OPINION OF LORD HAMILTON : OUTER HOUSE, COURT OF SESSION **:** 5 November 1999

1. The pursuers are a company incorporated in Italy. They manufacture football and sports boots. On 27 January 1997 they entered into a Distribution Agreement with the defenders relative to the distribution of the pursuers' products in the British Isles. In pursuance of that Agreement the defenders, early in 1997, placed orders with the pursuers for certain goods. These were supplied in June and July of that year. They were then marketed by the defenders in their retail outlets. Further orders were placed by the defenders on 2 June 1997. On 11 August the pursuers confirmed by fax that the goods ordered on 2 June would be despatched from their factory in Italy on 18 August. By fax dated 11 August the defenders intimated as follows - *"Due to the current experience we have with the product, all deliveries are on hold".*

2. That fax was followed by a further fax of the same date in which the defenders gave notice under reference to Clause 22.2 of the Distribution Agreement of rejection of goods already supplied on the ground that they were disconform to quality as warranted under the Agreement.

3. The Distribution Agreement provides by Clause 27 as follows -

"27.1 This Agreement shall be construed according to the laws of Scotland. The parties irrevocably submit to the non-exclusive jurisdiction of the Scottish Courts...

27.2 The Parties shall attempt in good faith to resolve promptly any dispute or claim arising out of or relating to the design or state or condition of the Goods or their conformity to quality through negotiations between such officers of the parties as may be nominated from time to time for the purposes of this clause who shall have the authority to settle the same.

27.3 If the matter is not resolved through negotiation, the parties shall attempt in good faith to resolve the dispute or claim by referral to arbitration by a single arbiter appointed by agreement. In the event that such an appointment is not mutually agreed within seven days following request to do so in writing by either party, the matter shall be settled under the Rules of Conciliation and Arbitration of The International Chamber of Commerce appointed in accordance with the said Rules. The seat of the arbitration will be in Milan, Italy".

4. In August 1997 judicial proceedings were instituted in this court by the pursuers against the defenders, the summons in a commercial action being signetted on 14 August. In that summons the pursuers claimed payment for goods already supplied but not paid for. They also sought damages in respect of the defenders' refusal to accept delivery of the goods ordered on 2 June. Defences were lodged in which the defenders denied liability, maintaining that the goods supplied had been in certain respects defective. These defects, they claimed, had resulted in a markedly higher return than normal of goods purchased by retail customers.

5. A preliminary hearing in the action was held before Lord Macfadyen on 29 September 1997 at which both parties sought leave to adjust their pleadings. Leave to adjust having been granted, the preliminary hearing was continued to 21 November. Prior to that date the pursuers enrolled a motion for summary decree. That motion was heard by me on 12 November when counsel for the pursuers restricted his motion to the amount of £207,370.80 (being part of the claim for payment of goods already supplied). The primary basis for that application was that the pursuers had, they maintained, grounds for believing that, notwithstanding the defenders' claim that the goods supplied were defective, they were continuing to market them in their retail outlets. That contention was supported by an affidavit sworn by the pursuers' local solicitor who deponed that he had, on 22 October, attended a retail outlet of the defenders in Glasgow and there observed football boots of various models manufactured by the pursuers exposed for sale there. After a lengthy hearing, in the course of which I was provided by the defenders with material suggesting that any exposure for sale as may have been observed was contrary to express instructions earlier issued by the defenders' senior management, I refused the motion for summary decree *in hoc statu*. It appeared to me that, on the information and pleadings then available, it could not be said that there was a near certainty that the defenders had no defence to the action (in whole or in part). Further time was then allowed to both parties to adjust their pleadings, the date for the continued preliminary hearing being varied to 1 December. Both parties adjusted. Prior to 1 December the pursuers had enrolled a further motion for

summary decree but at the hearing on that day their counsel intimated that he was not insisting on it. Further time was allowed for adjustment which again both parties availed themselves of. Parties were appointed to lodge in process not later than 31 December all documents on which they intended to rely. The pursuers, who had earlier lodged certain documents, on 31 December lodged further documents including reports by certain Italian testing and research houses for footwear (RICOTEST and CIMAC). These reports *ex facie* tended to support the pursuers' contention that goods of the types supplied to the defenders were free from material defect. The defenders had earlier (in September 1997) lodged test results from a British testing house (Intertek Testing Services) which *ex facie* tended to support the defenders' contention that the goods were defective.

