevitable: cf. dicta in **Sherwood, Macob, and Bouygues (UK) Ltd.** Procedural defects were capable of being reviewed only if they were sufficiently serious to invalidate the adjudication: cf. Lord Reed at page 1050A-B in **Ballast plc v The Burrell Company (Construction Management) Ltd.,** cit. sup.; and Lord Macfadyen in **Homer Burgess Ltd. v Chirex (Annan) Ltd.**, 2000 S.L.T. 277. Thus even if the adjudicator had erred in his application of the test in **Hunter v Hanley**, or had erred in his approach to the facts, his decision could not be challenged.

[35] Counsel submitted that such an approach was necessary to protect the viability of the adjudication scheme. It was obviously impossible for a lay adjudicator to deal with a construction dispute of some size and complexity within the 28-day time limit, and to produce a decision which would withstand scrutiny in the Inner House. There had to be some sacrifice of right answers and procedural propriety in order to achieve an instant, practical decision, with parties' rights and obligations ultimately reviewable by a court or arbiter. Matters might be different in the case of an error of law which went to jurisdiction; or a failure to consider relevant material ; or a clear breach of natural justice. In **SL Timber Systems Ltd. v Carillion Construction Limited** [2001] B.L.R. 516, Lord Macfadyen analysed types of error and contrasted a jurisdictional error (for example, the adjudicator's failure to exhaust the dispute referred to him) and an error which was within the scope of his jurisdiction (for example, by reaching the wrong answer to the first part of a question, such that he did not answer the second part). The latter type of error was not reducible. The question put to the adjudicator in the notice of adjudication number 7/2 of process was: *"[The employers submit] that they have suffered losses by virtue of [Diamond's] breaches of the terms of the parties' contract, as follows [specification of alleged breaches and losses]"*. The adjudicator had addressed that question, even if he misapplied the test in Hunter v Hanley, omitted arguments, or misunderstood arguments in his endeavour to answer the question. He had not fallen into the category of fundamental error envisaged by Lord Reed. If Diamond were correct in their contentions, and adjudicators' decisions were open to "*Wordie*" scrutiny, then the inviolability of adjudicators would be breached. Accordingly, only fundamental errors of the nature outlined by Lord Reed in paragraphs [35] and [39] of **Ballast plc v The Burrell Company (Construction Management) Ltd**., cit. sup., were reviewable: cf. the approach adopted by the majority of their Lordships in **Regina v Hull University Visitor, ex parte Page** [1993] A.C. 682, at pages 693A-702, 704 B-C; and cf. the approach adopted in **Watson Building Services Ltd. v Harrison**, 2001 S.L.T. 846, at page 853I.

[36] Counsel submitted that it should also be noted that in England it was not possible to seek judicial review of an adjudicator's decision. Scots law allowed judicial review in respect of the sort of fundamental procedural errors envisaged by Lord Reed and Lord Macfadyen, but the category of possibly reviewable decisions had to be strictly adhered to, otherwise the UK-wide adjudication procedure would be treated differently north and south of the border. Also the whole aim and purpose of the adjudication scheme would be undermined.

[37] If, contrary to counsel's primary submission, it were held to be necessary to ascertain whether the adjudicator's decisions had been right or wrong, counsel submitted that, in relation to the grant of extension of time, the adjudicator had in fact taken account of Diamond's submission. In the adjudicator's reasons, number 6/2 of process, at page 11 under the heading *"Extension of Time/Entitlement to LADs/Additional Professional Fees"*, and under the sub-heading "Respondents' Position", the adjudicator had narrated Diamond's contention that they had "acted correctly in granting an extension of time." Also in Appendix A to the reasons could be found "List of Documents received from the Parties and taken into consideration in reaching my decision". That list included, as item 16: *"Information handed over at the oral hearing on 19 April 2001 from both parties including copies of court decisions etc."* That information included photocopies of **Chappell & Powell Smith, and London Borough of Merton v Stanley Hugh Leach** cit. sup. - although not, it was thought, a photocopy of **Hunter v Hanley**, 1955 S.C. 200, despite the adjudicator having been addressed on that case. So the adjudicator recorded that he had taken Diamond's submissions and supporting materials into consideration. He had then rejected these submissions, rightly or wrongly. In his reasons number 6/2

of process at page 12, he stated: *"It is my opinion from the evidence placed before me and my reading of the building contract that [Diamond] were not correct in granting an extension of time after practical completion had been achieved"*. It was submitted that the word "*evidence*" was used loosely to embrace not only oral testimony at the hearing (i.e evidence from a witness for the employers, and a witness for Diamond) but also the information placed before the adjudicator, including the authorities referred to.

