OPINION OF LORD HAMILTON : OUTER HOUSE COURT OF SESSION : 18th May 2000

[1] In or about November 1998 the pursuers and the defender entered into a contract under which the former undertook to construct for the latter a showroom, office block and workshop at Newhailes Industrial Estate, East Lothian. The contract was in the form of the Scottish Building Contract With Contractor's Design (July 1997 Revision) subject to certain amendments and modifications. It was a "construction contract" within the meaning of s104 of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"). The Date of Possession was 12 November 1998 and the Date for Completion 16 March 1999.

[2] The pursuers commenced and ultimately completed the works. The defender maintains that they failed to complete them by the Date for Completion, even as that was agreed to be extended. By some time prior to August 1999 various interim payments had been made to the pursuers but a balance of about £40,000 of the contract sum remained unpaid. On 17 August 1999 the Employer's Agent, Messrs Ryden, wrote to the pursuers stating that a balancing payment of £40,379.40 was outstanding. They continued -

"Our client is unwilling to settle this amount unless due consideration is made of the cost incurred as a result of firstly extensive delays in completing the works and the subsequent disruption suffered following the threat of statutory action by Building Control.

We have consulted with our client and their solicitors and would put forward the following sums which should be accounted for prior to any balancing payment being made...".

Two bases of claim were then specified, the first (in a total sum of £10,408) being for "L & A Damages for Delay" and the second (in a total sum of £28,136) being for "Direct Costs Incurred".

[3] The letter continued -

"*Following consultation, in an effort to reach a prompt settlement, our client is prepared to make the following proposal on the basis of a capped contribution to the direct costs incurred.*

Balancing Payment £40,379.40

Less

L & A Damages £10,408.00

Direct Costs Incurred £25,000.00

On a without prejudice basis, our client is prepared to make a payment of £4,971 in full and final settlement of his obligations under the contract. This would be conditional upon receipt of all warranty documents duly executed together with the Health & Safety File fully completed."

So far as appears, that proposal was not responded to by the pursuers.

[4] On or about 22 November 1999 the pursuers delivered to the defender an invoice for the sum of £41,277.05 (inclusive of VAT) in respect of monies claimed by them under the contract. The defender did not respond in writing to that invoice; but he avers that on the day he received it he telephoned the pursuers' office and, on being informed that the individual in the pursuers' organisation responsible for the contract was unavailable, left a message for him with the pursuers' telephonist. That message, the defender avers, referred the pursuers to the fact that the parties were already in dispute regarding further payment and specifically referred to Messrs Ryden's letter of 17 August.

[5] In February 2000 the pursuers raised the present action for payment of the sum of £41,277.05. The Defences lodged included a plea that the action be sisted for arbitration. It being clear at the preliminary hearing that the pursuers intended to resist that plea and that the issues relative to it required further to be focused, the case was continued for adjustment on that aspect and thereafter for a hearing on the defender's motion to sist. Parties duly adjusted and were then heard on the motion.

[6] The contractual provisions relative to payment, in so far as material, are as follows:

"30.1.1 Interim Payments shall be made by the Employer to the Contractor in accordance with clauses 30.1 to 30.4.....

30.3.1 The Contractor shall make Applications for Interim Payment as follows... (certain procedures are then set out; it is not disputed that the invoice rendered on 22 November 1999 constituted an Application for Interim Payment complying with the procedures in clauses 30.3.1 and 30.3.2).

30.3.3 Subject to clause 30.3.4 the Employer shall pay the amount stated as due in the Application for Interim Payment within 14 days of the issue of each Application for Interim Payment.

30.3.4 If on receipt of any Application for Interim Payment the Employer considers that the amount stated as due in the Application is not in accordance with this Contract he shall forthwith issue to the Contractor a notice with reasons to that effect and shall within 14 days of the issue of the Application pay such amount as he considers to be properly due as an Interim Payment."