6. At the next continued preliminary hearing (on 7 January 1998) counsel for the pursuers stated that the pleadings and productions for the pursuers were complete. He sought an order for proof with a direction that witness lists and witness statements be provided in advance. He estimated that a proof would last between 4 and 6 days. Counsel for the defenders in response stated that it was impossible at that stage to make any confident estimate of the length of the proof; he suggested that witness lists and statements be provided before proof was allowed and its date fixed.

7. By this stage it was clear that the parties were at issue over the quality of the goods supplied by the pursuers to the defenders and that that issue involved technical matters. I raised with parties the possibility of a remit being made to an expert under Rule of Court 47.12(2)(f). Parties undertook to consider that course. I declined at that stage to allow a proof but appointed each party to lodge by 6 February 1998 a list of witnesses together with summaries of the matters to which they would respectively speak, This was duly done. At the next hearing (on 16 February 1998) the matter of a remit to an expert was further explored. Parties were agreed in principle that a remit to an expert should be made and as to the general scope of that remit. The defenders suggested that the remit should be to the Shoe and Allied Trade Association (SATRA). A difficulty, however, arose as the pursuers had meantime instructed for their own purposes an expert report from a Mr Parker of that organisation. The case was appointed to a procedural hearing to be held on 20 March 1998. In advance of that hearing the pursuers lodged a Note of Proposed Further Procedure which, after reference to a remit to SATRA and a report from it, proposed, - *"Thereafter a Proof should be appointed. The principal issues at which will be:*

(a) To determine whether or not the goods sold by the pursuers to the defenders were of the standard contractually stipulated for;

(b) If not, whether the defenders have suffered any loss;

(c) If so, the extent of that loss".

8. At that hearing it was apparent that, for various reasons, including the fact that Mr Parker had already accepted instructions from the pursuers, SATRA was not prepared to accept a remit (from the court) under Rule of Court 47.12(2)(f). However, arrangements were then made for Mr Parker, as an expert for the pursuers, to visit the defenders' premises in Scotland and there to select and remove for testing a representative sample of each of the types of boots supplied by the pursuers to the defenders. After some delay this procedure was completed and Mr Parker's reports (four in number) were lodged in process. On perusal it was plain that, with minor qualifications, Mr Parker's conclusions supported the defenders' position (and gave little or no support to the pursuers' position) as to the quality of the goods. At a hearing on 6 July 1998 counsel for the pursuers stated that the pursuers accepted Mr Parker's conclusions. It was thus clear that the primary issue on which the parties had hitherto joined (namely, the quality of the goods supplied) had, after consideration of reports by an appropriately skilled person, been effectively resolved, by concession of the pursuers, in the defenders' favour.

9. At this stage, however, counsel for the pursuers introduced a contention which had not previously been advanced. It related to what rates of return of sports footwear sold retail were, as a matter of the defenders' general practice and also as a matter of custom of trade, acceptable and whether the rates of return experienced with the pursuers' products were within such rates. The pursuers were allowed further time to adjust their pleadings on this aspect with the defenders being given time to respond.

After sundry procedure the case was appointed to be heard at a further procedural hearing on 5 October 1998. Immediately prior to that hearing intimation was given to the court by the Edinburgh agents for the pursuers that their correspondents in Glasgow (who had hitherto been acting directly on instructions from the pursuers) had withdrawn from acting. On 5 October 1998 the pursuers' Edinburgh agents and their counsel were given leave to withdraw and an order was made for a notice to be served on the pursuers requiring them to intimate to the court whether they intended to proceed with this action. Thereafter the pursuers endeavoured to instruct other solicitors. Ultimately at a hearing on 19 February 1999 Mr Sandison, who had had no previous involvement with this case and was instructed by solicitors who likewise had had no such involvement, appeared for the pursuers. By this stage steps had been taken in Italy which resulted in the pursuers being put into "judicial administration" - apparently because of financial difficulties experienced by them. The requirements of Italian law and procedure resulted in there being some delay in the formulation by the pursuers, under their new administration, of a definite attitude towards this litigation. At a hearing on 21 June 1999 Mr Sandison intimated that the pursuers would now prefer to proceed by I.C.C. arbitration in Milan as provided for in Clause 27.3 of the Distribution Agreement. Subsequently the pursuers were allowed by amendment of the pleadings to introduce a plea that the action be sisted for arbitration. Mr Sandison on their behalf moved me to sustain that plea and to sist the action. Mr Sellar for the defenders opposed the motion.

