

OPINION OF LORD DRUMMOND YOUNG. OUTER HOUSE, COURT OF SESSION. 6th February 2007

- [1] In May 2001 the parties entered into a contract for the construction of certain works by the defender in licensed premises belonging to the pursuer. The circumstances of the contract are set out at length in an earlier opinion in this action, dated 29 December 2005. The contractual form that was used was the Scottish Building Contract, Contractor's Designed Portion, Without Quantities (January 2000 Revision), subject to certain amendments and modifications. Disputes arose between the parties, and two referrals to adjudication were made by the defender. The second adjudication is material for present purposes. The decision in that adjudication was issued on 7 November 2003. Prior to the date, on 8 October 2003, the architect had issued the final certificate under clause 38 of the conditions of contract.
- [2] The pursuer subsequently raised the present proceedings against the defender. The parts of the pursuer's claim that are material for present purposes are as follows. In their tenth conclusion the pursuers seek payment of the sum of £72,680, with appropriate interest. That sum is said to be due by way of damages for the defender's breach of contract. It relates to delay occasioned in the period following the date of practical completion. Under the contract the pursuer was entitled to claim liquidate and ascertained damages for delay, but only in respect of the period that ended with practical completion; consequently damages are sought for delay that is said to have occurred thereafter. In relation to the damages claim, the pursuer avers that the works carried out by the defender contained defects. The work of rectifying those defects, which fell to the pursuer's shopfitting contractor, Dimension Shopfitting Ltd, is said to have taken 28 days. It is then averred that as a result of the defender's breach of contract the opening of the pursuer's premises was delayed for a like period of 28 days. That 28 day delay in opening the premises is said to have resulted in a loss of profits to the pursuer amounting to £72,680; that is the sum sought as damages for breach of contract.
- [3] The action proceeded to debate, and thereafter the opinion dated 29 December 2005 was issued. The consequence of that opinion was that certain parts of the claim were held irrelevant; these did not include the damages claim in respect of delay after practical completion. In addition, it was held that the pursuer was 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; this part of the opinion is important in relation to subsequent procedure. Thereafter the pursuer amended its pleadings to deal with certain matters arising out of the opinion of 29 December 2005. Following the amendment procedure the defender sought a further debate on the relevancy of the claim for damages in respect of delay after practical completion. This opinion relates to that debate.

Defender's argument

- [4] The defender's argument is as follows. The matters decided in the second adjudication cannot now be challenged by legal proceedings of the sort contemplated by section 108(3) of the Housing Grants, Construction and Regeneration Act 1996; that was part of the court's decision following the first debate, in terms of the opinion of 29 December 2005. It followed that any matter decided by the adjudicator in the second adjudication was now binding on the parties, without the possibility of its being reopened in court proceedings. One of the matters so decided was the length of the delay that resulted from the defender's breach of contract, and the consequential need to remedy defects. The adjudicator found that the pursuer's claim in respect of the defects in the defender's work was greater by a considerable amount than was justified by the true extent of the defects. More specifically, the adjudicator held that only one week was required for Dimension Shopfitting Ltd to make good the defects in the defender's work that resulted from the defender's breach of contract. Dimension had made a claim for additional loss and expense resulting from the delay caused by the need to execute remedial works, and in the second adjudication the pursuer had claimed that amount from the defender. The adjudicator awarded the pursuer an amount corresponding to the additional loss and expense to which Dimension had properly become entitled in consequence of the delay caused by the defender's breach of contract. That amount was calculated on the basis that one week's delay had been so caused. The pursuer had contended in the second adjudication that a delay of four weeks had occurred to Dimension's completion date as a result of the defender's breach of contract. That contention had been rejected, however, and the sum awarded by the adjudicator in respect of the additional loss and expense claim by Dimension had been limited accordingly.
- [5] The adjudicator's decision related to the pursuer's ability to recover from the defender the sum that it was obliged to pay to Dimension in respect of the latter company's loss and expense. Counsel for the defender contended that in deciding that matter the adjudicator had formed a conclusive opinion as to the length of the delay caused by the defender's breach of contract; he had determined that delay at one week, not the four weeks claimed by the pursuer. That opinion was conclusive not only in relation to Dimension's loss and expense but in relation to any other issue that was dependent on the length of the delay caused by the defender's breach of contract. The loss of profit sustained by the pursuer in consequence of the late opening of its premises was such an issue. The pursuer was only entitled to recover from the defender for the period of delay actually caused by the defender's breach of contract, and that had been determined by the adjudicator at one week. In the present proceedings, however, the pursuer claimed loss of profit for a period of four weeks. Counsel accepted that the pursuer's own loss of profit had not been remitted to the adjudicator, and indeed had been expressly excluded from the remit. Nevertheless he contended that a critical element in the loss of profit claim had been determined by the adjudicator, and that determination was conclusively binding. It could not be reopened in the present proceedings.

