Extra Division, Inner House, Court of Session before Lord Prosser; Lord Milligan; Lord Kingarth. 31st August 2001.

OPINION OF THE COURT delivered by LORD PROSSER

[1] The appellants, Scottish Equitable plc (formerly Scottish Equitable Life Assurance Society), and the respondents, Miller Construction Limited, concluded a contract in May 1988, which was formally executed in March 1989, for the demolition of premises at 12 Blenheim Place, Edinburgh and construction of a new office block there. Certain disputes and differences arose between the parties in connection with or arising out of the works, and these resulted in Miller Construction making claims upon Scottish Equitable which they wished to have resolved by arbitration. By a Joint Deed of Submission dated 9 and 16 May 1997, they recorded their agreement to the appointment of Mr. David Pirie as arbiter to resolve these matters, all as referred to in a prior Notice to Concur dated 7 May 1996.

[2] Mr. Pirie accepted office in July 1997, and appointed a Clerk and a Legal Assessor. Miller Construction lodged a Statement of Claim which was answered by Scottish Equitable, and in due course a closed record was lodged with the arbiter in May 1999.

[3] Certain issues arose in relation to prescription, and oral and written submissions were made by the parties in that regard. These related in part to the long negative prescription, but the parties came to agree that the arbiter should deal in the first place with their respective positions on the hypothesis that the relevant prescriptive period was the short negative prescription of five years, as provided for in section 6 and Schedule 1 of the Prescription and Limitation (Scotland) Act 1973. In August 1999, Proposed Findings were intimated to the parties. Representations led to revisal of these Findings, and on 11 January 2000 the arbiter heard further representations. On that same date, he issued an interlocutor disposing of various pleas in law. In addition, on the same day but prior to the hearing, Miller Construction had lodged a Minute, requesting the arbiter in terms of section 3 of the Administration of Justice (Scotland) Act 1972 to state a case for the Opinion of the Court of Session on certain specified questions. Intimation of this Minute to Scottish Equitable was made, and accepted. The proposed findings were issued in their final form on 18 January 2000, but contained no further additions or revisals to the form in which they had been issued in December 1999. In view of the request for a stated case, the arbiter left his findings in a "proposed" form. A subsequent request that a case be stated on additional questions was refused.

[4] The contract into which the parties entered was a Scottish Building Contract (with Quantities) January 1988, with Scottish Supplement incorporating the Conditions of the Standard Form of Building Contract 1980 edition (Private with Quantities) and the Supplemental Provisions known as the VAT Agreement. J.C.T. Amendments 1, 2, 4 and 5 applied, except that the references to Articles 5.2.2 and 5.2.3, and to the appendix in J.C.T. Amendment 2, were deemed to be deleted. Both the Scottish Supplement forming Appendix I and the Abstract of Conditions forming Appendix II were incorporated in the contract.

[5] In their Claim in the arbitration, Miller Construction seek five declarators, and in addition have three craves for payment. Put shortly, the declarators sought are (1) that the architect should have instructed as variations, or sanctioned in writing, various matters; (2) that certain specified matters constituted "*relevant events*" in terms of Clause 25 of the contract; (3) that the Claimants' works were delayed beyond the completion date because of *"relevant events";* (4) that the Claimants have incurred direct loss and/or expense in the execution of the contract within the meaning of Clause 26.1, because the regular progress of the works, or part of the works, was materially affected by the specified alleged variations and relevant events, and *"that the amount of such loss and/or expense ought to have been included in an interim certificate No. 29 issued by the architect on 18 June 1992, and that the said certificate falls to be opened up, reviewed, revised and amended accordingly";* and finally (5) that for ascertainment under Clause 26.1 of the loss and/or expense that ought to have been included in interim certificate 29, the architect should have stated in writing to the Claimants that an extension of time had been given, with a new completion date of 6 August 1990, and that *"the architect's failure so to do is a decision that falls to be opened up, reviewed and revised accordingly"* with other certificates and the like which are contrary to the terms of the crave. Of the craves for payment, the first was not insisted in before the arbiter. The second (crave 6) is for the sum of £230,000. The third (crave 7) is for £2,080,307.44. This last-mentioned sum relates to alleged direct loss and expense due to progress of the works being materially affected.