[38] Counsel further submitted that the adjudicator, although not provided with a copy of **Hunter v Hanley**, appeared at page 13 of the reasons to have applied the correct standard when he held: *"It is my decision that [Diamond] in issuing an extension of time when they did not have the power to do so, have failed to exercise the degree of skill and care to be expected of an ordinarily competent surveyor."* His view was that the extension of time granted was incompetent. Diamond had been on notice that it was questionable whether they could grant an extension of time after practical completion. They should therefore have taken legal advice. They did not. The decisions of previous adjudicators had not been favourable to Diamond. The wording of Clause 3.2 of the SBCC contract number 6/7 of process, and in particular the use of the future tense in the phrase *"If it becomes apparent that the works will [italics added] not be completed by the date for completion ..."*, indicated that the application for an extension of time had to be made before the date of completion. Diamond's request for an extension of time had been made after completion (not merely practical completion). It had been somewhat inept to allow the extension. The passages in Chappell & Powell Smith at page 153 appeared to contain internal contradictions, as did the illustrative flow-charts. These passages and charts could not amount to a material consideration.

[39] Counsel conceded that the question whether an incompetent extension of time amounted to a breach of the contractual duty to exercise reasonable care and skill in terms of Hunter v Hanley was another question. Nevertheless, even if the adjudicator had erred on that question, either in law or in fact, his error was not one which was reviewable.

[40] Counsel further submitted that the adjudicator had given a clear and intelligible reason for his decision that Diamond had failed to show the standard of skill and care to be expected of an ordinarily competent surveyor exercising reasonable care and skill. His reason was that Diamond had issued an incompetent extension of time. Whether the adjudicator was right or wrong was nothing to the point.

[41] In relation to the alleged failure to give written instructions, counsel reminded the court that his submissions on this matter were again purely on an esto basis - i.e. esto, contrary to his primary submissions, it were held necessary to ascertain whether the adjudicator's decisions had been right or wrong. The adjudicator in his reasons number 6/2 of process recorded an admission by Diamond that written instructions had not been given. If the documentary evidence contradicted that admission to any extent, the adjudicator had been faced with a conflict in evidence. He had then preferred one version to another. He was entitled to do so. However if one went further, one could examine the items complained of - items 33, 34 and 38 of the referral notice number 6/4 of process. Item 33 concerned the hanging of wallpaper. Diamond's position was that written instructions had taken the form of minutes of site meetings, and reference had been made to minutes of a meeting on 3 August 1999 number 6/9 of process. However, if one referred to paragraph 3.01 of those minutes, one found no record of instructions from the contract administrator, but only an instruction or request from the employers. But it was not the employers' function to issue instructions, it was the contract administrator's. Item 38 was concerned with the lining of the external wall. Diamond had referred to a document number 6/8 of process, headed "Contract Instruction", issued in June 1999. However that document referred to strapping and lining "blockwork walls within display room area", which did not seem relevant to external walling. The adjudicator therefore had information and documents tending to support the view which he had reached. As for giving intelligible reasons, the adjudicator had explained that he had accepted evidence that written instructions had not been given in relation to the items complained of. Even if he were wrong so to decide, his decision was not reviewable.

Opinion "Construction contract"

[42] Section 104(1) of the Housing Grants, Construction and Regeneration Act 1996 provides inter alia: *"In this Part a "construction contract" means an agreement with a person for any of the following - ... (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise ..."*

[43] Section 104(2) provides inter alia: *"References in this Part to a construction contract includes an agreement - to do architectural, design or surveying work ... in relation to construction operations ..."*

[44] Diamond's terms of appointment as contained in the letter dated 9 July 1998 number 7/1 of process detailed functions including ascertaining site dimensions, drawing up plans, obtaining statutory consents, advising about other consultations, drafting schemes, preparing specifications, trade preambles and drawings, preparing a pre-tender budget, seeking tenders, assessing tenders, making a tender report, having a pre-contract meeting, programming the works, monitoring the works, visiting the sites, liaising with parties, administering the works, having responsibility for financial control, preparing evaluations of work done, issuing certificates including a certificate of practical completion, dealing with outstanding works, carrying out a final inspection, and deciding on the release of retentions. The services rendered were to be charged according to the Building Surveying Services Building Works Scale Fee 10% in the RICS Scale of Charges for Building Surveying Services.

