OPINION OF LORD GLENNIE : Outer House, Court of Session. 18th September 2008

[1] The pursuers are building contractors. On or about 1 November 2006 they entered into a contract with the defenders for the construction of certain works in connection with the stabilisation of abandoned coal mine workings beneath a site at New Stevenston Road, Carfin. The defenders were the employers in terms of the contract. The engineer appointed under the contract was the Mason Evans Partnership.

[2] The contract incorporated the ICE Conditions of Contract 5th Edition dated June 1973 (January 1979 Revision) subject to various bespoke amendments agreed between the parties. It also incorporated a number of other documents to which I need not refer for present purposes.

[3] Clause 60 of the ICE conditions deals with "C*ertificates and Payment*". It provides in clause 60(1) that:

"The contractor shall submit to the Engineer after the end of each month 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; ..."

and other matters relevant to its claim for payment. Clause 60(2) provides that:

"Within 28 days of the date of delivery to the Engineer....in accordance with sub-clause (1) of this Clause of the Contractor's monthly statement the Engineer 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-clause (1)(a) and (d) of this Clause less a retention as provided in sub-clause (4) of this Clause..."

Clause 60(6) has been amended by the parties. It provides for interest on overdue payments. Clause 60(8) provides that every certificate issued by the Engineer pursuant to the clause must be sent to the Employer and at the same time a copy must be sent to the Contractor.

[4] The pursuers aver in their summons that they issued a monthly statement in the form of an application for payment dated 31 August 2007. Thereafter the Engineer issued a certificate under clause 60(2) dated 21 September 2007, certifying an amount of £1,136,525. They claim payment of that amount less payments previously made which are agreed to be in the sum of £919,665. The balance concluded for is £216,860. They also claim interest on that sum in terms of clause 60(6). The calculation of interest is a matter of simple arithmetic applied to the Bank of Scotland base rate as it varies from time to time.

[5] The defenders dispute the pursuers' case. In summary, they say that the document dated 21 September 2007 was not a valid certificate issued by the Engineer in terms of clause 60(2). Further, they maintain that even if it is a valid certificate and *prima facie* triggers the obligation to make payment under clause 60(2), the defenders are entitled to withhold that payment pending resolution of their claims for damages against the pursuers for breach of contract. They allege that the pursuers are in breach by reason of their delay in carrying out the works.

[6] The pursuers respond to that last contention by pointing out, as is admitted to be the case, that the defenders have not served a "*withholding notice*" in terms of section 111(1) of the Housing Grants Construction and Regeneration Act 1996 and are therefore not entitled to withhold payment of sums which they are due to pay in terms of the contractual mechanism.

[7] Clause 66 of the ICE Conditions is headed "*Settlement of Disputes*". It provides as follows:-

"66(1) If any dispute or difference of any kind whatsoever shall arise 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 of after the determination abandonment or breach of the Contract) it shall be referred to and settled by the Engineer who shall state his decision in writing and give notice of the same to the Employer and the Contractor... Such decisions shall be final and binding upon the Contractor and the Employer unless either of them shall require that the matter be referred to arbitration as hereinafter provided..."

Relying upon this clause, the defenders moved the Court to sist the cause so that the dispute might be referred to the Engineer. The pursuers, for their part, opposed that motion on the ground that there was no arguable dispute or difference between the parties to be referred to the Engineer. They submitted that the points raised by the defenders were untenable. They moved that the matter proceed to debate on their pleas-in-law to the relevancy of the defences; and, as a fall-back, they also moved the court to grant summary decree in case the defences were held relevant because of some averment of fact or non-admission which could be seen to be clearly unfounded.

[8] I heard that debate and the motion for summary decree at the same time as the defenders' motion for a sist.

