OPINION OF LORD MARNOCH with Lords Marnoch, Dawson & Clarke. Extra Division Inner House Court of Session. 22nd January.2002

[1] This is a reclaiming motion against the dismissal by the Lord Ordinary of a petition for judicial review of an Adjudicator's decision under the Housing Grants, Construction and Regeneration Act 1996.

[2] The only plea-in-law tabled by the petitioners and reclaimers was that "The adjudication decision being ultra fines compromisi, et seperatim ultra vires, decree of reduction should be pronounced as sought." In the event, as we have said, the Lord Ordinary dismissed the petition but, as so often happens, the argument before us was considerably more focused than appears to have been the position at first instance. What is more, the respondents have in the meantime gone into liquidation and the liquidator has decided not to sist himself to the process. In that situation Mr. McKenzie, solicitor advocate for the petitioners and reclaimers, gave us the benefit of a concise argument while being at the same time mindful of his duty to alert the court of contentions which could have been advanced on behalf of the respondents.

[3] In her decision the adjudicator identified the nature of the dispute between the parties as being "the right of the Sub-contractor (Sweeney) to receive payment for works carried out for the Contractor (Karl) to 31 January 2000, (as in Sweeney's Valuation No. 5 dated 1 February 2000)". In thereafter finding Sweeney entitled to payment of the sum of £39,872.24 exclusive of VAT and interest, the adjudicator held, inter alia, that the terms and conditions of the Sub-contract did not make adequate provision for payment as required by section 110 of the Housing Grants, Construction and Regeneration Act 1996. She accordingly invoked what she described as the "default position" of applying the provisions for payment contained in Part II of the Schedule to the Scheme for Construction Contracts (Scotland) Regulations 1998.

[4] Mr. McKenzie's position was that if one looked only to the terms of the Notice of Intention to Refer and the Notice of Referral itself, the adjudicator was entitled to do exactly what she did. Accordingly it is unnecessary for us to refer to the contents of these documents. What, however, Mr. McKenzie contended was that the "dispute" referred to the adjudicator had become differently identified at the stage when Sweeney chose to reply in writing to the Response to the Referral lodged with the adjudicator by Karl. At that stage, according to Mr. McKenzie, it was clear that both parties accepted there was no incompatibility of the contract provisions with the requirements of section 110 of the 1996 Act and that the adjudicator was accordingly obliged to reach her decision on that basis.

[5] We reject Mr. McKenzie's submission on this matter for two reasons. In the first place, there was no dispute but that in the present case the contract provisions anent the adjudication process were compatible with the requirements of section 108 of the 1996 Act and the relevant provisions are accordingly to be found within the written contract and, in our view, essentially within clauses 38A.5.1 and 38A.6.5 of that contract which are inter alia in the following terms:

"38A.5.1 When pursuant to Clause 5 of the narrative of the Sub-contract a party requires a dispute or difference to be referred to adjudication then that party shall give notice to the other party of his intention to refer the dispute or difference, briefly identified in the notice, to adjudication. Within 7 days from the date of such notice or the execution of the SBCC Adjudication Agreement by the Adjudicator if later the Party giving the notice of intention shall refer the dispute or difference to the adjudicator for his decision; and shall include with that referral particulars of the dispute or difference together with a summary of the contentions on which he relies, a statement of the remedy which is sought and any material he wishes the adjudicator to consider. The referral and its accompanying documentation shall be copied simultaneously to the other party".

38A.6.5 In reaching his decision, the adjudicator shall act impartially, set his own procedure and at his absolute discretion may take the initiative in ascertaining the facts and the law as he considers necessary in respect of the referral which may include the following:

38A.6.5.1 using his own knowledge and/or experience;

38A.6.5.9 obtaining from others such information and advice as he considers necessary on technical and legal matters subject to giving prior notice to the parties together with a statement or estimate of the cost involved;..."

In our opinion it is clear from these provisions that the "dispute or difference" which is referred to the adjudicator is one which has to be identified in the referral documents. Of course the adjudicator may well have to look outwith the documents to the whole factual background in order fully to understand, and, it may be, in a sense fully to identify, the dispute but that is a wholly different matter from looking to future actings or representations of the parties for that purpose.

[6] The only authority relied on by Mr. McKenzie in support of his submission was that of Fastrack Contractors v. (1) Morrison [2000] B.L.R. 168. In our opinion, however, there is nothing said in that case by Judge Thornton which in any way conflicts with what we have just said. Indeed, at one point his Honour says this:

"In other words, the 'dispute' is whatever claims, heads of claim, issues, contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference (our italics)".

At a later point in his opinion he goes on to point out that:

"A referring party might decide to cut out of the reference some of the pre-existing matters in dispute and to confine the referred dispute to something less than the totality of the matters then in dispute."

This, however, was not the contention of Mr. McKenzie in the present case. On the contrary, his contention - and his only contention - was that the ambit of the original and only "dispute" referred could somehow be defined by actings such as those described in the passage just quoted. In our opinion that contention has to be unsound.

[7] Even if we were wrong in our decision so far, there is, as we have said, a second reason why, in our opinion, Mr. McKenzie's submission must be repelled and that is a fairly fundamental one. What, after all, Mr. McKenzie's submission amounted to was that the adjudicator's understanding and application of the relevant law could in some way be circumscribed by the agreement of the parties. In our opinion, however, that proposition only has to be stated in order to be discarded. The adjudicator, who was in terms charged with ascertaining, inter alia, "the law" had no option but to apply the relevant law as she saw it and, indeed, in the present case, any other conclusion would enable parties effectively to contract out of the mandatory provisions of the 1996 Act. For this reason also, therefore, we reject Mr. McKenzie's submission.

[8] There remains to be dealt with only a short alternative submission advanced by Mr. McKenzie towards the end of his address which was to the effect that, as a matter of natural justice, the Adjudicator should at least have invited submissions from the parties before departing from their agreed position as described above. In our opinion, however, this submission also falls to be rejected. In the first place, it is clear that the adjudication process as envisaged by the 1996 Act, and in this case as incorporated in the parties' written contract, is a process far removed from the traditional adversarial format adopted in the courts. In the second place, it follows from that and from what we have already said that the parties had no good reason to think that the adjudicator would be circumscribed, in reaching her decision, by the terms of any written representations made to her, let alone representations that should somehow circumscribe her in her appraisal of the relevant law. This is particularly so bearing in mind that, if she had wished to do so, the adjudicator could have taken her own independent legal advice. It may also be of some significance that Sweeney had in terms disavowed any intention of being legally represented and that the written representations on their part had been prepared by their Commercial Manager. And, lastly, it has to be borne in mind that the adjudicator was under compulsion to issue her decision within the very short time scale of, at most, six weeks.

[9] In the result, and for all the foregoing reasons, we are satisfied that the Lord Ordinary reached the right conclusion in dismissing the petition and the present Reclaiming Motion will be refused.

Act: Mackenzie, solicitor advocate; Masons (Petitioners and Reclaimers)
Alt: No appearance (Respondents)