

**OUTER HOUSE, COURT OF SESSION**

**[2005] CSOH 178**

CA50/04

OPINION OF LORD DRUMMOND YOUNG

in the cause

CASTLE INNS (STIRLING) LIMITED,  
TRADING AS CASTLE LEISURE GROUP

Pursuers:

against

CLARK CONTRACTS LIMITED

Defenders:

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**Pursuers: Renton, Solicitor; Dundas & Wilson**

**Defenders: Howie, Q.C.; MacRoberts**

29 December 2005

[1] On 2 May 2001 the parties entered into a contract under which the defender was to carry out certain works on premises at 6-8 Methven Street, Perth. The works comprised downtakings, demolitions, and alterations to the structure of the building, including forming structural openings, new floors and stairs and new walls; the works also included roof works and drainage. The purpose of the works was to provide watertight shell accommodation for fitting out as licensed premises by others. The parties' contract was concluded by means of a tender and acceptance; no formal written contract stating its terms was signed. The tender and acceptance did, however, incorporate the conditions of the Scottish Building Contract without Quantities, Contractors Design Portion (January 2000 revision), subject to certain amendments and modifications.

[2] The pursuer avers that the contract works began on about 7 May 2001 and that the architect issued a certificate of non-completion which stated that the works should have been

completed by 19 November 2001. A certificate of practical completion was issued in due course by the architect, which certified that the contract works were complete on 18 February 2002. Under the contract, the pursuer was entitled to deduct liquidate and ascertain damages of £5,000 for every week of the period between the date on which the contract works should have been completed and the date when they were in fact completed. That period, the pursuer avers, runs from 19 November 2001 to 18 February 2002, and amounts to 14 weeks, with the consequence that the pursuer was entitled to deduct liquidate and ascertained damages amounting to £70,000. That sum was withheld from the amount certified as due to the defender under interim certificate no 9. The pursuer further avers that defects existed in the works carried out by the defender, and that the pursuer was in consequence entitled to withhold £51,976 from monies otherwise due to the defender. The pursuer withheld £51,976 from the payments certified as due to the defender by interim certificate no 10.

[3] Disputes arose between the parties in the course of the contract works, and these resulted in two separate referrals to adjudication by the defender. The first adjudication was begun by notice of adjudication served upon the pursuer on 13 June 2003. It related to the sum due to be paid to the defender in respect of interim certificate no 10. An adjudicator, Mr. Ian Strathdee, was appointed, and he issued part decisions and reasons on 13 August 2003 and his final decisions and reasons on 27 August 2003. The adjudicator made a number of findings and awards. First, he found that the defender was entitled to an extension of time until 31 December 2001, and ordered that the architect's certificate of non-completion should be revised accordingly. Secondly, he found that the defender was entitled to payment of direct loss and/or expense under clause 26 of the relevant SBC conditions, and awarded £89,062.89 by way of such loss and expense. Thirdly, he considered the sums withheld by the pursuer from the payments made in respect of interim certificates nos.9 and 10; in this respect he found that the pursuer had no entitlement to withhold certain sums from interim certificates nos 9 and 10 and ordered the pursuer to pay those sums, which amounted in total to £75,276, to the defender. Fourthly, the adjudicator ordered that interim certificate no 10 should be opened up, reviewed and revised, with the result that a further sum of £12,830.12 was due by the pursuer to the defender. He further awarded interest on the sums awarded. Finally, the adjudicator ordered the pursuer to pay all of his fees and disbursements; these amounted to £44,949.86 inclusive of value added tax. Under their contract the parties were jointly and severally liable for payment of the adjudicator's fees and disbursements. The defender in fact made payment to the adjudicator of his fees and disbursements, and on 19 January 2004 the pursuer paid the defender the amount that the latter had paid, plus interest for late payment.

[4] The second adjudication was begun by notice of adjudication served upon the pursuer on 16 September 2003. It related to a claim made by the pursuer to recover sums totalling £129,287.09, either under the provisions of the contract or by way of damages for breach of contract, in respect of alleged defects in the works carried out by the defender and in respect of sums paid by way of loss and expense to the contractor responsible for fitting out the premises. Once again Mr. Ian Strathdee was appointed adjudicator. He issued a decision and reasons on 7 November 2003. He decided that the monetary value of the pursuer's claim was £11,180.48. £11,500 of that had already been withheld by the pursuer, and the adjudicator accordingly ordered payment of the sum of £380.48. It is clear that he intended to order payment of the sum by the defender to the pursuer, but his decision erroneously states that it is payable by the pursuer to the defender. The adjudicator further ordered that the pursuer should be liable for all of his fees and disbursements in respect of the second adjudication. The pursuer avers that it disputes the adjudicator's decisions and has not paid the sums awarded by him.

[5] The pursuer further avers that on 8 October 2003 the architect issued a final certificate under clause 38 of the conditions of contract. In the final certificate the contract sum as finally adjusted was declared to be £647,962.94 excluding value added tax. The sum certified in previous interim certificates was declared to be £897,744.00 excluding value

added tax. Consequently a balance of £249,781.06 plus value added tax was due to be paid by the defender to the pursuer.

[6] The pursuer subsequently raised the present proceedings, in which it seeks to have the matters that formed the subject matter of the first adjudication finally determined by the court. In relation to that adjudication, the pursuer asks for a final determination of the matters decided by the adjudicator, as contemplated by section 108 of the Housing Grants, Construction and Regeneration Act 1996. To that end, the pursuer has conclusions for payment of the various sums that the adjudicator ordered to be paid to the defender in the course of the first adjudication, and also has declaratory conclusions in respect of the date on which the contract works ought to have been completed and the sums due in respect of interim certificate no 10. One of the sums claimed is the amount that the pursuer paid in respect of the adjudicator's fees and disbursements, and the ninth conclusion is for payment of £44,949.86, the sum that was paid in respect of those fees and disbursements. The pursuer then makes two further claims. The first is based on breach of contract. The pursuer avers that the works carried out by the defender contained defects, and that those involved a breach of contract by the defender. As a result of that breach of contract it is averred that the pursuer sustained losses arising in two ways. First, the contractor responsible for fitting out the premises was delayed, with result that the pursuer required to pay a sum by way of that contractor's loss and expense. Secondly, the pursuer avers that as a result of the defender's breach of contract the opening of its licensed premises was delayed by 28 days, with a consequential loss of profits. Those profits are also sought by way of damages. The second of the further claims is for payment of the balance due in terms of the final certificate, under deduction of sums that had already been withheld. That is obviously a claim for payment in terms of the parties' contract.

