Before Lord Prosser, Lord Philip, Lord Caplan Extra Division, Inner House Court of Session on appeal from the Sheriffdom of South Strathclyde, Dumfries & Galloway at Hamilton before Lord Prosser, Lord Philip, Lord Caplan. 23rd June 2000.

OPINION OF LORD PROSSER :

[1] In or about March 1999, the pursuers in this action, Stiell Ltd, were instructed by the defenders, Riema Control Systems Ltd to carry out the supply & installation of certain control & electrical equipment at a site known as British Telecom, Atlantic Quay, Glasgow. The original contract price was £156,982, exclusive of VAT. The pursuers aver that the defenders instructed them to carry out certain extra works, and that the total value of all the works carried out is £275,104.15, exclusive of VAT. Certain payments having been made, they sue for the sum of £139,375.93, which they say is the balance remaining due, including VAT.

[2] The action was raised in January 2000. Under a warrant for arrestment on the dependence, sums in the hands of a third party were arrested. The amount arrested was restricted, by agreement, to £160,000. It is not disputed that the arrestment was competent and valid, at the time when it was effected in January.

[3] Prior to the raising of the action, in December 1999, the pursuers had exercised their right, under s108(1) HGCRA 1996 to refer a dispute arising under the contract for adjudication under the appropriate procedure. The dispute thus referred related to the valuation in respect of the supply and installation of control and electrical equipment, including the value of additional work. The remedy sought was an award in favour of the pursuer, as the Referring Party, of £118,617.81 plus VAT together with interests and costs. The contract between the parties was a sub-contract, and clause 11.0 thereof dealt with adjudication. The clause provided *inter alia* that any adjudication was to be carried out under the Centre of Dispute Resolution (CEDR) Rules for adjudication. On 11 February 2000, the adjudicator issued his decision that the total value of the works, including the value of additional works carried out by the Referring Party totalled £220,336.67 (excluding VAT, Retention, Interest and subject to current VAT regulations). The adjudicator ordered that the defenders, as Responding Party, must pay to the pursuers as Referring Party the amount of £58,655.01, and must comply with the decision within five working days of issue. That amount was paid, together with the appropriate VAT.

[4] On 22 February, the sum arrested on the dependence of the action was further restricted, by agreement, to £90,000. Thereafter, the defenders moved that the arrestments be recalled; and having heard submissions from the parties, the sheriff refused the motion. The defenders reclaim. They submit that the sheriff erred, and that the arrestments are now incompetent, or alternatively that they are nimious and oppressive.

[5] In terms of s108(1) of the 1996 Act, the adjudication must be *"under a procedure complying with this section"*. Subsection (3) provides that "The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration...or by agreement."

[6] By virtue of s108(5) & s114(4), implied terms are imported into the contract, where there is default of contractual provision agreed by the parties. In the present case, however, as we have indicated, the parties agreed that the CEDR Rules, which comply with s108, were imported into the contract. In terms of paragraph 11 of those Rules, *"every decision of the Adjudicator shall be binding on the parties and notwithstanding paras 12 & 13 shall be implemented without delay by the parties who shall be entitled to such reliefs or remedies as are set out in the decision."* Paragraph 12 provides that if a party is dissatisfied with the decision of the adjudicator, it may within a specified time give written notice of its dissatisfaction. If no notice of dissatisfaction is issued within the specified period, it is provided by paragraph 12 that *"the decision of the adjudicator shall be final and binding upon the parties."* Paragraph 13 provides that if a notice of dissatisfaction is given, the dispute *"will be finally determined by court proceedings or by reference to arbitration in accordance with the contract between the parties."* The paragraph further provides that unless otherwise agreed by the parties, the court or the arbitrator shall not be bound by, and shall have power to review and revise every decision of the adjudicator. Following upon the adjudicator's

decision in the present case, the pursuers gave timeous notice of dissatisfaction, and it is not disputed that all issues raised in the action, including that which was referred to the adjudicator, now fall to be resolved by the court in those proceedings, without regard to the adjudicator's decision or anything that followed thereon.