[6] In relation to the issue of prescription it is appropriate to set out the relevant statutory provisions. Section 6(1) of the Prescription and Limitation (Scotland) Act 1973 provides as follows:

"If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years -

(a) without any relevant claim having been made in relation to the obligation, and

(b) without the subsistence of the obligation having been relevantly acknowledged, then as from the expiration of that period the obligation shall be extinguished."

Subparagraph (1)(g) of Schedule 1 of the Act provides that subject to paragraph 2, section 6 of the Act applies *"to any obligation arising from, or by reason of any breach of, a contract or promise, not being an obligation falling within any other provision of this paragraph".*

[7] Section 6(2) of the Act provides that in subsection (1), the reference to the appropriate date, in relation to an obligation of the kind here in question, is a reference to the date when the obligation *"became enforceable".* Whether the obligations in question have been extinguished depends upon whether any *"relevant claim"* was

made which in terms of section 9 of the Act means a claim made in appropriate proceedings in a court of competent jurisdiction or in arbitration proceedings. In terms of section 15(2) of the Act, a reference to an obligation includes a reference to the right correlative thereto.

[8] In these circumstances, the arbiter says that in his judgment, the principal question for him is "*When did the right to claim these sums become enforceable in law, and has five years elapsed from those rights becoming so enforceable without any relevant claim being made, so as to preclude, by reason of the operation of the five year prescriptive period, recovery of the sums in question?*"

[9] By his interlocutor of 11 January 2000, the arbiter repelled and sustained a number of pleas in law for each of the parties, in whole or in part, and it was not and is not disputed that his disposal of pleas in that interlocutor would be appropriate on the basis of his Proposed Findings. The Proposed Findings are incorporated in the stated case. The questions posed in the stated case, for the Opinion of this court are as follows:

"*1. Was I correct in law to find that under the contract between the parties, time would only begin to run for the purposes of section 6 of the Prescription and Limitation (Scotland) Act 1973 on the claims reflected in crave 7 and its supporting averments, craves and pleas, upon the issuance of a Final Certificate, or in any event that said claims only became enforceable on the issue of interim certificate 29?*

2. If I was not correct so to find, upon what legal principles should I determine when time began to run for the purposes of section 6 of the Prescription and Limitation (Scotland) Act 1973 on said claims?

3. Was I correct in law in holding that the claims reflected in crave 7, and its supporting averments, craves and pleas, have not prescribed by the operation of section 6 of the Prescription and Limitation (Scotland) Act 1973?

4. Should I have:

(a) held that the said claims have prescribed by virtue of section 6 of the Prescription and Limitation (Scotland) Act 1973; or

(b) allowed a proof before answer on the question of whether or not the said claims have prescribed by virtue of section 6 of the Prescription and Limitation (Scotland) Act 1973?"

[10] On behalf of the appellants, it was submitted that questions 1 and 3 should be answered in the negative, question 4(a) should be answered in the affirmative, which failing question 4(b) should be answered in the affirmative. Question 2 should be answered as follows: "*In relation to each relevant matter, time began to run when the contractor was first able to enforce his right to have the correct amount of direct loss and expense arising from that matter ascertained and added to the contract sum.*"

[11] On behalf of Miller Construction, it was submitted that question 1 should be answered affirmatively, in a manner to which we shall return when considering the significance of the final certificate and interim certificate 29. Upon that basis, question 2 was superseded, but it was submitted that the answer proposed by the appellants was too vague to be of assistance to the arbiter. Question 3 should be answered in the affirmative, as raising no issues separate from those raised in question 1. Finally, question 4(a) should be answered in the negative, as should question 4(b), there being no need for proof, whatever the legal position.