#### *Issues at debate*

[7] The defender has tabled a plea to the relevancy of the pursuer's averments. In the course of the case management procedure this was developed into a note of argument, and a debate was allowed on the matters referred to in that note of argument. In the event the parties reached agreement on certain of those matters, and only three issues were in fact debated. First, the defender argued that the pursuer's claim for the amount that it had paid in respect of the adjudicator's fees and disbursements was irrelevant, both under the terms of the parties' contract and at common law. Consequently that part of the claim should be dismissed. Secondly, it was submitted that the general basis on which the pursuer sought recovery of sums paid pursuant to the first adjudication was unclear, but appeared to be related to the common law principle of unjustified enrichment. Properly understood, however, that principle had no application to a case where the parties' contract made provision for the events that occurred, as was the case under the form of contract used by the parties. Thirdly, the defender argued that the pursuer's claim for payment in terms of the final certificate covered the same ground as the second adjudication. To that extent it involved the unwinding of the second adjudication by court proceedings of the sort contemplated by section 108(3) of the 1996 Act. That procedure, however, was time-barred by clause 30.9.4 of the contractual conditions. That clause provided that a challenge to an adjudicator's award given after the date of the final certificate could only be made within the period of 28 days after the award was made. In the present case it was averred that the final certificate was issued on 8 October 2003 and the adjudicator's second award was made on 7 November 2003. The present proceedings were not begun until March 2004, well after the 28-day period. Consequently the adjudicator's second award was final and could not now be challenged. I will deal with each of these arguments in turn.

#### **Liability in litigation for adjudicator's fees and disbursements**

[8] The pursuer's averments in support of its claim to recover the amount paid in respect of the adjudicator's fees and disbursements are as follows:

"The Adjudicator apportioned liability for his fees and disbursements on the basis of success in the Adjudications. The Defender is not entitled to the orders made by the Adjudicator as condescended upon above. The Pursuer is therefore entitled to repayment of the sums paid in respect of the Adjudicator's fees and disbursements; this is the sum ninth concluded for.... Explained and averred that the allocation of liability for the Adjudicator's fees and expenses proceeded on the basis that the majority of the parts of the dispute referred were decided in favour of the Defender. The allocation of [the] adjudication fee payable to the Adjudicator forms part of the decision and is an interim decision. In the event that the final determination of the disputes results in the majority of the parts of the disputes referred being decided in favour of the Pursuer then the Defender has financially benefited from the erroneous allocation of liability in the adjudication to the extent of the amount paid by the Pursuer as a proportion of Adjudicator's fees, and as such has been unjustly enriched to the extent of that portion of Adjudicator's fees and expenses".

The basis on which the pursuer seeks repayment of the amount paid in respect of fees and disbursements is accordingly unjustified enrichment. I will consider the general availability of that remedy in cases such as the present in the next section of this opinion. At present, however, I am concerned with the more specific question as to whether a party who is unsuccessful in an adjudication but is subsequently successful in court in unwinding the adjudication is able to recover sums that he has paid towards the adjudicator's fees and expenses.

### *Submissions*

[9] Counsel for the defender submitted that such sums were not recoverable; if they were, the contractual structure would be subverted. He drew attention in particular to clause 41A.7.1 and .2 of the parties' contract, the provisions that entitle an adjudicator to deal with questions of fees and expenses, and submitted that no other person or body was given power to interfere with the adjudicator's decision. Consequently a party who was unsuccessful in an adjudication would be unable to recover fees paid to the adjudicator in an action under section 108(3) to unwind the adjudicator's decision. In any event the degree of success in the adjudication and in a subsequent section 108(3) action might vary. In the present case, for example, the pursuer had challenged the jurisdiction of the adjudicator, and had been unsuccessful in that challenge. It was not obvious why it should be able to recover fees in respect of that part of the adjudication. Counsel further submitted that the pursuer's claim to recover the amount of the adjudicator's fee and disbursements was contrary to the legal requirements of unjustified enrichment. In particular, in *Dollar Land (Cumbernauld) Ltd. v CIN Properties Ltd.*, 1998 SC (HL) 90, it was held that enrichment pursuant to a contractual right could not be a basis for recovery because the existence of the contractual right provided full justification for the enrichment. In the present case, to the extent that the defender had been enriched by the pursuer's liability to pay the adjudicator's fee and disbursements, that was merely in accordance with the scheme of the parties' contract. It could not, therefore, provide the pursuer with a ground of action.

[10] The solicitor for the pursuer submitted that, if the court reached a decision that was contrary to the adjudicator's decision, the adjudicator's decision was at an end, and it was open to the court to reach a contrary view on any part of the adjudicator's decision. In particular, the court had power in terms of clause 41C.2 of the parties' contract (set out at paragraph [19] below) to revoke the adjudicator's decision on liability for his fee and disbursements and to substitute its own decision.

### *Discussion*

[11] The pursuer's claim to recover the sums paid in respect of the adjudicator's fee and expenses is based on the principle of unjustified enrichment. For present purposes, one particular feature of the law of unjustified enrichment is important. This was expressed by Lord Hope of Craighead in *Dollar Land Ltd. v CIN Properties Ltd*, *supra*, in the following terms (at 1998 SC (HL) 94E-F):

"An obligation in unjustified enrichment is owed where the enrichment cannot be justified on some legal basis arising from the circumstances in which the defender was enriched. There can be no better justification for an enrichment than that it was obtained and is being retained in the exercise of a contractual right against the party who seeks to invoke the remedy".

Thus any benefit obtained in consequence of a contractual entitlement cannot be challenged on the ground that it involved unjustified enrichment; the existence of a contractual right provides clear legal justification for the enrichment. It follows that, in any case where unjustified enrichment is alleged in the context of a contractual relationship, it is essential to consider whether the benefit that is said to constitute the enrichment resulted from the operation of the contract. If it did, there is no basis for recovery.

[12] It is accordingly necessary to examine the present contractual scheme to discover whether it has a bearing on the ultimate liability to pay the adjudicator's fees and outlays. The relevant contractual provisions are based on the requirements of section 108 of the Housing Grants, Construction and Regeneration Act 1996. Section 108(1) provides that a party to a construction contract has a right to refer a "dispute" arising under the contract for adjudication. "Dispute" is defined as including any difference, and is clearly a word of wide signification. Nevertheless, it is clear that a dispute is something that exists prior to the reference to adjudication. In the present case, that point is important because it means that liability to pay the adjudicator's fees and outlays cannot be a "dispute". Subsections (2) and (3) of section 108 refer to the adjudicator's decision; subsection (2)(c) requires the adjudicator to reach a decision within, normally, 28 days of referral, and subsection (3) makes the decision binding until the dispute is finally determined by legal proceedings, arbitration or agreement. Subsection (3) provides

"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.

