

Opinion of Lord Eassie. Outer House, Court of Session. 14th January 2005

- [1] On 13 June 2001 the present pursuers, who are the executors of the late Brian Douglas Frazer, raised an action for payment against the present second defenders, Laurieston Properties Limited - "Properties". The summons contained a warrant for arrestment on the dependence of the action and on the following day the executors, the present pursuers, successfully arrested in the hands of the present first defenders, Laurieston Homes (Howwood) Limited - "Howwood" - sums then due by Howwood to Properties. On a motion by Properties for recall or restriction of the arrestment the court restricted the amount arrested to the sum of £75,000. Decree by default was subsequently granted in that action for payment by Properties to the pursuers of various sums exceeding *in cumulo* the amount of the funds arrested (as restricted). The current action is an action of furthcoming to have the restricted amount of the monies arrested in the hands of Howwood made over to the pursuers.
- [2] The monies so arrested consisted in a sum payable by Howwood to Properties as an *interim* payment under a building contract whereby Howwood had employed Properties to construct a number of houses on a residential development. In the present action the first defenders - Howwood - aver that the building contract was concluded on 17 May 2000 and its terms were those of the Scottish Building Contract with Contractor's Design (January 2000 Revision) which incorporated the JCT Standard Form of Building Contract with Contractor's Design (1998 Edition). The pleadings for the pursuers accept that the sum arrested was payable under a building contract but the conditions of the contract are said, in the pleadings, to be not known and not admitted. However, from the productions and the manner in which the debate before me was conducted I did not understand there to be any real factual dispute as to whether the building contract in question was subject to those contractual terms.
- [3] Of those terms the relevant provisions dealing with *interim* payments are to be found in clause 30 of the JCT Conditions. The clause contains a number of detailed provisions respecting the "modalités" for calculation of the *interim* payments due to the contractor by the employer and the date of payment to which provisions I was referred by way of explanatory background but which I do not think it necessary to set out or discuss since it was accepted by Ms Patterson, the solicitor for Howwood who appeared in the exercise of her extended audience rights, that at the date of service of the arrestment, the *interim* payment in question had been properly certified and was due and payable at that time.
- [4] Ms Patterson's opposition to the action for furthcoming turns on subsequent events and clause 27 of the JCT Conditions. The subsequent events are that Properties, who had apparently sub-contracted the whole of the building works to a third party, Ballast plc, are averred to have found their sub-contractor's performance unsatisfactory. Properties determined their contract with their sub-contractor, Ballast. Immediately thereafter, the main contract between Howwood (the employer) and Properties (the contractor) was determined by Howwood on 8 April 2002.
- [5] Clause 27.2 of the JCT Conditions incorporated in the contract between Howwood and Properties makes provision for the contract being determined by the employer on the ground of a "default" by the contractor. Among such defaults is a failure by the contractor "to proceed regularly and diligently with the performance of its obligations under the Contract" (clause 27.2.1.2). On the occurrence of such a default the employer may give notice specifying the default and if the contractor thereafter remain in default for 14 days the employer may determine the contract. It is averred by Howwood (but not expressly admitted by the pursuers) that Howwood determined the contract on the ground of the default just mentioned and that the contractor, Properties, waived its entitlement to receipt of any notice of default.
- [6] Where the contract is thus determined by the employer on the ground of the contractor's default, the consequences of such a determination are treated in clause 27.6 of the JCT Conditions. Among other things, the employer is entitled (clause 27.6.2) to employ other contractors to carry out and finish the works and to use any temporary buildings, plant and equipment or materials already on site for that purpose. As regards payments due by the employer to the contractor clause 27.6.5.1 reads as follows: "*Subject to clauses 27.5.3 and 27.6.5.2 the provisions of this Contract which require any further payment or any release or any further release of Retention to the Contractor shall not apply; provided that clause 27.6.5.1 shall not be construed so as to prevent the enforcement by the Contractor of any rights under this Contract in respect*

of amounts properly due to be paid by the Employer to the Contractor which the Employer has unreasonably not paid and which, where clause 27.3.4 applies, have accrued 28 days or more before the date when under clause 27.3.4 the Employer could first give notice to determine the employment of the Contractor or, where clause 27.3.4 does not apply, which have accrued 28 days or more before the date of determination of the employment of the Contractor”.

