OPINION OF LORD CLARKE : OUTER HOUSE, COURT OF SESSION **:** 5th June 2002

[1] In this action the pursuers seek interdict against the first defender, who did not enter appearance in the action, from proceeding with any purported arbitration proceedings under and in terms of a joint Deed of Appointment between the pursuers and the second defenders dated 7 June 1994.

The Background to the Dispute

[2] The background to the matter is as follows. The pursuers and the second defenders, on 4 July 1990, entered a building contract, which incorporated *inter alia* the Standard Form of Building Contract, JCT 1980 Edition, Private Edition with Quantities, as amended by the Scottish Supplement thereto. Under that contract the pursuers were to carry out certain renovation works for the second defenders at Broomhill Shopping Centre, Glasgow. Disputes arose between the parties. Those disputes were made the subject of Sheriff Court proceedings which, apparently, were sisted for arbitration. The first defender was appointed to hear the disputes by virtue of the said Deed of Appointment referred to above, whose terms are incorporated into the pursuers' pleadings, and are admitted by the second defenders.

[3] In Article 3 of Condescendence, the pursuers aver as follows: *"The pursuers lodged a statement of claim in the arbitration. Following sundry procedure on 26 August 1999 the second defender (sic.) issued to parties in the arbitration, his decree arbitral. The said decree arbitral was the final award of the first defender in the arbitration proceedings. It was issued by the first defender following upon final submissions to him on a draft note of proposed decree arbitral issued on 6 August 1999. In said decree arbitral the first defender pronounced decree arbitral in favour of the pursuers and against the second defenders in the sum of £24,672.84."*

The decree arbitral is produced in the proceedings and there was no dispute about its terms. It bears to be the first defender's final decree arbitral. All of the foregoing averments are met by an admission. Accordingly, the second defenders admit that the decree arbitral of 26 August 1999, issued by the first defender to the parties, was his final award in the arbitration proceedings.

[4] In March 2001 the second defenders intimated a claim against the pursuers for £70,059.91 arising out of the said building contract between the parties. The second defenders requested the first defender to deal with this claim under, and in terms of, the original Deed of Appointment dated 17 June 1994. On 20 June 2001 the first defender held a meeting, attended by representatives of the pursuers and the second defenders. At that meeting submissions were made, on behalf of the pursuers, to the effect that the reference to the first defender to act as arbiter had been exhausted by the issue of his final award. He was, accordingly, ***functus officio*** and had no jurisdiction to hear a fresh claim made by the second defenders. Notwithstanding those submissions the first defender, by letter dated 27 June 2001 (6/4 of process) wrote to the respective agents of the pursuers and the second defenders and advised them that he considered that he had jurisdiction to arbitrate upon the claim now being advanced by the second defenders, by virtue of the original Deed of Appointment. Attached to this letter, the first defender set out a note of the arguments that had been put forward to him on behalf of the pursuers and the second defenders about his jurisdiction to entertain the claim. In that note he recognised that the claim, which related to payment for repair to defective render, had in substance formed part of a counterclaim by the second defenders in the previous arbitration proceedings, but they had, in the event, not insisted upon this and the counterclaim had been dismissed. Notwithstanding the issuing of his final decree, the first defender reached the view that he was not ***functus officio*** and it was open to him to hear the second defenders' claim and to arbitrate upon it, apparently for the reason, insofar as I understand his note, that the claim was now formulated on a different legal basis from that upon which it had been advanced in the second defenders' counterclaim.

[5] The first defender then proceeded to fix a preliminary meeting for 15 August 2001. He purported to order the claim of the second defenders to be received into process and purported to ordain the pursuers to lodge answers thereto by 13 September 2001. The pursuers then raised the present proceedings and on 20 September 2001 I pronounced *interim* interdict against the first defender in terms of the conclusion of the summons. The matter then came before me for debate, on the parties' respective preliminary pleas.