The parties may agree to accept the decision of the adjudicator as finally determining the dispute".

[13] In the parties' contract, clause 41A gives effect to the legal requirements of section 108, but adds a great deal of detail. The consequences of an adjudicator's decision are set out in clause 41A.8.1, which largely repeats the requirements of section 108(3). It provides as follows:

"The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or by court proceedings or by an agreement in writing between the parties made after the decision of the Adjudicator has been given".

Thus the decision of the adjudicator is provisionally binding on the parties, and must be given effect. Nevertheless, clause 41A.8.1, following section 108(3), contemplates that the court or an arbiter or the parties by agreement can in effect undo the adjudicator's decision on a dispute or difference and substitute another decision, which will thereafter be binding on the parties. When the court is involved, the mechanism that is used is an ordinary action to enforce the parties' contractual rights. Any such proceedings before the court are not an

appeal; that is made clear by the side note to clause 41A.8.1, which states that the court proceedings are not an appeal against the decision of the adjudicator but are a consideration of the dispute or difference as if no decision had been made by an adjudicator. That side note is in my opinion an accurate statement of the legal position. The court proceedings do not involve any reconsideration of the adjudicator's decision, but are entirely free-standing.

[14] If a dispute between the parties is referred to the court, the court's decision on that dispute will thereafter be binding on the parties, and is clearly implicit in the scheme of clause 41A.8.1 that the adjudicator's decision on that dispute will cease to be binding. If the court's decision on the dispute is at variance with the adjudicator's decision, any sums that have been paid pursuant to the adjudicator's decision must obviously be repaid. Neither section 108 nor clause 41A states the legal basis for such repayment. In theory two possible bases might exist, either an implied term of the parties' contract or a restitutionary obligation based on unjustified enrichment. This is a case, however, where the parties' contract remains in full force and effect and the obligation to repay can be said to arise directly out of the contractual scheme. In such a case the use of an implied term of the contract is a more natural mechanism than a restitutionary obligation based on unjustified enrichment, which is necessarily an extra-contractual obligation. For that reason I am of opinion that the obligation to repay is based on an implied term of the parties' contract. Perhaps the most standard ground for the implication of a contractual term is that it is necessary to give business efficacy to the parties' agreement; that test is clearly satisfied in the present circumstances.

[15] In his decision, the adjudicator may determine liability for his own fee and expenses. The relevant contractual provisions are found in clause 41A.7.1 and .2, which provide as follows:

"41A.7.1 The Adjudicator in his decision shall state how payment of his fee and reasonable expenses is to be apportioned as between the parties. In default of such statement the parties shall bear the cost of the Adjudicator's fee and reasonable expenses in equal proportion.

41A.7.2 The parties shall be jointly and severally liable to the Adjudicator for his fee and for all expenses reasonably incurred by the Adjudicator pursuant to the Adjudication".

Any finding by the adjudicator on these matters forms part of his decision, as clause 41A.7.1 indicates. Nevertheless, any such finding does not relate to the dispute that is the subject of adjudication; it is merely an ancillary finding, obviously analogous to a court's decision on expenses. The "dispute" that is contemplated by section 108 and clause 41A is clearly something that predates the reference to adjudication, and forms the substantive subject matter of the adjudication; the finding relative to the adjudicator's fees and expenses, by contrast, is something that can only be determined at the end of the adjudication process.

[16] The critical question that arises in the present case is whether that part of the adjudicator's decision can be reconsidered by the court or, presumably, by an arbiter. In my opinion it cannot, on the basis that such reconsideration would be contrary to the contractual scheme found in clause 41A. I reach this conclusion for four reasons. First, there is no contractual mechanism in clause 41A that would allow such reconsideration to take place. The power in clause 41A.7.1 is conferred specifically upon the adjudicator. No appeal is possible against an adjudicator's decision, and an adjudicator's decision cannot be challenged on the ground that it is a wrong on the facts or in law: see *Diamond v PJW Enterprises Ltd.*, 2004 SC 430. It follows that the adjudicator's decision as to liability for his fee and expenses cannot be challenged directly. Secondly, although the contractual scheme does permit an indirect challenge to the adjudicator's decision on any dispute submitted to him by means of court proceedings or arbitration, that mechanism only relates to a dispute or difference; that appears from the wording of clause 41A.8.1, and indeed section 108(3). It accordingly does

not apply to the adjudicator's decision on his fee and expenses, as that part of his decision does not involve a "dispute" in the contractual sense. Thus the contract has deliberately excluded any direct challenge to the adjudicator's decision, and does not, at least according to its terms, contemplate that anything other than a "dispute" can be the subject of indirect challenge. The possibility of challenging an adjudicator's decision has accordingly been taken into account in the contract, and the contractual scheme is that an indirect challenge, through court or arbitral proceedings, is possible but only in respect of the underlying dispute. That seems to exclude any challenge to ancillary findings, such as a finding on liability for the adjudicator's fee and expenses. Thirdly, because the adjudicator's decision on liability for his fee and expenses is essentially ancillary in nature, there is no commercial necessity that it should be capable of reconsideration. In any system of dispute resolution the parties are likely to incur irrecoverable outlays and expenses; indeed in some jurisdictions, such as those in the United States, a successful party does not recover anything in respect of expenses, outlays and other costs. Thus the normal criterion for the implication of a contractual term does not apply to the part of the adjudicator's decision dealing with his fee and expenses.