[12] The arbiter's position can be stated briefly. It was for Scottish Equitable to establish that the obligation or obligations in question had been extinguished by prescription. By crave 6, the Claimants sought repayment of £230,000 which had been deducted as liquidate damages, upon the basis that they were entitled to an extension of time and a revised completion date, in accordance with which no liquidate damages would be due. The arbiter held that this claim had been extinguished by prescription, and the questions upon which the opinion of this court is sought do not relate to that matter. We need say no more about it. We are concerned only with the appellant's contention that the Claimants' claim, in terms of crave 7, for £2,080,307.44, which they say is direct loss and expense incurred by them due to the progress of their works being materially affected, has likewise been extinguished by prescription.

[13] The arbiter rejected that contention. In terms of the contract, the date of completion was 8 December 1989. The Claimants aver that the works were certified as practically complete on 6 August 1990. All of the matters founded upon by the Claimants as factual justification for claims for additional sums, under reference to Clause 26 of the contract, are averred by them to have occurred before that date. Interim certificates were issued from time to time, the last such certificate being interim certificate No. 29, dated 18 June 1992. No Final Certificate has yet been issued. Under reference to certain observations by Hobhouse J. in ***The Secretary of State for Transport v. Birse-Farr Joint Venture*** 62 B.L.R. 45 at page 53, and a number of passages from the speeches of Lord Lloyd, Lord Hoffmann and Lord Hope in ***Beaufort Developments (N.I.) Limited v. Gilbert-Ash N.I. Limited*** [1999] 1 A.C. 266, the arbiter contrasted the contractual function of interim certificates with the function of the Final Certificate. On the basis that the contractual machinery for assessing the final sum due in respect of loss and expense arising from Clause 26 events was still in play until at least the issuing of interim certificate No. 29, he held that any obligation to make full payment in respect of such events had not been finally determined, in the manner provided for by the contract, and therefore had not become enforceable prior to 18 June 1992. It followed that no such obligation had prescribed prior to 18 June 1997. By that date the matter had been submitted to arbitration, and a relevant claim had thus been made.

[14] While noting that he had sought, obtained and followed the advice of his legal assessor on a number of matters including the issuing of certificates and the question of prescription, the arbiter adds that the advice received and adopted coincides with what he himself believes is the practical operation of building contracts. It is perhaps

appropriate to quote what he says in that respect, as a background to the submissions advanced in the present appeal: *"In my experience claims for reimbursement of direct loss and expense are often notified by contractors during the execution of the works but these are usually not pursued, either by arbitration or litigation, until the end or near the end of the Architect's certification process. The reason for this is, firstly, that the contractor may not wish to pursue claims based on Interim Certificates that would inevitably become superseded. Any perceived problem with regard to payment may therefore become resolved in the natural on-going process of certification. Secondly, contractors would wish to avoid a multiplicity of arbitrations and to avoid duplication of effort in the presentation and ascertainment of claims. Claims made during the course of a contract may often be affected by other claims and can consist of a complex interaction of facts and circumstances which may only be properly presented, assessed and ascertained at or near the end of the certification process. The legal analysis which I adopt in relation to the role and function of the Final Certificate, and its significance in relation to the running of prescription, would reflect all of this."*

[15] Both parties proceeded upon the basis that the issue between them was essentially one of construction of the contract. In a sense, that is correct. But the issue is not merely one of differing interpretations. In considering whether rights and obligations have been extinguished by prescription, the natural starting point is perhaps the identification of the rights and obligations which are in issue. In practical terms, at the end of the day, one can no doubt say that what will matter to the parties will be whether Scottish Equitable are obliged to make, and Miller Construction are entitled to receive, a payment in respect of direct loss and expense. As we have noted, the arbiter saw the principal question for him as relating directly to that right and obligation. When did the right to claim these sums become enforceable? Has five years elapsed from those rights becoming so enforceable, without a relevant claim being made? And is recovery of the sums in question thereby precluded by prescription? It is unnecessary to consider whether it was in such terms, and upon such a basis, that the parties presented their contentions to the arbiter. But in their submissions to this court, counsel for each party proceeded upon the basis that one was not concerned with the prescription of a simple obligation to make, or right to receive, payment of the sums claimed.