- [6] Counsel for the defender referred in some detail to the claim by the pursuer that had been remitted to adjudication and the adjudicator's decision. I discuss these documents at paragraphs [10]-[11] below; in summary, counsel sought to demonstrate that the length of the delay caused by the defender's breach of contract was in issue; that delay was the time that was necessary to repair the defects. In this respect, the adjudicator's decision had effect as if it had contained a declarator of the time required to repair the defective work. Any petitory claim involves a declarator of the pursuer's right as a necessary condition of the claim; in *Union Electric Co Ltd v Holman & Co*, 1913 SC 954, LP Dunedin stated (at 957-958)

"In one sense there is always a declarator subauditus in every decree that you ask. Take, for instance, a mere action for payment founded upon a bill or a bond. There must always be a finding that the bill or the bond was good. It would be a perfectly good answer to say that the bill was forged or that the bill was obtained by false pretences, and yet the action could be nothing but a petitory action. Accordingly, it seems to me that the demand for a declarator is a first stage of every action, whether declarator is expressly concluded for or not".

Counsel submitted that that principle was applicable to the second adjudication. In effect, the adjudicator had made a declarator as to the length of the delay; in awarding any sum of money a court, or adjudicator, always makes an implied declarator. It was that declarator that was binding in all subsequent proceedings, by virtue of the fact that the adjudicator's decision could no longer be reopened under section 108(3).

- [7] Counsel further referred to the decision of Judge Humphrey Lloyd QC in *Sindall Ltd v Solland*, 2001, 80 Con LR 152. In that case a dispute had arisen about the employer's right to determine the contractor's employment on account of its failure to proceed regularly and diligently with the works. The contractor had claimed an extension of time. The contract administrator had nevertheless alleged default on the contractor's part as a result of failure to proceed regularly and diligently, and the employer had thereafter terminated the contract under the relevant provision of the contractual conditions. Thereafter the contractor began adjudication proceedings to challenge the determination of the contract. The adjudicator decided that the contractor was entitled to an extension of time and, in consequence of that decision, decided that the determination was wrongful. It was held that, in order to determine whether the contractor had proceed regularly and diligently with the works, it was necessary to establish the proper date for completion, and that in turn required consideration of the contractor's entitlement to extensions of time. Consequently the employer's right to determine the contract was linked to the question of whether the contractor was entitled to an extension of time, and the adjudicator required to deal with the latter question to reach a decision on the former. For that reason the adjudicator was acting within his jurisdiction in considering the application for an extension of time: see paragraphs [19] and [20]. Counsel for the defender submitted that a similar principle applied in the present case; the adjudicator had decided that the delay caused by the defender's breach of contract was limited to one week; in so doing he had acted within his jurisdiction, and that part of his decision was binding for all purposes.

Pursuer's argument

- [8] Counsel for the pursuer opened his submissions by pointing out that the loss of profit claim had been expressly excluded in the referral notice that gave rise to the second adjudication. In these circumstances, he submitted that the parties and the court were not bound by the adjudicator's decision in so far as it related to the loss of profit claim. The contractual time bar arose from the provisions of clause 30.9.4 of the conditions of contract. That clause referred to a "dispute or difference on which an adjudicator has given his decision". The pursuer's claim for loss of profit in consequence of the late opening of the premises was of itself a "dispute or difference"; but that dispute had not been referred to adjudication and consequently there was no binding decision on it. The consequence was that the pursuer was entitled to raise further court proceedings to have the loss of profit claim determined. Clause 30.9.4 only dealt with disputes that had been referred to an adjudicator and determined by him. It did not prescribe that any effect should be given to a previous adjudication decision in respect of issues that had not been referred to and determined by the adjudicator.
- [9] Counsel emphasized that the court was only concerned with the competency of raising an action. If clause 30.9.4 were to prevent that, clear wording was needed, but that was absent. That was in accordance with clause 41A.8.1 of the contractual conditions and section 108 of the Housing Grants, Construction and Regeneration Act 1996; these provisions envisaged that the court could reconsider matters decided by an adjudicator following completion of the contract, and that jurisdiction could only be excluded by sufficiently clear wording. In the present circumstances, where the loss of profit claim had been expressly excluded, if the defender were correct parties could not assume that the express exclusion of an issue from adjudication would necessarily protect their position in future court proceedings on that issue. That could have serious consequences, especially if the significance of one part of an adjudicator's decision was not fully appreciated and was accordingly not fully argued. Finally, counsel pointed out that the delay that was considered by the adjudicator was slightly different from that involved in the loss of profit claim. The adjudicator required to consider what was a reasonable period for the defects in the defender's work to be made good; the loss of profit claim, by contrast, required the court to determine what was the period during which the pursuer was unable to trade because of the defender's breach of contract. While these might be closely related, they were not identical.

