OPINION OF LORD JOHNSTON OUTER HOUSE, COURT OF SESSION **:** 21st September 2001

[1] The matter arises out of a contract entered into between the petitioners and the respondents in relation to sub-contract work with regard to the formation of certain rock embankments and associated works at Loth and Rapness.

[2] The contract was subject to an arbitration clause the terms of which were not in dispute before me.

[3] The petition goes on to narrate that a dispute having arisen between the parties with regard to the retention by the employer of liquidated damages by reason of alleged delays of a sub-contract by the respondents, on 24 January 1996 the respondents purported to issue a preliminary notice of arbitration. No arbitration proceedings were instituted and a further notice was issued on 16 January 2001. The notices were in identical terms.

[4] The petitioners present this petition in order to obtain an *interim* interdict against the respondents proceeding with the arbitration in respect of either notice, in particular in relation to the appointment of an arbiter.

[5] Mr McKenzie, Solicitor Advocate appearing for the petitioners, submitted certain basic propositions.

[6] Firstly, there was no dispute now capable of resolution by an arbiter having regard to the fact that a period of more than five years had arisen from the date of any loss, the relevant date being 15 March 1992 or at worst for him, 15 March 1994 when the engineer's certificate relevant to the matter was issued; secondly, for there to be a relevant and competent submission to an arbiter there required to be a dispute within the meaning of the arbitration clause in the contract (Clause 18), thirdly, that there was no current dispute between the parties capable of being litigated by reason of the operation of prescription. Fourthly, there had been no interruption of the prescriptive period in terms of relevant legislation and finally as a matter of general law the Court had the jurisdiction to interfere in the context of arbitration if the issue presented to the Court was relevant and competent for its consideration.

[7] Mr McKenzie, under reference to the Prescription and Limitation Act (Scotland) 1973, Section 6, ("the Act") pointed simply to the time limit imposed by Section 6 in relation to a claim to which it applied as this one did and thereafter to the relevant dates and the subsequent passage of time in this case thereby demonstrating beyond peradventure that more than five years had now expired from whichever date applied. Accordingly the claim was extinguished as was indeed, he submitted, the right to go to arbitration in itself which was also a matter competently governed by Section 6.

[8] On the question for there to need to be a dispute before there could be any arbitration Mr McKenzie referred me to *Davidson on Arbitration*, paragraph 7.17 and the cases referred to therein. Perhaps the high point of his position was a quotation from Lord President Clyde in ***Woods* v *Co-Operative Insurance Society Limited*** 1924 S.C. 692 at p.698 where his Lordship says: *"There must, in short, be a real question and it must be of the kind which the contract between the parties appropriate to the determination of the arbiter."*

Reference was also made to ***Douglas Milne Limited* v *Borders Regional Council*** 1990 S.L.T. 558.

[9] Thus far Mr McKenzie's position was clear and seemingly powerful but he accepted that the issue before me essentially turned on the question of whether or not there had been a relevant interruption against the running of prescription effected by the service of initially the preliminary notice of arbitration in 1996 and peripherally by the re-issue of the notice in 2001.

[10] The Act having determined that interruption can be effected by a relevant claim defines that matter in relation to arbitration particularly under reference to Section 9(3) which is in the following terms: *"Where a claim which, in accordance with the foregoing provisions of this section is a relevant claim for the purposes of Sections 6 ... is made in arbitration and the nature of the claim has been stated in a preliminary notice relating to that arbitration, the date when the notice was served shall be taken for those purposes to be the date of the making of the claim."*

[11] Mr McKenzie's position in this respect was that the effect of Section 9(3) when considered against Section 4 was, assuming that the relevant preliminary notice was competently framed and contained a

statement of claim, nevertheless, while being the date eventually upon which the interruption of prescription would be effected as being the date of the relevant claim, there required to be an arbitration process in place with a claim made in it before total interruption could occur. The service of the notice was only conditional, which condition was to be purified in an arbitration process timeously brought. He referred in this respect to ***John O'Connor (Plant Hire) Limited* v *Keir Construction Limited*** 1990 S.C.L.R. 761 and *R. Peter & Co Limited* v *The Pancake Place Limited* 1993 S.L.T. 322. He accordingly submitted in the present case that there could be no question of there having been ever proper interruption in the sense of a relevant claim having been made because there never had to this date been commenced a proper arbitration process with an arbiter appointed and a claim made in it, there merely being two preliminary notices in existence. In these circumstances he submitted that there was no dispute between the parties, against the general background of the cases on the issue of prescription that he had already considered, which would permit an arbitration to take place on a competent basis. Reference was also made to Professor Johnston's book on arbitration.

[12] No attempt was made by Mr Connell, appearing for the respondents to suggest the Court did not have a general jurisdiction to regulate matters which were *prima facie* subject to an arbitration clause provided they did so against the background of recognising that the primacy of that clause in relation to the resolution of relevant disputes. If any authority was needed for that proposition it could be found in ***Hamlyn* v *Talisker & Co*** 1894 21R. at 23-25.