[16] So far as the respondents and claimants were concerned, it was argued that the right which they were seeking to enforce was identified in the closing words of the fourth crave: the amount of loss and expense ought to have been included in interim certificate 29, and the right which was in issue was their right to have that certificate opened up, reviewed, revised and amended accordingly. That was the right which they were seeking to enforce. Like any other right, it could of course prescribe if no relevant claim to enforce it was made timeously. But the arbitration proceedings had commenced within five years from the date of certificate 29, so that no prescription of that right had occurred. In exercise of that right, they sought a revisal of the certificate to produce a higher sum due. If they were successful in that respect, their right to payment of that higher sum in terms of crave 7 would be merely consequential.

[17] The appellants' position in identifying what right of the respondents and claimants had prescribed seemed to us perhaps to change somewhat in the course of the hearing. At an early stage, junior counsel made it clear that the right in question was not a right to payment of amounts due and suggested that there was no indication that the arbiter had understood this. Senior counsel likewise submitted that the arbiter had "totally missed the point" in this respect. At least before this court, the point was said to be that the claimants had had rights which at earlier stages during the execution of the works were enforceable, and which had been extinguished by prescription, with the result that any right to obtain payment had also and consequentially been lost. As eventually expressed by senior counsel, the relevant right was *"a right to have it determined that a matter listed in Clause 26.2 had occurred, causing the contractor direct loss and expense, and thereafter a right to have that loss ascertained and added to the sum stated in a certificate"*. This right was said to be closely analogous to a right to damages. While it could be described as a compound right, it was not complex.

[18] This submission will require closer scrutiny in the context of the actual provisions of the contract. But it may be observed at this stage that like the submissions advanced on behalf of the claimants, the appellants' argument concentrates upon what may or must be done when interim certificates are issued, and what the consequences are of action or inaction at that stage. Moreover, in submitting that it was these earlier rights that had been lost, senior counsel for the appellants said that he was not disputing the general relationship between interim and final certificates discussed in ***Secretary of State for Transport v Birse-Farr Joint Venture or Beaufort Developments (N.I.) Ltd.*** But the rights in questions were rights which were already enforceable by the date of practical completion at the latest. Five years had elapsed from that date, before the arbitration proceedings commenced. The rights had therefore prescribed, notwithstanding the relationship between interim and final certificates.

[19] The submissions of the parties, and in particular those advanced on behalf of the appellants, thus turn upon an analysis and interpretation of the terms of the contract, and in particular of Clause 26. Clause 26.1 provides as follows:

"If the Contractor makes written application to the Architect stating that he has incurred or is likely to incur direct loss and/or expense in the execution of this Contract for which he would not be reimbursed by a payment under any other provision in this Contract because the regular progress of the Works or of any part thereof has been or is likely to be materially affected by any one or more of the matters referred to in Clause 26.2; and if and as soon as the Architect is of the opinion that the regular progress of the Works or of any part thereof has been or is likely to be so materially affected as set out in the application of the Contractor then the Architect from time to time thereafter shall ascertain or shall instruct the Quantity Surveyor to ascertain, the amount of such loss and/or expense which had been or is being incurred by the Contractor; provided always that:

.1 the Contractor's application shall be made as soon as it has become, or should reasonably have become, apparent to him that the regular progress of the Works or of any part thereof has been or was likely to be affected as aforesaid, and

.2 the Contractor shall in support of his application submit to the Architect upon request such information as should reasonably enable the Architect to form an opinion as aforesaid, and

.3 the Contractor shall submit to the Architect or to the Quantity Surveyor upon request such details of such loss and/or expense as are reasonably necessary for such ascertainment as aforesaid."

