

OPINION OF LORD MACKAY OF DRUMADOON : Outer House Court of Session : 1st April 2003

- [1] This is an action for payment in which the pursuers, the Trustees of the Harbours of Peterhead, conclude for payment of two separate sums by the defenders. Conclusion 1 is for payment of £1,428,847.50 and Conclusion 2 for payment of £122,178.80. The defenders are a limited company, which carries on business as contractors. The action arises out of a contract in terms of which the defenders ("the Contractor") undertook certain construction works for the pursuers ("the Employer"), in connection with the Merchants Quay Development at Peterhead Harbour.
- [2] The action is a commercial action. During a Preliminary Hearing, on 14 March 2003, I heard submissions in respect of a motion on behalf of the defenders to sist the action, to enable the dispute between the parties to be resolved in terms of Clause 66 of the contract. In practical terms, what the defenders seek to do is to refer the disputes between the parties to arbitration. The motion was opposed by the pursuers. The submissions I heard raised issues as to the relationship between adjudication, conducted under reference to the provisions of the Housing Grants, Construction and Regeneration Act 1996 ("*the 1996 Act*") and The Scheme for Construction Contracts (Scotland) Regulations 1998 (SI 1998 No.647) ("*the 1998 Regulations*"), and arbitration. Accordingly, before I turn to deal with the submissions I heard, it is appropriate that I refer briefly to that statutory background.
- [3] Sections 108 and 114 of the 1996 Act provide as follows:
- "108 (1) 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. For this purpose 'dispute' includes any difference.*
- (2) The contract shall -*
- (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;*
 - (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;*
 - (c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;*
 - (d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;*
 - (e) impose a duty on the adjudicator to act impartially; and*
 - (f) enable the adjudicator to take the initiative in ascertaining the facts and law.*
- (3) 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.*
- The parties may agree to accept the decision of the adjudicator as finally determining the dispute.*
- (4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.*
- (5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.*
- 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.*
- 114 (1) The Minister shall by regulations make a scheme ('the Scheme for Construction Contracts') containing provision about the matters referred to in the preceding provisions of this Part.*
- (3) In this section 'the Minister' means -*
- (a) for England and Wales, the Secretary of State, and*
 - (b) for Scotland, the Lord Advocate.*
- (4) Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provisions agreed by the parties, they have effect as implied terms of the contract concerned."*
- [4] The 1998 Regulations were made by the Lord Advocate on 6 March 1998. They extend only to Scotland. Part 1 of the Schedule to the Regulations contains The Scheme for Construction Contracts (Scotland) ("the Scheme"). The Scheme applies when a construction contract, which is subject to the law of Scotland, does not comply with the requirements of subsection (1) to (4) of the 1996 Act.
- [5] The contract between the parties was entered into after 1 May 1998. The law of Scotland applies to the contract. The contract is a construction contract. The contract does not comply with the requirements

of sub-sections (1) to (4) of section 108 of the 1996 Act. In these circumstances the provisions of the Scheme apply. Having regard to the terms of section 114(4) of the 1996 Act, the provisions of the Scheme have effect as implied terms of the contract between the parties. All this was a matter of agreement between the parties.