[7] The contractual provisions relative to arbitration comprise clause 7 of the Building Contract and clause 39 of the relative Conditions (as amended). They are respectively in the following terms -

"7. If any dispute or difference as to the construction of this Contract or any matter or thing of whatsoever nature arising thereunder or in connection therewith shall arise between the Employer or the Employer's Agent on his behalf and the Contractor either during the progress or after the completion or abandonment of the Works or after determination of the Contractor's employment... (subject to an exception immaterial for present purposes)...., it shall be and is hereby referred to arbitration in accordance with clause 39."

"39. In the event of any dispute or difference between the Employer and the Contractor arising during the progress of the Works or after completion or abandonment thereof in regard to any matter or thing whatsoever arising out of this Contract or in connection therewith.... (again subject to the same exception)... the said dispute or difference shall be and is hereby referred to the arbitration of such person as the parties may agree to appoint as Arbiter...".

The pursuers, in resisting the defender's motion that the court sist the action for arbitration, also rely on certain provisions of the 1996 Act. The material sections, all contained in Part II of the Act, are:

"110(1) Every construction contract shall -

(a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
(b) provide for a final date for payment in relation to any sum which becomes due.
The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

(2) Every construction contract shall provide for the giving of notice by a party not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if -

(a) the other party had carried out his obligations under the contract, and
(b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts,
specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated.

(3) If or to the extent that a contract does not contain such provision as is mentioned in sub-section (1) or (2), the relevant provisions of the Scheme for Construction Contracts apply.

111(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.

The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.

(2) To be effective such a notice must specify -

(a) the amount proposed to be withheld and the ground for withholding payment, or
(b) if there is more than one ground, each ground and the amount attributable to it,
and must be given not later than the prescribed period before the final date for payment.

(3) The parties are free to agree what that prescribed period is to be.
In the absence of such agreement, the period shall be that provided by the Scheme for Construction Contracts....

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115(1) The parties are free to agree on the manner of service of any notice or other document required or authorised to be served in pursuance of the construction contract or for any of the purposes of this Part.

(2) If or to the extent that there is no such agreement the following provisions apply.

(3) A notice or other document may be served on a person by any effective means.

(4) If a notice or other document is addressed, pre-paid and delivered by post -

(a) to the addressee's last known principal residence, or, if he is or has been carrying on a trade, profession or business, his last known principal business address, or

(b) where the addressee is a body corporate, to the body's registered or principal office,

it shall be treated as effectively served.

(5) This section does not apply to the service of documents for the purposes of legal proceedings, for which provision is made by rules of court.

(6) References in this Part to a notice or other document include any form of communication in writing and references to service shall be construed accordingly."

The applicable Scheme is that contained in The Scheme for Construction Contracts (Scotland) Regulations 1998 (1998 S.I. 687) which came into force on 1 May 1998.

[8] The contractual provisions do not specify a "final date for payment" or a "prescribed period" before the final date for payment. The pursuers aver that by application of the Scheme the final date for payment was 23 December 1999. By paragraph 10 of the Scheme the prescribed period for the giving of an effective notice under section 111 expired 7 days before the final date for payment.

[9] The issue for determination is whether there exists a dispute or difference between the parties within the meaning of clause 7 of the Building Contract, as read with clause 39 of the Conditions, which requires the court to sist this action for arbitration in respect of that dispute or difference. I should mention that the Defences (as adjusted) make averments of alleged breaches other than those referred to in the letter of 17 August 1999 but these were hardly touched on in the discussion before me and I do not regard them as material to the present issue.

[10] It is not disputed that the contractual arbitration provisions are of a "general" or "universal" character (as distinct from being "restricted" or "executorial"). As such they might encompass disputes over matters of law. It is also conceded by the pursuers that, as a general proposition, a question whether or not a notice has been duly given could fall within these arbitration provisions, though they contend that in the present circumstances no such question does so fall.