[45] In my view, even if the contract administration services were to be severed from the other services undertaken by Diamond, those contract administration services amounted to *"arranging for the carrying out of construction operations by others, whether under sub-contract ... or otherwise"*, in terms of section 104(1)(b) of the 1996 Act. *"To arrange"* is defined in the Oxford English Dictionary as meaning *"2. To put ... into proper or requisite order ...5. To settle (relations between parties, conflicting claims, matters in dispute, differences) ... 6. To come to an agreement or understanding as to mutual relations, claims, matters in dispute; 7. To settle the order, manner, and circumstantial relations of (a thing to be done); to plan beforehand"*. I consider that it is of the essence of a contract administrator's function that he "arranges" for the carrying out of the construction operations by means of advising on consultations required, orchestrating tenders, programming, certifying, and controlling finances. Without these measures, the construction operations would not be carried out - or would not be carried out in a satisfactory way.

[46] I am therefore satisfied that the contract between the employers and Diamond, whether viewed as a whole, or viewed solely as the contract administration part (severed), was a construction contract within section 104(1)(b).

[47] In any event, I accept the employers' counsel's further contention that Diamond, by undertaking to carry out contract administration services, were entering into an agreement *"to do ... surveying work ... in relation to construction operations"*. Working as a contract administrator is something which surveyors do, as part of their professional life. The work was to be paid for in terms of the Building Surveying Services Building Works Scale Fee 10% in the RICS Scale of Charges for Building Surveying Services. In my view therefore, Diamond's contract administration services also qualify as surveying work in terms of section 104(2), and therefore the contract is a construction contract.

[48] I am fortified in the view which I have reached by the observations of His Honour Judge Gilliland, Q.C., in **Fence Gate Ltd. v James Knowles Ltd**., 31 May 2001, at paragraphs 2,3,6,7,11, and 12.

Adjudicator's power to award damages

[49] I accept that it is well-settled in Scotland that an arbiter does not have the power to award damages, unless the parties have expressly empowered him to do so in terms of their remit to him: cf. the Stair Encyclopaedia, Volume 2, paragraph 448; **Aberdeen Ry Co. v Blaikie Bros**. (1852) 15 D. (H.L.) 20; **McAlpine v Lanarkshire & Ayrshire Ry. Co.** (1889) 17 R. 113. By contrast, arbiters in England are able to award damages: cf. dicta in **Heyman v Darwins Ltd**. [1942] A.C. 356, at page 366.

[50] Nevertheless, parliament has by legislation introduced a new adjudication scheme applicable to the whole of the United Kingdom, with a view to providing a relatively prompt provisional resolution of the many disputes and differences which can arise in the course of construction works (see **Macob Civil Engineering Ltd. v Morrison Construction Ltd.** [1999] B.L.R. 93, paragraphs [14] and [19]; **Karl Construction (Scotland) Ltd. v Sweeney Civil Engineering (Scotland) Ltd**., 2001 S.C.L.R. 95, paragraphs [17] and [19]). I therefore consider that the statutory provisions should be taken to mean

what they say, unless there is good reason to conclude otherwise. I agree with counsel for the employers that the court should be slow to import into a United Kingdom statutory scheme certain Scottish common law rules relating to the quite separate system of arbitration, a fortiori if a common law rule has been the subject of some criticism and would result in different approaches to adjudication north and south of the border.

[51] Section 108(1) provides:
"*A party to a construction contract has the right to refer a dispute arising under the contract for adjudication ...*".

[52] The Scottish Scheme as set out in S.I.1998 No.687 provides:
"1(1) Any party to a construction contract ("the referring party") may give written notice ("the notice of adjudication") of his intention to refer any dispute arising under the contract to adjudication ...
20(1) The adjudicator shall decide the matters in dispute and may make a decision on different aspects of the dispute at different times.
(2) The adjudicator may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute, and in particular he may -
... (b) decide that any of the parties to the dispute is liable to make a payment under the contract (whether in sterling or in some other currency) and, subject to section 111(4) of the Act, when that payment is due and the final date for payment ..."

