JUDGMENT : Sheriff Principal Edward F Bowen QC. 8 February 2002

The Sheriff Principal having heard counsel for the pursuers and appellants and the solicitor for the defenders and respondents, sustains the appeal and recalls the sheriff's interlocutor complained of dated 24 January 2002; grants interim interdict against the defenders or anyone acting on their behalf or on their instructions from proceeding with an adjudication all in relation to alleged disputes or differences between the defenders and the pursuers concerning (a) an ascertainment of the amount properly due to the defenders in terms of its final account to the pursuers dated December 2000 and/or (b) payment of loss and expense allegedly incurred by the defenders all under the Scottish Minor Works Contract between the defenders and the pursuers entered into on 24 and 25 May 1999; allows the pursuers' motion (no. 7/2) of process to be withdrawn; find the defenders and respondents liable to the pursuers and appellants in the expenses of the hearing for recall on 24 January 2002 and the expenses of the appeal excluding the expenses in respect of said motion (no. 7/2 of process) in respect of which finds no expenses due to or by either party; allows the pursuers' account of expenses to be received and remits same when lodged to the auditor of court to tax and to report thereon; certifies the cause as suitable for the employment of junior counsel for the purposes of the appeal.

[1] Section 108 of the Housing Grants Construction and Regeneration Act 1996 provides 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 the section. The procedure envisaged by sub-section (2) enables a party to give notice at any time of his intention to refer a dispute to adjudication; the appointment of the adjudicator and referral of the dispute to him within seven days of appointment; and a requirement on the adjudicator to reach a decision within 28 days thereafter. Sub-section (3) provides that *"The contract shall provide that the 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"*.

[2] In **Macob Civil Engineering Ltd v Morrison Construction Ltd**, (1999) BLR 93, Dyson J commented that *"The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decision of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement"*.

[3] In the present action the pursuers seek interim interdict against the defenders seeking to have an adjudicator appointed, and from otherwise proceeding with an adjudication in relation to a contract entered into between the parties on 24 and 25 May 1999. Interim interdict was granted before service. That was recalled by interlocutor dated 24 January 2002 which is the subject of the present appeal.

[4] Certain procedural events, which are not disputed, are material to this appeal. As indicated the contract was entered into in May 1999. The contract works involved alterations to properties at La Belle Place, Glasgow. These were completed by November 1999. Thereafter there was a dispute over the sum due to be paid to the defenders, who were the contractors, and this led to a protracted series of exchanges in the course of meetings and by way of correspondence between the parties' representatives. It is not disputed that certain payments were made by the pursuers, the last being on 30 September 2000. In November 2001 the present defenders raised an action in this Court against the present pursuers seeking £126,290. The averments in support of that claim might best be described as sparse. In response the present pursuers lodged detailed defences, the substance of which was that the contract price had been the subject of an agreed settlement and all but £7,000 held by way of retention had been paid. In addition to defences the present pursuers lodged a counterclaim for damages. That proceeds on an esto basis; that is to say it is advanced on the hypothesis that there was no compromise agreement between the parties. Thereafter by letter dated 14 January 2002 the defenders' agents sought to refer two disputes to adjudication under Clause 10A of the contract (which adopts the provision of Section 108 of the 1996 Act). These are described as:

"(1) an ascertainment of the amount properly due to the referring party in terms of its final account dated December 2000 (including loss and expense);

(2) payment of loss and expense sustained by the referring party due to the regular progress of works being affected".

The issuing of that reference prompted the present proceedings for interdict.

[5] After narrating inter alia the existence of the proceedings for payment and referring to the defences and counterclaim the pursuers in the initial writ seeking interdict set out that *"the defenders are seeking to refer to adjudication the issues which are currently before the court in the aforesaid action"*. They go on to say *"Further the present pursuers contend inter alia that the present defenders have agreed the final account under said contract. Accordingly any dispute does not arise under or by reason of breach of the contract. Further, the present defenders raised the aforementioned proceedings before this court for final determination of the disputes between the parties. By so doing they are personally barred from referring these matters to adjudication. Again, further the matters which the defenders seek to refer to adjudication amount to more than one dispute, and the pursuers have not consented to more than one dispute being adjudicated upon by an adjudicator in terms of Clause 10A.4.1 of the contract"*.

[6] The sheriff reached the view that the pursuers were not entitled to interim interdict on the following basis. He commented that Parliament had *"specifically imposed upon"* parties the process of adjudication; that it could be commenced at any time, and was not inconsistent with court proceedings. He appeared to tacitly, if not expressly, accept that adjudication proceedings could be displaced (or at least superseded) if the parties had entered into a contract of compromise in relation to their dispute. He did not, however, consider that the pursuers had shown prima facie that any such contract existed. He went on to hold that the balance of convenience favoured continuation of the adjudication proceedings. In that respect he said this: *"Again, I emphasise that Parliament had provided this remedy for parties to a construction contract. The parties themselves have agreed to incorporate adjudication provisions within their contract and therefore questions of expense and delay seem to me to be nothing to the point. The question of expenses effects both equally and I cannot see that the cost of preparation for an adjudication is likely to be any different from continuation of the current proceedings"*.

[7] The sheriff's approach to the question of whether the pursuers were entitled to interim interdict was undoubtedly the correct one. He sought to determine whether the pursuers had demonstrated a prima facie case, and went on to consider whether, on a balance of convenience, it was appropriate that interim interdict should be granted. I regret, however, that I cannot agree with the conclusion which he arrived at in respect of either of these issues.