[11] It is plain that, where parties have entered into a contract which includes arbitration provisions of so comprehensive a character, the circumstances in which the court may properly refuse a motion by a defender to sist for arbitration are strictly limited. The circumstance that the pursuers make a claim for payment under the contract and the defender resists that claim might suggest that inevitably there is a "dispute" or "difference" between them which, if either party so insists, requires to be determined by an arbiter rather than by the court. However, despite the apparent logical puzzle, there is authority binding on me to the effect that the court, before sisting for arbitration, must examine the matter raised and satisfy itself that there is truly raised between the parties a question which amounts to an arbitral dispute. In ***Albyn Housing Society v Taylor Woodrow Homes Ltd*** 1985 S.C. 104 Lord Hunter, with whom the other judges of the Extra Division agreed, said at p.107 - *"Counsel on both sides of the bar accepted the principle illustrated by authorities such as* ***Parochial Board of Greenock v Coghill & Son*** *(1878) 5 R. 732,* ***Mackay & Son v Leven Police Commissioners*** *(1893) 20 R. 1093 and* ***Woods v Co-operative Insurance Society*** *1924 S.C. 692. That principle was applied, in particular circumstances, in the recent Outer House case of* ***Redpath Dorman Long Ltd v Tarmac Construction Ltd*** *1982 S.C. 14. The principle is that there must be a dispute between the parties which comes within the terms of the arbitration clause. A question must be truly raised between them which amounts to an arbitral dispute. Lord President Clyde in Woods v Co-operative Insurance Society, supra at p.698 pointed out that the court is entitled and bound to see that such a question is truly raised, and added: 'There must, in short, be a real question, and it must be of the kind which the contract between the parties appropriates to the determination of arbiters.'"*

The required examination may involve the court itself considering arguments on legal issues, including the construction of the relevant contract. That consideration may result in the court holding

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that an argument on interpretation advanced by one party is so clearly lacking in substance that there is no question *"truly raised"* for an arbiter to decide (***Mackay & Son v Leven Police Commissioners***, per Lord Adam at p.1102). The court's view on interpretation may also lead to the conclusion that a claim by a defender to withhold monies may, in whole or in part, be so ill-founded that there is no real dispute for arbitral adjudication (***Redpath Dorman Long Ltd v Tarmac Construction Ltd***, per Lord Ross at p.18). There is, of course, a danger that by entering upon questions of interpretation the court will be at risk of arrogating to itself the function of adjudication committed by the parties to arbitral decision. But the effect of the authorities seems to be that, at least if the legal position is *"perfectly clear"* (Lord Adam) or the claim to set-off *"clearly"* does not fall within the contractual provision relied on (Lord Ross), there does not exist a dispute or difference for arbitral determination. Lord President Clyde in **Woods v Co-operative Insurance Society** speaks at p.699 of the legal position being "unmistakeably obvious". He continues - "*There is thus no room for difference of opinion on the question which the defenders say has arisen; and the case therefore appears to me to fall within the principle applied in* ***Parochial Board of Greenock v Coghill & Son.***"

There may, in the judgement of the court, truly be no room for such difference even if a party insists that there is.

[12] In the present case the first matter which arises for the court to determine is whether it is unmistakeably clear that the defender failed effectually to operate clause 30.3.4. The pursuers maintain that he so failed, the defender that he did not. Mr Ross for the pursuers did not argue that an oral communication could never constitute a notice for the purposes of that sub-clause. His argument was that the telephonist could not in any relevant sense be said to represent the pursuers and that there was nothing in the defender's averments to suggest that any message left with him or her had been passed on to a person who did represent them; this was of particular importance, it was said, having regard to the content required of a notice under the sub-clause. I am unable to accept that argument. On the basis of (1) the concession that a question whether or not a contractual notice had been issued was, as a general proposition, a matter capable of giving rise to an arbitral dispute and (2) the absence of any argument that writing was a prerequisite to any valid notice under this sub-clause, the question whether an effectual notice was issued in this case appears to me to raise factual and legal issues, including issues of agency, which fall within the arbitration provision. It cannot be said unmistakably that the communication did not satisfy that sub-clause. In these circumstances it is unnecessary to discuss a further contention advanced by Mr d'Inverno for the defender that, even if clause 30.3.4 was not satisfied, the defenders had (under reference to ***Redpath Dorman Long Ltd v Cummins Engine Co Ltd*** 1981 S.C. 370) an argument amenable for consideration by an arbiter that at common law the defender had a right, unexcluded by this contract, to retain against the Interim Payment his contra-claims for liquidated damages and otherwise.