[9] In making their submissions, both parties relied heavily upon the approach taken by the court in considering whether to sist a cause for arbitration. They did not, as I understood it, argue that the clause was an arbitration clause. By reason of the fact that the pursuers are incorporated in England, and in the absence of averments that their relevant place of business is in Scotland, had this been an arbitration clause it would have been in respect of an international arbitration to which section 66 and Schedule 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 applied, with the consequence that Article 8 of the UNCITRAL Model Law on International Commercial Arbitration would apply. It was not suggested that I should proceed by analogy with the mandatory sist in that Article (*"mandatory"* because, in the context of the Model Law, the word *"dispute"* means what it says, and there is no room for the court to form any view about whether the point is or is not *"disputable"* - c.f. ***Halki***

Shipping Corp. v Sopex Oils Ltd [1998] 1 WLR 726). The approach which parties seemed content to adopt was by analogy with a motion to sist on the basis of a domestic arbitration clause. Unlike the case of international arbitration (governed by the 1990 Act and the Model Law) and, previously, non-domestic arbitration (to which section 4(2) of the Arbitration Act 1950 and later section 1 of the Arbitration Act 1975 applied), the power to sist a cause on the basis of a domestic arbitration agreement derives in Scotland not from statute but from common law. The discussion which follows is, accordingly, limited to dealing with the motion before the court by treating it as analogous to a motion to sist for domestic arbitration at common law.

[10] Although for some time this did not seem likely, by the end of the discussion there was, in fact, no real dispute as to the principles to be applied when considering a motion to sist for arbitration in such circumstances. The arbitration clause does not wholly oust the jurisdiction of the court - it simply deprives the court of jurisdiction to enquire into and decide the merits of the case. When there is a binding reference to arbitration, therefore, the proper course is to sist the cause until it has been settled by arbitration. The defender has a right to such an order whenever an action has been brought by someone who is party to an arbitration agreement in respect of the subject of the action: see ***Sanderson & Son v Armour & Co*** 1922 SC (HL) 117 per Viscount Finlay at p.120. In ***Sanderson v Armour***, Lord Dunedin, in a well known passage, put the position in this way (at p.126);

"The English Common Law Doctrine - eventually swept away by the Arbitration Act of 1889 - that a contract to oust the jurisdiction of the Courts was against public policy and invalid, never obtained in Scotland. In the same way the right which in England pertains to the Court under that Act to apply or not to apply the arbitration clause in its discretion never was the right of the Court in Scotland. If the parties have contracted to arbitrate, to arbitration they must go."

See also ***North British Railway Co v Newburgh and North Fife Railway Co*** 1911 SC 710 per the Lord President at 719. That approach has been applied in a number of cases: see e.g. per Lord Stewart in ***Roxburgh v Dinardo*** 1981 SLT 291 at 292.

[11] However, there is another line of authority to the effect that where there is no *"real"* question to go to arbitration, where there is "*no room for difference of opinion",* to take two of the expressions used in ***Thomas Woods v The Co-operative Insurance Society Limited*** 1924 SC 692 at 698 and 699 respectively, then the Court will not require the matter to go to arbitration or lend its assistance by appointing an arbiter. In addition to ***Woods,*** the cases vouching this proposition include the ***Parochial Board of the Parish of Greenock v John Coghill & Son*** (1878) 5 R 732, ***Redpath Dorman Long Ltd v Tarmac Construction Limited*** 1982 SC 14, ***Albion Housing Society Ltd. v Taylor Woodrow Homes Ltd*** 1985 SC 104 (though in that case the court held that there was a real dispute) and more recently, ***Strathmore Building Services v Greig*** 2000 SLT 815 (refusing to sist the cause) and ***Orkney Islands Council v Charles Brand Ltd*** 2002 SLT 100 (refusing to interdict an arbitration on the ground that there was an arbitrable dispute between the parties).

[12] It is not easy to discern the rationale for this exception to the principle stated in ***Sanderson v Armour***. From the various opinions in the cases, it does not appear that it is based upon there being a residual power to refuse to sist the cause where the defence to the claim is untenable - a power later conferred by statute on the Scottish courts in relation to non-domestic arbitration (see section 4(2) of the Arbitration Act 1950 and section 1 of the Arbitration Act 1975). It may be that the rationale, if there is one, is that if there is no *"real"* dispute then there is no dispute upon which the arbitration clause can bite, and therefore nothing to refer to arbitration since the arbiter has jurisdiction over disputes rather than non-disputes. If this is the rationale, it potentially raises questions as to the enforceability of an award made by an arbiter in favour of a claimant whose claim is "*indisputable*": see per Saville J in ***Hayter v Nelson & Home Insurance Co*** [1990] 2 Lloyd's Rep 265 at 268. The logic of this argument, however, has not been tested in Scotland. In an article entitled "*Arbitration in Scotland - A New Era Dawns"* by Lord Dervaird and others, 2006 SLT 125, the following analysis is advanced:

*"Scots Law takes a more restrictive view than the English of what constitutes a dispute (in particular the **Halki** principle does not apply); if the defender (respondent) merely refuses or delays fulfilment of its obligations, there can be no submission to arbitration (**Albion Housing Society Limited v Taylor Woodrow Homes Limited** 1985 SC 104), although there is no reason why an agreement to arbitrate could not be enforced by the Courts".*

I take the last part of that to mean that there is no reason why the decision of an arbiter should not be enforced by the Courts in such circumstances. If so, and if it be correct (as I suspect it is, though I was referred to no authority supporting it), it would appear that Scots Law offers a pragmatic rather than a principled response to the problem identified by Saville J.

[13] There is a further *"logical puzzle"* inherent in this approach, highlighted by Lord Hamilton in para.[11] of his Opinion in ***Strathmore Building Services***. Although the existence of an arbitration clause has the effect of requiring the Scottish court to abjure any enquiry into the merits of the case, the court must, if so requested, enquire into the merits of the case, at least to some extent, in order to decide whether there is a dispute requiring to be referred to arbitration.

[14] What is to be the extent of that enquiry? Plainly, the court will not allow a full scale debate on relevancy (c.f. ***Jamieson v Jamieson*** 1952 SC (HL) 44, 50), so that the pursuer can argue that the defender's case is irrelevant and only if proof before answer would otherwise be allowed will the case be sent to arbitration. Parties were agreed that such an exercise would trespass on the functions of the arbiter. It was only in the rare case where there was no real dispute that the court should refuse to sist the cause. A number of different expressions were used by Counsel to give the flavour of where the line should be drawn. Miss Hamilton sought to characterise the

points raised by the defender as no more than a "*dressed up refusal to pay*". In those circumstances, she submitted, there was "*nothing disputable to go to arbitration*". Mr Thomson was prepared to accept a threshold of the defenders' case being "*plainly untenable*". Only if it was "*readily and immediately demonstrable*", to borrow an expression from the judgment of Saville J in ***Hayter v Nelson*** at p.271, that the defender has no good grounds for defending the claim should a sist for arbitration be refused. These expressions all point the same way. The formulation adopted by Lord Johnston in ***Orkney Islands Council*** at para.[14] was this:

"The jurisdiction of the arbiter should only be ousted by the Court if there is no basis upon which a two sided dispute can be identified".

To my mind that expresses the test as well as any of the expressions put forward.

[15] Doing my best to apply that test, I have formed the clear view that the defenders have not raised any points which can be said to raise a real dispute or difference so that the cause should be sisted for arbitration. The fact that a number of points were argued at length and with skill and persistence does not mean that they are genuinely arguable or that they raise a real question to be referred to arbitration. I do not propose to set out the arguments or my reasoning in full. But I should comment briefly upon each of the points raised.

[16] The first point is that the pursuers' application for payment was not an application that could properly lead to the engineer certifying under clause 60(2). Under reference to clauses in the Contract requiring the pursuers to keep certain records of work done, materials brought on site, etc., it was argued that any application for payment had to be supported by such material. It was said that clause 7.1 of the Supplementary Conditions of Contract disentitled the engineer from issuing an interim certificate for payment unless the application contained supporting information which was objectively sufficient. This is incorrect. Clause 7.1 says that the engineer "*shall be under no obligation to issue an interim certificate*" unless the contractor has applied in writing *"including appropriate supporting information as may reasonably be required by the Engineer"*. That leaves it to the engineer to decide what information is appropriate and whether or not he should grant a certificate. I see nothing in this first point.