[53] The wording of both the 1996 Act and the statutory instrument is quite general: *"a dispute arising under the contract ... any dispute arising under the contract ... shall decide the matters in dispute and may make a decision on different aspects of the dispute at different times"*. Such wording alone, in my view, would entitle an adjudicator to make a finding of damages due, and to award or set off such damages, if a claim for damages formed part of the dispute referred to him. Further, the wording of paragraph 20(2) of S.I. 1998 No.687 is not exhaustive, and accordingly even if one took the view that damages could not be regarded as "*a payment under the contract*" (paragraph 20(2)(b)), I do not consider that paragraph 20(2), properly construed, means that an adjudicator cannot award damages. In any event, I agree with counsel for the employers that authorities such as **Heyman v Darwins Ltd**. [1942] A.C. 356, at page 366 (foot); **Photo Production v Securicor** [1980] A.C. 827, Lord Wilberforce at pages 844A, 845; **Lloyds Bank v Bamburger**, 1993 S.C. 570, at page 573; and **Compagnie Commercial Andre S.A. v Artibell Shipping Co. Ltd.**, 1999 S.L.T. 1051, at pages 1061K-1062B, and page 1063 I, tend to support the argument that the adjudication scheme extends to awards of damages arising as a result of breach of a construction contract. I am therefore satisfied that the statutory scheme entitles an adjudicator to make findings that damages are due, and to make awards (or to set off) sums in name of damages.

[54] I find support for such a conclusion in several sources. Firstly, in England, adjudicators can and do award damages: see, for example, **Bouygues (UK) Ltd. v Dahl Jensen (UK) Ltd.**, Court of Appeal, [2000] B.L.R. 522. Secondly, the construction industry in Scotland appears to envisage and accept as appropriate the possibility that an adjudicator might award damages: see, for example, the form of SBCC Scottish Minor Works Contract (April 1998 revision) between employer and contractor number 6/7 of process, and in particular clause 10A.6.5.10. While that clause is not relevant in the present dispute, it does perhaps illustrate that the Scottish construction industry regards adjudicators as properly able to assess and award damages. Thirdly, the conclusion reached avoids the unacceptable situation which might arise were one contracting party to go to adjudication to achieve payment of a sum due to him under the contract (for example, a contract instalment for work done, or a professional fee), and the person prima facie liable to pay the sum due was unable properly to advance a defence that the sum claimed should not be paid (or paid in full) as there had been breaches of contract on the part of the claimant entitling the other party to damages, retention or set-off.

Argument that employers had suffered no loss

[55] As a result of what was perceived to be Diamond's failure to issue written instructions, an adjudicator acting in one of the five previous adjudications between the employers and the contractors felt obliged to hold the employers liable to pay the full contract price in respect of certain items of work, despite

the fact that the work actually executed by the contractors was of a lesser quantity and value than that specified in the contract. The employers were then obliged to pay the contractors accordingly: see paragraph 23(2) of the adjudication scheme. Further, following upon Diamond's grant of an extension of time, the employers were unable (until the extension was ruled wrong by Mr Wilson) to recover liquidate damages from the contractors. As a result, the employers incurred bank overdraft costs and additional legal fees. The employers' resources were therefore depleted, both by having to make over-payments in respect of certain items of work, and by having to incur unexpected overdraft costs and legal fees. In other words, the employers suffered losses.

[56] Whether or not the employers may ultimately recover some or all of those losses in court proceedings or in an arbitration at the end of all the construction work is something which cannot be predicted or guaranteed. Many factors might result in non-recovery: for example, the contractors' insolvency, or a change of policy on the part of the employers' board of directors resulting in a decision not to attempt to pursue the matter further. I consider therefore that the employers suffered a loss or losses as soon as the over-payments were made, and as soon as the bank overdraft costs and additional legal fees were incurred.

[57] Diamond contended that it is a fundamental principle that damages should be assessed once and for all (**Stevenson v Pontifex & Wood** (1887) 15R. 125), and therefore that the adjudicator's award, being merely provisional, could not properly be regarded as a loss. The employers argued that the *"once and for all"* assessment of damages was simply a Court of Session procedural rule. In any event, the adjudicator's award had to be complied with. The employers had been obliged to make payments as ordered.

[58] In my view, parliament has the power to make exceptions and qualifications to any general principle, including the fundamental rule in damages referred to by Diamond's counsel. I consider the adjudication scheme set up by the Housing Grants, Construction and Regeneration Act 1996 to be an example of a statutory exception to or qualification of the general principle.

[59] In any event, even if one were to apply the common law principle embodied in Stevenson, that principle dictates that the decision-maker must assess any loss on the basis of information currently available, making reasonable predictions and allowances for future developments. The decision-maker should then award a certain sum in damages. Subsequent events may prove that sum inappropriate in some way (too low, too high, or reflecting an apparent loss which later "*disappeared*" as a result of ensuing events): but that is irrelevant when applying the principle in Stevenson. Accordingly, in the present case, the known fact is that the employers had, at the time of the adjudicator's deliberations, suffered a loss or losses. Even applying the principle embodied in Stevenson, it is at least arguable that it would be impossible at that stage to predict whether or not the employers might succeed in making good some of their losses in future. Accordingly the adjudicator was in my view quite entitled to take the view that the employers had suffered losses, and to assess these losses as they stood at the date of his decision.