[13] There remains the pursuers' argument under the 1996 Act. Two matters of statutory interpretation were raised. The first was whether, as the pursuers contend, an effective notice within the meaning of s111 requires to be in writing. Mr d'Inverno in the end effectively conceded that it did. Although the words "in writing" are not expressly used, I am satisfied that it unmistakably appears that writing in some form is required. This is so, in my view, having regard not only to the language of s111 itself, including the use of the indefinite article ("an effective notice", "a notice") and the requirement to "specify" particular matters, but also to the language of s115 &, in particular, s115(6) which contemplates that a notice under Part II will be in some form of writing. A telephone message, even one referring to a particular letter of earlier date, will not suffice.

[14] The second matter raised was whether a notice effective for the purposes of section 111 could be a communication in writing sent earlier than the making of the relevant Application. Mr d'Inverno pointed out that, while section 111(2) provided that any notice must be given not later than a particular time, it did not provide that it required to be given after any particular time, i.e. there was no *terminus a quo*. The letter of 17 August, albeit sent prior to the invoice of 27 November, was (or was arguably) a notice of intention to withhold payment within the meaning of section 111. I am unable to accept that argument. The purpose of section 111 is to provide a statutory mechanism on compliance

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with which, but only on compliance with which, a party otherwise due to make a payment may withhold such payment. It clearly, in my view, envisages a notice given under it being a considered response to the application for payment, in which response it is specified how much of the sum applied for it is proposed to withhold and the ground or grounds for withholding any amount. Such a response cannot, in my view, effectually be made prior to the application itself being made. It may, of course, be that the matter of withholding payment of any sum which might in the future be applied for has previously be raised. In such circumstances a notice in writing given after receipt of the application but which referred to or incorporated some earlier written communication might suffice for the purpose - though I reserve my opinion on that matter. But such an earlier written communication, whether alone or referred to subsequently in an oral communication, cannot, in my view, suffice. This is, as a matter of statutory interpretation, in my view, unmistakeably the case.

[15] Although it was somewhat tentatively suggested that the contract may have been varied by the actings of the parties, it was not contended that for the purposes of s111(1) the sum for which the invoice was issued was not "due under the contract" - no doubt because, whatever the position as a matter simply of interpretation of the contract, the Act & Scheme had that effect. In these circumstances it is clear, in my view, that the defender has not complied with s111 & that, as regard this aspect of the case, no question for arbitral decision truly arises.

[16] I would add that I have serious doubts whether the letter of 17 August was, in any event, in its terms apt as a notice of intention to withhold payment. While it identifies certain sums which the writer contends should "be accounted for prior to any balancing payment being made" and identifies the bases for so doing, it is in effect an offer to compromise in a restricted sum. It in no way unequivocally states that, in the event of a further application for payment being made by the pursuers, the defender will withhold payment to the extent and on the bases referred to in that letter. However, as this matter was not fully argued, I place no reliance on it for the purposes of this disposal.

[17] I have proceeded on the basis (conceded by Mr Ross) that a question of interpretation & application to the circumstances of the 1996 Act could give rise to a "dispute or difference as to the construction of this Contract or any matter or thing of whatsoever nature arising thereunder or in connection therewith" (or the similar wording in cl 39). I am not, however, to be taken as accepting that that concession was correctly made.

[18] For the reasons given I shall repel the defender's first plea-in-law (which seeks a sist for arbitration). Mr Ross further moved me, in the event of my doing so, to sustain the pursuers' second plea (a general plea to the relevancy of the defences) and to grant decree *de plano*. However, the hearing was appointed only on the plea relative to arbitration. It would be inappropriate to accede to Mr Ross's further motion without first giving to Mr d'Inverno an opportunity to consider the defender's position in light of my decision on the arbitration point.

Pursuers: Ross; Maclay Murray & Spens
Defender: d'Inverno; Ketchen & Stevens, W.S.