10. Mr Sandison referred to Clause 27 of the Distribution Agreement. It was clear, he said, that the dispute between the parties fell within the scope of that clause. The pursuers, he submitted, had *prima facie* a right to go to arbitration; it was not a matter for the discretion of a court (***D. & J. McDougall* v *Argyll & Bute District Council*** 1987 SLT 7, per Lord Weir at p. 10F-G; ***Inverclyde (Mearns) Housing Society Ltd* v *Lawrence Construction Co Ltd*** 1989 SLT 815, per Lord McCluskey at p.817J-L). The onus of demonstrating that the pursuers' right had been elided rested squarely on the defenders. No express waiver had been suggested. It was accordingly necessary for the defenders to demonstrate that the right had impliedly been waived. Waiver had been authoritatively discussed in ***Armia Ltd* v *Daejan Developments Ltd*** 1979 SC (HL) 56. To be effective it required (1) abandonment of the right by one party and (2) that the other party had conducted his affairs in reliance on such abandonment. That dual requirement had, in the context of sisting for arbitration, been adopted and applied in *Inverclyde* (pp.819D-J and 821C) and ***Presslie* v *Cochrane McGregor Group Ltd*** 1996 SC 289. The test for element (1) was a high one. It was not satisfied by the mere raising of the action (*McDougall*, per Lord Weir at p. 11J; ***Graeme Borthwick Ltd* v *Walco Developments (Edinburgh) Ltd*** 1980 SLT (Sh. Ct.) 93 at p. 94). In this case the pursuers had raised the action in circumstances where they considered that there was no real or substantial dispute in respect of the quality of the goods. This was pointed by their early motions for summary decree. The fact that the pursuers had adjusted their pleadings, even over a lengthy period did not infer waiver (*Presslie)*. Nor did other aspects which involved the ordinary procedures of litigation. The closing of the record was not a critical event (***Wylie* v *Corrigan*** 1999 SLT 739, at p. 742H). The proposition that an arbitration plea should be take *in limine* was a matter only of good practice (which might have consequences in expenses). Moreover under the Commercial Actions Rules there was no equivalent to the closing of the record in ordinary actions. Any suggestion that a procedural hearing was such an equivalent was ill-founded. Finalisation of the pleadings might be a factor but was not critical. In the present case, although parties had had a proof in mind, no order for proof had been made. Even after the various expert reports had been lodged, there had been no determination as to substantive procedure. In *McDougall* (where the motion to sist had been granted) a preliminary proof had already taken place. Here all that had occurred was *"the first step down a lengthy road"*. In ***Inverclyde*** (the only recent case where a sist had been refused) there had been an accumulation of factors, the act of the defenders bringing in a third party being of particular significance as pointing to a preference for judicial over arbitral procedure. Delay in taking the plea was not of itself significant. In any event, the effective delay in the present case had not been substantial; at the outset of proceedings there was no obvious dispute as to quality, while from late 1998 there had in effect been a paralysis due to the financial difficulties in which the pursuers had been placed. In any event, it could not be shown that the defenders had conducted themselves on the

basis that the right to proceed by arbitration had been abandoned by the pursuers. Reference was made to ***Morrison* v *Rendall*** 1986 SC 69, especially per Lord Justice Clerk Ross at p. 75, ***McDougall,*** per Lord Weir at p. 12G-H, ***James Howden & Co Ltd* v *Taylor Woodrow Property Co Ltd*** 1999 SLT 841, especially per Lord Kirkwood at pp. 850-1 and *Presslie* at pp. 291-2. The defenders' actings were consistent simply with defending the action. The requirements for effective waiver of the right to go to arbitration not being demonstrated, the plea to sist should be granted.

11. Mr Sellar, in moving that the pursuers' motion be refused, submitted that, if the relevant law was applied to the undisputed facts, the proper conclusion was that the pursuers had long ago given up their right to go to arbitration. It was accepted that the institution of legal proceedings and the occurrence of delay by themselves would not give rise to loss of the contractual right. However, non-assertion of the right prior to the closing of the record in an ordinary action, while not fatal, constituted a very strong indication that the right had been waived (***Presslie*** at pp. 292I-293C). The finalisation of the parties' positions on the pleadings was also important (***Wylie* v *Corrigan*** at p. 743C-K). All the factors (including the whole history of the litigation) had to be looked at (***Inverclyde*** at p. 821C); it was erroneous to conclude that any special significance had in that case been given to the convening of a third party. There might be some doubt about the treatment in *McDougall* of the fact that parties had undergone a preliminary proof; but it was clear that Lord Weir would have considered agreement by the pursuers to an inquiry on the general merits as being inconsistent with an assertion of the right to go to arbitration (p. 12E). In commercial actions there was no provision for closing of a record. It was, however, suggested that an equivalent stage had been reached by not later than the initial procedural hearing in this case. It was relevant that it was the pursuers who had brought and insisted in the action. Moreover, the contractual provision related not to a domestic but to a foreign arbitration. In such circumstances the court should be readier to infer that there had been waiver by the pursuers. In the present case, after the motions for summary decree had been dealt with, the pursuers had pressed on with the litigation on the merits of the dispute. By 7 January 1998 the issues on the merits were focused. On 16 February a procedural hearing had been fixed. It had taken place on 20 March. All the active procedure thereafter until the Autumn of 1998 had concerned the merits. The first suggestion that arbitration might be involved had been made on 21 June 1999. By that time the issue of the quality of the goods had long been effectively determined. The arbitration clause had been referred to at the initial preliminary hearing before Lord Macfadyen on 29 September 1997. In the whole circumstances, notwithstanding that the test was a high one, waiver of abandonment of the right to go to arbitration had clearly been made out. As to the second element for effective waiver, the history was entirely consistent with the defenders having conducted their affairs on the basis that the right had been waived Where the first element was made out, it was not difficult to infer the second. Reference was made to ***Presslie*** at pp. 291H-292A and ***Inverclyde*** at p. 821E-H.