[60] I am therefore of the view that the employers suffered loss on making the over-payments and on incurring the bank overdraft and additional legal fees.

Adjudicator's decision in relation to extension of time and written instructions

[61] Parliament created the adjudication scheme in order to provide *"a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement ..."* (Dyson J. in **Macob Civil Engineering Ltd. v Morrison Construction Ltd.** [1999] B.L.R. 93, at paragraph [14]). As Lord Caplan observed in **Karl Construction (Scotland) Ltd. v Sweeney Civil Engineering (Scotland) Ltd**., 2001 S.C.L.R. 95, at paragraph [19]:

"...The objective is to get a practical provisional decision in proceedings where the parties are likely to have commercial considerations in mind, rather than to have a concern for extensive legal analysis ... in the background is the fact that any resolution of the dispute in the adjudication is only a provisional result to deter stalemate but that errors can eventually be corrected."

[62] Further guidance can be found in **Sherwood & Casson Ltd. v. Mackenzie** (2000) 2 T.C.L.R. 418 (H.H. Judge Thornton Q.C.):

"i. A decision of an adjudicator whose validity is challenged as to its factual or legal conclusions or as to procedural error remains a decision that is both enforceable and should be enforced.

ii. A decision that is erroneous even if the error is disclosed by the reasons, will still not ordinarily be capable of being challenged and should, ordinarily, still be enforced.

iii. A decision may be challenged on the ground that the adjudicator was not empowered by the Act to make the decision, because there was no underlying construction contract between the parties or because he had gone outside his terms of reference.

iv. The adjudication is intended to be a speedy process in which mistakes will inevitably occur. Thus, the court should guard against characterising a mistaken answer to an issue, which is within an adjudicator's jurisdiction, as being an excess of jurisdiction. Furthermore, the court should give a fair, natural and sensible interpretation to the decision in the light of the disputes that are the subject of the reference.

v. An issue as to whether a construction contract ever came in to existence, which is one challenging the jurisdiction of the adjudicator, so long as it is reasonably and clearly raised, must be determined by the court on the balance of probabilities with, if necessary, oral and documentary evidence."

[63] Counsel for the employers advised the court that, in England, it is simply not open to parties to seek judicial review of adjudication proceedings. In Scotland, however, applications for judicial review of adjudications had been entertained: see for example Lord Macfadyen in **Homer Burgess Ltd v Chirex (Annan) Ltd.,** 2000 S.L.T. 277. Nevertheless, as counsel submitted, it is a rare case in which parties can properly invoke the supervisory jurisdiction of the Court of Session in adjudication matters. The rarity of such cases has been emphasised by Lord Reed in **Ballast plc v The Burrell Company (Construction Management) Ltd.,** 2001 S.L.T. 1039, at paragraph [39]:

"Balancing the various considerations to which I have referred, I have come to the conclusion that the scheme should be interpreted as requiring the parties to comply with an adjudicator's decision, notwithstanding his failure to comply with the express or implied requirements of the scheme, unless the decision is a nullity; and it will be a nullity if the adjudicator has acted ultra vires (using that expression in a broad sense to cover the various types of error or impropriety which can vitiate a decision), for example because he had no jurisdiction to determine the dispute referred to him, or because he acted unfairly in the procedure which he followed, or because he erred in law in a manner which resulted in his failing to exercise his jurisdiction or acting beyond his jurisdiction."

[64] Against that background, there is in my view much to be said for a policy that decisions of adjudicators acting under the 1996 Act should not be challengeable by way of judicial review. If adjudicators' decisions are open to challenge in court by way of judicial review, the whole purpose of the adjudication scheme could be undermined. The fact that disputes and grievances can be explored, and if necessary errors put right, in a subsequent litigation or arbitration in terms of section 108(3) of the 1996 Act and paragraph 23(2) of the scheme, in my view places an adjudicator acting under the 1996 Act in a rather special category, and certainly in a different category from many other decision-makers: cf. observations in **Watson Building Services Ltd. v Harrison**, 2001 S.L.T. 846, at page 853I-J.

[65] Nevertheless, assuming that, in Scotland, judicial review of adjudicators' decisions is to be permitted, and applying the guidance provided by Lord Macfadyen in **Homer Burgess Ltd. v Chirex (Annan) Ltd**., 2000 S.L.T. 277, and **SL Timber Systems Limited v Carillion Construction Limited** [2001] B.L.R. 516 (quoted below), and by Lord Reed in **Ballast plc v The Burrell Company (Construction Management) Ltd**., 2001 S.L.T. 1039, it is my view that the present case does not fall into a reviewable category.

