OPINION OF LORD WHEATLEY : Outer House Court of Session. 4th April 2003

[1] The petitioner and first respondent entered into a contract in respect of the building of a leisure complex at Kingask, St Andews. The contract is governed by the HGCRA 1996 and incorporates the conditions contained in the Standard Scottish Building Contract with Contractors' Design (May 1999 Edition) with amendments ("the standard contract"). In terms of both the statutory provisions and the contract either party was entitled to refer any dispute or difference arising out of any breach of contract to an adjudicator. The essence of the scheme under the Act is to provide a compulsory form of adjudication in construction contracts such as the present with a view to achieving an immediate provisional resolution of any dispute which can then be confirmed or otherwise at the end of the contract. In January 2003 the first respondent intimated that it intended to refer a dispute to arbitration in terms of the scheme. The dispute concerned a request for interim payment by the first respondent to the petitioner for additional work done in respect of the contract, which had been made in April 2002 and which had been refused by the petitioner.

[2] Following the notice of an intention to refer the dispute to adjudication given by the first respondent on 9 January 2003, the second respondent was appointed to be the adjudicator. On 10 January 2003, in terms of the standard procedure, the first respondent issued a Referral Notice, and on 20 January 2003 the petitioners served its Response to the Referral Notice. Section 108 of the 1996 Act contains a number of provisions which regulate the referral procedure and particularly the time limits within the adjudicator must reach a decision. The standard contract referred to above which was also adopted by the parties to regulate their contractual relations reflects the statutory provisions and provides further and more detailed provisions regulating the parties' relationship.

[3] In terms of section 108(2) of the Act, the contract shall:

"(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;

(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred".

[4] Further, the standard contract in terms of para 39A.6.3 allows further deferrals if jointly agreed between the parties.

[5] Because the first respondent served the Referral Notice on 10 January 2003, the second respondent required to make a decision, subject to any extension of time granted, by 7 February 2003. Various extensions were granted to the second respondent in terms of the statute and the contract, the net effect of which was that the second respondent was eventually required to reach a decision by 5 March 2003.

[6] The first respondent, not having heard from the second respondent on 5 March 2003, made enquiry of her after 5.00pm on that date by telephone. A secretary employed by the second respondent's firm informed the first respondent's solicitors that the adjudicator had reached a decision but did not intend to release it until her fee had been paid. The second respondent had not at that time issued an invoice for her fee. By fax transmission received by the petitioner at 9.13pm on 5 March 2003, the second respondent confirmed the foregoing and included an invoice for her fee. By fax dated 6 March 2003 the first respondent indicated its intention to pay the whole of the second respondent's fee in order to secure the release of the decision. The second respondent then released her decision by fax on 7 March 2003. The reasons for her decision were then communicated to parties on 10 March 2003. At no time did the second respondent seek an extension of the time required to produce a decision beyond 5 March 2003.

[7] In these circumstances the petitioner has raised the present judicial review, seeking to challenge the second respondent's decision. In essence the petitioner claims that the second respondent, in terms of the standard contract between the parties and the statutory provisions contained in section 108, had no power to reach her decision after 5 March 2003. The decision intimated to the parties on 7 March 2003 was therefore not a valid decision and was issued outwith the powers then available to the second respondent. The petitioner therefore seeks reduction of the adjudication decision, and

also wishes to interdict the first respondent from registering the decision in the Books of Council and Session and obtaining diligence thereon, and to suspend any diligence so obtained, and further to suspend the second respondent's adjudication. The petitioner also seeks interim orders in those respects.

[8] For the petitioner, counsel submitted that a decision reached but not communicated was no decision at all, and accordingly the adjudicator must be deemed to have reached her decision in the present case on 7 March 2003, the date when it was communicated to parties, or arguably on 10 March 2003 when the reasons for her decision were issued. The provisions of the standard contract in effect provide that if the adjudicator fails to produce a decision within the time limits allowed, the referring party can instruct another adjudicator and the original adjudicator must resign (see para. 39A). Accordingly once the adjudicator is out of time she is no longer seized of the matter. The position was identical under both the contract and the statute. Reference was made to ***McQuaker v The Phoenix Assurance Co*** 1859 21 D 794. In particular, counsel for the petitioner argued that a decision cannot be said to have been reached until intimation of that decision is made available to the parties. Reference was made to ***Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd*** 2000 T.C.C.764 (it is understood that the page number may change in the final report). Although this was a case which was concerned with whether an adjudicator could correct an obvious slip in his issued decision, a feature of the case was that the adjudicator had reached his decision on the last day allowed under the agreement but had not published it until two days later. The circumstances surrounding the issue of the decision were therefore identical to the present case. Although this matter did not at the end of the day become an issue, in Judge Toumlin (at p.796) said:

"If this case had been persisted in, I should have concluded that the word 'forthwith' in clause 41A.5.3 meant what it said and required that the process of communication of the decision should have started immediately after the decision had been reached; i.e. that the decision has two elements: first, reaching the decision and secondly, sending that decision to the parties. Clearly, if the decision was sent only by post, it would not be received immediately. In this case it was sent by fax on 11 February 2000. In the absence of consent to an extension of time by the party referring the dispute (Bloor), the decision was rendered out of time. This issue and its consequences have not been decided by a court, but the Scheme lays down in paragraph 19(2) that, where the adjudicator fails for any reason to reach his decision, any party to the dispute may serve a fresh notice for a new adjudicator to act, i.e. a new adjudicator must be appointed (in the absence of agreement between the parties) and the adjudication starts again".