Of the clauses to which reference is made in that provision neither clause 27.5.3 nor clause 27.3.4 are pertinent in the present case. Put shortly, the remaining clause to which reference is made, viz clause 27.6.5.2, provides that upon completion of the design and construction of the works (and the making good of any defects) an account shall be drawn up in terms of the matters referred to in clause 27.6.6. Those matters may be paraphrased as (a) the amount of the expense incurred by the employer in completing the contract and any loss suffered by him by reason of the determination; (b) the amounts already paid to the contractor; and (c) the total sum which would have been payable to the contractor had he completed the works. The account involves, in terms of clause 27.6.7, adding (a) and (b) and comparing the resulting total with the amount under (c). If the resulting total of (a) and (b) exceeds the amount of (c) the difference is payable by the contractor to the employer; if less, then *vice versa*.

- [7] The primary submission for Howwood, respecting which their solicitor invited me to uphold the second plea-in-law for Howwood, which seeks absolvitor on the basis of there being "no sums owing to the second defenders by the first defenders as arrested in the hands of the first defenders", turned on the terms of clause 27.6.5.1, set out above. Since it was a principle of the law of arrestment that the arrestor took *tantum et tale* with the creditor's right in the obligation arrested, and since the pursuers had arrested an *interim* payment due under the building contract, which had subsequently been determined, the pursuers were thus affected by clause 27.6.5.1. Ms Patterson submitted that, unless the proviso contained within that clause applied, the effect of the clause was to extinguish the employer's liability to pay the sums certified under any *interim* certificate on the determination of the contract. Any obligation of the employer to make payment under the *interim* certificate was replaced by such obligation, if any, as might arise on completion of the account required by clause 27.6.5.2. The obligation arrested by the pursuers was thus subject to the resolute condition contained within clause 27.6.5.1. The proviso contained within the clause which maintained the recoverability of sums contained in *interim* certificates which had accrued 28 days prior to the determination of the contract could not apply in the present case since the result of Howwood's being precluded from making payment by reason of the arrestment was that Howwood could not be said to have unreasonably not paid the *interim* payment in question. (It is not suggested that, apart from the existence of the arrestment, there was any conceivable ground upon which timeous payment of the sum subject to the *interim* certificate in question could have been refused or withheld.)
- [8] In support of her submission that the arrestor takes *tantum et tale* Ms Patterson referred to *Graham Stewart on Diligence*, p 128, and, particularly *Chamber's Trustees v Smiths* (1877) 5 R(HL) 151. In that case it was held that a testamentary bequest which, although vested, could be defeated by a decision of the trustees, gave the arrestor no greater right than the beneficiary and the subsequent act of the trustees in exercising their power affected the arrestor. Reference was also made *Foster v Campbell* (1866) 2 SLR 98, with a view, as I understood it, to distinguish that case from *Chamber's Trustees*. In that case the provision in the marriage contract in issue provided that the beneficiary's rights should be forfeited were he "to do or suffer any act or thing whereby the same or any part thereof ... would cease to be receivable by him for his own use". As is observed by *Graham Stewart*, p 132, the beneficiary's rights having been arrested, it was found that the arrestment could be completed by a forthcoming without involving forfeiture.
- [9] As respects the interpretation of clause 27.6.5.1 and in support of her submission that, in the circumstances of the present case, its provisions had the effect of extinguishing the debt constituted by the *interim* certificate which had been the subject of the arrestment, Ms Patterson referred to *Hudson on Building Contracts* (11th Ed.) paragraph 12-060; paragraph 12-061. She further referred to the first instance decision of Nienaber J in the Natal Provincial Divisional Court in South Africa, reported in

1986 Construction Law Journal 216, in the litigation between *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* in which it was held that, under the building contract there in issue, the enforceability of two *interim* certificates was revoked upon the contract being determined. Ms Patterson referred in particular to the passage in the judgment at p. 224, but she recognised that the clause of the contract in issue in that case differed importantly from the present case in respect that there was no proviso which preserved the enforceability of certificates issued 28 days prior to the employer's determination of the contract.