[17] The foregoing reasons for the conclusion that an adjudicator's decision on his fee and expenses cannot be reconsidered by the court all relate to the contractual structure of clause 41A. The fourth reason indicates an obvious rationale underlying that conclusion; it is the practical difficulty of reconsidering the adjudicator's decision on such a matter. Adjudication is a distinct process, with its own peculiar features. In particular, it is subject to very demanding time limits, which apply both to the parties and to the adjudicator. The result is that the parties' cases may not be as fully prepared as is desirable, and the adjudicator may be compelled to come to a relatively hasty decision. In court proceedings, by contrast, a full and detailed presentation is expected, and the judge has a significantly better opportunity to come to a carefully reasoned decision. Moreover, additional facts may emerge, or additional arguments may be developed. It is accordingly impossible to conclude merely from the fact that the court reached a different decision that the adjudicator's decision was wrong. The decisive factor in the court's decision might not have been presented to the adjudicator, or might have been presented in such a way that its significance was obscured. If, therefore, the court is to reconsider the adjudicator's decision on liability for his fee and expenses, the facts and arguments presented to the adjudicator will frequently require to be investigated and taken into account. That is inevitably a difficult task; it involves weighing the significance of arguments that are not the same as those presented to the court. In addition, in some cases matters may be argued before the adjudicator that are not argued before the court. The present case provides such an example; in the first adjudication the question of the adjudicator's jurisdiction was argued, I was informed, at some length. That issue was determined in favour of the present defender. It is not, however, an issue that can arise in the present proceedings. If it is the case that a large part of the argument before the adjudicator was taken up with the question of jurisdiction, it is obviously likely that his decision on liability for his fee proceeded at least in part on the basis that the present defender had succeeded on that part of the argument. Consequently, even if the pursuer were wholly successful in the present litigation, it would not be appropriate to allow it to recover the whole of the adjudicator's fee and expenses. How any apportionment should be carried out, however, is an extremely difficult task for a tribunal that has not heard the same arguments as the adjudicator. For all these reasons I am of opinion that there are sound practical reasons for holding that an adjudicator's decision on liability for his fee and expenses cannot be reopened in any proceedings before the court.

#### *Additional arguments*

[18] The solicitor for the pursuer argued that, if the court reached a decision that was contrary to the adjudicator's decision, that brought the adjudicator's decision to an end, leaving the question of liability for the adjudicator's fee and expenses at large. In my opinion that submission is not correct. It is true that, to the extent that a dispute or difference decided by the adjudicator is subsequently determined in court proceedings, the decision in the court proceedings will supersede the determination of the adjudicator; that is clearly

inherent in the scheme of clause 41A.8.1, and indeed section 108(3) of the 1996 Act (see paragraphs [12] and [13] above). Nevertheless, the decision of the court only supersedes the determination of the adjudicator to the extent that a particular dispute or difference submitted to the adjudicator is raised in the court proceedings and in due course decided by the court. If a dispute or difference is not raised in the court proceedings, the decision of the adjudicator will remain binding on the parties. That is so even if other disputes that formed part of the subject matter of the same adjudication have been raised in the court proceedings. In my opinion this is inherent in the basic scheme of clause 41A.8, as described in paragraph [16] above. The court proceedings are free standing; they do not constitute an appeal against the adjudicator's decision. Consequently they can only supersede the adjudicator's decision *pro tanto*, to the extent that disputes or differences are specifically raised and decided in the court proceedings. They do not render the decision a nullity, even if the court's decision is contrary to the adjudicator's. That means that the part of the adjudicator's decision dealing with liability for his fee and expenses is not affected by the court proceedings.

[19] The argument dealt with in the last paragraph was developed in a subsidiary argument for the pursuer. This was that, following the final determination of the dispute by the court, the adjudication decision was no longer binding. The result was to annul the adjudicator's decision under the first sentence of clause 41A.7.1 as to apportionment of his fee and expenses. That brought the second sentence of clause 41A.7.1 into operation, with result that the parties should bear the cost of the adjudicator's fee and expenses in equal proportion. The fallacy in this argument is in my opinion the proposition that the result of court proceedings was to render the adjudicator's decision no longer binding. For the reasons described in the last paragraph, I consider that it is only those parts of the adjudicator's decision that are determined by the court that are superseded; the remainder of the decision stands.

[20] The solicitor for the pursuer further argued that the court had power to alter the adjudicator's decision on liability for his fee and expenses by virtue of clause 41C.2 of the parties' contract. This clause provides

"When any dispute or difference is to be determined by court proceedings, then insofar as the Conditions provide for the issue of a certificate, or the expression of an opinion or the giving of a decision, requirement or notice such provision shall not prevent the Court, in determining the rights and liabilities of the parties hereto, from making any finding necessary to establish whether such certificate was correctly issued or opinion correctly expressed or decision, requirement or notice correctly given on the facts found by the Court; nor shall such provision prevent the Court establishing what certificate ought to have been issued or what other opinion should have been expressed or what other decision, requirement or notice should have been given as if no certificate, opinion, decision, requirement or notice had been issued, expressed or given".

It was suggested that the reference in that clause to making findings necessary to establish whether a decision was correctly given and to establishing what decision should have been given empowered the court to consider and if necessary reverse any part of an adjudicator's decision. In my opinion that contention is not correct. Clause 41C.2 was introduced into the JCT forms of contract to deal with the decision in *Northern Regional Health Authority v Derek Construction Co. Ltd.*, [1984] QB 644, where it was held that a court had no power under the earlier JCT forms to open up, review and revise certificates issued by the contract architect. *Crouch* has, of course, now been overruled by *Beaufort Developments (N.I.) Ltd. v Gilbert-Ash (N.I.) Ltd.*, [1985] AC 191, and the practical significance of the clause is reduced in consequence. Nevertheless, clause 41C.2 must in my opinion be given the relatively limited scope that was originally contemplated when it was introduced into the JCT conditions. It applies in particular to any "dispute or difference" that is to be determined by court

proceedings. For the reasons described above at paragraphs [15] and [16], the adjudicator's decision as to liability for his fee and expenses does not form part of a dispute or difference; the latter must antedate the reference to adjudication. Thus clause 41C.2 does not apply directly to any challenge to that part of the adjudicator's decision. Perhaps more importantly, the purpose of clause 41C.2 is to ensure that any provision in the Conditions that provides for inter alia the giving of a decision does not prevent the court from considering whether that decision was correctly given or from establishing what decision should have been given. That purpose appears clearly from the wording of the clause, and is obviously directed towards reversing the effect of *Crouch*. Thus the clause is designed to remove a disability from exercising the court's normal powers; it is not designed to confer an additional power on the court. I accordingly conclude that clause 41C.2 has no bearing on the present case.

### *Decision*

[21] For the foregoing reasons, I hold that the pursuer's averments directed towards its claim to recover the sum paid in respect of the adjudicator's fee and disbursements are irrelevant. I will accordingly repel the pursuer's eleventh plea-in-law, which is directed towards that part of its case, and sustain the defender's plea to relevancy to the extent of excluding those averments from probation.

