OPINION OF LADY PATON : Outer House Court of Session. 28th November 2002

Attempt to suspend a construction contract adjudication

[1] On Wednesday 3 October 2002, the petitioners (Skanska) sought an interim interdict and interim suspension which would have the effect of bringing to a halt a construction contract adjudication taking place between Skanska and the first respondents (ERDC).

[2] The matter was of some urgency, as the adjudicator had directed Skanska to lodge a Response to the Referral by Friday 4 October 2002. Having heard submissions and considered the productions and authorities cited by counsel, I refused to grant interim interdict and interim suspension. I indicated that I would issue written reasons later, and I now do so.

Sub-contract

[3] Skanska and ERDC entered into a sub-contract for certain landscaping works. The sub-contract - SBCC Domestic Sub-Contract Conditions DOM/C/SCOT (1997 edition - August 1998 revision) - contained the following clauses:

4.14: Interim and final payments.

4.17: Ascertainment of amounts due in interim payments (including 4.17.2.2: direct loss and expense).

4.23: Adjustment of sub-contract sum (including 4.23.1.1: ... not later than 6 months after practical completion of the Sub-Contract Works the Sub-Contractor shall send to the Contractor all documents necessary for the purpose of the adjustment of the Sub-Contract Sum; 4.23.1.2: ... not later than 3 months after receipt by the Contractor of [said] documents ... a statement of all adjustments to the Sub-Contract Sum to which clause 4.23.2 refers shall be prepared by the Contractor and the Contractor shall forthwith send a copy of the statement to the Sub-Contractor which shall be before the Contractor notifies final payment for the Sub-Contract Works; 4.23.2: The Sub-Contract Sum shall be adjusted ... as follows: ... there shall be added ... 4.23.2.8 any amount ascertained as a result of the application of clause 4.38 [direct loss and expense]).

4.38: Direct loss and expense (including 4.38.1.3: the Sub-contractor shall submit to the Contractor such details of such loss and/or expense as the Contractor requests in order reasonably to enable the ascertainment of that loss and/or expense to be agreed; 4.38.3: Any amount from time to time ascertained as a result of the operation of clause 4.38.1 shall be added to the Sub-Contract Sum or included in the computation of the Ascertained Final Sub-Contract Sum.).

8: Adjudication, including 8.3.2: an Adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to Adjudication, and a decision has been taken in that Adjudication [a clause reflecting Regulation 9(2) of the Regulations set out in the Schedule to The Scheme for Construction Contracts (Scotland) Regulations 1998 S.I. 1998 No. 687].

First adjudication

[4] In December 2001 and January 2002, an adjudication took place relating to ERDC's Application for Interim Payment No. 7 contained in ERDC's letter dated 6 September 2001 No. 7/1 of process. As is clear from ERDC's Notice of Intention to refer a dispute to adjudication dated 4 December 2001 No. 6/5 of process, and the Referral Notice dated 11 December 2001 No. 6/6 of process, the dispute concerned ERDC's contention that further sums amounting to £261,812.57 and VAT should be paid to them by Skanska in satisfaction of a claim for direct loss and expense (not measured work).

[5] A summary of ERDC's claim for direct loss and expense can be found in a document headed *"Summary of Direct Loss or Expense Claim"* on the last page of Section 8 of the Statement of Claim prepared in August 2001 No. 6/4 of process. That summary is in the following terms:

8.9 Summary

8.02	*Prolongation of Preliminaries*	*£ 71,184.66*
8.03	*Disruption Expenditure*	*£164,321.54*
8.04	*Additional Supervision*	*£ 38,801.32*
8.05	*Head Office Overhead Recovery*	*£ 53,026.42*
8.06	*Finance and Funding Expenditure*	*£ 28,459.00*
8.07	*Loss of Opportunity*	*£ 18,732.65*
8.08	*Claim Preparation Costs*	*£ 14,975.00*
	Total	*£389,500.59*

In their Referral Notice No. 6/6 of process, ERDC explain in paragraph 5:
"On comparison of the Referring Party's Interim Application for Payment No. 7 dated 6 September 2001, and the Responding Party's revised calculation dated 19 November 2001, it can be seen that there is no material difference between both parties' valuation of the measured works. The amount in dispute relates almost entirely to the Referring Party's entitlement to direct loss and expense. The Referring Party seeks direct loss and expense in the sum of £389,500.59 whereas to date the Responding Party has paid a total of £128,966.12 against what it categorises as an "extension of time claim" and "disruption". The Responding Party has failed to confirm the basis on which it has calculated this figure."