[9] Clause 41A.5.3 in the English standard contract is in similar terms to para.39A.6.3 of the Scottish standard conditions. It was agreed in that case that parties had consented to the short extension necessary to allow for publication of the decision, and so the difficulty which arises in the instant case was not critical. Counsel however argued that, although *obiter,* what was said in that case clearly favoured the petitioner's position.

[10] Counsel further argued that a rigid timetable had to be adopted and applied. There was no implied agreement that parties had accepted that there would be a further extension to the second respondent by their undertaking to pay her fees; this was an impractical solution and depended entirely on when the second respondent decided to issue her fee invoice. There was no agreement in her appointment letter which would allow a failure to pay her fees to lead automatically to an extension of the time allowed for her to come to a decision. It was clear from what

Judge Toumlin had said in the ***Bloor Construction*** case that in normal circumstances the decision should be issued forthwith. If the second respondent wished to make a condition that her fees be paid prior to issuing her decision, then that was a separate matter and should not affect her statutory and contractual responsibility to produce her decision timeously.

[11] Finally, counsel submitted in respect of the balance of convenience that the circumstances favoured the petitioner. The dispute meant that the sum was not established as being due. As the parties had agreed to registration of the decision, diligence would follow automatically and this would cause

significant prejudice to the petitioner. Accordingly, the interim orders contained in the petition should be granted.

[12] For the first respondent counsel argued that the petitioner would have to satisfy the Court that there was good arguable case that the second respondent had acted outwith her powers. It was not clear if there was a jurisdictional issue but even if there was there had been no excess of jurisdiction in the present circumstances. Counsel referred to ***Ballast PLC v The Burrell Co (Construction Management)*** 2003 S.L.T.137, and submitted that parties should comply with the adjudicator's decision unless it could be said that the decision was a fundamental nullity. In the present case, if there was a failure by the second respondent it was simply a breach of her contractual agreement to deliver her decision, and the decision itself was not a nullity. The adjudicator had not failed to deal with the subject matter of the dispute; she had simply refused to release her decision until her fees had been paid.

[13] Even if this was not the case, counsel submitted that the contractual arrangements between the parties was such that the second respondent could not be said to have failed to comply with her contractual obligations. In terms of the letter written by the first respondent accepting her appointment on 13 January 2003, she had stipulated that the payment of her fees must be made within 7 days of invoice and all fees must be settled prior to her decision being released by first class post. In these circumstances the second respondent had clearly reached her decision within the provided time limits. In terms of s108(2)(c) of the Act the only requirement upon her was to reach her decision; nothing is said about delivery or intimation of her decision. But in terms of para.39A.6.3 of the standard contract, the requirement on the adjudicator is simply to reach a decision and to send her decision forthwith to the parties. Accordingly counsel argued that there was therefore a clear distinction between reaching a decision and delivering it. In the present case the decision was reached within the period required. The only relevance of the agreement on fees is that it explains the delay in issuing the decision. The decision was sent out as quickly as possible.

[14] In terms of the balance of convenience, respondents' counsel argued that to suspend the process would mean that the petitioner would not receive monies to which they were entitled and that the purpose underlying the whole procedure, namely that of achieving a speedy determination of any dispute, would not be realised. In these circumstances the balance of convenience could not be said to favour the petitioner. The first respondent was due significant sums to subcontractors, and accordingly, if anything, any balance of convenience must favour the first respondent.

[15] In the context of these submissions, I am satisfied that it cannot be said that the second respondent has reached her decision within the time limits set in accordance with either the statutory provisions or the standard contract. In terms of those arrangements it is clear, and appears to be accepted on both sides, that the second respondent required to reach her decision by 5 March 2003. In my view she did not do so. It does appear that she had completed her consideration of the matter referred to her by that date. However she had made no effort to communicate her decision to the parties or to intimate the fact that she had arrived at a decision at that time. It is true that the statutory provisions only require the adjudicator to reach a decision. This is all that is said in terms of section 118(2)(c). However, para.39A.6.3 also requires that the adjudicator reach a decision within 28 days and further provides that he shall "forthwith send that decision in writing to the parties".

[16] There are therefore two sets of provisions which apply to the present situation. Dealing first with the statutory provision, it is clear that the only obligation upon the adjudicator in this matter described in the Act is that a decision should be reached within 28 days. The Act is totally silent on the question of intimation or communication of that decision. In these circumstances it must therefore follow that the obligation to reach a decision must include a contemporaneous duty to communicate that decision to the interested parties. Not to require such an interpretation of the obligation to reach a decision would render the whole purpose of the legislation meaningless. It would suggest that there is no obligation on the adjudicator, having once arrived at that decision, to communicate it at all to anyone else. Alternatively, it would mean that the decision once reached did not have to be communicated within any time limit to the parties interested in receiving it, thus

frustrating the purpose of a speedy resolution of building contract disputes envisaged in terms of the legislation. I therefore can only conclude that the requirement to reach a decision in terms of the statutory provisions includes a duty to intimate or communicate that decision to interested parties. An alternative interpretation of the statute is that the duty on the adjudicator is to intimate or communicate the decision reached within the time limits immediately or forthwith. On either view, it is clear that the adjudicator cannot be said to have satisfied either definition of her duties.

