

**JUDGMENT : SHERIF JAMIE GILMOUR :** Lanark Sheriff Court : 13<sup>th</sup> April 1999

1. The pursuers have raised an action against the defenders seeking damages for breaches of contracts in relation to a failure of the defenders to carry out works in a good and workmanlike fashion. The action relates to a number of individual contracts between the pursuers and the defenders.
2. The pursuers obtained warrant for arrestment on the dependence on 5th March 1999. On the same day the solicitors for the pursuers delivered to the solicitors for the defenders a remittance of £166,560.95 in payment of the principal sums together with VAT awarded in favour of the defenders against the pursuers by an adjudicator appointed under the Housing Grants, Construction and Regeneration Act 1996. The adjudication related to three contracts two of which are specified in the pursuers' action for damages against the defenders. At the same time as delivering the cheque in favour of the defenders' agents in payment of the adjudicator's award, the pursuers arrested the said funds in the hands of the defenders' solicitors. The said arrestment took place prior to the service of the Initial Writ on the defenders.
3. On 9th March 1999 a Writ was served on the defenders and the sum of £6,028 was arrested in the hands of the Clydesdale Bank plc, Lanark. Accordingly the total sum arrested is (172,588.95).
4. The defenders have enrolled a Motion (no. 7(1) of Process) for the recall of all arrestments by the pursuers on the basis that they are nimious and oppressive.
5. On 12th March 1999 I heard parties on the defenders' Motion. Mr Cheyne, Advocate, appeared on behalf of the pursuers. Miss Cook, solicitor, appeared on behalf of the defenders. Miss Cook submitted that the arrestments defeated the four awards made by the adjudicator against the pursuers and in favour of the defenders under the said 1996 Act. She submitted that the pursuers never intended to make payment to the defenders despite the said awards. This represented bad faith on behalf of the pursuers. By way of background information the solicitor advised that the defenders are a small engineering firm with an annual turnover of approximately (450,000. The pursuers are a large national company. From January 1998 to November 1998 the defenders were asked to tender for and subsequently carried out a number of contracts in Scotland and in England for the pursuers. Some 15 contracts were placed with the defenders by the pursuers. The works were carried out and signed off. However, their working relationship broke down at the beginning of November 1998. On 6th November the pursuers wrote to the defenders about concerns on four contract sites and intimated that no payment of any kind would be made to the defenders until other sites had been investigated (no. 1 of the First Inventory of Productions for the defenders). The defenders wrote to the pursuers on 11th November 1998 requesting a meeting and suggesting the appointment of an independent specialist to investigate any alleged defects (no. 2 of the said Inventory of Productions). The sum of money due to the defenders by the pursuers at that time was £170,484.27. The pursuers did not respond to that letter and the defenders were refused access to any of the contract sites. As a consequence the defenders invoked the benefit of 6.108 (5) of the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (Scotland) Regulations 1998 in respect of three contracts entered into between the parties after 1st May 1998 in Granton, Edinburgh, Barnetby and Wakefield. The solicitor explained that the Act and Regulations were introduced to assist small companies as sub-contractors in receiving contractual payments from large companies. She submitted that if a contractor intended to withhold payment notice was required together with the reasons for non-payment all in terms of s.111 of the said Act. No such notice was given by the pursuers. The defenders assumed no funds were to be retained and not having been paid referred the matter for adjudication. Clause 23 (2) of the said Scheme makes the decision of the adjudicator binding on the parties who comply with it until, amongst other things, final determination by a court.
6. It was submitted that the action of the pursuers in taking Court action against the defenders and arresting the funds due by the pursuers to the defenders negated the whole adjudication process. The pursuers ignored the four awards in respect of the three contracts. The defenders were obliged to petition the Court of Session for payment. Parties were due to be heard on the matter today, 12th March. Before this date, however, the pursuers had raised an action in the Sheriff Court relating, inter alia, to two contracts dealt with by the adjudicator. Further there was no clause in the contracts

referred to the adjudicator for set-off but the adjudicator did order that almost £4,000 be retained on the Bameby contract to cover potential defects. The pursuers had participated in the adjudication process.