The second defenders' arguments regarding the competency of the proceedings

[6] The second defenders have a plea to the competency of the action. It was this plea which formed the basis of their attack on the pursuers' case at the debate. The point taken by them was a short one. The action, it was submitted, was incompetent because it sought review of the actings of an arbiter, and any such review required to be taken by way of judicial review proceedings under Rule of Court 58 and not by way of ordinary action for interdict. In making that submission counsel for the second defenders referred to the leading modern authority on the supervisory jurisdiction of the Court of Session, namely, ***West* v *The Secretary of State for Scotland*** 1992 S.C. 380 and, in particular, to the opinion of Lord President Hope, at p.412, where he said: *"The Court of Session has power, in the exercise of its supervisory jurisdiction, to regulate the process by which decisions are taken by any person or body to whom a jurisdiction, power or authority had been delegated or entrusted by statute, agreement or any other instrument."*

That supervisory jurisdiction can now only be invoked in terms of Rule of Court 58. Rule of Court 58.3(1) provides: *"....an application to the supervisory jurisdiction of the court shall be made by petition for judicial review."*. Counsel for the second defenders submitted that the pursuers were seeking to have reviewed the actings of an arbiter which could only be done by having recourse to the supervisory jurisdiction of the Court of Session. In ***Kyle & Carrick District Council* v *A.R. Kerr & Sons*** 1992 S.L.T. 629 Lord Penrose, at p.633, having reviewed the authorities relating to the review of arbiter's actings, said: *"The effect of these decisions is to assert a jurisdiction in the Court of Session to review the procedures adopted by arbiters and to decide whether decrees have proceeded within the scope of the reference, within the powers conferred upon the arbiter, and in accordance with the interests of substantial justice as reflected, for example, in the traditional rules of natural justice. The formulations adopted mirror to a substantial extent the expressions used in defining and describing the court's jurisdiction over other forms of tribunal and over public and other authorities generally. In my opinion, that jurisdiction is of the superintending or supervisory character covered by Rule 260B, as a matter of language."*

While counsel for the second defenders accepted, as he was, it seems to me, bound to do, that an arbiter may be ***functus*,** as to his jurisdiction, if he has decided upon all the disputes which the parties have identified, and which fell within the terms of their deed of submissions to him, nevertheless, he contended, if such a person purports to exercise a jurisdiction, as arbiter, any challenge to that purported exercise must go to the supervisory jurisdiction of the court at least, as counsel put it, *"if there is a bona fide dispute as to whether or not he has a jurisdiction"*. It was pointed out to counsel that in this case the first defender has not entered appearance and has not, in these proceedings, contended that he has a jurisdiction. Nevertheless, counsel for the second defenders said that it was enough that the second defenders, as the other interested party, were contending that the first defender had such a jurisdiction. Counsel accepted that if a person, as an ordinary individual, purported to exercise a jurisdiction he did not have, that conduct could be prevented by the bringing of an ordinary action of interdict, but the position may be different, he submitted, where, as here, it was not disputed that the person in question had at least once exercised a valid jurisdiction as arbiter. If he had not dealt with all the disputes that existed between the parties he was not ***functus*** as an arbiter. The arbitration clause under which the first defender had acted upon in this case, was a general arbitration clause which, counsel submitted, was not to be construed as confining him to dealing with only one dispute between the parties. Moreover, the Deed of Appointment in the present case imposed no limit in time as to his jurisdiction, or on the number of disputes which could be placed before the arbiter. In concluding his submissions, counsel for the second defenders referred me to the case of ***Naylor* v *Greenacres Curling Ltd*** 2001 S.L.T. 1092 in support of his basic submission that any challenge to a person acting without jurisdiction should be made by way of petition for judicial review. In that case the Lord Ordinary, Lord Bonomy, had to consider the provisions relating to the Statutory Building Contracts Adjudication Scheme, which are to be found in the Scheme for Construction Contracts (Scotland) Regulations 1998, and in particular, Regulation 9(2) thereof. That Regulation is in the following terms: *"An adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication."*

Contractors who had been operating under a building contract, had brought a petition for *interim* interdict, against an adjudicator, continuing to act in an adjudication on the grounds that the dispute