[17] On the other hand, the contract appears to contemplate that the requirement to deliver the decision is a separate one from the obligation to reach a decision. As I have indicated, para.39A.6.3 requires the adjudicator to reach his decision within 28 days of the referral and forthwith send that decision in writing to the parties. In terms of current commercial understanding and procedure, and modern methods of communication, there would appear to be little doubt that the term "forthwith" should mean that the decision is to be sent immediately or as quickly as possible by what is currently regarded as conventional and universally available methods of business communication. In particular therefore there would appear to be no reason why any such decision cannot be immediately transmitted to interested parties by fax transmission. It may conceivably be arguable that a decision could be communicated or intimated to other parties by first class postal delivery, although such a claim might be regarded as archaic.

[18] I therefore consider that it is appropriate to conclude that in terms of both the contractual and the statutory provisions a decision of this sort cannot be said to be made until it is intimated. If the only obligation incumbent upon the adjudicator was to reach a decision, then that decision need never be intimated. Between the time when the decision was made and the time it was intimated, the decision could be changed. As indicated above, to take any other view would frustrate the entire purpose of these various arrangements.

[19] Neither can it be said that the adjudicator is entitled to delay communication or intimation of a decision until her fees are paid. There is nothing in the scheme or contract which allows this. It is of course perfectly permissible for the adjudicator to require parties to come to a separate arrangement about the payment of her fees. However, it is not permissible in my view for such an arrangement to frustrate or impede the progress of the statutory arrangements for resolving these contractual disputes. If the adjudicator wishes to impose such an arrangement upon parties, then it is her responsibility to see that that arrangement is accommodated within the statutory or contractual time limits. I can find no reason why the payment of the second respondent's fees should be allowed to impede the statutory process, or justify a failure to observe its requirements. It is noteworthy that in fact the second respondent does not appear to have received her fees before issuing her decision. Rather, she appears to have been prepared to issue her decision following an undertaking given by the first respondent to pay all her fees in order to secure communication of that decision.

[20] Further, I do not consider that the second respondent can be said to have failed to reach her decision until she has produced the reasons for her decision. There is separate provision for the production of her reasons (para.29A.6.4) in the contractual arrangements between the parties, and the question of whether a decision has been reached cannot in a way depend upon the supplementary requirement to provide reasons if requested.

[21] However, the question remains as to what remedy should be available to the petitioner in these circumstances. The petitioner has not taken advantage of the opportunity of submitting the referral to another adjudicator in terms of the scheme. I do not consider that the failure by the adjudicator to observe the time limits in the circumstances must invariably allow the petitioner not to comply with the adjudicator's decision when it is eventually issued. In ***Ballast PLC v The Burrell Co (Construction Management)*** case Lord Reed is reported at p.139 as having said:

> *"[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, 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".*

I respectfully agree with that view. While the failure of an adjudicator to produce a decision within the time limits is undoubtedly a serious matter, I cannot think that it is of sufficient significance to render the decision a nullity. The production of a decision two days outwith the time limit provided is not such a fundamental error or impropriety that it should vitiate the entire decision. Such a failure is a technical matter, and it is of significance in the present case that no challenge is offered to the merits of the adjudicator's decision. I am somewhat reinforced in that view by the clear nature of the compliance provisions in paras.3913.2 and 3913.3 of the standard contract. While this view of the statutory and contractual provisions may be thought in some respects to be unsatisfactory, and in particular offers no sanctions against an adjudicator who fails to produce a decision within the time limits, that is not something which alters my opinion. No doubt any adjudicator who fails to comply with time limits is unlikely to find favour with those who are seeking suitable persons to adjudicate on their disputes. However, this is not relevant to my conclusions. In all the circumstances therefore I have decided that there is not a good arguable case which might suggest that this petition for judicial review would succeed.

[22] Further, I was not persuaded by the petitioner's submissions that they were favoured by the balance of convenience. The financial consequences for either side in this case are very significant, as the sums involved are large. However, these considerations are at best equal, and it could be argued that as the first respondent requires to pay a number of sub-contractors, there will a greater spread of prejudice if the adjudicator's decision is suspended. Further, however, I considered that the balance of convenience significantly favoured the first respondent as they were in possession of what is in effect a decree arbitral which recognised that they were entitled to payment of the sums they had claimed for work done. Accordingly, even if I had been persuaded by the petitioner's arguments on the merits of this review, I would not have been prepared at this time to grant the interim orders which they sought. I therefore refused the petitioner's motion for interim order.

Petitioners: Glennie, Q.C., Smith; Paull & Williamson
Respondents: Stewart, Lindsays, W.S.