OPINION OF T G COUTTS, QC, Sitting as a Temporary Judge, Outer House Court of Session. 28th January 2004.

[1] This action was brought in order to revisit an adjudicator's decision awarding a payment to the defenders. That related to a contractual dispute which arose as a result of damage to premises in Edinburgh while they were being extended and refurbished by the defenders. The works had not been insured.

[2] By contract dated 8 and 23 June 1998 the defenders engaged the pursuers to act as project managers in relation to the said operation. In terms of the agreement (Clause 16.1) any dispute could be referred to adjudication and Part 1 of the Scheme for Construction Contracts (Scotland) Regulations 1998 was applied to the procedures to be adopted in any adjudication. Paragraph 23(2) of that scheme provides that; *"the decision of the adjudicator shall be binding on the parties, and they shall comply with it, until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties"*

[3] Clause 16.2 of the agreement provided for arbitration. Arbitration however has not taken place. Instead the present action was raised after there had been an adjudication by Mr John D Spencely who, in broad terms, found in favour of the defenders.

[4] The pursuers were not content with that decision and in the first instance presented a petition seeking judicial review; this was dismissed on 5 October 2001. Thereafter there followed a decree pronounced by The Honourable Lord Macfadyen under which the pursuers paid to the defenders the amount presently concluded for. Accordingly the payment which was made by the pursuers was in implement of decree of this court.

[5] Three issues were debated by senior counsel for the defenders. The first of these was an attack upon the formulation of the action, the second the onus of proof and the third the question of whether a plea of contributory negligence was appropriate. The first matter had been presented as an instance of *condictio indebiti* by which payment was sought in repetition or recompense. That matter gave rise to an interesting argument about the type of action which would be appropriate for resolving a situation like this. The defenders have in their possession a sum of money already paid to them in terms of a court decree. They do not require to do anything further. As there was no concurring litigation or arbitration, unless the pursuers were to instigate some procedure, the defenders are in right of the money and the status quo.

[6] While it is clear that the adjudication procedure was introduced in order to provide an interim remedy, the matter of how that interim remedy can be revisited in all circumstances is not explicitly dealt with.

[7] Although the theory could have been of some interest, counsel for the pursuers conceded that he wished to present his action differently but rather than propose an amendment at procedure roll he moved the court to determine whether there is a relevant case on the merits and to answer the question posed in the pleadings, namely on which party the onus of proof lay.

[8] **THE PLEADINGS** In the pleadings the pursuers state:-

"Any dispute or difference between the parties arising from this Agreement which cannot be resolved amicably shall be and is hereby referred to adjudication. Part I of the Scheme for Construction Contracts (Scotland) Regulation 1998 shall apply to the procedures to be adopted in any adjudication ...."

They further aver *"The Adjudicator found that on 12 May 1998, the pursuers had incorrectly advised the defenders that Trentham was liable for insuring the works and that such advice was in breach of Clause 2.9 of Appendix 1 of the Agreement. The Adjudicator also determined that such advice was in breach of the warranty in Clause 7.1 of Appendix 1 and was also a negligent act giving rise to an indemnity under Clause 2.6 of Appendix 1. The Adjudicator erred in his decision."*

The pursuers specifically state; *"Any incorrect information passed to the defenders on 12 May 1998, was not provided by the pursuers in the "performance of the Services" or the discharge of any obligation incumbent under the Agreement. Further, for the same reasons, the Adjudicator erred in his conclusion that the indemnity under Clause 2.6 was applicable. In the circumstances, there is no proper basis in fact and law for holding the pursuers to be liable to make reparation to the defenders in respect of breach of contract or liable to make payment under a contractual indemnity as the Adjudicator held."*

Further detail was given in the counterclaim.

[9] The adjudicator had come to the view, giving reasons, that the advice he found had been given was in breach of Clause 2.9 of the Appendix 1 of the agreement and that such advice was in breach of the warranty in Clause 7.1 of Appendix 1 as well as being a negligent act giving rise to an indemnity under Clause 2.6 of Appendix 1. However it having been averred that the adjudicator erred both in fact and law it would seem to be inevitable that the underlying facts i.e. whether erroneous advice was given and if so what the consequences were require proof before answer.

[10] The pursuer's pleadings in this regard may turn out to be somewhat less than frank. If that be so, disapproval can be expressed in an award of expenses.

[11] Had it been the case that the pursuers had made an admission of the erroneous advice, I would have considered, for the reasons given by the adjudicator, which seemed to me to be correctly found in the terms of the contract between the parties, that the pursuers were liable at least for the amount awarded in the adjudication.