[7] As enrolled, the motion for recall of arrestments which was made to the sheriff was upon the basis that the arrestments were nimious and oppressive. However, the submissions advanced to him in argument were upon a wider basis, turning upon the fact of the adjudicator's decision requiring the defenders to pay the pursuers £58,655.01. The sheriff describes the defenders' submission as having been "*that such an adjudication award having been granted on the identical subject-matter of the present litigation, then the arrestments should be recalled as the matter was* ***res judicata***". In the present appeal, the defenders and appellants proceed upon the basis that the sheriff has misunderstood the nature of the submission made to him. Their position is that the arrestments are incompetent, the sums claimed by the pursuers being contingent. We shall come to that submission; but it is said that "the decision of the adjudicator renders the unsuccessful part of the pursuer's claim contingent upon final determination by legal proceedings or agreement between the parties". The crux of the matter is therefore the nature and effect of the prior decision, in respect of the same matter as is being brought before the court. At least in that respect, there is some similarity with the situation which arises where a plea of *res judicata* is taken. Whether or not the sheriff has misunderstood the precise nature of the submission, the point was not pressed on behalf of the pursuer and respondent, and in their submissions to this court counsel for both parties were concerned with the primary issue of law rather than any specific aspect of the sheriff's disposal of it.

[8] On behalf of the defenders & appellants, it was emphasised that the provisions for referral to adjudication, & all that had followed thereon, were contractual matters. The 1996 Act made provision for such referral, and the contractual provisions with which we were concerned were consistent with the statutory requirements. But it was important to bear in mind at all times that the referral was made in terms of the parties' contract, and that in reaching his decision, the adjudicator was essentially carrying out the parties' bargain.

[9] As we have indicated, the defenders and appellants do not submit that the arrestments were incompetent originally. The contention that they are incompetent is based upon the assertion that the sums claimed are "contingent". But it is important to note that it is not said that they would be contingent in any sense, apart from the provisions for adjudication. Moreover, it is not said that they are made contingent by the mere presence in the contract of these provisions for adjudication. Nor is it said that they had been rendered contingent by the referral to the adjudicator. They were thus, notwithstanding that referral, not contingent when the action was raised. The debt which was asserted in the action was then to be regarded as a *"pure"* debt, and it could not be claimed that the sum sought in the action was then anything other than a sum "due", so as to make arrestment on the dependence competent. What is said to have changed matters is thus neither the provision for referral, nor actual referral; it is the decision reached by the adjudicator. Furthermore, it is not said that the decision rendered the whole sum sued for "contingent". To the extent of the sum which required to be paid, the original arrestments remained valid until security became unnecessary, upon payment of that sum. It was the remainder or balance of the sum sued for, which the adjudicator had decided did not require to be paid, which was said thereby to have become a debt contingent upon final determination of the pursuers' action against the defenders. The action was now proceeding only in respect of this "unsuccessful part" of the claim. Put shortly, the submission was that the adjudicator's decision in relation to that part of the claim (like his decision in relation to the amount which he said required to be paid) was "binding" upon the parties, until finally determined by legal proceedings or agreement. Until such determination or agreement, the sum was not due or payable, and must be regarded as contingent upon such determination or agreement.

[10] On behalf of the defenders & appellants, our attention was drawn to the terms of chapter 9 of the Latham Report, & in particular para 9.13. It was clear from the terms of that paragraph that the intention was for adjudication to be "the normal method of dispute resolution in construction".

Holding up the flow of cash was bad for the construction industry, & the purpose of the procedure was to ensure that cash would flow speedily without delays in settlement. Reference was also made to ***Homer Burgess Ltd* v. *Chirex (Annan) Ltd*** 2000 S.L.T. 277, & Lord Macfadyen's acknowledgement at page 285E that the policy of the legislation was to prevent payment being delayed by lengthy dispute. The defenders & appellants acknowledged that the adjudicator's decision was an interim determination, which could be reversed in whole or in part by the court's subsequent determination. The adjudicator's determination was nonetheless to be seen as an important one, determining the matter & binding upon the parties, with provision for very early payment, subject only to the possibility of subsequent alteration by a determination of the court. That possibility was a contingency which could not be ignored. And it was a contingency which meant that any liability on the part of the defenders to pay more than the amount identified by the adjudicator must be seen, as matters stood, as not yet in existence, & requiring a determination of the court, contrary to the adjudicator's determination, to bring it into existence. The sums not awarded were quite simply not presently due, & while the Notice of Dissatisfaction had prevented the adjudicator's decision from becoming final, that Notice did not alter the binding status of his decision, unless & until it were to be reversed by the court.