- [6] Paragraph (1) of the Scheme provides that any party to a construction contract ("the referring party") may give written notice ("the notice of adjudication") of his intention to refer any dispute arising under the contract to adjudication. Paragraph 7(1) of the Scheme provides for the referring party to refer the dispute in writing to the adjudicator, by means of a "referral notice". The remaining paragraphs of the Scheme lay down the details of the procedures for adjudication and the effect of the adjudicator's decision. In particular, paragraph 23(2) provides: *"The decision of the adjudicator shall be binding on the parties, and they shall comply with it, until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agreed to arbitration) or by remit between the parties."*
- [7] For the purpose of determining the motion to sist this action, it is unnecessary to record in detail how the contract between the parties was constituted or to say much about its terms. The contract is, however, subject to the I.C.E. Conditions of Contract 6th Edition (January 1991) ("the Conditions"), together with the definitions, additions and variations listed in the tender documentation. It is also clear from a reading of the Summons and Defences, that it is a matter of agreement between the parties that the defenders agreed to carry out the contract works on a lump sum basis, subject to certain agreed conditions and modifications. Moreover, there is no dispute that when the contract was concluded the parties agreed that the contract commencement date should be 15 June 1998 and the contract completion date should be 20 June 1999.
- [8] Clauses 60 and 66 of the Conditions provide as follows:
- "60 (1) The Contractor shall submit to the Engineer at monthly intervals a statement (in such form if any as may be prescribed in the Specification) showing*
- (a) the estimated contract value of the Permanent Works executed up to the end of that month*
 - (b) a list of any goods or materials delivered to the Site for but not yet incorporated in the Permanent Works and their value*
 - (c) a list of any of those goods or materials identified in the Appendix to the Form of Tender which have not yet been delivered to the Site but of which the property has vested in the Employer pursuant to Clause 54 and their value and*
 - (d) the estimated amounts to which the Contractor considers himself entitled in connection with all other matters for which provision is made under the Contract including any Temporary Works or Contractor's Equipment for which separate amounts are included in the Bill of Quantities*
- unless in the opinion of the Contractor such values and amounts together will not justify the issue of an interim certificate.*
- (2) Within 28 days of the date of delivery to the Engineer or Engineer's Representative in accordance with sub-clause (1) of this Clause of the Contractor's monthly statement the Engineers shall certify and the Employer shall pay to the Contractor (after deducting any previous payments on account)*
- (a) the amount which in the opinion of the Engineer on the basis of the monthly statement is due to the Contractor on account of sub-clauses (1)(a) and (1)(d) of this Clause less a retention as provided in sub-clause (5) of this Clause and*
 - (b) such amounts (if any) as the Engineer may consider proper (but in no case exceeding the percentage of the value stated in the Appendix to the Form of Tender) in respect of sub-clauses (1)(b) and (1)(c) of this Clause.*
-*
- 66 (1) Except as otherwise provided in these Conditions if a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with or arising out of the Contract or the carrying out of the Works including any dispute as to any decision opinion instruction direction certificate or valuation of the Engineer (whether during the progress of the Works or after their completion and whether before or after the determination abandonment or breach of the Contract) it shall be settled in accordance with the following provisions.*
- (2) For the purpose of sub-clauses (2) to (6) inclusive of this Clause a dispute shall be deemed to arise when one party serves on the Engineer a notice in writing (hereinafter called the Notice of Dispute) stating the nature of the dispute. Provided that no Notice of Dispute may be served unless the party wishing to do so has first taken any steps or*

invoked any procedure available elsewhere in the Contract in connection with the subject matter of such dispute and the other party or the Engineer as the case may be has

(a) taken such step as may be required or

(b) been allowed a reasonable time to take any such action.

(3) Every dispute notified under sub-clause (2) of this Clause shall be settled by the Engineer who shall state his decision in writing and give notice of the same to the Employer and the Contractor within the time limits set out in sub-clause (6) of this Clause.

.....

(6) (a) Where a Certificate of Substantial Completion of the whole of the Works has not been issued either

(i) the Employer or the Contractor is dissatisfied with any decision of the Engineer given under sub clause (3) of this Clause or

(ii) the Engineer fails to give such decision for a period of one calendar month after the service of the Notice of Dispute or

(iii) the Employer or the Contractor is dissatisfied with any recommendation of a conciliator appointed under sub-clause (5) of this Clause

then either the Employer or the Contractor may within 3 calendar months after receiving notice of such decision or within 3 calendar months after the expiry of the said period of one month or within one calendar month of receipt of the conciliator's recommendation (as the case may be) refer the dispute to the arbitration of a person to be agreed upon by the parties by serving on the other party a written Notice to Refer.

(b) Where a Certificate of Substantial Completion of the whole of the Works has been issued the foregoing provisions shall apply save that the said periods of one calendar month referred to in (a) above shall be read as 3 calendar months."

