

OPINION OF LORD CARLOWAY : Outer House Court of Session : 5th August 2003

[1] This petition follows on from the events of *Construction Centre Group v Highland Council* 2003 SLT 623 when, on 11 April 2003, an Extra Division, of which I chanced to form part, refused a reclaiming motion from an interlocutor of the Lord Ordinary (Macfadyen) dated 23 August 2002 (2002 SLT 1274) granting summary decree in favour of the respondents against the petitioners for payment of £245,469.24 conform to a decision of an adjudicator dated 28 June 2002 in respect of a construction contract relating to the Small Isles and Inverie Ferry Scheme. The interlocutor was not appealed and in due course it was extracted. It might have been thought that the petitioners, a public authority, would then have paid it to the respondents, now in receivership. They did not and have not.

[2] Meantime, the petitioners referred the question of liquidate damages in respect of delays to the contract works to an adjudicator, the engineer having granted extensions only to 14 December 2001 and the petitioners eventually expelling the respondents from the works on 14 October 2002. In terms of the contract, the petitioners claimed a figure of £2,100 per day for this 304 day period, a total of £638,400. In the Notice of Adjudication (lodged at the bar by the respondents) served by the petitioners, however, the petitioners made specific reference to certain sums they had withheld. These were £3,250, £29,375 and the very £245,469.24 which they had been ordered to pay over to the respondents by the Court. The Notice stated : *"Accordingly the amount due to the [petitioners] from the [respondents] after taking into account the sums withheld is £360,305.76."*

However, in detailing the orders sought, the petitioners restricted themselves to an order that the respondents were *"liable to pay"* to the petitioners the full £638,400 *"forthwith"*. There was no specification of the amount they sought by way of payment. In the Notice of Referral (No 6/3 of process) of the petitioners, reference was again made to the claim for the full amount and to the sums retained by the petitioners *"in respect of liquidated damages"*. The Notice then stated : *"The [petitioners] now seeks determination of entitlement to liquidate and ascertained damages in order to apply those withheld sums to the debts due."*

The relief sought was more or less the same as in the Notice. It is of significance that, whereas in both of these documents the petitioners refer to the sums withheld, and a balance due, nowhere is it disclosed that the Court had already determined that the sum of £245,469.24 was, in effect, unlawfully withheld and ought to have been paid over.

[3] The respondents' submission to the adjudicator (Pro. 6/4) did make reference to the Court proceedings and made clear that their position was that the petitioners were using the adjudication as a means of continuing to withhold the sum ordered to be paid by the Court (see para 1.4). However, in the course of this document the respondents presented an argument which ran as follows:

*"3.3 Furthermore...[the petitioners] admits...that sums to the total of £278,094.24 have been withheld by it in respect of its purported entitlement to liquidated and ascertained damages. [The petitioners] also asserts that its entitlement to liquidated damages amounts to the sum of £638,400...Accordingly, even on the basis of its own argument, [the petitioners are] entitled to payment forthwith (as is sought...) by [the respondents] of £360,305.76 (being the balance).*

*As [the petitioners have] not invited...the Adjudicator to order payment by [the respondents] of any lesser sum than £638,400, the Adjudicator has no jurisdiction to make such an award. Accordingly, on this basis alone and notwithstanding the arguments set out above, [the petitioners are] not entitled to the redress sought..."*

In fact the petitioners, whether by accident or design, had not actually stipulated the amount they wanted an order for payment for (as distinct from a finding of liability to pay a particular sum).

[4] In the result, what the Adjudicator did in his decision dated 2 July 2003 (Pro 6/1) was find in the petitioners' favour so far as the liquidate damages were concerned and found the petitioners entitled to the full £638,400. For reasons not immediately clear from his written decision he then found the respondents "liable to pay" only £360,305.76, being the balance figure after deduction of the withheld amounts as set out in the original notice by the petitioners and by the Adjudicator in an appendix. The petitioners have apparently raised a commercial cause for payment of the restricted sum and, no doubt, plan to obtain a summary decree in terms of the Adjudicator's order.