### **Legal basis for pursuer's claims**

#### *Submissions*

[22] Counsel for the defender further attacked the legal basis on which the pursuer sought recovery of the various sums paid by it pursuant to the decision of the adjudicator in the first adjudication. In the first place, he submitted that the pursuer did not set out the legal basis on which it sought to recover sums paid to the defender in implement of the adjudicator's decision in the first adjudication. In the second place, he submitted that, if the pursuer sought to rely on principles of unjustified enrichment as the basis for recovering those sums, the legal requirements of the appropriate remedy, the *condictio indebiti*, were not satisfied. In particular, because the payments under challenge had been made in accordance with the parties' contract, it could not be said that the defender was unjustifiably enriched. Moreover, no error on the part of the pursuer as the party making payment was averred, and nothing was said about the equities of permitting recovery, the *condictio* being an equitable remedy. Counsel accepted that, in the event that the court reached a decision contrary to that of the adjudicator, any sum paid pursuant to the adjudicator's decision would require to be repaid. He submitted, however, that the basis for this was an implied term of the contract rather than the principles of unjustified enrichment. The pursuer had not, however, specified any such term.

[23] The solicitor for the pursuer stated that the basis relied on by the pursuer for its entitlement to payment was the final certificate, which had conclusive status as between the parties. Under section 108(3) and clause 41A.8.1, the decision of an adjudicator, taken as a totality, was binding only until the disputes that had been dealt with by the adjudicator were finally determined by the court or arbitration. Once the court had pronounced on those disputes, the decision of the adjudicator was no longer binding, and the party who was successful in challenging the adjudicator's decision in the court proceedings was entitled to sue on the architect's certificate, without reference to the adjudicator's decision. In any event, it was submitted on behalf of the pursuer that a remedy based on unjustified enrichment was available in the present circumstances. Reference was made in particular to *Dollar Land (Cumbernauld) Ltd. v CIN Properties Ltd.*, *supra*, per Lord Hope of Craighead at 1998 SC (HL) 98.

#### *Discussion*

[24] I agree with counsel for the defender that the legal basis on which the pursuer seeks to recover the sums paid pursuant to the first adjudication is not clearly set out. One exception exists; in the case of the adjudicator's fee and disbursements, the averments set out above at paragraph [8] make it clear that the pursuer relies on the principle of unjustified enrichment. In relation to the first adjudication, it is not apparent that the pursuer relies on the final certificate issued by the architect. That certificate is referred to, but only as a basis for the claim in respect of the second adjudication. In any event, I do not agree with the pursuer's contention that the remedy following a successful unwinding of the adjudicator's decision is merely to sue on the final certificate. The effect of an adjudicator's decision to allow a claim is an order for payment, and in terms of clause 41A.8.2 payment must be made in implement of that order. If, accordingly, the court reaches a decision on any particular dispute or difference that is contrary to the decision of the adjudicator, it is obvious that any sum paid pursuant to that part of the adjudication must be repaid. For the reasons stated above at paragraph [14], I am of opinion that the appropriate mechanism for achieving such repayment is an implied term of the contract, based on business efficacy. That will achieve a repayment of any sums that have been wrongly paid, in the sense that the court has ultimately found those sums not to be due. I have difficulty, however, in understanding how an action based on the final certificate can achieve the same result. What is contemplated by section 108(3) and clause 41A.8.1 is an unwinding of the adjudicator's decision, and that must be achieved before any certificates of the architect can be fully implemented. Even if no monies have been paid by the pursuer following the adjudicator's decision, that decision imposes a binding obligation to pay. In such a case, therefore, the pursuer should make it clear in its pleadings that the adjudicator's decision is to be superseded by the court's decision. That has not been done in the present case.

[25] I accordingly agree with counsel for the defender that the pursuer has not adequately stated the basis on which an unwinding of the first adjudication is sought, and should not in any event base that unwinding on principles of unjustified enrichment. My reason for the latter conclusion, however, is that the parties' rights and obligations following a successful unwinding of the adjudicator's decision are better analyzed using an implied term of the parties' contract rather than restitutionary rights based on unjustified enrichment. That is because the obligation to repay monies arises very squarely from the operation of the parties' contract, and in particular clause 48A.8.1; consequently an implied term is the natural mechanism to enable the contract to deal comprehensively with the parties' rights and obligations. On that basis, it is not necessary for me to consider whether the requirements of the *condictio indebiti* would have been satisfied. I should observe, however, that in *Dollar Land (Cumbernauld) Ltd. v CIN Properties Ltd.*, Lord Hope of Craighead points out (at 1998 SC (HL) 98) that the various remedies that are available to redress unjustified enrichment are not to be rigidly categorized but should rather be considered as alternative means to the same end; all seek to further the broad equitable principle *nemo debet locupletari ex aliena jactura*. In a case such as the present, accordingly, if a restitutionary remedy had been appropriate I would not have interpreted the requirements of the *condictio indebiti* too narrowly. It is true, as counsel for the defender contended, that the pursuer was not in error when it implemented the adjudicator's decision. It is also true that it was implementing its obligations under the parties' contract when that payment was made. Nevertheless, when the adjudicator's decision is unwound, the contractual scheme is that there must be some form of repayment. Furthermore, the payment made by the pursuer was made on grounds that were not ultimately held to be justified. In the circumstances the case could be regarded as falling between the *condictio indebiti* and the *condictio causa data causa non secuta*. An error exists, albeit on the part of a third party, the adjudicator, rather than the party making the payment, and there is ultimately no justifiable cause for the payment. In the circumstances I consider that a restitutionary remedy would be available, even if it cannot be fitted into the defined categories that have so far been explicitly recognized.

*Decision*

[26] In the result, I am of opinion that the whole of the pursuer's pecuniary claims in relation to the first adjudication are irrelevant because they do not adequately state the basis on which payment is sought. This affects the pursuer's second, third, fifth, seventh, eight and nine conclusions. This defect in the pursuer's pleadings can be rectified fairly easily, however, and I propose to have the case put out by order to enable an appropriate motion to be made.

### **Time bar and final certificate**

#### *Averments*

[27] The final matter in dispute between the parties is whether the pursuer's claim for the balance due under the final certificate is now time barred by clause 30.9.4 of the contractual conditions, on the ground that determination of that claim by the court involves reconsideration of disputes dealt with in the second adjudication. This part of the argument arises out of the pursuer's eleventh and twelfth conclusions. The eleventh conclusion is for declarator that in the final certificate the contract sum as finally adjusted should be £647,962.94 exclusive of value added tax. In the pleadings it is explained that on 8 October 2003 the architect issued a final certificate in those terms. That certificate brought out a balance due by the defender to the pursuer, and it is averred that after the deduction of sums already withheld by the pursuer a balance of £91,865.06 plus value added tax is due by the defender to the pursuer. The twelfth conclusion is for payment of that sum.