- [9] The sum first concluded for relates to certain claims for payment, which formed part of an interim application for payment, No. 27, which was submitted by the defenders to the pursuers' Engineer on 11 October 2001. That interim application for payment fell to be dealt with under the provisions of Clause 60 of the Conditions. By letter dated 9 November 2001, addressed to the defenders, the Engineer recorded that the interim application for payment had been assessed and that the Engineer had concluded that no further monies were due to the defenders. That letter accordingly gave notice of the Engineer's decision under Clause 60(3), in respect of the interim application for payment.
- [10] On 13 December 2001, the defenders served a notice of adjudication on the pursuers. On 21 December 2001, the defenders served a referral notice on the pursuers, referring a dispute between the parties, to an adjudicator. In those documents, the dispute between the parties was defined as relating to the pursuers' refusal to make payment in respect of the interim application for payment, No 27, or alternatively for payment of certain sums as damages for breach of contract. In setting out what the defenders were claiming from the pursuers, the notice of referral specified a total of fourteen individual claims for additional payment under Clause 60(2) of the Conditions. Six of those claims, amounting to a total of £1,217,753.34, plus VAT, were upheld by the Adjudicator, in a decision dated 12 April 2002. In accordance with the requirements of paragraph 23(2) of the Scheme, the pursuers paid the defenders the total sum decided upon by the Adjudicator, together with interest.
- [11] In the present action, by way of Conclusion 1, the pursuers seek repetition of the total sum they paid the defenders, in compliance with the Adjudicator's decision, under deduction of three comparatively small sums, which the pursuers accept are payable to the defenders, in respect of three of the six claims that the Adjudicator upheld. The pursuers aver that they are entitled to repetition of the sum first concluded for, having regard to the terms of the contract between the parties and the merits of the six claims, which the pursuers contend should not have been upheld by the Adjudicator, except to the limited extent of the three small sums, which I have mentioned.
- [12] Conclusion 2 of the Summons relates to a claim by the pursuers to recover liquidated damages from the defenders. The pursuers aver that the defenders were late in completing the contract works. The pursuers contend that the contract works ought to have been completed by 20 June 1999, whereas the actual completion date was 16 March 2000. The pursuers' averments in relation to this claim to recover liquidated damages are the subject of a bald denial in the defences.
- [13] In opposing the motion to sist the action, senior counsel for the pursuers advanced separate submissions in relation to the claims for payment encompassed in the two conclusions. As far as

Conclusion 1 was concerned, he argued that in a situation where a dispute had been referred to adjudication and an adjudication had taken place, the terms of Clause 66 of the Conditions are not such as to admit the possibility of a subsequent arbitration in respect of the subject matter of that dispute. He submitted that the provisions of Clause 66 do not create any entitlement to arbitration. He submitted that when the defenders triggered the adjudication, as they had been perfectly entitled to do, they had 'stepped outside' the provisions of Clause 66. The contractual route to arbitration, previously available to them, had accordingly closed down.

- [14] Senior counsel for the pursuers also argued that before there could be any arbitration there required to be a "dispute", within the meaning of Clause 66 of the Conditions. As the pursuers were perfectly content with the Engineer's decision in respect of the defenders' interim application for payment, No.27, as set out in the letter of 9 November 2001, there could no longer be any dispute in respect of the interim application that could be referred to arbitration.
- [15] In my opinion this first chapter of the pursuers' objection to the defenders' motion, to sist the action pending arbitration, proceeds on a misunderstanding of the relationship between the express terms of the parties' contract and the implied terms of that contract, which arise by virtue of the provisions of section 114(4) of the 1996 Act.
- [16] As was stated by Dyson J. in **Macob Civil Engineering Ltd v Morrison Construction Ltd** [1999] B.L.R. 93, at p.97: *"The intention of Parliament in the (1996 Act) was plain. It was to introduce a speedy mechanism for settling disputes and 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. Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved."*

The views as to the relationship between adjudication and arbitration, which have subsequently been expressed by several other judges, including Lady Paton in **Watson Building Services Ltd v Harrison** 2001 S.L.T. 846, at p.852F, para.[21], and Lord Macfadyen in **The Construction Centre Group Ltd v The Highland Council** 2002 SLT 1274, at para.[10], are entirely consistent with Dyson J's approach.

- [17] The terms of section 108(4) of the 1996 Act and paragraph 23(2) of the Scheme explicitly envisage the decision of an adjudicator being binding on the parties and requiring to be complied with, but only until "the dispute" is finally determined, whether by legal proceedings or by arbitration (if the contract provides for arbitration) or by agreement between the parties. That is hardly surprising, having regard to the nature of the adjudication process, which Parliament created and which the 1998 Regulations have provided for.
- [18] The dispute between the parties, in respect of the defenders' claim for repetition, arises out of the interim application for payment, No.27, which the defenders submitted to the pursuers' Engineer. That interim application for payment was submitted in respect of, inter alia, works carried out by the defenders, which formed the basis for the fourteen individual claims for payment. The dispute between the parties, which arose when the Engineer took his decision on the interim application, related, in part, to what the defenders were entitled to be paid for the works specified in those fourteen individual claims. The Adjudicator's decision and the payment that the pursuers subsequently made to the defenders, in furtherance of the Adjudicator's decision, also relate to that dispute. As, in my opinion, does the pursuers' claim for repetition. The claim for repetition is an attempt to achieve a final determination as to extent of the defenders' contractual entitlement to payment, in respect of six of those fourteen claims.
- [19] Clause 66 (1) applies to *"a dispute of any kind whatsoever (arising) between the Employer and the Contractor in connection with or arising out of the Contract or the carrying out of the Works including any valuation of the Engineer"*, unless the Conditions otherwise provide. In my opinion the dispute that remains between the parties as to the extent of the defenders' contractual entitlement to payment, in respect of six of the fourteen individual claims, is a dispute that can competently be resolved in accordance with the provisions of Clause 66.