[12] There is also a counterclaim by these defenders which, it was argued, could stand on its own by way of an action. That would involve consideration of the same issues in order to give rise to the extended damages claim. The defenders would require to establish these, i.e. the onus at that point would clearly be upon them.

[13] On the present pleadings however I do not feel able to dismiss the principal action.

[14] **ONUS OF PROOF** Parties joined issue upon the incidence of the onus of proof. Counsel for the defenders adopted the straight-forward position that it was for a pursuer and not a defender to establish the essential facts. Counsel for the pursuers indicated that the adjudicator's decision was of no consequence in determining where the onus of proof lay and could not subvert it. Since the pursuer's liability before the adjudicator depended upon the defenders establishing that the alleged misinformation was given the defenders in the present situation had likewise to establish their entitlement.

[15] This matter was adverted to by Lord Macfadyen in ***City Inn Limited* v *Shepherd Construction Limited*** 2002 SLT 781 at paragraphs 57-59. His Lordship said,

"It is, in my view, no part of the function of an adjudicator's decision to reverse the onus of proof in any arbitration or litigation to which the parties require to resort to obtain a final determination of the dispute between them. It is reading too much into the reference clause 41 A.8.1 (and s 108 (30)) to the adjudicator's decision being binding "until the dispute or difference is finally determined" to construe it as affecting the burden of proof in the arbitration or court proceedings. The burden of proof in any such action lies where the law places it, and is unaffected by the terms of the adjudicator's decision".

[16] I respectfully agree with that view. It has frequently been said that matters of onus have little relevance once the facts are before the court. The facts could be put before the court in the present dispute either by way of admissions which are not here present or by way or enquiry. Onus does not appear to me to be of material significance when what is being considered is the effect of contractual provisions on proved fact. While no doubt the pursuer in any action has an initial obligation to set the matter before the court, that has little to do with questions such as who might lead at a proof or the correct interpretation of a contract. In matters of interpretation there are simply opposing contentions and onus has no relevance. In the present case the pursuer, by way of averment and such proof as is necessary, will require to set up a factual background and it is against that factual background that the Court will determine liability. I cannot conceive that a matter of onus will play any significant part in the courts determination in the principal action. Procedurally there might be a motion by the pursuer to have the defenders lead at the proof which might or might not be granted. If the pursuers persist in their denial of the transmission of the erroneous information, it may be that the defenders would have to establish that matter as in an ordinary litigation. Until, however, the matters are fully focused on the pleadings, it is neither appropriate nor sensible at this stage to attempt to answer academic questions about onus of proof. As presently advised I cannot see any difficulty arising whoever were to lead at any enquiry which might be necessary.

[17] **CONTRIBUTORY NEGLIGENCE** The pursuers pled an *esto* case that if they were in breach of contract then the defender's losses were in part occasioned by their own negligence. They make averments to indicate that the defenders could have dealt with insurance themselves without ever having inquired of the pursuers. Whether or not they could or should have done that has to be a matter for proof. However, the defenders did attack the idea that contributory negligence applies to a matter of breach of contract. I was referred to ***Forsikrings Vesta* v *Butcher*** 1988 2 AER 43 where under reference to the English Law Reform (Contributory Negligence) Act 1945 it was stated that where a defendant's liability in contract was the same as his liability in the tort of negligence, independently of the existence of any contract, the court had power to apportion blame and reduce the damages recoverable even though the claim was made in contract. It was argued for the defenders that because in terms of the paragraph 2.9 of the contract liability was strict it was not the same as, and did not equiparate to negligence and therefore the averments of contributory negligence should be deleted.

[18] Bearing in mind the difference albeit slight between the Scottish and English Acts and noting that one does not sue "in tort" in Scotland but merely sues for damages, I can see no reason as a matter of law not to allow proof in relation to contributory negligence. At all events on the averments I cannot affirm that that plea would be bound to fail.

[19] **CONCLUSION** I am minded on the present pleadings, if an action is differently formulated, to allow a proof before answer. If it is accepted as fact, however that misleading information was given by the pursuers in relation to the insurance matters, I would hold that, subject to contributory negligence, there was no relevant case available on the terms of the contract to demand repayment of the sum found due on adjudication in the principal action. It would then follow that there was no relevant defence on the merits to the counter claim which would then proceed to proof on quantum and contributory negligence. However, as requested by counsel for the pursuers I put the case out by order so that he may consider whether and to what effect he wishes to amend the general form of his action, or other matters.

Pursuer: Young; Simpson & Marwick, W.S. :
Defenders: Howie, Q.C.; Tods Murray