- [10] While the primary submission for the first defenders was thus that the furthcoming failed because the obligation which had been arrested had been extinguished consequent upon the first defenders' decision to determine the building contract, the solicitor for the first defenders submitted alternatively that if, contrary to her primary submission the obligation was not extinguished, it was an obligation altered in its form being subject to a different mode of calculation. Only to the extent that on the final reckoning between the employer and the contractor a sum might be shown to be due to the contractor, could there be a sum which might be the subject of the action of furthcoming. That matter could not be determined on the present pleadings and in the event that her alternative submission were to be upheld, the case should be put out by order for further procedure.
- [11] For his part, the pursuers' solicitor, Mr MacKenzie, who likewise appeared in the exercise of his extended audience rights, moved for decree *de plano*. He pointed out that it was admitted by Howwood that decree had been granted in the action for payment brought against Properties; that the execution and later restriction of the arrestment in the hands of Howwood had taken place; and that the funds so arrested were due and payable at the time of arrestment, the only reason for non-payment thereafter being the existence of the arrestment. The pursuers' solicitor then advanced what he described as three "key" propositions (with none of which I understood the solicitor for the first defenders ultimately to take any issue).
- [12] The first of those propositions was that arrestment created a nexus over the arrested subject, rendering it litigious. In relation to this proposition Mr MacKenzie referred to the description of arrestment contained in the lead opinion delivered in the Inner House by Lord Deas in *Smiths v Chamber's Trustees* (1877) 5 R 97, 107; to what was said by the Lord President (Emslie) in *Lord Advocate v Royal Bank of Scotland Ltd* 1977 SC 155 at 169, foot ff; and to the passage in *Graham Stewart* at 128 in which it was stated that a debtor could not by novation, discharge or assignation get rid of the arrested debt.
- [13] The second proposition advanced by the solicitor for the pursuers was that the nature and state of the obligation to account which had been arrested fell to be assessed at the time at which the arrestment was laid. In vouching this proposition the pursuers' solicitor referred to *Riley v Ellis* 1910 SC 934; *Iona Hotels Ltd, petitioners* 1990 SC 155; *Shankland & Co v McGildowny* 1912 SC 857. In regard to *Smiths v Chamber's Trustees*, the pursuers' solicitor pointed out under reference to the speeches of Lord Hatherley at 154 and Lord Blackburn at 162 that the trustees' power in that case to defeat the beneficiary's claim to payment existed at the moment when the arrestment had been executed and could thus have been a complete defence to any action raised by the beneficiary at the time of the laying on of the arrestment.
- [14] The third proposition was that the arrestor's right to the arrested obligation was taken *tantum et tale* with the arrestee's obligation to the debtor but, as I understood Mr MacKenzie, the point advanced was essentially a corollary of his second proposition, namely that the standing of the arrestee fell to be assessed at the time at which the arrestment was executed.
- [15] Against that legal framework, which was not disputed by Ms Patterson for the first defenders, the solicitor for the pursuers advanced, in the following order, five reasons for which he said clause 27.6.5.1 did not defeat the arrestment. First, on a proper construction of the building contract, the debt consisting of the contractor's remuneration for the work performed which was subject to the *interim* certificate was not extinguished. It was carried forward into the subsequent accounting calculation. It was only after the process of drawing up a statement of account had been gone through that one would know whether the debt might be offset by compensatory amounts due by the contractor to the

employer. There was no averment tendered by the defenders to the effect that if that process were conducted the sum contained within the *interim* certificate would be offset by any compensatory amount. Secondly, the possibility of a counterclaim arose only after the determination of the contract, which of course post-dated the arrestment. The decision to determine the contract was a voluntary act on the part of the arrestee and therefore could not prejudice the arrestor. Thirdly, the solicitor for the pursuers submitted that it was not correct to characterise the current situation as one in which the employer had not "unreasonably not paid" the sum in the *interim* certificate. What had happened was that the sum had been rendered litigious by means of the arrestment. There had been no refusal to pay on grounds personal to the payer. In what was, I think, in some ways a corollary to the last submission, the solicitor for the pursuers advanced fourthly the contention that the submission for the first defenders suffered the flaw of not looking at the obligation in question free of the effect of the arrestment. Their argument involved a circularity in that they maintained that the arrestment was defeated because the money had not been paid whereas in fact it was only not paid because it had been rendered litigious. Fifthly, Mr MacKenzie submitted that while it might be that on a proper construction of clause 27.6.5.1 the contractor's entitlement to payment of the sum certified in an *interim* certificate were subject to a resolutive condition, that condition was simply that the contract be not determined within 28 days from the date upon which the sum in the *interim* certificate became payable. Thus, testing matters at the time of the arrestment - which was the proper test - the only basis for defeasance of the right to payment would be determination of the contract by the employer within 28 days and that event did not occur in the circumstances of the present case. For all these reasons Mr MacKenzie submitted that the position of the first defenders was misconceived: there was no relevant defence and decree of furthcoming should be granted *de plano*.