Clause 26.2 sets out the matters referred to in Clause 26.1; but we do not find it necessary to set these out here. Clause 26.5 provides that any amount from time to time ascertained under Clause 26 shall be added to the Contract Sum. Clause 3 provides that where in the Conditions it is provided that an amount is to be added to or deducted from the Contract Sum, or dealt with by adjustment of the Contract Sum, then as soon as such amount is ascertained in whole or in part such amount shall be taken into account in the computation of the next interim certificate. Clause 30.1 makes provision for interim certificates, providing *inter alia* (at 30.1.2) that interim valuations shall be made by the quantity surveyor whenever the architect considers them to be necessary for the purpose of ascertaining the amount to be stated due in an interim certificate, and also (at 30.2) that the amount stated as due in an interim certificate is to be a gross valuation, being the total of certain amounts, less the total of certain other amounts, referred to in various sub-Clauses of Clause 30.2. Among the amounts to be included are (as provided at 30.2.2.2) any amounts ascertained under Clause 26.1. Clause 30.6.1.1. (as amended) provides that not later than six months after Practical Completion of the Works the contractor is to provide to the architect or the quantity surveyor *"all documents necessary for the purposes of the adjustment of the Contract Sum..."* Clause 30.6.2 makes provision for adjustment of the Contract Sum, with provision for certain deductions and also for certain additions including (30.6.2.13) any amount ascertained under Clause 26.1. It is to be noted that Clause 30.6.1.2.1 (inserted by an amendment) provides that not later than three months after receipt by the architect or by the quantity surveyor of the documents referred to in Clause 30.6.1.1 the architect or quantity surveyor "*shall ascertain (unless previously ascertained) any loss and/or expense under Clauses 26.1....".*

[20] On behalf of the appellants, it was submitted that in terms of Clause 26, it was clear that the contractor had a right to make a written application stating that he had incurred or was likely to incur direct loss and expense. If he wished to avail himself of that right, he was obliged to make the application as soon as it had become, or should reasonably have become, apparent to him that regular progress had been or was likely to be affected. By availing himself of these rights at the appropriate time, he would have had a right to have the sums in question *"ascertained"* and added to the Contract Sum.

[21] References to the architect's opinion did not create a condition precedent to that right but were merely machinery. The right to such ascertainment, like a right to reparation, emerged when progress had been or was likely to be affected and in consequence the claimants had incurred or were likely to incur direct loss and expense. At least when loss and damage had in fact been incurred, this was a right which could be enforced even by action in court - the existence of Clause 41, with its provision for arbitration, did not mean that an action could not thus be raised (***Rippin Group Ltd v ITP Interpipe SA*** 1995 S.C. 302; ***Lowland Glazing Co Ltd (in receivership) v G A Group Ltd*** 1997 S.L.T. 257). In these circumstances, it was submitted, the claimants had had an enforceable right to "ascertainment" more than five years prior to the making of a relevant claim by initiating the arbitration. While it would require subsequent quantification and the like, it was not merely a contingent right when it came into existence, but one which could have been enforced immediately. That being so, it had prescribed.

[22] Other provisions were said to confirm this. The fact that a contractor is not merely entitled to make a Clause 26 application, but is obliged to do so "as soon as" it is or should be apparent that progress has been or is likely to be affected, taken with the provision that "if and as soon as" the architect is of the opinion that progress has been or is likely to be affected "*then the architect from time to time thereafter shall ascertain....",* may be seen as a basis for saying that the contractor has an enforceable right to such ascertainment in the described circumstances. The various references in subsequent provisions to amounts *"ascertained",* and in particular perhaps the words in Clause 30.6.1.2.1 *"unless previously ascertained",* perhaps reinforce the proposition that ascertainment is envisaged as something that can be objectively achieved, when the processes described in Clause 26.1 are triggered by a contractor.