[28] The defender's primary response to this part of the pursuer's case is an explanation that the final certificate was wrong and reducible for reasons set out in an action raised by the present defender against the present pursuer for reduction of the certificate. Those matters were not the subject of the present debate. The defender goes on, however, to aver that, on the hypothesis that a final certificate was issued on 8 October 2003, the pursuer is contractually barred from challenging the decision in the second adjudication by reason of the lapse of time. Although it is not made explicit in the pleadings, the underlying reason for those averments is that, in issuing the final certificate, the architect made certain decisions and awarded certain sums on a basis that was at variance with the determination of the adjudicator in the second adjudication, which was issued on 7 November 2003. Consequently the 28-day period in clause 30.9.4 began to operate on that date, and had expired before the present action was raised. In response, the pursuer has made a number of averments on the question of time bar. After making averments about clause 30.9 of the parties' contract, which deals with the effect of a final certificate and any challenge to such a certificate, the pursuer avers that the effect of the final certificate was to re-evaluate the position arising between the parties on a comprehensive basis and produce a final certificate that reflected the correct position between the parties. But for the defender's challenge to the final certificate in the action for its reduction, the pursuer would be entitled to the benefit of the final certificate as conclusive evidence of the matters specified in clause 30.9.1 of the conditions of contract. The final certificate was not a matter on which any dispute or difference had been referred to adjudication. The dispute or difference referred to adjudication in the second adjudication was not within the final certificate. Consequently, until a challenge was made to the final certificate, as occurred in the action of reduction raised by the defender on 6 December 2003, there was no basis on which the pursuer required to have the decision of the adjudicator finally determined by arbitration or legal proceedings; that decision had been superseded by the final certificate. The pursuer further avers that, on the hypothesis that the final certificate was amended by the adjudicator's determination of 7 November 2003 by virtue of clause 30.9.2, the final certificate should be amended to exclude the terms of that determination, with the result that the pursuer was entitled to decree in terms of the eleventh conclusion.

#### *Submissions*

[29] The defender's note of argument states that, in so far as the action imports a challenge to the second decision of the adjudicator, the averments in support of that challenge are irrelevant in that they disclose that the challenge is time barred and that the decision of the adjudicator has become final. By virtue of clause 30.9.4, a challenge to an adjudicator's award given after the date of the final certificate can be made only within 28 days after the award was made. In the present case the final certificate was issued on 8 October 2003 and the adjudicator's second award was made on 7 November of that year. Consequently clause 30.9.4 applied. The present proceedings were not started until March 2004, well beyond the period of 28 days, with result that the second award could not now be challenged. In his submissions counsel for the defender further argued that an adjudication decision could not be superseded by the final certificate, as the pursuer seemed to assert. An adjudication decision can be undone only in the manner contemplated by section 108 of the Act and clause 41A.8.1, that is to say, by court proceedings, by arbitration or by the agreement of the parties. The decision of the architect in issuing the final certificate was not among these. Consequently the architect, in issuing the final certificate, was obliged to have regard to any relevant adjudication decisions. Counsel further submitted that it was not possible that the time bar in clause 30.9.4 did not apply if the final certificate was challenged, because the time limit for challenging the final certificate under clause 30.9.3, 60 days in Scotland, was different from the time limit of 28 days under clause 30.9.4. Thus the latter period could run out before it was known what was happening in respect of the other challenge.

[30] The primary contention for the pursuer was that this part of their claim merely involved payment of the sum due under the final certificate issued by the contract architect. It did not involve any challenge to the second adjudication, because the final certificate was independent both of the interim certificates issued by the architect and of any adjudication in respect of those certificates; that was said to be apparent from the wording of clause 30.8. The second adjudication had arisen out of an interim certificate, and was accordingly of no relevance to the final certificate. Even if that primary submission were wrong, the solicitor for the pursuer submitted that the criteria for decisions on an interim certificate were quite different from those that applied to the final certificate. Consequently the court would require to be satisfied on the evidence that the decision in the second adjudication involved issues that were the same as those that arose in the final certificate. For that reason the defender's argument could not be sustained merely as a matter of relevancy. So far as the contractual time bar in clause 30.9.4 was concerned, the pursuer did not seek to challenge the second adjudication in the present action. What they did was to assert that the defender was wrong in asserting that the decision in the second adjudication ought to be imported into the final certificate. If, however, the defender were correct, the pursuer's position was that the final certificate should be re-amended to exclude the effects of the decision in the second adjudication. That was the point of the 11th conclusion of the summons and the supporting averments. Moreover, if the defender's position were correct, the result would be to fetter the court's power in any action to challenge the final certificate. That, it was submitted, was contrary to the decision of the House of Lords in *Beaufort Developments (N.I.) Ltd. v Gilbert-Ash (N.I.) Ltd*, *supra*, and also clause 41C.2 of the contract conditions. In addition, clause 30.9.4 provided that, if a party wished to challenge the decision of an adjudicator, that party "may" commence arbitration or court proceedings within 28 days. That wording was permissive, and the time limit was not mandatory.

### *Discussion*

[31] The dispute between the parties on the effect of clause 30.9.4 is in a sense theoretical at this stage, because it is not clear on the pleadings which parts of the final certificate might be affected by the decision in the second adjudication. Nevertheless, both parties accepted that at least some of the matters determined in the second adjudication were matters that also arose for decision in the preparation of the final certificate, and detailed submissions were made on that basis. It is clear, therefore, that the issues debated between the parties were not merely theoretical but will have an important practical result in

determining the dispute that arises in the present case. I accordingly think it appropriate to determine the question in principle of whether the time bar in clause 30.9.4 is capable of applying in the circumstances of the present case. For reasons that I discuss later, however, I consider that the detailed application of the time bar depends on whether there is an identity between the matters determined in the adjudication and the matters arising in the preparation of the final certificate. Consequently it is not possible in my view to determine the practical effect of the time bar. I will accordingly confine my decision to a finding on the issue of principle and the exclusion of such of the averments as appear inconsistent with that finding.

[32] The final certificate was issued on 8 October 2003. The second adjudication had been started by notice of adjudication served on 16 September 2003, and the adjudicator's decision in that adjudication was issued on 7 November 2003. The relevant provisions of the parties' contract are found in clause 30.9, which deals with the effect of the final certificate. First, clause 30.9.1 provides that the final certificate is to have effect as conclusive evidence of a number of matters, including standards of workmanship and conformity to the contract. Clause 30.9.2 then provides as follows:

"If any adjudication, arbitration or other proceedings have been commenced by either Party before the Final Certificate has been issued the Final Certificate shall have effect as conclusive evidence as provided in clause 30.9.1 after either.