[17] Secondly, it is said that in form, substance and intent, the document issued by the engineer is not a valid certificate. Those three headings were taken from the well known judgement of Devlin J in ***Minster Trust Limited v Traps Tractors Limited*** [1954] 3 All ER 136 at 152H, applied in the case of a building contract by ***Crestar Limited v Michael John Carr and Another*** (1987) 37 BLR 113, 116. Mr Thomson said that in form the document did not bear to be a certificate, in substance it did not identify precisely what was to be paid and, as to intent, it was not clear that the engineer had applied his mind to whether he was issuing a certificate at all. I do not accept those points. The certificate took the form of a letter to CRGP (the defenders' project manager). It referred in terms to the pursuers' "*ninth application for payment*". It stated that *"a current value of completed works has been assessed ...*", and went on to say "*we therefore certify the amount of £1,136,525.00 (zero rated for VAT) and would ask you to make payment directly to the Contractor, less any amounts previously paid*". As a matter of form that is unobjectionable. As a matter of substance it identifies the amount due and requires payment of that amount less any amounts paid. In the context of the application for payment, it tells the employer plainly what he is required to pay. There is nothing to negate the inference that it was intended to be a certificate under clause 60(2). Furthermore, it is in almost precisely the same form as previous engineer's certificates which led to payments already having been received in the sum of £919,665.

[18] The next point which Mr Thomson made, albeit rather tentatively, was that the certificate was not sent to or received by the defenders. I say "*rather tentatively*", because, at the hearing before me, Mr Thomson told me that he understood, on the basis of recent instructions, that the actual certificate had only been received by his clients during the pre-action correspondence. He was careful to make it clear that he was not advancing a case after full investigation of the facts to the effect that it had not been received earlier. The point raised in the defences was rather different. There it was said that the letter of 21 September 2007 (i.e. the certificate) from the engineer to the defenders' project manager, CRGP, *"is not a certificate within the meaning of clause 60 of the Conditions of Contract"*. The defenders say that "*that letter was written by the Engineer to CRGP in the context of the latter's cost monitoring responsibilities to the defender's bankers*". There is nothing there about non-receipt of the certificate by the defenders. It is not suggested there that the defenders themselves never received it. Certainly, in the correspondence I was shown passing between the parties between November 2007 and April 2008, it is clear that the defenders were aware at an early stage that a certificate had been issued certifying the same amount as is in issue in this action. No point is taken in the correspondence that it had not actually been received. Further, it is apparent from documents lodged in process that all but two of the previous certificates were addressed to CRGP - yet they resulted in payment. In those circumstances it seems to me that the point is wholly devoid of merit. If there was a failure to send the certificate to the correct party, it is a failure which has not resulted in any prejudice: c.f. ***Emson Contractors Ltd v Protea Estates Limited*** (1987) 39 BLR 131. No remotely arguable case has been put forward that the defenders were misled or prejudiced in any way.

[19] The final point taken concerned the lack of a withholding notice in terms of 111(1) of the 1996 Act. This point, of course, only arises if there was a valid certificate from the engineer triggering the obligation to pay. In those circumstances, if the defenders wished to withhold payment they required to serve a notice in terms of that section. It is admitted that they did not do so. Mr Thomson argued valiantly that they can withhold payment notwithstanding the absence of a withholding notice. He submitted that that argument was not untenable since there was no binding authority against him. The decision of Lord Hamilton in ***Strathmore,*** which he accepted was against him, was not binding upon this court. Nor was the decision of Sheriff Principal Taylor in ***Clark Contracts***

Limited v The Burrell Co (Construction Management) Limited 2002 SLT (Sh. Ct.)103, a decision expressly approved by the Court of Appeal in England in ***Rupert Morgan Building Services (LLC) Limited v Jarvis*** [2004] 1 All ER 529 at para [14]. In the absence of binding authority, he submitted, I could not find the argument to be untenable. I disagree. I can and I do. The authorities are directly in point and the decisions are clearly correct.

[20] For those reasons I have come to the view that the points raised by the defenders give rise to no real dispute and that I should refuse the motion to sist the cause. Having heard the arguments at debate, I am satisfied that the defences are irrelevant. I shall sustain the fourth plea in law for the pursuers and grant decree *de plano*. It was agreed that the parties would submit an agreed calculation of interest. Decree will be for the principal amount claimed plus interest in the agreed sum. I do not need to make any order on the motion for summary decree since the only two potentially relevant points of denial and non-admission in the defences have been clarified in the course of the discussion before me. It was agreed between the parties that expenses should follow success and I shall award the pursuers the expenses of the action.

[21] Before formally granting decree, I shall put the case out By Order to allow parties time to calculate the interest as mentioned above. If that calculation is produced to the court before the By Order date, then the By Order hearing can be discharged and decree granted without appearance.

Pursuers: Miss Hamilton, McClure Naismith
Defenders: Mr Thomson, Brodies LLP