[23] However, it was submitted on behalf of the claimants that it is hard to see matters in that way when one has regard to the essentially practical and provisional nature of interim certificates and the sums stated in them. Clause 30.1.2 shows that the amounts thus *"ascertained"* may be based upon merely interim valuations. The expressions "is likely to incur" and *"is likely to be so materially affected"* show that there may well be an uncertainty not merely in relation to quantification, but in relation to the substantive basis for a Clause 26 claim. And while the amount "ascertained" is to be added to the Contract Sum, and is to be included in the gross valuation which constitutes the amount stated as due in any interim certificate, its purely provisional nature is evident from the fact that interim certificates are successive re-statements of what is due, so that the ascertained sum reflected in one certificate may effectively be lost when a subsequent certificate is issued.

[24] Furthermore, it did not appear to be disputed that there would be no right to payment without the issue of a certificate: the issue of a certificate would effectively be regarded as a condition precedent to payment. See for example **Lubenham Fidelities and Investments Co Ltd v South Pembrokeshire District Council and Another** 33 B.L.R. 39; *Costain Building & Civil Engineering Ltd* v *Scottish Rugby Union plc* 1993 S.C. 650. Without forgetting

that in terms of the appellants' submissions it is not the right to payment which is said to have expired, it is clear that the effect of "*ascertainment*" by the architect of direct loss and expense would be that the sum ascertained would require to be included in the next interim certificate. There is at least something strange if a contractor could properly be regarded as having any actionable right in advance of the issue of a certificate which either included a figure for direct cost and expense, or omitted such a figure which ought to have been included. The right to abstract ascertainment, as opposed to a right to have an ascertained amount included in the gross valuation, does not appear to us to fit easily into the concept of an actionable or enforceable right.

[25] The approach adopted by counsel for the claimants was that the parties had agreed in their contract upon certain procedures. These would include application by the contractor in terms of Clause 26, and thereafter consideration of the application by the architect, who might or might not come to be of the opinion that regular progress had been or was likely to be materially affected. If and only if he reached that opinion, then "from time to time thereafter" it would be his duty to ascertain the amount of loss and expense which at any particular time had been or was being incurred. These agreed procedures were designed to lead to the inclusion in the gross valuation contained in any interim certificate of an appropriate *"ascertained*" - but none the less provisional - amount. Once a sum had been thus included, or omitted, it was possible that there might be some enforceable right. But even then, having regard to interim certificates, it appears that either the contractor or the building owner could take a point in relation to any certificate, treating past certificates as superseded. As Lord Justice May said in ***Lubenham,*** "*The fact that interim certificates can usually represent no more than approximate valuations will normally be of no great consequence to the parties, since...they will be subject to readjustment, not only in the final certificate but in subsequent interim certificates...*". And the fact that the procedures described in Clause 26.1 were linked to assessments of likelihood both by the contractor and subsequently by the architect, reflected the changing uncertainties in the progress of contractual works, and the impossibility, at any point in time, of any accurate prognosis of the practical or financial consequences which might flow from any of the events set out in Clause 26.2. The word *"ascertain"* must be read in context; and in the context of interim certification, it was clear both that the architect would frequently find the matter imponderable when first raised, and that any figure which he might feel able to reach would have to remain open to review until, at some late stage, the underlying facts and their actual consequences could be more accurately assessed. The proposition that these agreed procedures, and the normal working of interim and final certification, could be entirely undermined by the prescription of some underlying right to seek ascertainment would be an absurdity.

[26] In addition to the authorities which we have already mentioned, counsel for the parties referred us to *dicta* in a number of other cases. However, none of these is very directly in point, and in considering the issue of prescription and construing the contract, we do not find it necessary to refer further to case law.