.2.1 such proceedings have been concluded, whereupon the Final Certificate shall be subject to the terms of any decision, award or judgment in or settlement of such proceedings, or

.2.2 a period of 12 months after the issue of the Final Certificate during which neither Party has taken any further step in such proceedings, whereupon the Final Certificate shall be subject to any terms agreed in partial settlement,

whichever shall be the earlier".

Clause 30.9.3, as amended by the Scottish Supplement, provides that if any adjudication, arbitration or other proceedings have been commenced within 60 days after the final certificate, the final certificate is to have effect as conclusive evidence save only in respect of all matters to which those proceedings relate. Clause 30.9.4, as amended by the Scottish Supplement, then provides as follows:

"Where pursuant to Clause 41A.8.1 either Party wishes to have a dispute or difference on which an Adjudicator has given his decision on a day which is after the date of issue of the Final Certificate finally determined by arbitration or by court proceedings either Party may commence arbitration or court proceedings within 28 days of the date on which the Adjudicator gave his decision".

[33] The foregoing provisions govern the effect of a final certificate and its relationship with adjudication proceedings. One of the critical issues in the present case is whether an adjudicator's decision on a dispute arising under an interim certificate is binding on the architect at the time when he issues the final certificate. It is accordingly necessary to consider the relationship of interim and final certificates; this was a matter that was heavily founded on by the solicitor for the pursuer. It is clearly correct that there are certain important differences between interim certificates and the final certificate. Interim certificates are essentially provisional in nature, and the sums paid under them may be adjusted subsequently. The final certificate, by contrast, is definitive, and has conclusive effect as to

the matters set out in clause 30.9.1; interim certificates have no such effect. Moreover the final certificate is prepared following the various financial adjustments that are described in clause 30.6, and fixes conclusively the sum due to the contractor. An interim certificate has no such effect. Despite these differences, however, there are substantial similarities in the tasks that the architect must perform in preparing an interim certificate and in preparing a final certificate. In both cases the architect is calculating the sum that is due to be paid to the contractor on the relevant date. In both cases the architect is concerned with such tasks as valuing items of work or ascertaining direct loss and expense caused by particular relevant events in terms of clause 26. By the time of the final certificate it is no doubt a common occurrence that extra work or omissions or errors have come to light, or defects have emerged, with the result that the figures in the interim certificates must be corrected. Nevertheless, much of the calculation will typically be the same at the stages of interim and final certificates, and the general approach to calculation will normally be the same, even though the figures may have to be altered or refined. For this reason it is plain that an adjudication decision relating to an interim certificate may be relevant to the final certificate.

[34] Clause 41A.8.1, implementing section 108(3) of the 1996 Act, provides that the decision of an adjudicator is to be binding on the parties until the dispute or difference is finally determined by arbitration, court proceedings or agreement between the parties. Clause 41A.8.2 further provides that the parties are to comply with decisions of the adjudicator immediately on delivery of the decision, and that the employer and the contractor "shall ensure that the decisions of the Adjudicator are given effect". That wording clearly contemplates that the parties to the contract will ensure that the adjudicator's decision is implemented not only by themselves but also by any other person to whom they can give instructions. That would include the architect, who is the agent of the employer. Consequently, the effect of clause 41A.8.1 and .2 is to oblige the employer to ensure that the architect complies with decisions of the adjudicator. That is wholly in accord with the fundamental purpose of adjudication, which is to achieve provisional resolution of disputes between the parties. The decision of an adjudicator can be undone, but only in the three ways contemplated by section 108(3) and clause 41A.8.1, that is to say, by court proceedings, by arbitration or by the agreement of the parties. The architect has no power to undo the decisions of an adjudicator, and must accordingly comply with those decisions so far as they are relevant to any of his tasks.

[35] In my opinion the foregoing reasoning applies to the preparation of the final certificate by the architect. To the extent that the adjudicator has decided a matter that is relevant to the final certificate, the architect is bound by the adjudicator's decision. That is subject to one important qualification. If new material has emerged since the date of the adjudicator's decision, the architect is entitled to take that into account in preparing the final certificate, or indeed any interim certificate, and to make any appropriate modification to the adjudicator's decision. Where, for example, the adjudicator has assessed direct loss and expense under clause 26 but more exact figures for the loss and expense are available at the time when the final certificate is prepared, the architect is in my opinion entitled to take those more exact figures into account. What the architect cannot do, however, is to refuse a head of direct loss and expense that has been allowed by an adjudicator, or to go against the basic principle on which the adjudicator proceeded in awarding a sum for such loss and expense. Thus two types of case must be distinguished, those that merely involve the refinement of the adjudicator's decision in accordance with new material and those that involve a challenge to the issue of principle in the adjudicator's decision. The first type of modification is permissible; the second is not. Distinguishing the two cases is no doubt a matter of degree, and may involve difficult questions of judgment in marginal cases. Nevertheless it is a distinction that must be drawn on a case-by-case basis.

[36] The proposition that an architect in issuing the final certificate is bound by adjudication decisions is in my opinion strongly supported by the provisions of clause 30.9, and in particular by clause 30.9.2, which is quoted above at paragraph [32]. That clause contemplates the situation where adjudication proceedings have started before the issue of

the final certificate but remain uncompleted at that time. If the adjudication is subsequently concluded, clause 30.9.2.1 provides that the final certificate, although issued, is to be subject to the terms of any decision of the adjudicator. That clearly assumes that the decisions of adjudicators will be binding on the architect for the purposes of the final certificate. It should, moreover, be noted that clause 30.9.2 applies to "any adjudication" that has been commenced before the final certificate has been issued; it is thus quite general in its application. If the adjudication is begun before the date of issue of the final certificate, it is obvious that its subject matter will almost invariably be a dispute or difference that has arisen in respect of an interim certificate. That tends strongly to confirm that there is no fundamental distinction between the interim certificate and the final certificate for this purpose; when the architect prepares the final certificate he must act in accordance with any determination of an adjudicator on a matter that is relevant to the final certificate.