[6] The redress sought in that Referral Notice was an order for payment of "the sum of £261,812.57 plus VAT thereon of £45,817.20, or such other sum or sums as the Adjudicator may decide", together with interest and expenses. Mr. Fiddes, the adjudicator to whom the referral was addressed, accepted office. On 30 January 2002, Mr. Fiddes ruled that Skanska were not obliged to pay ERDC anything. Mr. Fiddes' ruling, No. 6/9 of process, states inter alia:
"I find that [Skanska] is not due to make payment to [ERDC] of the sum of £261,812.57 plus VAT thereon of £45,817.20, or any other sum."

Mr. Fiddes' reasons, No. 6/10 of process, made fairly frequent reference to "insufficient information", "insufficient specification", and "insufficient evidence": see for example paragraphs 2.02, 3.01, 3.02, and 7.00 of his reasons.

Second adjudication, in respect of which interim interdict and suspension sought

[7] In September 2002, a second adjudication commenced relating to Skanska's final account dated 21 March 2002. ERDC's Notice of Intention to refer a dispute to adjudication dated 6 September 2002 No. 6/15 of process, and the Referral Notice dated 13 September 2002 No. 6/16 of process, refer a dispute about whether £244,011.93 and VAT should be paid to ERDC by Skanska. Paragraph 16 of the Referral Notice states:
"The amount in dispute [£244,011.93 and VAT] relates almost entirely to the Referring Party's entitlement to Direct Loss and/or Expense. The Referring Party seeks Direct Loss and/or Expense in the sum of £372,978.05 whereas the Responding Party has only paid a total of £128,966.12 against extension of time and disruption."

[8] On the last page of Section 4 of a letter dated 2 May 2002 Nos. 6/12 and 6/13 of process, ERDC set out a summary of their claim for direct loss and expense as follows:

SUMMARY	
Prolongation of Preliminaries	*£ 71,184.66*
Disruption Expenditure	*£196,242.69*
Additional Supervision	*£ 38,801.32*
Finance and Funding Expenditure	*£ 28,581.34*
	£334,810.01
Head Office Overhead Recovery 11.40%	*£ 38,168.34*
Total	*£ 372,978.35*

The Referral was made to the second respondent, Mr. Hunter, who accepted office as adjudicator.

Skanska's objection to second adjudication: dispute "the same or substantially the same" as first dispute previously referred to adjudication.

[9] By letter dated 17 September 2002 No. 6/17 of process, Skanska's agents asked Mr. Hunter to resign in terms of Clause 8.3.2 of the sub-contract, on the basis that the dispute which had been referred to him was the same or substantially the same as the first dispute which had been decided by Mr. Fiddes' decision dated 30 January 2002, Nos. 6/9 and 6/10 of process.

[10] By letter dated 26 September 2002 No. 6/20 of process, Mr. Hunter rejected Skanska's request, stating:
"Having considered the submissions from Anderson Strathern dated 17 and 25 September 2002 and the submission from MacRoberts dated 23 September 2002, I hereby find that I have jurisdiction to proceed.

The reasons for my findings are, in essence, as follows. I am satisfied that the first dispute related to an interim application for payment and I refer the parties to page 2 of the Notice of Intention to refer a dispute to adjudication, served by MacRoberts on 4 December 2001, which refers in paragraph 2 on page 2 to interim application for payment No. 7 and that said interim application represented the Referring Party's calculation of

the amount to which it was entitled, at that time, in terms of the Contract between the parties [emphasis added by me].

The current dispute, in my view, relates to an adjustment of the Sub Contract Sum and I am satisfied that these matters are provided for in the Sub Contract Conditions by different clauses and my view is that there is authority for reaching this conclusion which supports [ERDC's] contention, in the cases of ***Holt Insulation Ltd v Colt International Ltd*** *and* ***Sherwood and Casson Ltd v MacKenzie.***

I fully understand [Skanska's] position regarding the substantial overlap but I am satisfied that there is a difference between application No. 7, as an interim payment, and the current matter before me ...".

Skanska's petition for judicial review

[11] Skanska then sought judicial review of Mr. Hunter's decision of 26 September 2002. The matter came before me for a first hearing on Wednesday 3 October 2002. Counsel for Skanska sought (1) an order for intimation and service; (2) interim interdict against ERDC and Mr. Hunter from continuing the conduct of the second adjudication; and (3) an order suspending ad interim the second adjudication.

Submissions on behalf of Skanska

[12] Counsel submitted that the dispute referred to Mr. Hunter by ERDC in the second adjudication was "substantially the same" as the dispute which had been referred to and decided by Mr. Fiddes in the first adjudication. Accordingly in terms of Clause 8.3.2, Mr. Hunter should resign. Mr. Hunter had in effect no jurisdiction.