which had been referred to him was the same or substantially the same as one upon which had already been referred to adjudication and decided in that adjudication. *Interim* interdict was pronounced by the court. The respondent employer sought recall of the *interim* interdict. While the court considered that the petitioners were well founded in claiming that the dispute was substantially the same as one which had previously been decided in a previous adjudication, and that it was competent for the court to pronounce an interdict against an adjudicator, who was exercising a jurisdiction which he did not possess, nevertheless, the petition proceedings were held by the court to be incompetent as they had not been brought under Rule of Court 58. The Lord Ordinary accordingly recalled the *interim* interdict. In relation to the competency point which was raised in that case, his Lordship was to the following effect, at p.1094 I-K: *"Counsel's second submission, on the other hand, was one for which the solicitor advocate had no answer. While the cases to which the solicitor advocate referred appeared to constitute a line of authority about the interdict in arbitration proceedings, they are simply examples of the exercise by the court of its supervisory jurisdiction. The solicitor advocate rather recognised that that was so when he submitted, in dealing with the balance of convenience, that, if the second adjudication was allowed to proceed and a decision was made in favour of the respondents, the petitioner would then require to seek judicial review of that decision, and that by granting interim interdict the court would prevent that from happening. If the court would in these circumstances be exercising its supervisory jurisdictions, then it would also plainly be doing so when asked in the present proceedings to consider interdicting the second adjudication. Since 1985 it has been mandatory to present applications to the supervisory jurisdiction of this court by petition for judicial review."*

His Lordships then referred to the provisions of Rule of Court 58.3(1) and continued: *"Rule 58.3(1) comes into play in two respects. What the petitioner seeks to challenge is the vires of the second adjudicator, and that challenge arises out of the failure of the second adjudicator to resign as required by para.9.2 of the scheme, in other words, his failure to implement his statutory duty. While interdict and suspension is the remedy sought, that is simply a means of effecting specific performance of the second adjudicator's statutory duty. These are issues which must nowadays be raised by petition for judicial review. Ordinary petition procedure is no longer competent."*

Counsel for the second defenders invited me to apply the reasoning of the Lord Ordinary to the circumstances of the present case since he contended that it was, on all fours, with the *Naylor* case. He moved me, accordingly, to sustain the second defenders' first plea-in-law and to dismiss the action.

The pursuers' reply and attack on the relevancy of the second defenders' pleadings

[7] In opening his reply, Mr Glennie, Q.C., for the pursuers, invited me to repel the second defenders' first plea-in-law, to sustain the pursuers' first plea-in-law and to grant interdict as concluded for. Senior counsel then referred me to the case of ***West*** and, in particular, to what Lord President Hope had said in his opinion at pps.412-413 in relation to the nature of the supervisory jurisdiction which his Lordship repeatedly referred to as being a supervisory function of the Court of Session in respect of a jurisdiction, power or authority "***delegated or entrusted***" to someone. Senior counsel submitted that the supervisory jurisdiction was designed to control the actings of a person or body in carrying out the functions dedicated to him. So long as those functions continue to be dedicated to him he may commit irregularities which require to be put right by the Court of Session in the exercise of the supervisory jurisdiction. But, senior counsel submitted, there is no role for the supervisory jurisdiction when the person or body, whose actings are being challenged, is not entrusted at all with any function. To require that, in such a case, the supervisory jurisdiction must be invoked, would be to confer on the person or body, in question, a status he or it did not possess. In discussion with the court, the example of a sheriff who had retired, or resigned, or had been dismissed, who then turns up at the sheriff court and purports to hear cases, was given. Mr Glennie submitted that such a person could be interdicted from continuing to behave in such a way and this could be by way of either ordinary petition or ordinary action for interdict and would not be by way of procedure for judicial review. The cases of ***Kyle & Carrick District Council*** and ***Naylor,*** upon which the second defenders relied, did not detract from these submissions. In both cases, the person in question - in ***Kyle & Carrick*** the arbiter, and in *Naylor* the adjudicator - were lawfully in place, the former by virtue of the relevant agreement, and the latter by operation of the statutory scheme. In *Naylor* the position was that the adjudicator was failing

to implement his statutory duty to resign. He was not a *"**pretended**"* adjudicator. Unless and until he resigned, or was ordered to do so by the court, he was a lawfully appointed adjudicator *"**with power to decide matters**"* to use the words of Lord President Hope in ***West*** at p.413 in defining the word *"**jurisdiction**"* in this context. In the present case the *"**power to decide**"* for the first defender came from the Deed of Appointment. That power to decide was exhausted in his case, in 1999, when he issued his final decree arbitral. This consequence flowed from the basic principle of arbitration law that it is the duty of the arbiter to proceed to an award which should be exhaustive. Senior counsel referred me, in support of this submission, to the *Stair Memorial Encyclopaedia of the Laws of Scotland* Vol.2 and the article contained therein on arbitration. At paragraph 459 thereof it is stated: *"Since the function of the award is to decide the matters which have been referred to the arbiter and to bring the submission to an end, it should leave none of the disputed matters undecided, unless power has been given to pronounce part awards. The failure of the arbiter to exhaust the submission is fatal to the award."*