[66] I have reached that conclusion for several reasons:

Adjudicator entitled to form a view about allegations of professional negligence

[67] In my view there is nothing in the 1996 Act, or the adjudication scheme (S.I. 1998 No.687), or in precedent or principle, to suggest that an adjudicator seeking to resolve a dispute arising under a construction contract is not entitled to reach conclusions about the manner in which a professional person has carried out his or her duties in the course of the construction contract - and that includes

conclusions as to whether there might have been any professional negligence. In a construction contract providing for the services of a professional, such as an architect, it is usually an implied term that the professional will act with the care and skill to be expected of an ordinarily competent professional in that field acting with reasonable care and skill. A failure to achieve that standard may, in certain circumstances, amount to professional negligence, always providing that the test in Hunter v Hanley, 1955 S.C. 200, is satisfied. Such professional negligence may in turn constitute breach of contract. Accordingly in the present case, a question such as the question referred to Mr Wilson prima facie invited the adjudicator to consider inter alia any alleged failure on the part of Diamond to act with the care and skill to be expected of an ordinarily competent surveyor/contract administrator acting with reasonable care and skill.

[68] Some support for this conclusion can be found in **Fence Gate Limited v James R. Knowles Limited** (TCC 25/01 SF 102200, released 31 May 2001). In that case, H.H. Judge Gilliland Q.C. does not suggest that a professional person could not be the subject of an adjudication referral.

[69] While therefore, it may on one view seem startling that a professional person acting as an adjudicator should be invited to rule within 28 days on the important and often difficult and delicate question as to whether a fellow-professional has failed in his or her duty to such an extent that there has been professional negligence, yet it seems that a proper construction of the statutory language setting up the *"exceptional and summary"* adjudication procedure (to quote the words of Buxton L.J. in **Bouygues (UK) Ltd**.) permits this very result - although importantly, a "provisional interim" result (**Macob Civil Engineering Ltd. v Morrison Construction Ltd.** [1999] B.L.R. 93).

[70] If parliament wishes to exempt professional persons from the adjudication scheme, further legislation may in my view be necessary.

No failure to take into account relevant material

[71] In this case, I am not persuaded that the adjudicator failed to take into account relevant material submitted to him by the parties (including the authorities cited by counsel for Diamond) such that his decision could properly be termed invalid or a nullity. Indeed the adjudicator expressly referred to *"Information handed over at the oral hearing on 19 April 2001 from both parties, including copies of court decisions etc.":* see the appendix to his reasons number 6/2 of process. I do not accept that the adjudicator could only have reached the conclusions he did had he failed to take certain submissions and the authorities into account. In my view, the adjudicator appears to have taken into account all the material considerations placed before him, including submissions relating to the test for professional negligence: see, for example, his references to "the degree of skill and care to be expected of an ordinarily competent surveyor". Nevertheless he may have fallen into error in his analysis of the material considerations, and in particular in his application of the law relating to professional negligence: see paragraphs [77] et seq. below.

Provided that the adjudicator's decision is intra vires, it is irrelevant that the decision (or part of it) may be wrong

[72] The only question with which this court is concerned is whether the adjudicator has acted ultra vires, resulting in a decision which is a nullity in the sense outlined **in Ballast plc v The Burrell Company (Construction Management) Ltd**., 2001 S.L.T. 1039; cf. principles (ii) and (iv) in **Sherwood & Casson Ltd. v Mackenzie** (2000) 2 T.C.L.R. 418 (noted above).

[73] The limits of the court's powers when considering the correctness or otherwise of an adjudicator's decision were further emphasised by Lord Macfadyen in **SL Timber Systems Limited v Carillion Construction Limited** [2001] B.L.R. 516, at page 523, at paragraphs 18 and 23, as follows:

> *"[18] ... Errors of fact or law on the part of the adjudicator will not afford ground for refusal of enforcement [of the adjudicator's decision], unless the error was of such a nature that the adjudicator's decision was, as a result, one which he had no jurisdiction to make (**Watson Building Services Limited** per Lady Paton at paragraphs [21] to [24]; **Homer Burgess Limited v Chirex (Annan) Limited** [2000] B.L.R. 124 at 284] to 285D; **Macob Civil Engineering Limited v Morrison Construction Limited** [1999] B.L.R. 93 per Dyson J. at paragraph [19]; **Northern Developments (Construction) Limited** per His Honour Judge Bowsher Q.C. at paragraph 24). The issues which require to be addressed in dealing with this*

