JUDGMENT OF SHERIFF A.L. STEWART, Q.C. DUNDEE. 7 July, 2000

The sheriff, having resumed consideration of the cause ALLOWS the amended closed record, no. 16 of process to be opened up and amended in terms of (1) the minute of amendment as adjusted for the first defender, no. 23 of process under deletion of paragraph 3 of said minute and (2) the minute of amendment as adjusted for the second and third defenders, no. 19 of process under deletion of that part of paragraph 3 of the minute of amendment which seeks to add a new plea-in-law 4; RESERVES meantime all questions of expenses arising out of the debate of 9 February 2000 and of the amendment procedure; APPOINTS the case to the procedure roll of July 2000 for parties to be heard thereon and on further procedure; *ex proprio motu* GRANTS LEAVE to any party to appeal against this interlocutor.

NOTE : INTRODUCTION : This is an action in which the pursuers, who are building contractors, sue the defenders for payment of the sum of £27,297.38 allegedly due in terms of a contract entered into between them in 1995. Defences were lodged separately on behalf of the first defender on the one hand and of the second and third defenders on the other. The defences for the second and third defender were timeously lodged but those for the first defender were late. However, that is of no materiality. What is perhaps worthy of note is that neither set of defences, as originally lodged, contained a plea-in-law seeking that the cause should be sisted for arbitration.

PROCEDURAL HISTORY OF THE CASE

1. The options hearing was fixed for 22 April 1999. The pursuers lodged a record of the pleadings on 15 April. In this record the first defender did not have any plea directed at the question of arbitration nor indeed any other preliminary plea. However, the second and third defenders had a plea to the effect that the action should be sisted pending arbitration as well as general plea to the relevancy of the pursuers' averments. The pursuers had no preliminary pleas. On 22 April the options hearing was continued until 20 May. The second and third defenders had lodged no note in terms of rule 22.1(1) but the interlocutor of 22 April took no account of this fact and did not, as would have been appropriate, repel the preliminary pleas for these defenders for want of insistence. On 12 May the pursuers lodged a record for the continued options hearing. This record contained the same preliminary pleas for the second and third defenders as had the record lodged on 15 April. It contained also on behalf of the pursuers a general plea to the relevancy of the defences, seeking decree *de plano*. On 12 May the pursuers also lodged a note in terms of rule 22.1 of the Ordinary Cause Rules. The record of 12 May contained no preliminary plea for the first defender.

2. The case called on 20 May for the continued options hearing. There was still no rule 22 note for the second and third defenders. The interlocutor of 20 May states (clearly in error) "The sheriff *ex proprio motu* repels the pleas-in-law for the second and third defenders ...". What was obviously intended was that the *preliminary* pleas for these defenders (i.e. their first and second pleas-in-law) should be repelled because no note in terms of rule 22.1 had been lodged. The interlocutor goes on to appoint parties to be heard in debate "on the pursuers' preliminary pleas" (*sic* although the pursuer had at that stage only one preliminary plea) on 25 August 1999. A motion on behalf of the pursuers for summary decree was continued until 3 June. On that date the sheriff *ex proprio motu* continued consideration of the motion for summary decree until the debate of 25 August.

3. On 25 August the sheriff on pursuers' motion, and of consent, discharged the diet of debate and allowed the first defender to lodge a minute of amendment within fourteen days. The pursuers' motion for summary decree was allowed to drop from the roll. On 9 September the time for the first defender to lodge his minute of amendment was prorogated by a further thirteen days. The minute was eventually lodged on 22 September. It contained *inter alia* a plea-in-law seeking to have the action sisted pending arbitration. However, the first defender did not lodge along with his minute of amendment any note in terms of rule 18.8(1) of the Ordinary Cause Rules. On 23 September the pursuer and second and third defenders were given thirteen days within which to lodge answers, if so advised, to the first defenders' minute of amendment.

4. On 7 October the record was opened up and amended in terms of the first defenders' minute of amendment and answers for the pursuers, the second and third defenders having intimated that they did not wish to answer. The interlocutor of 7 October makes no reference to the first defenders' plea

relating to arbitration but simply sent that case to debate on 5 January 2000 as the pursuers were insisting on their first and second pleas-in-law. The pursuers had added a further preliminary plea by their answers to the first defender's minute of amendment and this plea as well as their existing first plea, was sent to debate notwithstanding the fact that the pursuer had lodged no note in terms of rule 18.8(1) in support of their new preliminary plea.

5. On 20 October on the pursuers' unopposed motion the diet of debate for 5 January was discharged and 9 February fixed as a new date therefor.