[13] However Mr Connell's position was to the effect that so long as there was a dispute as to whether or not the claim in this case had prescribed, that was a dispute which fell to be determined by the arbiter within the terms of the arbitration clause. He derived some support from this position in the context of the chapter in Stair's Encyclopaedia drafted by the now Lord Hope of Craighead on the whole question of arbitration and also on certain English cases which were referred to in the passage referred to me by Mr McKenzie in ***Davidson.*** He submitted that while the certain passages in the cases relied upon by Mr McKenzie would support his so-called double headed approach which would mean that a preliminary notice of arbitration achieved no more than a conditional interruption, he maintained that there was still an issue to try on that whole question and that accordingly a relevant dispute existed, it not being disputed that the claim being made was one embraced by the arbitration clause in substance. While he recognised that it was not particularly helpful to look at the English position because of the intervention of statute, he did refer to ***Halki Shipping Corporation* v *Sopex Oils Limited*** 1998 A.E.R. 23 per Lord Justice Henry at page 41.

[14] Before seeking to resolve this particular matter it is important in my opinion to place the position of the Court in relation to contracts containing arbitration clauses in its proper context. There is no doubt that the law does not oust the jurisdiction of the Court in general terms from consideration of contracts containing arbitration clauses but equally where the claim or dispute in question falls firmly within the terms of the arbitration clause it will only be in the most exceptional cases that the Court will interfere to prevent the matter being resolved by arbitration. The corollary to this that while it is recognised that before there can be an arbitration there must be a dispute, the Court, in being asked to determine whether such exists, should give a very broad interpretation to the word "dispute" in the sense that, looking at the authorities, such as they are, if the issue is not one of the jurisdiction of the arbiter in relation to the terms of the clause, properly it is whether or not there exists a dispute in relation to a claim which otherwise falls within the scope of the arbitration clause. The jurisdiction of the arbiter should only be ousted by the Court if there is no basis upon which a two-sided dispute can be identified. It follows that it matters not whether or not the Court considers that one side's position may be much stronger than the other.

[15] It is also important to note that it would appear at least from ***Douglas Milne*** *(supra.)* that issues of prescription have been considered by an arbiter, that case being an appeal by way of stated case. It is also important to recognise that in *O'Connor (supra.)* Lord Cameron of Lochbroom was dealing with a question of whether or not a claim for damages had prescribed against the context of the effect of a preliminary notice to arbitration in relation to the relevant matter.

[16] In these circumstances I consider that properly what I am being asked to determine is whether there is in fact any dispute existing in this case which is competently capable of being resolved by the arbiter and I do so against a self imposed test that I am required to be satisfied that there is only one resolution of the "dispute" that is tenable before rejecting the role of the arbiter. In other words, to achieve the opposite result would be properly categorised as perverse.

[17] In these circumstances I need not resolve the issue as to the effect of a preliminary notice in relation to an arbitration where no arbitration thereafter follows in the context of relevant claim and interruption under the Act so long as I am satisfied that there are two sides to the issue. Mr Connell accepted that the cases relied upon by Mr McKenzie were not necessarily helpful to him on the interruption issue but equally submitted that there was no authority or a decision on the point which appears to have been avoided by academic writers. I also note that in the passages referred to me in Stair's New Encyclopaedia even issues of *ultra vires* were still allowed to be determined by the arbiter rather than by the Court. I may say that this seems to me to be consistent to the overall determination of the Court to maintain the integrity of an arbitration process if such has been agreed to by the parties in advance, as is the case here.

[18] In these circumstances I am satisfied that in general terms a prescription issue is capable of being determined by an arbiter in response to a claim which is otherwise competently before him. I do not consider it to be in a special position. If therefore there is perceived to be a dispute as to whether or not this particular claim has been extinguished by prescription that seems to me to fall within the jurisdiction of the arbiter however strong or otherwise the position of the petitioners may be on that point. On the test I have suggested, I consider such dispute exists for resolution by the arbiter.

[19] For these reasons it seems to me inappropriate for the Court to interfere notwithstanding that if, at the end of the day, the petitioners' position on prescription is correct, unnecessary expense may have been incurred. That seems to me to be the consequence of the existence of the arbitration clause and in any event in that result the petitioners ought to have the protection of expenses. I would hope that the issue of prescription could be dealt with as a preliminary question before great expense is incurred.

[20] Both parties made submissions to me on the issue of *prima facie* case and balance of convenience but in this rather unusual situation I consider neither is operative so long as there is the dispute which is identifiable rationally on both sides of the question. Putting it colloquially, if there is an issue to determine upon the issue of the claim that seems to me to be a matter for the arbiter as a matter of law rather than any question of equity.

[21] In these circumstances I will not grant *interim* interdict but simply refuse the motion *in hoc statu* lest either side decides to take the matter forward whether by answers or adjustment or both.

Petitioners: Mackenzie, Solicitor Advocate; Masons
Respondents: Connell, Solicitor Advocate; McGrigor Donald