The second adjudication

- [10] The pursuer's claim was intimated to the defender by a letter dated 19 August 2003; so far as material, this was in the following terms:

"As a consequence of your failure to carry out and complete the defects, which defects arose due to the material and workmanship not in accordance with the contract, as detailed (Schedule Part 1)..., we were required to employ Dimension Shopfitting Ltd ('Dimension'), the phase II contractor, to make good the defects. We regard your failure to carry out and complete rectification of the defects as a material breach of contract entitling us to recover those costs incurred arising as a direct consequence of your breach.

The total cost to make good the said defects amounts to £129,287.09. This includes the sum of £26,608.00 in respect of loss and expense incurred by Dimension and paid by us to Dimension. The total costs we have incurred in making good these defects are set out in the table below (Schedule Part 2)... This cost would not have been incurred had it not been for your material breach of contract. Accordingly, we require you to pay to us the sum of £129,287.09.

Dimension were unable to proceed regularly with the phase II works until the defects, in particular rectification of the internal and external drainage defects, had been completed.... The Contract Architect for the phase II works... assessed that a 28 day period of delay was caused as a direct result of the instructions given to Dimension to make good the defects".

The relevant dates were then summarized. The letter continued:

"As a further direct consequence of your material breach of contract, the nightclub was unable to commence trading for a period of 28 days from the planned trading commencement date of 14 June 2002. As a result of this we have incurred a loss of trading profit amounting to £72,680.00 for the 28 [day] period of lost trade".

The letter ended by claiming the various sums referred to.

- [11] Thereafter the defender referred certain matters to adjudication. The nature of the dispute that was so referred was set out in the defender's notice of adjudication of 16 September 2003; the material terms of the notice are stated in paragraph 5.00 of the adjudicator's decision and reasons, in which the defender is referred to as "the Referring Party" and the pursuer is referred to as "the Respondent":

"The Respondent maintains that they are entitled to recover certain sums from the Referring Party. The Respondent has alleged that they are entitled to recover the sum of £129,287.09 under the provisions of the contract and/or by way of damages for breach of contract. This sum primarily relates to defects which are alleged to exist in the works but also encompasses certain sums paid by way of 'loss and expense' to Dimension Shopfitting Limited by the Respondent. In this regard, reference is made to the Schedule Parts 1 and 2 appended to the Respondent's letter of 19 August 2003 addressed to the Referring Party.... The Referring Party maintain that the value of the Respondent's contractual entitlement and/or entitlement to damages for breach of contract as aforesaid is £11,500 (which sum has already been withheld...). Accordingly, the Adjudicator will required to decide what monetary value, if any, should be attributed to the items identified in the Schedule Parts 1 and 2 referred to above. ...

For avoidance of doubt the Referring Party has not referred to the adjudication the Respondent's purported entitlement to recover the sum of £72,690 in respect of certain delay related costs, all as more particularly described in the Respondent's letter of 19 August 2002...".

In his decision the adjudicator considered the individual defects that had been alleged to exist by the pursuer. Certain of the heads of complaint were found not to be defects. Finally, in relation to what was described as Defect No 22, the adjudicator considered the question of the extension of time of four weeks awarded to Dimension, and the resulting claim for £26,608.00. He held that the number of alleged defects that were properly substantiated was far less than the number sought by the pursuer. For that reason the adjudicator held that the four weeks claimed for Dimension's time spent in rectifying defects required to be substantially reduced. He concluded that one week was a reasonable estimate for the time required to rectify the defects or breaches that he had found substantiated. An award was made on that basis.

Discussion

- [12] The source of the contractual time bar is found in clause 30.9.4 of the conditions of contract, as substituted by the Scottish Supplement. This is in the following terms:

"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 date 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".