[8] The argument as to whether the pursuers had shown prima facie that a compromise agreement existed was developed in argument before me to a significant extent. I have endeavoured to put that out of my mind and to deal with the case on the basis which was presented to the sheriff. Whilst it is correct that the initial writ in the present action sets out in fairly bald terms that the parties *"have agreed the final account under said contract"* the pleadings refer, and hold to be repeated brevitatis causa, the averments in the pleadings in the earlier action raised by the present defenders. The terms of the defences set out in detail the nature of negotiations between the parties subsequent to 2 October 1999. It is averred in particular that on 26 November 1999 the present pursuers put forward a proposal which resulted in a final account figure of £305,025. It is averred that the present defenders accepted that proposal in January 2000 with £280,000 being payable as the contract sum and a further £25,000 payable on condition that the present pursuers would introduce further work to the present defenders. It is in effect averred that these sums were paid and accepted by the end of September 2000. Whilst I can see scope for argument that the terms of the agreement might have been subject to conditions which the present pursuers were not entitled to waive there are nevertheless clear averments of agreement on a specific sum and payment, and acceptance of payment, of it. This is not a case as the sheriff appears to suggest of a party seeking to avoid adjudication "by the simple device of a bare proposition that an agreement was reached as to monies due pursuant to the contract". Equally, I do not consider it necessary, again as the sheriff appears to suggest, for the present pursuers to have sought "a judicial determination as to the existence of that agreement" in any manner other than by stating it in the defences to the action raised against them.

[9] On that basis I am wholly satisfied that on the question of whether the dispute between the parties was the subject of a compromise agreement, that the pursuers have a case to try. It was accepted by the solicitor for the defenders that one can oust the jurisdiction of an adjudicator by reaching a compromise agreement in relation to a dispute which might otherwise be referred to him. That concession was in my

view properly made and is consistent with certain dicta in the case of **Shepherd Construction Ltd v Mecright Ltd**, 2000 BLR 489. That case was concerned with a dispute which was referred to adjudication by sub-contractors on 3 July 2000. On 11 July 2000 the main contractors, being the other parties involved wrote to the adjudicator pointing out that there had been a settlement agreement in March 2000. This was met by a contention by the sub-contractors that the settlement dispute had been entered into under duress. The view taken by the judge in the Technology and Construction Court was that until the settlement agreement was set aside there was no dispute capable of being referred to adjudication; as the sub-contractors had not sought to challenge the settlement until after the matter had been referred to adjudication the reference was not a good one. That case supports the view that a dispute which has been compromised is no longer susceptible of a reference to arbitration notwithstanding the provision in Section 108(2)(a) of the 1996 Act that a reference may be made *"at any time"*.

[10] Having arrived at the view that the pursuers have shown a prima facie case on the question of the existence of a compromise agreement it is unnecessary to express any view on the argument focused by the pursuers' second plea in law which is to the effect that by having raised court proceedings the defenders are personally barred from referring the same matters to adjudication. No argument was advanced in that respect and I express no view on it other than to observe that I can see the basis for it standing the terms of sub-section (3) of Section 108 which appears to contemplate a decision in adjudication prior to the matter being finally determined by legal proceedings, by arbitration or otherwise.

[11] It is equally unnecessary to deal with the argument that the defenders have referred to adjudication more than one dispute without the consent of the pursuers as required by Clause 10A.4.1 of the contract. Section 108(1) of the 1996 Act confers a statutory right "*to refer a dispute*" arising under a construction contract for adjudication. The section goes on to provide that *"for this purpose 'dispute' includes any difference"*. In **Fastrack Contractors Ltd v Morrison Construction Ltd & Another**, 2000 BLR 168 the view was expressed (at p 176 para 20) that a "dispute" which may be referred to adjudication *"is all or part of whatever is in dispute at the moment that the referring party first intimates adjudication reference"*. I am bound to say that I have some difficulty with that view if for no other reason than that the practicalities arising from the requirement for the adjudicator to reach a decision within 28 days of a referral in terms of Section 108(2)(c) would lead one to conclude that the legislature did not have the reference of a conglomeration of claims in mind. I am not, however, required to express a concluded view on that and do not purport to do so.

[12] On the question of balance of convenience the sheriff, at the end of the day, appears to have reached the view that the issues in adjudication may well be the same as in the current court proceedings. Whether that view be correct or not it does not, in my view justify the conclusion that the balance of convenience favours allowing the adjudication to proceed. The thrust of the pursuers' case is that there is no dispute to go to adjudication and in my view they are entitled to have that issue resolved. If it is resolved in their favour any expense involved in the adjudication will be avoided. If the adjudication were to proceed the present pursuers would no doubt argue before the adjudicator that the claim had been compromised. The adjudicator's decision, one way or the other, is unlikely to be accepted and the court action will have to have to proceed on this issue if no other. I am accordingly quite satisfied that for reasons of expediency the issue of whether the compromise agreement was reached is one which should be resolved in the court action. It is appropriate to pronounce interim interdict against the adjudication proceeding to enable that to be done.

[13] In the whole circumstances I shall recall the interlocutor pronounced on 24 January 2002 and of new pronounce interim interdict. Standing the fact that the defenders have already sought an appointment from the Royal Institute of Chartered Surveyors it is appropriate now to grant interdict against them proceeding with adjudication. Interim interdict is accordingly pronounced in terms of Part II of crave (1) of the initial writ.

Act: Dewar, Advocate.
Alt: McEntegart.