

OPINION OF T.G. COUTTS, Q.C. (Temporary Judge). Outer House Court of Session. 2nd August 2002.

Petition for a Suspension and an Order *ad factum praestandum*

- [1] Counsel for the parties were heard upon the respondents' motion to recall an interlocutor of the Honourable Lord Drummond Young pronounced, *ex parte*, on 1 July 2002, appointing the respondent, and others, to lodge answers to the petition within 14 days and, further, his Lordship's interlocutor: *"meantime ad interim suspends the periods for entering of appearance and the lodging of defences in the action pending before the Court of Session at the instance of Broderick Structures Limited and having case reference number CA110/02."*
- [2] The matter appeared in respect of motions by the petitioners for grant of the prayer of the petition and, for the respondents, to recall the interim suspension. The petitioners withdrew their motion to grant the prayer of the petition, answers having meantime been lodged and sought a hearing on the petition and answers.
- [3] The respondents' motion for recall of the said interlocutor proceeded on the basis that after an adjudication procedure in a construction contract, parties had obtained an award from the Adjudicator. The contract between the parties provided for such procedure to take place but in terms which were more than usually difficult to follow. It should be noted that in the terms of the contract between the parties, there is no provision for arbitration and the only ways of settling disputes are by adjudication and (ultimately) by court action.
- [4] The Housing Grants Construction and Regeneration Act 1996 provides: by section 108 that a party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section, by sub-section (3) the statute provides that the contract shall provide that a decision of the Adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration if the contract provides for arbitration or the parties otherwise agree to arbitration (or by agreement) by sub-section (6) it is provided that: *"for Scotland the scheme may include provision conferring powers on courts in relation to adjudication and provision relating to the enforcement of the Adjudicator's decision"*.
- [5] By paragraph 27 of the contract between the parties, dated 22 June 1999, there are provisions for the settlement of disputes 27.1 provides that: *"any dispute or difference arising between the contractor and sub-contractor shall be resolved in accordance with the sub-contract disputes resolution procedure set out in Appendix 8."*

Appendix 8 contains a virtually incomprehensible attempt to adapt to this Scottish contract, the Official Referees Solicitors Association ORSA Adjudication Rules 1998 for the purposes of dispute resolution. There are more deletions and emendations to the ORSA Rules than incorporation but, out of the confusion, there emerges the following. In ORSA it is provided at para.14, "decisions of the Adjudicator shall be binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement." In the emendation in said Appendix 8 the following appears, only the first of which, was quoted in the petition:

"(f) notwithstanding Rules 14 and 33, no party shall, save in the case of bad faith on the part of the Adjudicator make any application whatsoever to a competent court in relation to the conduct of the Adjudication or the decision of the Adjudicator until the earlier of the Actual Completion Date of the last Phase or termination of this Sub-Contract unless and until the prior written consent of both the Sub-Contractor and the Contractor has been obtained.

(g) notwithstanding Rules 14 and 33, no party shall make any application whatsoever to a competent court in relation to the conduct of the Adjudication or the decision of the Adjudicator after that date being the later of, ninety (90) days from the decision of the Adjudicator or ninety (90) days from the Actual Completion Date of the last Phase;

(h) notwithstanding Rules 14 and 33, no party shall make any application whatsoever to a competent court in relation to the conduct of the Adjudication or the decision of the Adjudicator unless it shall involve the pursuit of a claim or a counterclaim of a monetary value in excess of £25,000.00 (index-linked) or in the case of claims or counterclaims of a lesser monetary value arising out of the same facts and circumstances an aggregate monetary value of £25,000.00 (index-linked)."

It was also provided by 32A of Appendix 8 as follows:

"32A. These Rules shall be governed by and construed in accordance with the law of Scotland and the parties irrevocably submit to the non-exclusive jurisdiction of the Courts of Session, Scotland and waive any plea of forum non conveniens."

But, more significantly, by 28A:

"28A. Every decision of the Adjudicator shall be implemented without delay. The parties shall be entitled to such reliefs and remedies as are set out in the decision, and shall be entitled to summary enforcement thereof, regardless of whether such decision is or to be the subject of any challenge or review. No party shall be entitled to raise any right of set-off counterclaim or abatement in connection with any enforcement proceedings. The parties agree and bind themselves to each other to docket every decision with their consent and to registration of the Adjudicator's decision in the Books of Council and Session for execution."