*aspect of the present case are accordingly (1) whether the adjudicator did fall into error, and if so (2) whether his error resulted in his acting outwith the proper scope of his jurisdiction... [*His Lordship identified an error, and continued*]*

[23] The issue which remains for consideration is whether the nature of that error was such that the adjudicator must be regarded as having made a decision that he had no jurisdiction to make. I have come to the conclusion that the adjudicator's error did not take him out of the proper scope of his jurisdiction ... The adjudicator was asked to determine whether the defenders had failed to give timeous notice of intention to withhold payment. He answered that question in the affirmative. The question which then arose for his consideration was whether, in that event, the defenders were obliged to pay the sums claimed. He addressed that question, and answered it too in the affirmative. His reason for giving that answer to that part of the issue before him lay in the view he took of the effect of section 111, a view which I have held to be erroneous. But that was an erroneous answer which he gave after asking himself the right question, in the sense of the question referred to him for decision. It was the answer that was wrong, not the question. If he had taken what I hold to be the correct view of the effect of section 111, he would have gone on to consider whether the sums claimed were contractually due. But the fact that he did not reach that stage because he took an erroneous view of the prior question does not, in my opinion, amount to an error as to the scope of his jurisdiction. I am therefore of opinion that the adjudicator made an intra vires error rather than one which rendered his decision ultra vires. His decision was wrong, but not in such a way as to be invalid and reducible."

[74] A similar example of an intra vires error, cited by counsel for the employers, can be found in **Bouygues (UK) Limited v Dahl Jensen (UK) Limited** [2000] B.L.R. 522, where all parties agreed that the adjudicator's calculations were wrong, but the Court of Appeal held that his decision must nevertheless stand until explored in a subsequent litigation or arbitration in terms of section 108(3) of the 1996 Act. As Buxton L.J. explained at paragraphs 14-15 of his judgement:

"14. This is a very short point ... Here, Mr Gard [the adjudicator] answered exactly the questions put to him. What went wrong was that in making the calculations to answer the question of whether the payments so far made under the sub-contract represented an overpayment or an underpayment, he overlooked the fact that that assessment should be based on the contract sum presently due for payment, that is the contract sum less the retention, rather than on the gross contract sum. That was an error, but an error made when he was acting within his jurisdiction. Provided that the adjudicator acts within that jurisdiction his award stands and is enforceable.

15. Bouygues contended that such an outcome was plainly unjust in a case where it was agreed that a mistake had been made, and particularly in a case, such as the present, where Dahl-Jensen was in insolvent liquidation, and therefore the eventual adjustment of the balance by way of arbitration will in practical terms be unenforceable on Bouygues' part. I respectfully consider that the judge was quite right when he pointed out that the possibility of such an outcome was inherent in the exceptional and summary procedure provided by the 1996 Act and the CIC adjudication procedure. And in any event unfairness in a specific case cannot be determinative of the true construction or effect of the scheme in general."

[75] In the present case, the question put to the adjudicator was whether the employers had "suffered losses by virtue of [Diamond's] breaches of the terms of the parties' contract", all as set out in the second paragraph of the notice of adjudication number 7/2 of process. The nature of the redress sought was payment by Diamond to the employers of a sum of money, representing the losses suffered, together with interest and expenses. The adjudicator duly answered the question referred to him, deciding that the employers had suffered losses amounting to £29,119.80 by virtue of Diamond's breaches of the terms of the parties' contract, and making rulings on interest and expenses. Prima facie, his decision answers the question referred to him. Prima facie he has fulfilled his remit. His decision may be right, or partly right, or wrong, but if his decision is indeed intra vires (even if wrong), it is not open to this court to review the decision: cf. the authorities above cited, and also Dyson J. in **Macob Civil Engineering Ltd. v Morrison Construction Ltd**. [1999] B.L.R. 93; Lord Caplan in **Karl Construction (Scotland) Ltd. v Sweeney Civil Engineering (Scotland) Ltd.**, 2001 S.C.L.R. 95.

Adjudicator's reasons underlying his decision

[76] As indicated above, I consider that the adjudicator's decision is prima facie intra vires. Nevertheless it may be necessary to examine the adjudicator's reasoning in case that reasoning discloses something (for example, a breach of natural justice) which despite outward appearances of regularity renders the decision ultra vires and reducible: cf. **Homer Burgess Limited v Chirex (Annan) Limited** [2000] B.L.R. 124; **SL Timber Systems Limited v Carillion Construction Limited** [2001] B.L.R. 516; **Ballast plc v The Burrell Company (Construction Management) Ltd.**, 2001 S.L.T. 1039.