[27] In the event, we are satisfied that the contentions advanced on behalf of the appellants are not well founded, and that the submissions advanced on behalf of the respondents and claimants are sound. Given the quite complicated inter-relation between underlying facts and probabilities, any possible application under Clause 26, the opinions and expectations of the architect, the difficulty of reaching even a broad figure which would merit inclusion in an interim certificate and the essential need for subsequent review, we are not persuaded that the claimant is vested in any enforceable right to *"ascertainment"* as was contended on behalf of the respondents. Notwithstanding the terminology of Clause 26.1.1, it does not appear to us that a claimant who refrains from making an application (even if it should reasonably have become apparent to him that the progress of the works was likely to be affected) could properly be regarded (at least in the absence of some ultimatum requiring him to apply by a given date) as having departed from his right to apply. No other right would emerge under Clause 26 unless and until the contractor made an application, and thus put in train the agreed mechanism which would follow upon it. The matter may also be tested in this way: if the right to ascertainment is regarded as an enforceable right, which will prescribe unless it is made the subject of a relevant claim within five years, it appears that contractors would be advised both to make applications in situations where it is very uncertain whether or to what extent they are likely to incur loss and expense, and at least in contracts which take a long time to resolve, to raise protective actions before the architect has assessed the matter. The fact that this has not in general been seen as a necessary practice, together with the fact that it would not appear to be useful, helps to confirm that it is not the intention of the contract, by these provisions, to create an enforceable right of this nature, which might have to be pressed in cases where it would turn out to have been pointless and might in some cases have to be taken to arbitration or to court in order to avoid prescription, and which would have the indirect consequence of excluding the ordinary procedures according to which any certificate may be reassessed in subsequent certificates, and in particular in the final certificate.

[28] We do not see the analogy with claims for damages as useful: in relation to reparation, the distinction between *injuria* and *damnum* is a relatively clear one, but it does not seem to us that it can be transposed into the context of Clause 26.1 at all satisfactorily.

[29] The question which underlies the submissions advanced on behalf of the appellants is nevertheless perhaps this: if the claimants could have challenged earlier certificates, more than five years before they eventually initiated the arbitration, and moreover could have done so on the same basis as formed the basis of that eventual challenge, may it not be said that they really should have made that challenge at those earlier dates, and that having failed to do so their rights have prescribed? There is a certain attraction in that broad approach (although it is not perhaps quite the same as the argument presented by the appellants). But it is important to appreciate that the prescription of one right cannot prevent a claimant from continuing to assert another right. Since each interim

certificate supersedes its predecessor, and effectively constitutes a revaluation of the whole work carried out, any failure in relation to one interim certificate (in terms of prescription or otherwise) will apparently leave unaffected the right of a claimant (and indeed a building owner) to challenge the valuation of the whole works executed, in the next or any subsequent certificate. Moreover, Clause 41 provides not only a right, in arbitration proceedings, to challenge previous certificates in ways which were not available when those certificates were issued. A previous certificate can apparently be challenged in the arbitration, notwithstanding that the challenge might have been, and was not, advanced when that earlier certificate was issued. In our opinion, a challenge at the earlier stage, and a challenge at the stage of arbitration, can be distinguished. Even if the challenge is upon the same basis, a challenge when a certificate is issued would relate to the amount which ought to be paid at that stage and could properly be seen as part of the enforcement of a different contractual right. A subsequent challenge in arbitration, even upon the same factual basis, may be very different, relating either to the content of a much later interim certificate, or to a final certificate. The whole structure of the contract appears to us to allow such subsequent challenges, notwithstanding that a challenge on the same basis could have been made much earlier, for more limited or different purposes. The availability of arbitration or even litigation for those earlier purposes, even if regarded as the assertion of an enforceable right, does not result, by the elapse of a prescriptive period, in the loss of a separate right to challenge any subsequent certificate.

[30] In the whole circumstances, we are satisfied that the rights found upon by the claimants have not prescribed. We answer question one in the affirmative, insofar as the arbiter found that claims reflected in crave 7 (and its supporting averments, craves and pleas) only became enforceable on the issue of interim certificate 29. Question two is superseded. We answer question three in the affirmative. We answer both head (a) and (b) of question four in the negative.

Act: J.E. Drummond-Young, Q.C., Wolffe; MacRoberts (Appellants)
Alt: Reed, Q.C.; Dundas & Wilson (Respondents)