12. Where parties have contractually provided that disputes (or particular classes of dispute) between them are to be settled by arbitration, a Scottish court will recognise that agreement as giving rise to an enforceable contractual right. Thus, where litigation has been instituted in respect of a dispute falling within the scope of the arbitration clause, the court will, where one of the parties makes an appropriate application to it, ordinarily give effect to the provision by sisting the action to await the outcome of the arbitration. The application may be made by the pursuer or by the defender. It is immaterial whether the arbitration is domestic, foreign or international. The application will be dealt with as a matter of contractual right, not of judicial discretion. The right to have the action sisted for arbitration may, however, be lost. The issue for determination in this case is whether in the circumstances which have occurred the pursuers remain entitled to have this action sisted for arbitration under the I.C.C. Rules.

13. In modern times the issue whether the right to have the action sisted has been lost has been addressed both in the Inner and Outer Houses as an aspect of the law of waiver of rights (***Presslie, McDougall, Inverclyde*)**. That approach was adopted by both counsel before me. Accordingly, there was reference to authority on the law of waiver in contexts other than those of sisting for arbitration (***Armia Ltd* v *Daejan Developments Ltd; James Howden & Co Ltd* v *Taylor Woodrow Property Co Ltd***). In *Armia* at p. 72 Lord Keith said - *"The word 'waiver' connotes the abandonment of a right... The abandonment may be*

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express, or it may be inferred from the facts and circumstances of the case... the question whether or not there has been a waiver of a right is a question of fact, to be determined objectively upon a consideration of all the relevant evidence".

14. Those observations, made in the context of discussion of waiver of a right under a contract for the sale of heritage, were adopted and applied (in the context of a plea to sist for arbitration) by the Inner House in ***Presslie*** (at p. 291D-E). In ***Armia***, Lord Fraser at p.69 appears to have adopted an observation by Lord Denning in an English case to the effect that "it was enough if he [the party asserting waiver] had conducted his affairs on the basis of the waiver". The Inner House in ***Presslie*** (at p. 291G) seems to have had some difficulty with this element, though in ***Howden*** Lord Kirkwood (with whom Lord Allanbridge agreed) appears, again in the context of a contractual situation, to have regarded it as necessary for "***effective***" waiver that the pursuers establish that the defenders had conducted their affairs on the basis of the waiver (pp. 850L-851A). Lord Marnoch (at p. 853L) considered it necessary to look at English authority in this field with some care. However, before me it was accepted that both elements referred to by Mr Sandison required to be satisfied. I proceed on that basis.

15. The present action was raised very shortly after the defenders had given written notice of rejection. The summons as served was in fairly short compass. The defences as lodged referred to Clause 22 of the Distribution Agreement (the warranty clause) and specifically asserted that a significant proportion of the goods which had been supplied by the pursuers were defective and disconform to contract. They maintained (on grounds which were set out in some detail) that they were not liable to the pursuers in the sums claimed by them. They further claimed a right of retention against any debts otherwise due to the pursuers. They clearly put in issue the quality of the goods supplied under the Distribution Agreement. The history of the litigation thereafter has already been narrated.