[13] Counsel accepted that ERDC's claim in respect of Skanska's final account was made at a different time in the course of the contract. Also the claim fell under a nominally different heading: the first dispute had related to an application for an interim payment; the second related to final payment. However it was clear from the documents that ERDC's claim in each dispute was substantially the same, namely a dispute over the correct quantification of the direct loss and expense element. A comparison of the two summaries showed similar sums claimed in respect of direct loss and expense. For example, in the first adjudication, the total claimed was £389,500.59, which included items such as Prolongation of Preliminaries £71,184.66; Additional Supervision £38,801.32; and Head Office Overhead Recovery calculated at a rate of 11.40%. In the second adjudication, the total claimed was £372,978.35, which included items such as Prolongation of Preliminaries £71,184.66; Additional Supervision £38,801.32; and Head Office Overhead Recovery calculated at a rate of 11.40%. It was not merely a question whether the payment sought was interim or final, or whether applications were being made under different contractual provisions. The real question was whether the actual sum in dispute was substantially the same.

[14] Counsel referred to **Holt Insulation Limited v Colt International Limited, claim** No. LV01 5929 before His Honour Judge Mackay in the Liverpool Technology and Construction Court. The judgement was undated, but from its content appeared to have been issued in 2001. Counsel submitted that the case had been wrongly decided. In any event, Holt could be distinguished from the present case, as Judge Mackay had based his decision on the fact that there was a difference between the scope of each referral.

[15] Counsel next referred to **Sherwood & Casson Limited v Mackenzie,** 2000 T.C.C. 418. He contended that **Sherwood** was also distinguishable, as in that case a loss and expense claim had been introduced only after the first adjudication.

[16] In conclusion, counsel submitted that a prima facie case sufficient for interim interdict and interim suspension had been made out. It was further submitted that the balance of convenience favoured the granting of the interim orders sought. The interim orders would simply delay the adjudication and avoid expense - in particular, so far as Skanska were concerned, the expense of providing the Response to the Referral. There would be no prejudice to ERDC in having to wait until the question of jurisdiction had been determined.

Submissions on behalf of ERDC

[17] Senior counsel submitted that the cost of preparing a Response to the Referral was minimal in the context of the sums in dispute. In any event, if as Skanska contended there was a degree of repetition in the second referral, Skanska's task was made that much easier.

[18] It was further submitted that section 108 of the Housing Grants, Construction and Regeneration Act 1996 laid down a strict timetable. For example, in terms of section 108(2)(c), the adjudicator had to reach a decision within 28 days of referral. Also it was important to remember that the adjudicator's resolution was only provisional: section 108(3). The whole process was intended to be high-speed and purely provisional. To oust the adjudicator - which was what the interim interdict would do - required a very strong prima facie case. Skanska had failed to make out a prima facie case. Alternatively any case made out was not sufficiently strong to entitle Skanska to interim interdict. If interim interdict were to be granted, the whole adjudication procedure would be lost.

[19] Developing the argument relating to the existence or otherwise of a prima facie case, counsel submitted that the first adjudication had dealt with an interim application. The second adjudication concerned a final application. The second valuation exercise was therefore to be carried out at a different point in time. Measured work and direct loss and expense were to be considered at a time different from that at which they had been considered in the first adjudication. The second valuation exercise would proceed upon a different basis. Authorities such as **Holt** were very much in ERDC's favour. Assessing whether a dispute was substantially the same as an earlier dispute was not simply a question of ascertaining whether the underlying facts in each dispute were the same: the true extent of the issue or dispute had to be taken into account. The passage in paragraph 33, sub-paragraph 3, of the judgement in **Sherwood** at page 431 was supportive of ERDC's contention in that there was clear recognition of the difference between interim and final valuations - not only for measured work, but also for claims for direct loss and expense and disruption. The adjudicator had therefore been correct to find support in **Sherwood** and **Holt,** and to recognise the underlying reality, namely the difference between the interim and the final stage.

[20] The adjudicator had been a fortiori correct in the present case, for the previous adjudicator's decision had to a large extent been dictated by a lack of sufficient information. There could be a very real difference between the interim and the final stages, as at the latter stage considerably more information might be available. That was the case here.

[21] Senior counsel pointed out that it was always open to Skanska to adopt the options outlined by His Honour Judge Thornton Q.C., quoted in **Watson Building Services Ltd v Harrison,** 2001 S.L.T. 846, at paragraph [27]. Skanska could, for example, reserve their position, participate in the second adjudication, and then challenge any attempt to enforce the adjudicator's decision on jurisdictional grounds. That made Skanska's present position and their request for interim interdict and suspension all the more difficult.