Senior counsel went on to submit that clearly, if the award was not exhausted, the proper procedure was to seek to reduce it. Senior counsel, in further support of his position, referred me to paragraph 438 of the said article which begins with the following words *"the submission ends, if not terminated earlier by any of the events referred to above, when the arbiter issues his final award. When his award is issued **his powers are at an end, his office is functus and the submission is closed**"* (my emphasis). Later on in the same passage it is said *"...once the award has been signed and duly delivered, the arbiter has concluded his labours and it is no longer possible for him, for example, to state a case for the opinion of the court."*

[8] In response to counsel for the second defenders' submission, which seemed to envisage an open-ended and continuing jurisdiction vested in the arbiter, even after his final award has been issued, senior counsel for the pursuers referred me to the case of ***North British Railway Company* v *Barr*** (1855) 18 D. 102. That case involved an attempt by a party to have reduction of a decree arbitral, to enable them to obtain payment of a sum, which they claimed should have been included in the decree and was not included. The reason, in fact, that the sum was not included was that a party had not pled, in their submission to the arbiter, that it had paid the sum in question, nor did it produce any vouching of the sum. The court refused to grant decree of reduction. In his judgment Lord Ivory, at pps.106-017 said this: *"The only objection on the part of the pursuers is that they did not get credit for a sum of L.140, to which they alleged they are entitled. This was because they did not produce their voucher for that sum, or insist in their claim to have credit for it. Is a reduction to be allowed to save a party from the consequences of his own neglect? If such grounds were to be admitted, it would come to this, that a party would not get a closed decree until the end of time - a principle to which it would be very unsafe for the court to assent; and, besides, there may have been on both sides certain claims foregone."*

Mr Glennie invited me to follow that approach to matters in the present case. The second defenders were seeking to have the arbiter revisit, after he had pronounced his final decree arbitral, a claim they had previously withdrawn from his consideration. Under reference to the decree arbitral, 6/2 of process, and the accompanying note, the position was, as recorded in that note, that the second defenders had moved for the dismissal of their own counterclaim which related to the matter now sought to be put before the arbiter. It was not correct, in that situation, to characterise what the arbiter had done as involving a failure by him to deal with a matter put before him. He had dealt with all the matters put before him and, in that situation, from the moment of the issue of his decree arbitral his authority to act was revoked. In effect, from that point onwards, he was as a stranger, as far as these parties were concerned, and had no "jurisdiction" over them. In terms of the Deed of Appointment, he had been appointed to deal with all existing disputes. He had done so. He had no further role arising from the Deed of Appointment and, absent a fresh appointment, his position now was as if he had never been appointed at all. Senior counsel for the pursuers submitted that the clear distinction had to be drawn between, on the one hand, a person presently instructed to carry out a function, and who is exercising his powers in that respect and, on the other hand, a stranger being asked by one party to a dispute to deal with the dispute when he has no legal power to do so. That distinction had to be borne in mind when considering as to when the supervisory jurisdiction of this court has a role to play. The supervisory jurisdiction only came into play when a person or body, whose actings, it is sought to

review, has an existing and continuing jurisdiction, albeit that he or it might have exceeded that jurisdiction in the instant case. The first defender, in the note accompanying his letter of 22 June 2001, 6/4 of process, referred to the second defenders raising "a new arbitration". For him to have authority to conduct a new arbitration required a fresh appointment of him under a new Deed of Appointment. For all of these reasons, senior counsel, for the pursuers, invited me to repel the second defenders' plea to the competency of the action.

[9] Mr Glennie went on to submit that if I acceded to his motion to repel the plea to the competency, I should grant decree, as concluded for, since there was otherwise no relevant defence pled by the second defenders. The second defenders admitted that a final decree arbitral had been pronounced and did not contest its terms. The terms of the Deed of Appointment were admitted. It was noteworthy that in their answers the second defenders aver that they "are entitled to insist that the second arbitration proceedings should proceed". That averment betrayed the problem for the second defenders. There was no authority, in place, for the arbiter to act as arbiter in any second arbitration proceedings.