[11] In submitting that the pursuers' claim was now for a debt which was contingent, Mr. Mackenzie on behalf of the defenders and appellants referred to ***Costain Building and Civil Engineering Limited* v. *Scottish Rugby Union plc*** 1993 S.C. 650. No issue arises between the parties in the present case as to the underlying principles, which are fully considered and stated by the Lord President in ***Costain*** at pages 653 and 654. While various terms may be used, Scots law recognises two distinct categories of debt - those which are "pure" or immediately due, and those which are future, conditional or contingent. If the pursuer in an action sues for a debt in the latter category, arrestment on the dependence will be recalled (with certain exceptions which are not here in point). And at page 654E to F, the Lord President sets out the basis upon which the two categories are distinguished from one another, and the reason for allowing arrestment on the dependence only where the debt is due or pure: *"For this purpose a debt is due if it is due for payment immediately ex hypothesi of the pursuer's case. This means that, if all that is needed is for the pursuer to prove his averments in order to enforce the debt, the arrestment is competent. It is different, however, if the debt is payable only in the future because the contract provides that it is to be paid on a date which has not yet arrived, or if it is contingent because it is subject to a condition in the contract which must be fulfilled before it becomes payable. In regard to either of these two kinds of debt, for the debtor to be forced by an arrestment on the dependence to provide security before it is due is to innovate on the contract and the debtor is entitled to ask that the arrestment be recalled."*

[12] The submission advanced on behalf of the defenders and appellants did not (and indeed could not) rest simply upon this broad analysis of principle in ***Costain.*** The reclaimers in that case argued that in terms of their contract they were not under any present obligation to pay the sums sued for, as that obligation was contingent on the issue of an engineer's certificate or the decision of an arbiter. While noting that each contract must be examined according to its own terms, the court concluded that where the contract provides for payment for work done on the issuing of a certificate by an engineer or architect, the issue of the certificate is a condition precedent to the contractor's right to demand payment, and that a claim of that kind is a contingent claim because the debt is not due until the certificate has been issued. On behalf of the defenders and appellants in the present case, it was submitted that the incorporation of the adjudication procedures into the contract was analogous to the contractual requirement of an engineer's certificate. In each case, the parties had agreed in terms of their contract that instead of simply suing for payment, the right to demand payment was qualified by contractual procedures involving consideration of the matter by an outsider. It was not suggested that the analogy was precise, since in ***Costai****n* it had been held that the pursuer could not say that the debt was due unless and until the certificate had been obtained. But in the present case, we were no longer concerned with the sum which the adjudicator had held to be due: there was no need to proceed with the action for that sum, which had been paid. We were concerned with sums for which the pursuers had sought but not obtained an order from the adjudicator. In so far as a claim had been rejected by the adjudicator, it was analogous to a claim which had not received an engineer's certificate. In

support of the submission that the claim was thus subject to the contingency of determination by the court, reference was also made to the opinion of Lord McCluskey in ***Costain,*** at pp666-668. While the adjudication procedures were not contractually obligatory on the parties, in the sense that they had to be followed in every case, it was submitted that once the procedures had been adopted, by a reference, they had to be followed through, and once a decision was issued, revealing that claims had been rejected in whole or in part, the analogy with claims which were not supported by an engineer's certificate was sound. In the present case, the action had been in existence before the decision; but even if it had been raised after the decision, the position would be the same: in each case, the contractual process of adjudication having been completed, determination by litigation had become a contingency which had to be satisfied before the debt could be regarded as pure or due.

[13] On behalf of the pursuers, counsel submitted that the arrestments should not be recalled. While adjudication was intended to result in early determination of disputes where possible, it was to be noted that all manner of disputes could be referred, & that the purpose of s108 of the 1996 Act should not be viewed purely in terms of pecuniary claims & cash-flow. We were referred to Lord Kingarth's decision in ***Allied London & Scottish Properties plc* v. *Riverbrae Construction Ltd*** 1999 B.L.R. 346, and the case there referred to, ***Macob Civil Engineering* v. *Morrison Construction*** 1999 3 B.L.R. 93; but these decisions do not appear to us to throw any real light on the point which arises in this case. The powers of the adjudicator are not really in doubt, & the overall purposes of the legislation do not seem to us to help to resolve the question of the nature of the debt in question, at any stage. Counsel drew our attention to various differences which exist between the adjudication procedure & the status of architects' or engineers' certificates in cases such as ***Costain.*** It is clear that there are differences, & the usefulness of argument from analogy is perhaps doubtful when (as was made very clear in *Costain*) the analysis of the legal position depends on careful scrutiny of the particular contractual provisions which are in issue. The analogy may be a useful starting point, as indicating the type of approach which is said to be appropriate. But what is required thereafter is a consideration of the contract in question.