7. The solicitor referred to **Macob Civil Engineerine Ltd -v- Morrison Construction Ltd** reported from the High Court of Justice,, Q.B D Technology and Construction Court 12th February 1999 where the plaintive sought to enforce the decision of an adjudicator appointed under the said 1996 Act for payment of £302,366.34 plus VAT, interest and fees. he defendant did not comply with the adjudicator's decision. Miss Cook drew attention to the observations of Mr Justice Dyson at page 7 indicating that the intention of Parliament was to provide a speedy mechanism for the settling of disputes in construction contracts on an interim basis until a final determination was made by arbitration, litigation or agreement. Failure to comply with a decision of an adjudicator would substantially undermine the adjudication procedure.
8. The solicitor for the defenders also referred to **Hvdraload Research and development Ltd -v- Bone Connell and Baxters Ltd** 1996 SLT 219. There the defenders had a sheriff court decree for the supply of materials. The pursuers raised an action in the Court of Session and arrested the sum paid in terms of the sheriff court decree. A lack of specification in the pursuers' pleadings, the lack of explanation for the absence of a counterclaim in the Sheriff Court action and no demand for payment before the action was raised was sufficient to lead to the inference that the arrestments had been laid essentially either as an attack on the suppliers financial credit or as a form of riposte to the Sheriff Court action and were accordingly nimious and oppressive. The arrestments were recalled. Miss Cook submitted that the present situation was not dissimilar. Firstly, there was a lack of specification in the pursuers' averments. They consistently referred to "moderate estimates". The action proceeds on the basis of an inspection of various contract sites by the pursuers' representatives. The defenders were never advised of the outcome. On the back of these inspections the pursuers have raised a Court action without any intimation of claim. In respect of the two contracts referred to by the pursuers in Condescence 10 and 14, both of which were the subject of an adjudication, the pursuers could have raised their allegations when making representations to the adjudicator. The first knowledge the defenders had of the alleged complaints was when they were served with the writ. The action of the pursuers was no. more than a "revenge attack" along the lines referred to by Lord Marnoch in **Hydraload Research** supra page 220H. In the present circumstances there was no prior intimation and no breakdown of costs for remedying the alleged defects. The action was no more than an attempt to defeat the awards made by the adjudicator.
9. Miss Cook went on to submit that, in 'any event, the pursuers already held sums of money due to the defenders in respect of the Invergordon contract referred to in Condescence 8, the Edinburgh contract referred to in Condescence 10 and the Glasgow, Tollcrss, contract referred to by the pursuers in Condescence 4. In addition the adjudicator had determined that almost £4,000 be withheld from the Barnetby contract. The defenders were due a total of £44,000 in outstanding payments on contracts from the pursuers. This provided adequate security for any alleged defects. There was general bad faith on the part of the pursuers on the conduct of this matter and the arrestments should be recalled. If the Court was not minded to recall the arrestments in total the arrestments should otherwise be restricted to a suitable sum.
10. Mr Cbeyne, Counsel for the pursuers, submitted at the outset that on the issue of bad faith a Mr McNair of the pursuers was the only person who had been involved with the defenders. He had now been dismissed for alleged collusion with the defenders. Mr McNair and Mr Forrest of the defenders were also members of the same golf club.
11. It was submitted that arrestments were vital for the pursuers since the defender company only had a share capital of £1,000. With reference to the Housing Grants, Construction and Regeneration Act 1996 there was no provision therein prohibiting a pursuer arresting on the dependence of a Court action which followed an adjudication. On the issue of adjudication procedure the defenders' solicitors had made the point that no notice to withhold payment had been given in terms of the said Act but it was not known by the pursuers whether this was ignorance on the part of Mr McNair or a deliberate act

on his part. It was submitted that the absence of notice precluded the pursuers from raising certain matters relating to the Edinburgh and Barnetby contracts at the adjudication. 5.111 of the said Act determined the content of a notice of intention to withhold payment. Lack of notice restricted the ambit of enquiry at the adjudication.