That wording makes it clear that the time bar only operates in respect of a "dispute or difference" on which the adjudicator has given his decision. In relation to any matter on which the adjudicator has not given a decision, the time bar has no application, and court proceedings are competent, subject to the ordinary rules of prescription. The critical question in the present case is accordingly the identification of the "dispute or difference" on which the adjudicator gave his decision in the course of the second adjudication. The pursuer contends that, so far as material for present purposes, that dispute or difference was confined to the computation of the sum due by it to Dimension Shopfitting Ltd for rectification of defective work carried out by the defender and certain amounts due by way of loss and expense in consequence of that defective work; it did not extend to a determination of the delay caused by that defective work that was binding for all purposes, including the pursuer's claim for loss of profit. The defender, by contrast, contends that the dispute or difference included a determination of the length of

delay caused by that defective work, and that that determination is binding for any material purpose, including the calculation of the pursuer's loss of profit as a result of the late opening of the premises.

- [13] Although it has its origin in the Housing Grants, Construction and Regeneration Act 1996, adjudication is conceptually contractual in nature; an adjudication provision must be written into every construction contract, either expressly or by statutory implication. Consequently, in determining the "dispute or difference" on which an adjudicator has given a decision, it is appropriate in my opinion to adopt the general approach of the law of contract. This involves construing the reference to adjudication objectively, according to the standards of a reasonable man with a knowledge of the construction industry. It must also be borne in mind that adjudication is intended to be a relatively simple and informal procedure; moreover, it is a procedure that is frequently started with little or no legal advice, and such legal advice as is obtained is frequently given in a hurry, without the opportunity for detailed consideration and reflection. I am accordingly of opinion that courts should avoid an over-elaborate or over-analytical construction of references to adjudication. Instead, the critical question will normally be what a reasonable man with knowledge of the construction industry would take the reference to cover.
- [14] On that basis, I am of opinion that a "dispute or difference" within the meaning of clause 30.9.4 should normally be identified by reference to a claim made by one party and rejected by the other. Typically such a claim will relate to the payment or deduction of a sum of money or to the right of the contractor to an extension of time, but other forms are possible. Nevertheless, the critical point is in my opinion that one party makes a claim and the other rejects it. Thus it is the totality of the claim that is referred to adjudication, and it is the totality of the claim that constitutes the "dispute or difference" that is so referred. This can be seen using the example of a financial claim. With such a claim three elements will normally be involved: first, an event giving rise to a right to payment or a breach of contract; secondly, a sum due for payment or a loss sounding in damages, and thirdly a causal connection between the event or breach and the sum due or the loss. All of those elements must be established to make out the claim. In my opinion it is artificial to consider each such element in isolation as a "dispute or difference". The dispute between the parties rather relates to the totality of the elements, with a final financial result; unless all are established there are no financial consequences. Parties would not normally embark on adjudication or court proceedings in relation to one such element in isolation, unless the other elements were agreed and the only live issue between the parties related, for example, to whether a breach of contract had occurred. I am accordingly of opinion that a "dispute or difference" should be identified by reference to the totality of the claim, and not by reference to any single element within the claim.
- [15] When the foregoing approach is applied to the present reference, I am of opinion that the "dispute or difference" that was referred to adjudication was the pursuer's claim for damages for breach of contract in respect of the rectification of defective work and payments by way of loss and expense to Dimension Shopfitting Ltd. That dispute or difference did not extend to the determination of the pursuer's claim for loss of profit in consequence of the late opening of their premises. Nor did the dispute or difference extend to a determination of the delay caused by the need to rectify defective work that was binding for all purposes. I reach this conclusion on the basis of the terms of the defender's notice of adjudication of 16 September 2003, as set out in paragraph [11] above. Two features of that notice are in my opinion important. In the first place, the notice refers to the pursuer's claim to recover £129,287.09 under the provisions of the contract or by way of damages for breach of contract. It is then explained that "This sum primarily relates to defects which are alleged to exist in the works but also encompasses certain sums paid by way of 'loss and expense' to Dimension Shopfitting Limited by [the pursuer]". Reference is then made to the schedule appended to the pursuer's claim letter of 19 August 2003. When that schedule is considered, it is clear that it relates to sums allegedly due to Dimension by the pursuer. That formulation of the matter referred to adjudication makes it clear in my opinion that it was the liability to Dimension that was in issue, and not other possible claims. In the second place, the reference to adjudication goes on to state that, for the avoidance of doubt, the defender had not referred to the adjudication "the Respondent's [the pursuer's] purported entitlement to recover the sum of £72,690 in respect of certain delay related costs, all as more particularly described in the Respondent's letter of 19 August 2002". That letter contains a claim for £72,680 in respect of a delay of 28 days in the start of trading from the premises. It is accordingly clear that the intention in the notice of adjudication was to exclude that claim from the reference to adjudication. On that basis, I am of opinion that the pursuer's claim for damages for loss of trade consequential upon the delay in opening the premises was not part of the dispute or difference remitted to the adjudicator; on the contrary, consideration of that claim was expressly excluded by the reference.
- [16] The defender contends that the question of the delay caused by the defender's defective work is relevant to both of the foregoing claims, and that a decision on this question in respect of one of the claims is binding in respect of the other. In my opinion that contention involves isolating one element in the pursuer's claim for damages in respect of sums payable to Dimension and elevating that into a distinct "dispute or difference". For the reasons discussed previously, I consider that that is not the correct approach; on the standard of a reasonable man with knowledge of the construction industry, a "dispute or difference" should normally be determined by reference to a single financial claim. Moreover, nothing in clause 30.9.4 indicates that any element in an adjudicator's decision must be given effect in relation to a dispute that has not been referred to and determined by the adjudicator. The effect of that clause is that the adjudicator's decision on a dispute or difference is rendered final and binding if court proceedings or arbitration are not started within the specified time limit; the clause does not, however, give any greater force to the adjudicator's decision. Consequently the adjudicator's decision on any element of a claim is