[14] On behalf of the pursuers, it was submitted that the appropriate approach was to be found in ***Rippin Group Limited* v. *I.T.P. Interpipe S.A.*** 1995 S.C. 302 rather than in ***Costain,*** which the court in ***Rippin*** considered and distinguished. ***Rippin*** was a case in which a warrant to arrest on the dependence was obtained in a Sheriff Court action, which was thereafter remitted to the Court of Session. The Lord Ordinary recalled the arrestments, on the basis that the pursuers' claims were contingent upon an arbiter determining in the arbitration that the sums were payable in terms of the contract. At the same time, the cause was sisted for arbitration, of consent. Reversing the Lord Ordinary, the Second Division were satisfied *"that **ex hypothesi** of the pursuers' case, the sums claimed are due for payment immediately."*

[15] In delivering the Opinion of the Court in ***Rippin,*** Lord Justice Clerk refers to a passage in Graham Stewart on *Diligence*, at p81, to the effect that claims which depend on the issue of a suit are not truly contingent debts *"for decree in the action merely constitutes the debt which existed at the commencement of the case."* In ***Rippin***, there was nothing in the pursuers' pleadings to suggest that there was any condition in the contract which had to be fulfilled before these sums became payable. While there was an arbitration clause, it contained no condition which required to be fulfilled before any of the sums became payable. The parties were not bound to go to arbitration, & if, after the action had been raised, neither party had chosen to found upon the provision providing for arbitration, then no arbitration would take place. *"It accordingly cannot be asserted that the arbitration clause contains conditions which must be fulfilled before any sum becomes payable."* Nor did going to arbitration alter the position. *"On the pursuers' pleadings, the sums claimed are outstanding & debts thus exist although a decree arbitral may be required to constitute the debt."*

[16] In our opinion, what is said in ***Rippin*** shows the correct approach to the present case, although the adjudication provisions with which we are concerned are of course different from the arbitration provisions which were in point in ***Rippin.*** The issue between the parties, which requires to be determined in the action, is one which involves no condition or contingency. All the pursuers have to

do is prove what they aver. Upon that basis, it is conceded that at the outset of the action, the sums claimed were outstanding and debts thus existed. If the action proceeded without recourse to adjudication, the action would merely constitute the debt which thus existed at the commencement of the case. The fact that the issue in an action may in certain circumstances require to be determined by an arbiter, or indeed by an adjudicator, does not mean that there is any change in the issue which is to be determined, and accordingly does not mean that the claims which were pure become contingent. And if, as in this case, the determination by the adjudicator is binding only *ad interim*, and can be replaced by a determination by the court, it is all the clearer that the issue remains the same throughout, regardless of whether it is determined by the adjudicator, or by the court, or partly by the one and partly by the other. All that is happening, in either event, is the constitution of a debt which existed at the commencement of the case, and still exists to the extent that it has not been paid.

[17] As the Lord Justice Clerk observed in ***Rippin,*** the real basis of the decision in ***Costain*** was that the claims were contingent because no amount could be said to be due until the engineer or an arbiter had made a decision to that effect. That being so, they observe that any expression of opinion by Lord McCluskey, apparently suggesting that no debt could exist until the conclusion of the arbitration process, is *obiter*. We do not find it necessary or appropriate for us to comment on other situations in which the particular terms of a contract might be said to render claims contingent. We are entirely satisfied that the terms of the contract with which we are concerned are such as to provide different ways of constituting the debt, *ad interim* or finally, but that the debt in question is that which existed at the commencement of the case, and which was not and is not contingent.

[18] The alternative argument that the arrestments should be recalled because they were nimious and oppressive is in our opinion without substance. The contention appeared to be that in the light of the adjudicator's decision, it could be said that the pursuers' claim in the action was at least *prima facie* excessive or even extravagant. There was a decision, at present binding, to the effect that the balance of what they sought was not due. For the pursuers to obtain payment of money in accordance with the adjudicator's decision, and yet still to be able to freeze the balance which he had held not to be due, would be unfair and lacking in proper proportion in its treatment of the parties. Even if the debt were regarded as due, notwithstanding the proceedings before the adjudicator, his decision should at least be given effect as a *prima facie* indication that what was sought was excessive. We are not persuaded by this argument. There is no suggestion that the claim was made with anything other than a proper motive and a normal basis. Counsel for the pursuers submitted that there was nothing unusual in arrestments remaining in place, despite a view having been taken that the claim was bad, or bad in part. A decision which went against pursuers in the Outer House did not lead to arrestments being recalled if the matter was reclaimed and taken to a decision of the Inner House. The position remained the same, that the action was one for a pure debt which was due, and until there was a final determination of that matter, whether after an adjudication or upon a decision being appealed, the arrestments were performing their proper function of giving security for a debt which was not contingent. We are satisfied that that is indeed the position.

[19] In the whole circumstances we are satisfied that the debt for which the pursuers sue was and is a pure one, and that there is no good ground for recalling the arrestments. The appeal is accordingly refused, and we will remit the matter to the Sheriff Court, for the sheriff to proceed as accords.

Act: Howie; MacRoberts (Pursuers and Respondents)
Alt: Mackenzie, Solicitor-Advocate; Masons, Glasgow (Defenders and Appellants)