The second defenders' reply on relevancy

[10] In replying, briefly, to the pursuers' attack on the relevancy of the second defenders' pleadings, counsel for the second defenders observed that senior counsel for the pursuers had not disputed that a general arbitration along the lines of what had occurred in the present case "could be invoked without limit of time on multiple occasions". If that was accepted then there was nothing in the language of the joint Deed of Appointment that implied a restriction on the number of occasions in which it could be invoked. For that reason the second defenders' position, as averred, was not irrelevant.

Decision

[11] Having considered the submissions made on both sides of the bar, I have reached the conclusion that the second defenders' attack on the competency of the proceedings is misconceived. In this case the joint Deed of Appointment of the first defender, 6/1 of process, provided, *inter alia*, as follows. In the recital it stated: *"(Three) Disputes have arisen between the parties which have resulted in the parties making claims upon each other and which the parties require to have resolved by arbitration."*

Thereafter it is provided as follows: *"The Parties HAVE AGREED and DO Hereby AGREE as follows: (1) In terms of the Scottish Supplement to the said Standard Form of Building Contract the parties hereby refer all disputes and differences in connection with or arising out of the said building contract to the amicable and final decision as arbiter of" the first defender.*

The deed went on to give the arbiter power to award *interim*, part and final awards, as well as proposed awards. There was no dispute that the first defender issued a final decree arbitral which is No.6/2 of process. There is no complaint by the second defenders that the arbiter failed to deal with the matter put before him or that he overlooked some matter in issuing that award. Reduction is not sought. In the foregoing circumstances, the pursuers were, in my judgement, quite correct in submitting that as soon as the decree arbitral was issued, any power in the first defender to resolve disputes between the parties ended, and a fresh deed of appointment was necessary for him to have any further power in that regard. He was *functus officio*. Accordingly, in writing his letter of 27 June 2001, 6/4 of process, to the parties' representative and, purporting to make the orders he did thereafter, the first defender was acting, not as a person who possessed a jurisdiction, but as someone who had no jurisdiction. Such a person, in my judgement, is not subject to the supervisory jurisdiction of the Court of Session, whose actings can only be reviewed by judicial review procedure, but is someone who can be prevented from acting, unlawfully, by means of ordinary procedures. In reaching that conclusion, I have not overlooked the decision in the case of *Naylor*, but for the reasons given by senior counsel for the pursuers, that case is distinguishable from the present in that the adjudicator, in that case, was in post until he resigned voluntarily, or was compelled to do so by the court. He had a statutory duty to do so, in the particular circumstances, and it was his failure to carry out that statutory duty, as a person apparently otherwise validly appointed under the statutory scheme, that was being challenged in that case. The position, in the present case, is different where the first defender, for the reasons already given, never had any power or function to determine disputes

between the parties after the issue of his decree arbitral. I will accordingly repel the second defenders' first plea-in-law.

[12] I am furthermore satisfied that, once any question of the competency of the action is removed, there is not to be found, in the defenders' pleadings, a relevant defence. For the reasons given previously, the first defender had, after the issue of the decree arbitral, no power or authority to deal with disputes between the parties. Since the pursuers set out clear averments that, notwithstanding that fact, the first defender has been acting in a way, in taking steps on the basis of an apparent misconception that he had power and authority to determine disputes between the parties, the pursuers are, in my judgement, entitled to have him interdicted from acting in this unauthorised and illegal way. The only answer which counsel for the second defenders had to the pursuers' attack on the relevancy of the second defenders' pleadings was that in a general arbitration there was no limit in time, or in the number of disputes that might come before the arbiter. That is true in the sense that, as is expressly provided for in the Deed of Appointment in the present case, the arbiter may have power to make *interim* or partial awards, but it ignores the significance and status of the final decree, in that it is the final decree which terminates the arbiter's function when, and as soon as it is issued and delivered. The consequences of the submissions of counsel for the second defenders in this respect, as he put them, would, to use the words of Lord Ivory in the ***North British Railway Company*** case above, *"come to this, that a party would not get a closed decree till the end of time*". Since I, therefore, consider there is no relevant defence pled by the second defenders, I shall grant decree of interdict as concluded for by the pursuer.

Pursuers: Glennie, Q.C., Cowie; MacRoberts
Defenders: Upton; Drummond Miller, W.S.