not rendered binding in relation to another claim that has not been the subject of adjudication. It follows that the adjudicator's decision that the delay caused by the defective work was limited to one week, not the four weeks claimed by the pursuer, is not binding in relation to the pursuer's claim for loss of profit as a result of the late opening of their premises.

- [17] In any event, as counsel for the pursuer pointed out, the question of delay considered by the adjudicator is not precisely the same as the question of delay that is relevant to the pursuer's claim for loss of profit. The relevant part of the submission to the adjudicator (item 22) is for the determination of a reasonable period to make good the defects in the defender's work. The issue in the loss of profits claim, however, relates to the period during which the pursuer was unable to trade because of the defender's breach of contract. Those two periods are clearly related, and might be the same; nevertheless, conceptually they are not identical. In some circumstances they might be different. If, for example, the contractor's programme had a degree of slack towards the end the delay in opening the premises might be less than the time taken to make good defects. Alternatively, the intervention of public holidays could have the result that the delay in opening was longer than the time taken to make good the defects. Regardless of the practicalities, however, the issue before the adjudicator and the issue before the court are distinct, and my opinion the court could not be bound by the adjudicator's decision. Certainly nothing in clause 30.9.4 would have that result.
- [18] In his submissions counsel for the defender placed considerable reliance on the principle that a decree for payment or damages invariably involved an implied declarator; he contended that in the present case the adjudicator's award involved a declarator of the length of the delay that had occurred. The answer to that argument is in my view that put forward above, in particular in paragraph [16]; an adjudicator's decision resolves a "dispute or difference", and its binding effect for the purposes of clause 30.9.4 is confined to the resolution of that dispute or difference. The critical question is accordingly the identification of the dispute or difference that has been remitted to the adjudicator; that question should be determined on the basis of the totality of the claim rather than its constituent parts. It may be possible to analyze the adjudicator's reasoning into one or more implied declarators; nevertheless, those declarators, taken by themselves, are not made binding on the court by virtue of clause 30.9.4 of the contract conditions. The wording of that clause is not in my opinion sufficient to render such individual implied declarators binding in subsequent court proceedings. In arriving at this result, I have taken into account the consideration that the general scheme of the adjudication provisions of the 1996 Act and the standard forms of contract is that any dispute between the parties can be considered in court proceedings at the conclusion of the contract; consequently, if that result is to be excluded I am of opinion that clear contractual wording is required. The wording of clause 30.9.4 is in my opinion insufficient to achieve that result. In any event, as explained the last paragraph, the declarator that is implicit in the adjudicator's decision on item 22 of the reference is not precisely the same as the issue that arises in the present proceedings. That is a further reason for holding that the implied declarator is not binding on the court.
- [19] Reliance was also placed on the decision in *Sindall Ltd v Solland*, *supra*. That case emphasizes the fact that various individual aspects of parties' disputes may be closely interconnected, and that a reference to an adjudicator of one dispute can involve him in considering another matter. Nevertheless, the court in that case was not concerned with the extent to which the adjudicator's decision in such a case was rendered conclusive by clause 30.9.4. Nor was it necessary for the court to consider in detail what was a "dispute or difference" for the purposes of that clause. Consequently I do not consider that decision to be relevant to the present case.
- [20] For the foregoing reasons I will hold that the pursuer's claim for damages in respect of the late opening of the premises is relevant. The action will accordingly proceed to proof before answer on that basis.

Pursuers: A Young; Dundas & Wilson, CS
Defenders: Howie, QC; MacRoberts