16. It is plain, in my view, that, in respect of the quality of the goods supplied under the Distribution Agreement, the parties joined issue in this litigation, progressing matters to finalisation of their pleadings on that matter. They also took substantial steps in preparation towards an inquiry to determine that dispute by or under the auspices of this court. It was quite plain, even from the initial lodgement of defences (in September 1997) that there was a dispute as to the quality of the goods. The pursuers, far from invoking the arbitration clause at that stage, actively adjusted their pleadings on this issue and produced documentary support for their contentions in respect of it. They sought a proof in this court on that issue and lodged a list of witnesses to give evidence at such a proof. The applications for summary decree proceeded substantially on the basis that, as the defenders were apparently in at least one retail outlet still marketing the goods, the defence must be spurious. At least by the time the second motion for summary decree had been dropped, it must have been quite clear to the pursuers that there was a serious issue to try relative to the quality of the goods. From late 1997 to the summer of 1998 they actively pressed that issue in this court.

17. A plea to sist for arbitration has been described as one pleaded *in limine* (***Hamlyn & Co* v *Talisker Distillery*** (1894) 21 R. (HL) 21, per Lord Watson at p. 25). It has not been authoritatively determined whether a party is altogether barred in an ordinary action from taking such a plea after the record is closed; but it is clearly proper practice to take it before that stage and failure to observe that practice constitutes at least a very strong indication that the right has been waived (***Presslie*** at pp. 293C-D). In commercial actions there is no "***closing of the record***". Parties' ability to adjust their pleadings is subject to the control of the court, the object being to focus the issues and finalise the pleadings as expeditiously as possible. In this case the pursuers adjusted their pleadings until 31 December 1997 and on 7 January 1998 intimated that they were in final form. Good practice directed, in my view, that any plea to sist for arbitration should have been taken prior to and significantly prior to 31 December 1997. By contrast, the pursuers actively pursued the litigation. It was only when later expert reports obtained on their behalf (the conclusions of which they accepted) were apparently destructive of their position that they changed tack by introducing a new contention. Procedure between 6 July and 5 October 1998 was concerned with that aspect. Even at that stage the pursuers gave no indication of an intention to invoke the arbitration clause in respect of any matter.

18. The question whether a party has waived his right to insist on arbitration depends on an objective assessment of that party's conduct in the whole circumstances of the case (***Presslie*** at p. 292E; **Wylie v Corrigan** at p. 742H). Making that assessment I am satisfied that by at least the procedural hearing on 20 March 1998 (and possibly from the preliminary hearing on 7 January 1998) the pursuers had waived their right to have this action sisted for the purpose of arbitration. In any event, they had, in my view so waived that right long prior to the withdrawal of their former agents in October 1998.

19. There remains the question whether it is demonstrated that the defenders conducted themselves on the basis that the pursuers had waived that right. In my view it is so demonstrated. The pursuers raised and persisted in the litigation. So far as the defenders were concerned, the natural inference from the pursuers' actings (at least once the dispute as to quality had been focused) was that the pursuers had chosen to pursue their claim by litigation rather than by arbitration. Once that inference could properly be drawn (as in my view it could by at least March 1998), the defenders' activities in the litigation thereafter can appropriately be regarded as conduct by them on the basis that the pursuers had waived their right. The defenders' activities were directed to the issue of quality of the goods. This is not a case, such as ***McDougall,*** where the activity was referable to an aspect of the case distinct from its substantive merits. Although it can be said that the conduct relied on (which included three hearings before the court between April and August 1998 as well as extrajudicial activity) is explicable as ordinary conduct of litigation, it was in the circumstances of this case conduct in defending a litigation which they were entitled to assume the pursuers had opted to pursue in preference to seeking arbitration. The defenders' conduct (including their expenditure of time and resources) is hardly indicative of an expectation that the merits of the dispute would at any stage be addressed in an I.C.C. arbitration in Milan. It seems reasonably plain from the discussion in *Presslie* and in ***Inverclyde*** that the ordinary conduct of litigation may constitute conduct on the basis of the other party having waived its right to insist on arbitration. That is no doubt because in this context the conduct of the litigation and conduct in reliance on the waiver will generally be similar. Conduct more distinctly referable to the waiver may ordinarily be expected in other situations.

20. For these reasons I shall refuse the motion. One other matter may be mentioned. In the course of the discussion Mr Sellar stated that it was his instructing solicitor's recollection that the arbitration clause in the Distribution Agreement had been referred to at the preliminary hearing before Lord Macfadyen, that recollection being to the effect that his Lordship had raised with the defenders whether they were to insist on it and had received a negative response. Mr Sandison and his instructing agents, not having been involved at that stage, could make no comment on this matter. I have subsequently ascertained that following the hearing on 29 September 1997 Lord Macfadyen noted, among other matters - *"The contract between the parties contains an arbitration clause, but both parties confirmed that it was not to be relied upon"*. I record this circumstance but have not relied upon it for my decision on this motion.

Pursuers: Sandison; Bird Semple
Defenders: Sellar; Balfour & Manson