12. Counsel drew attention to MacPhail Second 'Edition Para 11.30 and the guidance given there on when an arrestment can be regarded as nimious or oppressive. On the issue of bad faith it was contended that for bad faith to exist the Court had to consider whether the pursuer was raising an action for a purpose he knew could not succeed. Counsel, however, conceded that bad faith could relate not only to the merits of an action but also to the conduct of the pursuers. It was submitted that the pursuers had made offers to the defenders to remedy the defects. Since the defenders had proceeded to an adjudication this precluded enquiry at the adjudication into the question of defects. The question of a failure to intimate notice to withhold payment was a highly technical point. Counsel submitted that there would have to be clear language in the 1996 Act to prohibit an arrestment following on adjudication but no such provision existed. Following on adjudication the adjudicator decides that payment should be made and permits registration in the Books of Council and Session. Payment was made. The 1996 Act distinguishes between an order for payment and enforcement of payment by registration. It is, therefore, open for either party to an adjudication to effect diligence. An adjudicator cannot enforce payment on his own. He is functus as far as actual payment is concerned. The pursuers having made payment had a right to arrest on the dependence of a quite separate action. The present circumstances and present action fell to be distinguished from the circumstances in **Hydraload Research**, supra. No question of bad faith arose in **Hydraload Research**. Further, there was no lack of specification by the pursuers. The Initial Writ runs to 18 pages covering 13 contractual engagements. There are clear heads of claim. Further, to aver moderate estimates does not mean that the pursuers cannot quantify in that sum. Consulting engineers prepared the estimates for the benefit of the pursuers. These estimates are only likely to be revised upwards.
13. It was submitted that as far as the Edinburgh and Barnetby contracts were concerned the costs of remedying the defects were quantified at £18,250 and £26,250 respectively. The defects on the remaining contracts were only discovered following the adjudication.
14. Counsel went on to submit that some of the contract work had not been completed. He had concern about some of the ex parte statements made on behalf of the defenders. There were serious factual disputes between the parties. There were no other funds available to the pursuers to arrest. There were vague assertions of bad faith which did not permit the defenders to seek recall of these arrestments.
15. In a brief response Miss Cook emphasised that Mr McNair of the pursuers had no involvement whatsoever in the running of the contracts by the defenders. The adjudication procedure introduced by the 1996 Act was entirely new but the **Macob** and **Hydraload** cases supra, raised certain inferences and assumptions entitling the Court to recall the arrestments. It was emphasized by the solicitor for the defenders that a counter adjudication notice could have been given by the pursuers. However, notice must be given by the pursuers if it is their intention to withhold payments. In conclusion the solicitor advised that four of the contracts referred to in the pursuers' action do not come under the 1996 Act.
16. The pursuers are entitled to raise an action of damages against the defenders for breach of contract. The pursuers are also entitled to raise proceedings against the defender in respect of the Edinburgh (Granton) and Barnetby contracts notwithstanding the adjudication procedure. This is implicit in terms of s.108 (3) of the 1996 Act which provides that "*The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings ...*". It is also implicit in terms of Clause 23 (2) of Part I of the said 1998 regulations which states that "*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 ...*".
17. It will be observed that Clause 23 (2) has the additional proviso that parties shall comply with the decision of the adjudicator and make payment where payment of a sum is awarded. Counsel for the

pursuers submitted that there was a distinction between an adjudicator's decision and enforcement of payment and that the pursuers, having tendered payment in terms of the award, were entitled to arrest on the dependence of a court action since there was no provision in the 1996 Act prohibiting an arrestment following an adjudication. I can only agree with Counsel that there is no provision prohibiting an arrestment on the dependence following an adjudication but in considering whether such an arrestment is nimious and oppressive reference requires to be made to the purpose and intention of the 1996 and supporting 1998 Regulations.