[77] Reasons underlying decision relating to grant of extension of time: It was one of Diamond's functions as contract administrator to decide whether or not to grant an extension of time. Diamond chose to grant an extension after the date of practical completion. Obviously a decision to grant or to refuse an extension of time has major consequences for the parties involved, and such decisions are bound to be criticised by one party or another as being wrong. Such a criticism does not necessarily make the decision wrong in fact or in law, nor does it automatically make the decision a breach of the contract administrator's contract. Nevertheless I accept that one way in which such a decision could conceivably be categorised as a breach of the contract administrator's contract entitling the other contracting party (the employers) to damages might be if the decision amounted to professional negligence.

[78] In Diamond's case, in order to establish professional negligence, it would in my view be necessary to show that (i) there was a recognised and established practice that a surveyor/contract administrator should never in any circumstances grant an extension of time once the date of practical completion had passed; (ii) Diamond had failed to follow that practice by choosing to grant an extension after the date of practical completion; and (iii) no ordinarily competent surveyor/ contract administrator, acting with reasonable care and skill, would in the circumstances have granted the extension of time: cf. Hunter v Hanley, 1955 S.C. 200.

[79] The test for professional negligence is a particularly demanding one, notoriously difficult to satisfy. In my view, the adjudicator's reasons are inadequate to justify his apparent finding of professional negligence. Standing Diamond's counsel's references to **Chappell & Powell Smith** and **London Borough of Merton v Stanley Hugh Leach Ltd.** (1985) 32 B.L.R. 51 (which arguably suggest that in the surveying/building world, an extension of time might in some circumstances be granted even after the date of practical completion) some clearer explanation from the adjudicator is in my view required to enable the informed reader or a court to understand how he reached the conclusion that the component parts of the Hunter v Hanley test set out in paragraph [78] above were satisfied. The adjudicator's own personal view as to the appropriate method of dealing with the late request for an extension of time, or his perception of how he and most other surveyors would have dealt with the request, or the fact that the employers' lawyers had questioned the competence of the granting of the extension of time, would not in my view be sufficient to support a finding in fact and in law that there had been professional negligence on the part of Diamond.

[80] Reasons underlying decision relating to lack of written instructions: Clause 5.3 of the SBCC Scottish Minor Works Contract (April 1998 revision) number 6/7 of process provides:
"The ... contract administrator may issue written instructions which the contractor shall forthwith carry out. If instructions are given orally they shall, within two days, be confirmed in writing by the ... contract administrator."
There is no definition of what constitutes a written instruction.

[81] It seems to me that in order to be satisfied that Diamond were professionally negligent on certain occasions because they had not issued written instructions, it would have to be established (a) that no written instructions were given in certain circumstances; (b) that it was the practice of surveyors/contract administrators in those circumstances to issue written instructions; and (c) that no ordinarily competent surveyor exercising reasonable care and skill would, in the particular circumstances, have done what Diamond did (for example, relied upon entries in the site minutes recording employers' requests to the contractors made in the contract administrator's presence): cf. Hunter v Hanley, cit. sup.

[82] Against that background, the adjudicator's reasoning in relation to this part of his decision does not disclose a clear basis for his finding of professional negligence.

[83] Decisions nevertheless intra vires, and court's powers limited: It will be seen therefore that, on the information before me, I am not satisfied by the reasons given for those parts of the adjudicator's decision relating to professional negligence in the context of the grant of extension of time and the lack of written instructions. It may be that some parts of the adjudicator's decision are not correct. However as indicated above, the court's powers of review in adjudications are limited. All that can be said at this stage is that any error which the adjudicator may have made is in my view an intra vires error, not an error rendering his decision (or part of it) ultra vires, or one which he had no jurisdiction to make. His decision may be wrong, or wrong in part, but any error into which the adjudicator may have fallen is not in my view of such a nature as to make his decision, or part of it, invalid and reducible. The effect of the "*exceptional and summary procedure provided by the 1996 Act*" (**Bouygues (UK) Limited**) is that it must be for Diamond to seek to have an intra vires error corrected in any subsequent legal proceedings or arbitration commenced in terms of section 108(3) of the 1996 Act and paragraph 23(2) of the scheme.

Conclusion

[84] For the reasons given above, I shall sustain the first respondents' (the employers') first, second, and third pleas-in-law, repel the petitioners' (Diamond's) first, second and third pleas-in-law, and refuse the petition.

Petitioners: R. A. Smith, Q.C., Clive; Simpson & Marwick, W.S.
First Respondents: Howie, Q.C.; MacRoberts