[5] When the case called before me in the Vacation Court, it was upon the petitioners' petition to suspend a charge (Pro 6/2) for the £265,469.24 and interest etc. served by the respondents upon the petitioners on 21 July 2003 and their motion for orders for service. The manner in which the case is set out in the petition is that the Adjudicator, in his decision, *"applied"* the total sum of liquidate damages *"so as to extinguish"*

the debt of £265,469.24. The manner in which the argument developed on the motion roll was a subtle and ingenious variation of that theme. It was accepted that compensation or set off require to be pled before decree and that compensation and retention cannot be pled as a ground for suspending diligence on a decree. It was said that the petitioners had not urged any compensation or set off in the reference to the Adjudicator. However, it was submitted that what had happened here was the equivalent of payment by the petitioners of the debt because the respondents had directed the Adjudicator to act as he did by their argument in paragraph 3.3 of their submissions. By so doing they had conceded that any award against them could be set off against the sum due to them under the decree, thus accepting any such award as payment of the debt, as any creditor is entitled to do. A creditor, it was said (no doubt correctly) can accept a red rose in satisfaction of his debt and in this case the respondents had accepted that any award which the Adjudicator made could be used as payment in this way. At least, it was said, the petitioners had set forth a *prima facie* case on this ground. The balance of convenience favoured the petitioners since, the respondents being in receivership, if any money was paid over to them, it would be likely to fall into a black hole and it was unlikely that it could ever be recovered. By allowing the diligence to proceed, the respondents' debt would, in effect, be satisfied twice, once by payment and twice by the Adjudicator's reduction of the liquidate damages. There was an inherent justice in suspending the diligence as this would allow both parties' claims arising out of the same contract to be set off against each other.

- [6] The respondents maintained that their argument in paragraph 3.3 had been taken out of context and had not meant that the respondents were conceding that any award made could be taken as extinguishing the amount in the decree. What was being said in the argument was that under the adjudication procedure, an adjudicator was not entitled to award less than the sum demanded. Thus, it was said, since the petitioners had accepted that they were withholding sums which would be set off against the principal sum requested, even on the petitioners' own argument the Adjudicator could not award that sum and the reference must fail. The respondents also maintained that the balance of convenience favoured them since they had been waiting over a year to be paid the sum which the Adjudicator had found them to be due and, after all, the adjudication process, as the Court had previously found, was supposed to result in swift payment of sums due but disputed so as to assist the cash flow of contractors otherwise at the mercy of unscrupulous employers.
- [7] I do not consider that the petitioners have made out a *prima facie* case. The respondents hold a court decree for payment of a sum. Unless a creditor discharges the debt in some manner, that decree can only be satisfied by payment of the sum. The petitioners cannot plead compensation or set off by virtue of another sum due under a decree in their favour or otherwise claimed by them. It is true that a creditor can discharge a debt due under a decree by accepting a lesser payment or no payment at all but before diligence could be suspended upon a lawfully extracted decree, there would have to be a *prima facie* case that such an acceptance or discharge had occurred. The phraseology adopted by the respondents in presenting their argument was perhaps a little unwise but, given the context in which it appeared, it is tolerably clear that the argument was being presented in the context of a submission that no award could be made by the adjudicator since, upon the petitioners' argument as presented in their papers, the whole sum which they claimed was not due. It could not be taken as expressing, or even implying, that the respondents were surrendering their right to payment under their decree in the event of a decision going in favour of the petitioners. Since I do not consider that there is a *prima facie* case of discharge or satisfaction of the decree, I will refuse the motion for interim suspension. I should add that although it is true that this may result in the funds being lost forever to the petitioners, I would still have tended to the view that the balance of convenience, and certainly the equities, favoured the respondents. The whole process of adjudication procedure is to secure quick payment. The petitioners have been withholding the sum in the decree from the respondents for over a year and indeed for some months since the Inner House of the Court ordered it to be paid over. The Court is bound to be less than impressed with a public authority failing to respond with reasonable expedition to the Court's determinations on matters on law governing its relations with private contractors.