[6] There was an adjudication and the decision at page 47 of its 47 pages reads:

"11.00 Decision

From the information I have received and ascertained on the matters in dispute within the timescale imposed it is my Decision that:-

11.01 The Referring Party are due an extension of time for a period of 46 weeks thus setting a revised completion dated of 25th June 2000.

11.02 The Referring Party are entitled to reimbursement of direct Loss and/or Expense, including interest, in the amount of £556,177.00 exclusive of Value Added Tax, as set out in Appendix C. The Referring Party shall be entitled to recover VAT as applicable on this sum.

11.03 The final date for payment of the amount shown at 11.02 above is 14 days from the Date of this Decision.

11.04 The Parties are jointly and severally liable for the Adjudicator's fees and expenses in relation to this Decision; and

11.05 The liability for the Adjudicator's fees and expenses in relation to the Adjudication as stated in paragraph 12.00 below shall be shared equally by the Parties."

Fees and expenses and were stated as being £39,958.93 including VAT.

[7] The petitioners having refused to consent to the adjudication award being registered as provided for in terms of 27A, the respondent raised an action in the Court of Session as a commercial cause to enforce the award. The petitioners' response was the present petition and the interlocutor under consideration.

[8] The respondent argued that in terms of the contract there was no bar to their seeking to enforce the decision of the adjudicator. The essence of the petition would appear to have been founded upon (f) above. That wholly failed to take into account said provision 27A and, in any event, did not, in its terms bar provision for enforcement, as opposed to challenge, of the Adjudicator's findings. (f) is not a stand alone provision and cannot prevent the enforcement of the Adjudicator's award by the respondents, to which they are entitled, both under contract and under the statute.

[9] If there were to be considered a matter of balance of convenience in the present circumstances, this could not lie in preventing the enforcement of the award standing 28A. The only purpose would be to permit the petitioners to continue to refuse to comply with their obligations. What they seek to do is to retain or counterclaim sums which they say are due by way of liquidated and ascertained damages. They make no averments of insolvency and the petitioners seek to subvert the plain terms of their contract and evade their obligations under both it and the statute. Since set-off and counterclaim are excluded from consideration in relation to enforcement the balance of convenience would strongly favour the respondents. The petitioners should not be permitted to found upon their own failure to comply with the registration provisions in 28A.

[10] It was argued for the petitioners that the terms of (f) meant that all disputes are postponed until the conclusion of the contract when they can all be raised at one time. That is reinforced by (g) and (h) which plainly set out to provide a means whereby disputes do not attract publicity and they may all be resolved within the window of time provided in (g). Further, the respondents have failed when one has regard to consideration of the mutuality of obligations. The Adjudicator's award declined to give the respondents the extension of time they sought. It would follow therefore that sums were due by

way of either liquidated and ascertained damages for delay or at least damages for delay. Since the respondents had failed to comply with the contract, they were not entitled to found upon the provisions thereof.

- [11] In my judgment the position adopted by the petitioners is unsound and cannot be sustained. It is an inevitable consequence of the statutory provisions that monies paid after an adjudication may not ultimately be found to have been due or may even prove to be irrecoverable. That there is no set off at the adjudication stage may, perhaps, lead on occasions to inequity in the end of the day, but the statute and the contract here so compel.
- [12] In this contract the parties have agreed paragraph 27 and the purported invocation of the earlier provisions (f), (g) and (h) to attempt to prevent enforcement is of no avail. The respondents in their action in the commercial court are not seeking to challenge the award, merely to enforce it as is their contractual right. If the petitioners were motivated by not wishing to have adverse publicity, as was contended, they could have quietly consented to registration and simply paid the sum due. That they did not consent to registration argues, in my view, irrebuttably, that the present procedure they have adopted is an attempt to obtain an illegitimate deferral of payment of the Adjudicator's award. A sum has been fixed, it is due, it should be paid. That there may be sums due by the respondent to the petitioners may be correct, but these are not quantified and no award has been made by the Adjudicator for any specific sum in that regard.
- [13] In all these circumstances, I shall recall the interim suspension granted on 1 July 2002 and put the case out By Order so that further procedure may be discussed.

Petitioners: Howie, Q.C.; Tods Murray, W.S.

Respondent: Glennie, Q.C.; Biggart Baillie