[37] The view that adjudication decisions will bind the architect for the purposes of the final certificate is also supported by clause 30.9.3, which deals with adjudication proceedings that are started within 60 days (in Scotland; 28 days in England and Wales) after the final certificate has been issued. That clause provides that the final certificate is to have effect as conclusive evidence as provided in clause 30.9.1 with an exception for the matters to which the adjudication proceedings relate. Once again, that assumes that the decision in the adjudication will bind the architect for the purposes of the final certificate. It also assumes that "matters" can be identified that are the subject of the adjudication decision and are also relevant to the final certificate. That is essentially the analysis that I have adopted in paragraph [35] above.

[38] Clause 30.9.4 then provides for challenge to an adjudication decision given after the date of issue of the final certificate. It is framed in very wide terms; it refers to "a dispute or difference on which an Adjudicator has given his decision on a date which is after the date of issue of the Final Certificate". That wording covers any dispute or difference, relating to any certificate, provided that the adjudicator's decision is given after the date when the final certificate is issued. The clause states that either party "may commence arbitration or court proceedings within 28 days of the date on which the Adjudicator gave his decision". When this provision is construed against the background described in paragraphs [34]-[37], its meaning is in my opinion quite clear. The final certificate involves the conclusive determination of the matters specified in clause 30.9.1; because of its importance it must be given effect as soon as is a reasonably possible. The final certificate is, however, subject to the terms of any adjudication decision pronounced after its date, and must be modified accordingly. Any such adjudication decision may be undone by court or arbitral proceedings. In order to ensure that the final certificate can be given effect at the earliest opportunity, however, a strict time limit is imposed on the commencement of such proceedings; otherwise the final resolution of the parties' liabilities could remain in limbo for an unnecessarily long period. Clause 30.9.4 is accordingly designed to impose a strict contractual time bar on proceedings to have any matter decided by an adjudicator after the final certificate finally determined by arbitration or court proceedings. If such proceedings are not begun within the 28-day period specified in the clause the time bar operates, with result that the adjudicator's decision becomes final and is binding for the purposes of the final certificate. That is the construction for which the defenders contend in the present case.

### *Decision*

[39] That is sufficient for a decision in the defenders' favour on the issue of principle. As I have indicated, whether any particular matter decided by an adjudicator is also a matter that is relevant to the final certificate is a question of fact, and must be decided on a case-by-case basis. In the present case I do not consider the parties' averments to be sufficiently detailed to enable me to decide that particular parts of the adjudicator's second decision are material to the final certificate; indeed, the parties did not present any submissions to that effect. For that reason I will confine myself to deciding the issue of principle, and to holding the

pursuer's averments described in paragraph [28] above to be irrelevant; these related to the issue of principle rather than its detailed application to the facts.

### *Additional arguments*

[40] I should, however, refer to certain other matters that were discussed in the course of submissions. First, counsel for the defender submitted that his construction of clause 30.9.4 was supported by the likely operation of clause 30.7. Clause 30.7 provides that not less than 28 days before the date of issue of the final certificate the architect must issue an interim certificate including the amounts of the subcontract sums for all nominated subcontracts as finally adjusted or ascertained under all relevant provisions of the applicable contracts. Thus the ascertainment of the sum due to each nominated subcontractor must be made in that certificate. The period of at least 28 days that must elapse prior to the issue of the final certificate is, counsel submitted, clearly designed to allow a challenge to the interim certificate. Moreover the statutory right to adjudication applies to such a certificate. If, however, adjudication is only begun within the 28-day period, it is likely that it will not be completed before the final certificate is issued. If the final certificate had the effect for which the pursuer contended, the effect of any such adjudication would be wholly negated by the issue of the final certificate. Counsel submitted that that was an improbable result. I agree with this contention. In my opinion clause 30.7 lends further support to the construction of clause 30.9.4 that I have adopted above.

[41] Secondly, the solicitor for the pursuer submitted that the use of the word "may" in clause 30.9.4 was significant. The clause provides that a party who wishes to have a dispute decided by an adjudicator after the date of issue of the final certificate finally determined by arbitration or court proceedings "may commence arbitration or court proceedings" within 28 days. The word "may", it was submitted, normally involves a discretion, and should be given that construction in the present clause. Consequently raising proceedings within the 28 day period was optional, and the clause did not operate as a time bar. In my opinion this argument is not correct. If it were, it is impossible to see why there is any reference to a period of 28 days from the date on which the adjudicator gives his decision. Limiting the procedure in this way only makes sense if the clause creates a mandatory time bar. There is, moreover, a practical reason for imposing such a time limit. If the architect in issuing a final certificate is bound by all adjudication decisions so far as they are material to the certificate, and is further obliged by clause 30.9.2 to have regard to any adjudication decisions made after the date of the final certificate, it is obvious that he must know within a short period whether any such decision is to be attacked by means of court proceedings or arbitration. That explains why the relatively short period of 28 days is selected as a time bar in clause 30.9.4 (in the versions used both in Scotland and in England and Wales).

[42] Thirdly, it was submitted on behalf of the pursuer that the defender's construction of clause 30.9.4 would have an extraordinary result, in that it would prevent any part of the final certificate that was dealt with in an adjudication decision issued after the date of the final certificate from being challenged unless the adjudication decision were attacked within 28 days. That, it was submitted, would fetter the court's power to review and revise the final certificate, as contemplated by clause 41C.2 and the decision in *Beaufort Developments (N.I.) Ltd. v Gilbert-Ash (N.I.) Ltd, supra*. In my opinion this argument is not correct. All that clause 30.9.4 does, on the construction that I have adopted, is to impose a time bar on challenge is to adjudication decisions issued after the date of the final certificate. There is a sound reason for such a time bar, namely that described in paragraphs [38] and [42] above. Such a provision cannot be regarded as fettering the court's powers; it only means that the exercise of those powers must be invoked relatively quickly.

### **Conclusion**

[43] In summary, I will hold the averments described in paragraph [21] above to be irrelevant. I will likewise hold irrelevant the pursuer's averments described in paragraph [28]. To that extent I will sustain the defender's first plea-in-law. I will also find that the pursuer is barred from challenging the decisions of the adjudicator in the second adjudication by legal proceedings or arbitration of the sort contemplated by section 108(3) of the Housing Grants, Construction and Regeneration Act 1996. Parties were agreed that the declarator sought by the pursuer in the fourth conclusion of the summons was inappropriate as disclosing no practical issue; I will accordingly of consent dismiss that part of the pursuer's case, and to that extent will sustain the defender's first plea-in-law. Finally, I will have the case put out by order to allow a discussion of further procedure generally, and in particular a discussion of the matters described in paragraph [29] relating to the legal basis on which the pursuer seeks a remedy.