[22] Senior counsel accepted that there were a number of similar underlying factors in the two disputes. But it was fundamental that the first adjudication had been concerned with an interim payment (Clauses 4.14, 4.17), while the second adjudication was concerned with a final payment (Clause 4.23). There had been a considerable accumulation and exchange of information following upon the first adjudication. Reference was made to Nos. 6/12 and 6/18 of process, recording the supplying of additional information and meetings at which such additional information had been provided and discussed during the period April to August 2002. The dispute in the second adjudication was not substantially the same, but was an entirely new position. "Dispute" was a much wider concept than that contended for by Skanska.

Further submissions on behalf of Skanska

[23] Counsel for Skanska developed a further submission. The date of practical completion had been 28 February 2001. Under reference to Clauses 4.23.1.1, 4.23.2.8, and 4.38.1.3, counsel submitted that ERDC's documentation and details supporting their claim for direct loss and expense had to be made available to Skanska within six months of practical completion (i.e. by 1 September 2001). Skanska were entitled to ignore or alternatively object to any new documents or details produced out of time.

This was in effect another reason why interim interdict and interim suspension should be granted: by the time of the first adjudication, the six month time-limit had expired. Skanska were entitled to have ERDC's claim for direct loss and expense valued on the basis of the information available at the first adjudication. That had been done by Mr. Fiddes in the first adjudication in December 2001 and January 2002. Accordingly the claim for direct loss and expense could not be re-assessed in the second adjudication in the light of any additional information made available following upon the first adjudication.

[24] Counsel advised, however, that despite the expiry of the six month period, the first adjudicator Mr. Fiddes had taken the view that he had power to seek further information from ERDC. In his reasons, No. 6/10 of process, he explained at paragraph 1.01:
"There were further arguments on whether I could only look at the information made available to Skanska which allowed [them] to make their assessment. I decided that the adjudication clause in the contract between the parties gave me the power to request additional information..."

Counsel also confirmed that additional information had been supplied in response to Mr. Fiddes' requests, and that he had used that information when reaching his decision.

[25] Counsel concluded by arguing that the first adjudicator's decision on the question of direct loss and expense must necessarily be final, because of the particular time-limits set out in the contractual conditions.

Reply on behalf of ERDC

[26] In response, senior counsel contended that the statutory periods were not mandatory, but simply provided a basis upon which parties were expected to operate. If further claims for direct loss and expense were to be excluded after the six month period, one would expect an express statement to that effect in the contract, but there was none. In any event, clause 4.38.3 provided:
"Any amount from time to time ascertained as a result of the operation of clause 4.38.1 (direct loss and expense) shall be added to the Sub-Contract Sum or included in the computation of the Ascertained Final Sub-Contract Sum."

Accordingly not all direct loss and expense had to be ascertained within the periods mentioned. Skanska had produced their "ascertainment" of ERDC's direct loss and expense in their final account on 21 March 2002. Their ascertainment was, on their own argument, late.

[27] In any event, counsel contended that even if there were strict time-limits (which he did not accept) the necessity of abiding by these time-limits appeared to have been waived by Skanska. Reference was made to the provision of information and meetings during the period April to August 2002, as outlined in documents Nos. 6/12 and 6/18 of process. Further the second adjudication proceeded on the basis of the final account which had not been produced until 21 March 2002. That final account, that "ascertainment", could not have been put before the first adjudicator.

Opinion

[28] I do not agree that the dispute referred to the second adjudicator is substantially the same as the dispute referred to the first adjudicator. A different stage in the contract has been reached; different contractual provisions apply; considerably more information may be available by the date of issue of the final account; and different considerations and perspectives may apply. The fundamental nature and parameters of the disputes are in my view different: cf. dicta in **Sherwood & Casson Limited v Mackenzie**, cit. sup., paragraph 32 et seq.

[29] In relation to Skanska's time-bar argument, I cannot accept that the contract terms, properly construed, prohibit the provision and receipt of further information, documentation, or details about direct loss and expense after the six month period following practical completion. Such a stringent time-bar would in my view require to be expressed in clear and unambiguous language, which I have been unable to find in the contract terms. On the contrary, the wording of clause 4.38.3 suggests that ERDC are correct in their contention that the statutory provisions simply provide a time-table to which parties are expected to adhere.

[30] In any event, standing Skanska's acceptance of the first adjudicator's requests for further information, together with their conduct during the period of meetings and provision of further information from April to August 2002, all as outlined in documents Nos. 6/12 and 6/18 of process, Skanska have in my view waived any right to present a time-bar argument.

[31] It follows that Skanska have failed to satisfy me that a prima facie case has been made out. I am not therefore persuaded that interim interdict or interim suspension should be granted. It is unnecessary to deal with balance of convenience.

Conclusion

[32] I refused to grant interim interdict or interim suspension. I ordered intimation and service of the petition.

Petitioners: Bowen, Advocate; Anderson Strathern, W.S.
First Respondents: N.J. Davidson, Q.C.; MacRoberts
Second Respondent: No appearance