[16] Of the points thus advanced by the solicitor for the pursuers, it appears to me that there is a degree of interlinking or overlapping between the third, fourth and fifth of those arguments. They proceed in essence from the principle that arrestment makes the sum arrested litigious and that the time at which to evaluate the arrested obligation is the time at which the arrestment is executed. As I have already indicated, I did not understand the solicitor for the first defenders to take issue with Mr MacKenzie's exposition of that legal framework. In particular, I understood her expressly to accept that the appropriate moment at which to test the extent to which the arrested obligation to pay or to account might be subject, wholly or partially, to extinction or defeasance by the operation of some other contractual condition attaching to it was the time of the execution of the arrestment. Adopting that approach - which I regard as the correct approach - I have come to the conclusion that the solicitor for the pursuers is well-founded in his argument that insofar as the *interim* payment arrested by his client might be subject to a condition of the nature of a resolutive condition in terms of clause 27.6.5.1, the resolutive condition applicable at the time was simply that the contract should not be determined by the employer within 28 days thereafter. I would reiterate that there is no suggestion that there was any reason peculiar to the relationship between the contracting parties wherefor Howwood would have been contractually justified in refusing to make punctual payment. Since the determination of the contract between Howwood and Properties did not ensue until some months after the laying on of the arrestment it is plain that but for the arrestment the sum could have been the subject of a successful action for payment long before the date of determination in April 2002. The *interim* payment having thus become indefeasibly payable to the contractor, but remaining subject to the nexus or litigiosity stemming from the arrestment, the duty of the first defenders was, to employ the phraseology of Lord Allanbridge in *Iona Hotels*, 337, "to keep it for the satisfaction of the debt for which it was arrested". But for the arrestment, the payment would no doubt have been punctually made by Howwood to Properties. It would in any event have been recoverable by the contractor under the proviso to clause 27.6.5.1, notwithstanding the determination. So in my view it cannot be said that in giving effect to the pursuers' claim the principle of the arrestor's taking *tantum et tale* is breached or that when the matter is viewed from the proper time perspective, the arrestor claims a greater right than that of the common debtor (Properties).

[17] It is clear that the argument for Howwood turns on the central point that the proviso embodied in clause 27.6.5.1 should not apply because Howwood had not "*unreasonably not paid*" the *interim* sum

due and payable because of the existence of the arrestment. As the pursuers' solicitor pointed out, there is a circularity in this argument and it involves the error of bringing into the assessment of the prestability of the arrested obligation the extraneous factor of the arrestment itself. Indeed on one view the argument for the first defenders, though purportedly based upon the principle of the arrestor's taking *tantum et tale*, may be seen to be in breach of that principle or rule in respect that the arrestee - Howwood - seeks to deploy the fact of the arrestment to their benefit in a way which would not have been available were they confined to their contractual rights. Seen from another optic, Howwood's contention gives to the phrase "unreasonably not paid" an unwarrantably wide interpretation. In my view, that phrase must be viewed in the context of the contract and relate to proper reasons for non-payment flowing from the contractual relationship itself. As I have already mentioned, there is no suggestion of the existence at any time of any such contractual dispute between Howwood and Properties. The clause should not be extended to apply beyond such a dispute.

- [18] In these circumstances, essentially for the grounds advanced by Mr MacKenzie under his reasons 3-5 inclusive, I am satisfied that the first defenders' resistance to the action of furthcoming is misplaced and that no relevant defence has been pled. I shall therefore uphold the pursuers' second plea-in-law and grant decree *de plano*. The first two reasons advanced by Mr MacKenzie give rise to greater difficulty. But it is not necessary for me to resolve those difficulties. Without reaching a concluded opinion I would observe simply that in my view there is force in the submission that the employer's determination of the contract did not remove the liability of the employer to pay for the works which had been contracted and duly certified. That liability is one which is carried forward in a process of reaching a final account which allows for the setting off of the employer's expenses and losses. To that extent, and I appreciate that it may be a question of the use of language, I think that the solicitor for the defenders' description of the operation of clause 27.6 as involving the extinguishment of a liability may be erroneous. While I recognise the arguable nature of Mr MacKenzie's submission that the liability is preserved and that the step of determining the contract thereby bringing into operation the possibility of compensatory claims is a voluntary act on the part of the arrestee, I prefer to rest my judgment on the grounds indicated.

Pursuers: MacKenzie, Solicitor Advocate; Pinset Masons

First Defenders: Ms Patterson, Solicitor Advocate; Dundas & Wilson

Second Defenders: No appearance