- [20] Senior counsel for the pursuers accepted that had there been no reference to adjudication, it would have been perfectly competent for either party to the contract to have referred that particular dispute to arbitration under Clause 66. I find nothing in the terms of Clause 66 to support the argument that, adjudication having taken place, a reference to arbitration, in terms of Clause 66, is now precluded. In my opinion, by referring the dispute to adjudication, the defenders did not 'step outside' the provisions of Clause 66 nor did they waive, or in some other way become barred from relying upon, their right to go to arbitration, as the mechanism for bringing about a final determination of this particular dispute (or any part of it). On the contrary, the defenders exercised a contractual right that was open to them. In my opinion, it is clear from the provisions of Paragraph 23(1) that could be done by the defenders, without prejudice to any contractual right they had to refer the same dispute (or part(s) of that dispute) to arbitration, at some subsequent date.
- [21] A further submission made by senior counsel for the pursuers was to the effect that as the pursuers had been (and indeed remained) perfectly content with the Engineer's decision in respect of the interim application for payment, No. 27, an arbitration could not be triggered. In my opinion, that submission also falls to be rejected. I find nothing in the provisions of Clause 66 that would preclude the defenders from serving a Notice of Dispute, in terms of Clause 66(2), as a necessary preliminary step to having the dispute between the parties resolved by arbitration. In my opinion, it would be competent for the defenders to trigger an arbitration, by serving a Notice of Dispute in terms of Condition 66(2). The service of such a Notice would require the dispute to be settled by the Engineer, in terms of Clause 66(3). As no decision by the Engineer could constitute a final determination of the dispute between the parties, for the purposes of superseding the decision of the Adjudicator, it would then be open to the defenders to refer the dispute to arbitration, under the provisions of Clause 66(6).
- [22] As I have already stressed, Paragraph 23(1) of the Scheme recognises that arbitration can follow adjudication. In my opinion there is no reason why the defenders should not be entitled to seek to follow the route of arbitration, if that is what they wish to do. Accordingly I reject the submissions by senior counsel for the pursuers, insofar as they relate to the sum claimed in Conclusion 1 of the Summons.
- [23] As far as the Conclusion 2 of the Summons is concerned, senior counsel for the pursuers restricted himself to arguing that the motion to sist for arbitration was premature. He accepted that the pursuers' claim for liquidated damages is a claim that is susceptible to arbitration, under the provisions of Clause 66 of the Conditions. He acknowledged that the pursuers' claim has given rise to a dispute between the pursuers, as the Employer, and the defenders, as the Contractor. He submitted, however, that unless and until the Notice of Dispute procedure in terms of Condition 66(2) had been invoked, it was premature to seek to sist the action. I reject that submission.
- [24] Senior counsel for the defenders has informed the Court that the defenders wish to refer to arbitration the disputes that give rise to the two claims for payment that the pursuers seek to advance in the present action. In my opinion, it would be pedantic were the Court to require that a Notice of Dispute (in terms of Clause 66(2), let alone a Notice to Refer (in terms of Clause 66(6)), be served before entertaining a motion to sist proceedings for arbitration. Such a requirement could lead to abortive expense being incurred in connection with the proceedings before this Court. No authority was cited in support of the contention that the Court should insist on such a requirement. I can see no good reason for doing so. If, for whatever reason, the defenders were to delay, or indeed to refrain from, initiating arbitration proceedings, then there would be nothing to prevent the pursuers from enrolling to recall the sist.
- [25] In the whole matter, therefore, I am satisfied that I should grant the motion to sist the action, to enable the defenders to refer to arbitration, in terms of Condition 66(6) of the Conditions, the disputes between the parties that relate to the pursuers' two conclusions for payment. I will pronounce an interlocutor to that effect.

Pursuers: Davidson, Q.C. ; Maclay Murray and Spens
Defenders: Glennie, Q.C., Cowie; Biggart Baillie