18. It is clear that Parliament intended that decisions of adjudicators are binding on parties and must be complied with until the contractual dispute is resolved by litigation, arbitration or agreement. It appears to me to be most obtuse if the pursuers, having participated in an adjudication and made representations on a construction contract, can then circumvent and negate the effect of an adjudicator's award, where they are not content with it, by raising a court action relating to the same subject matter and arrest the sum awarded on the dependence of the court action thus depriving the defenders of the benefit of the award. The purpose of the legislation and subordinate legislation is to offer what Mr Justice Dyson in **Macob Civil Engineering Ltd**, supra page 7 referred to as "a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement". Further, if it is the intention of a party to a construction contract to withhold payment after the final date for payment of a sum due under the contract, that party must give notice of intention to withhold payment either in terms of s.111 of the 1996 Act or in terms of Clause 10 of Part II of the 1998 Regulations, whichever is applicable. The pursuers failed to give such notice in respect of the Edinburgh (Granton) and Barnetby contracts which were the subjects of adjudication and form part of the subject matter of the present court action. Counsel for the pursuers submitted that the issue of notice was highly technical but that failure to give notice did restrict the ambit of the adjudicator's enquiry. This, however, is the shortcoming of the pursuers. Counsel also distinguished between an award of payment and enforcement of payment. The pursuers certainly effected payment and divested themselves of £166,560.95 but by paying with one hand and arresting the same funds with the other the defenders are denied the benefit of the adjudicator's award which is, as a consequence, frustrated. By means of arrestment the pursuers have not only, in practical terms for the defenders, defeated the adjudicator's award but also remedied their shortcoming in not giving statutory notice of an intention to withhold payment by ensuring the funds do not reach the defenders. In these circumstances such as an arrestment must be regarded as vexatious. In the court action the pursuers claim damages, extravagant or not, in respect of the Edinburgh (Granton) and Barnetby contracts in the sum of £18,250 and £26,250 respectively. Accordingly, I am of the view that, in any event, the arrestments made by the pursuers will fall to be reduced by £44,500 representing the sum sued for on the said two contracts and adjudicated upon.
19. It is appreciated that at this stage of the court action questions relating to a recall of an arrestment require to be disposed upon a prima facie presentation of the facts and oral explanations given. The solicitor for the defenders reported that the pursuers retained approximately £44,000 in respect of outstanding payments due on contracts undertaken by the defenders. This was not challenged, denied or queried by Counsel for the pursuers. Accordingly, I will, in any event, reduce the arrestments made by a further £44,000.
20. However, that is not the end of the matter concerning the motion for recall of arrestments. At the outset of her submissions, the defenders' agent made reference to bad faith on the part of the pursuers indicating it was never the pursuers' intention to adhere to the adjudicator's award. Counsel for the pursuers accepted that in determining bad faith, the court was entitled not only to consider the nature of the action but also the conduct of the pursuers. The circumstances are that as long ago as 6<sup>th</sup> November 1998, the pursuers intimated to the defenders that all sums due to the defenders were being withheld whilst the pursuers did a trawl of all sites where the defenders carried out works for the pursuers for the purpose of checking on any possible defects. It can be inferred that, at that time, the pursuers could not possibly quantify any remedial costs. Despite this, they were retaining £170,484.27 due to the defenders, a small company with an annual turnover of approximately

£450,000. On 11<sup>th</sup> November 1998 the defenders wrote a detailed letter to the pursuers making equitable suggestions including the appointment of an independent specialist to address the pursuers concerns and offering to make good any defects. This offer was not taken up by the pursuers. The pursuers failed to allow the defenders on site or to intimate any alleged defects other than a general reference to four sites in their letter to the defenders dated 6<sup>th</sup> November 1998. The defenders thereafter sought the benefit of s.108 (5) of the 1996 Act and 1998 Regulations. Following the appointment of an adjudicator, awards were made by him on 11<sup>th</sup> February 1999 totalling £166,560.95 inclusive of VAT. The pursuers did not immediately pay this sum. The defenders raised petition proceedings in the Court of Session for payment. Despite the fact that from 6<sup>th</sup> November 1998 the pursuers had a period in excess of two months to intimate claims to the defenders in respect of any alleged defects, the pursuers, without prior intimation of specific claims, raised a Sheriff court action craving decree for damages in respect of 13 contracts in the total sum of £182,950 obtaining warrant to arrest on the dependence on 5<sup>th</sup> March 1999 one week prior to the date set down for the hearing in the Court of Session petition action. The pursuers tendered payment of £166,560.95 on the same day as warrant to arrest on the dependence was granted and simultaneously arrested the said payment in the hands of the defenders' solicitors.

21. It can readily be assumed the course of action by the pursuers was carefully planned following the adjudicator's awards. There was a lack of good faith on the part of the pursuers in failing to obtemper the said awards and raising a court action without any prior intimation of claim whatsoever. I do not consider it necessary to comment on the matter of specification in the pursuers' writ although it should be noted that in Condescence 3 the remedial cost exceeds the original contract price by some £10,000 and in Condescence 18 the pursuers have failed to aver any contract price but aver remedial costs at £19,100.
22. In view of the conduct of the pursuers and the manner and circumstances in which the arrestments have been used I am of the opinion that it can be inferred that the arrestments were not used to protect the legitimate interests and rights of the pursuers but mainly to embarrass the defenders, defeat the adjudicator's awards and strain the financial credit of the defenders. The use of the arrestment demonstrates an abuse of process which ought to be redressed.
23. The Housing Grants, Construction and Regeneration Act 1996 and supporting Regulations herald a new regime in relation to construction contracts. As a consequence a party seeking to rely on an arrestment will require to ensure compliance with the statutory provisions otherwise courts will more readily infer or assume that such an arrestment has not been used principally to protect the interests of a pursuer.
24. I will grant the defenders' motion and recall the arrestments simpliciter. I find the pursuers liable to the defenders in the expenses of the application for recall.