6. On the latter date the case called before me for debate, the pursuers being represented by Mr Murray, Solicitor, Dundee, the first defender by Mr Brown, Solicitor, Dundee and the second and third defenders by Mr Myles, Solicitor, Dundee. Mr Murray addressed me at length in support of his first plea-in-law. Mr Brown addressed me relatively briefly and, it is fair to say, with limited enthusiasm submitting that there was just sufficient in the first defender's pleadings to allow the matter to proceed to proof before answer. Mr Brown did not address me at all on his plea seeking a sist for arbitration. Mr Myles addressed me first on the question of arbitration. When I indicated that, in my opinion, he could not competently do so as his plea-in-law on that matter had been repelled he did not press the matter. After addressing me further in response to Mr Murray's submissions, he conceded that he would require to seek to amend and moved me to give him the opportunity to do so. Having heard Mr Murray, who vigorously opposed this motion I granted it to the extent of allowing Mr Myles (and Mr Brown who then associated himself with Mr Myles's motion) to lodge minutes of amendment. I did so on the basis that the terms of these minutes would be considered before I should decide whether or not to allow amendment.

7. After sundry procedure the case called before me on 4 July 2000. Both sets of defenders had lodged minutes of amendment. Both minutes contained pleas seeking to sist the action pending arbitration. Both sets of defenders had lodged notes in terms of rule 18.8(1). Counsel for the second and third defenders moved me to allow amendment in terms of his minute. Mr Brown adopted counsel's submissions in moving me also to allow amendment in terms of his minute. For the pursuers Mr Murray did not oppose amendment except in terms of those parts of both minutes which sought to have the case sisted for arbitration. This is the matter which was then debated before me and with which this note is concerned.

8. I should say before proceeding any further that, until I came to write this note and went through the interlocutors with some care, I was unaware of two matters which may be of no great importance but about which I should have preferred to be addressed accurately by those appearing before me. The first and less serious of these is that the arbitration plea for the second and third defenders was not repelled until the *continued* options hearing. The second and more serious matter is that the first defender put forward his plea seeking a sist for arbitration only in his minute of amendment of 22 September 1999, and that there was in fact no interlocutor specifically repelling this plea. Those appearing for all parties addressed me, as I understood them, on the basis that the arbitration pleas for both sets of defenders had been part of the pleadings at the original options hearing and had there been disposed of. It is a matter for regret that I was not given correct information. However, I do not think that this omission affects the matter of principle which, in my opinion, I have to decide. In particular, the fact that there is no interlocutor specifically repelling the first defender's plea is immaterial standing the decision of the sheriff principal in *Bell v John Davidson (Pipes) Ltd* (Sh. Ct) 1995 S.C.L.R. 192 (Notes), a case which is not binding on me but with which I respectfully concur.

RELEVANT ORDINARY CAUSE RULES

9. Although, because of the misapprehension referred to above, I was referred only to rules 22.1(1) and (3), I should for the sake of completeness rehearse the terms of all the rules which are in fact relevant to the present discussion.

10. Ordinary Cause Rule 18.8 provides *inter alia*:-

(1) Where a party seeks to add a preliminary plea by amendment or answers to an amendment ... a note of the basis for the plea shall be lodged at the same time as the minute [or] answers.

(2) If a party fails to comply with paragraph (1), the party shall be deemed to be no longer insisting on the preliminary plea and the plea shall be repelled by the sheriff.

11. Ordinary Cause Rule 22.1 provides *inter alia*:-
(1) A party intending to insist on a preliminary plea shall not later than 3 days before the Options Hearing...
(a) lodge in process a note of the basis of the plea ...
(2) Where the Options hearing is continued ... and a preliminary plea is added by adjustment, a party intending to insist on that plea shall, not later than 3 days before the date of the Options Hearing so continued -
(a) lodge in process a note of the basis for the plea ...
(3) If a party fails to comply with paragraph (1) ... he shall be deemed to be no longer insisting on the preliminary plea; and the plea shall be repelled by the sheriff at the Options Hearing ...

SUBMISSIONS ON BEHALF OF PURSUERS

12. Mr Murray submitted that a plea seeking a sist for arbitration was indubitably a preliminary plea and was therefore subject to the terms of rule 22.1: *Dinardo Partnership v Thomas Tait & Sons* (Sh. Ct) 1995 S.C.L.R. 941. There had been no rule 22 note lodged prior to the Options Hearing (in fact, the continued Options Hearing) in the present case. The preliminary plea was therefore deemed not to be insisted on and had been repelled.

13. A plea which had been deemed not to be insisted on could not thereafter be argued: ***Bell v John Davidson (Pipes) Ltd,*** *cit. supra*.

14. Under reference to an article entitled "The Options Roll Revisited" by Sheriff A.G. Johnston (1995 Civ.P.B.6-5) Mr Murray submitted that once a preliminary plea had been repelled it could not be reinstated by amendment unless it related to new matter introduced by the amendment procedure. Although there had been amendment procedure in the present case the arbitration pleas for both sets of defenders did not truly relate to new matters; they simply sought to reinstate pleas which had been in the earlier pleadings but which had been repelled.

15. Mr Murray referred me to four cases dealing with the question of the stage of proceedings at which an arbitration plea could be introduced: ***Halliburton Manufacturing and Service Ltd v Bingham Blades & Partners*** 1984 S.L.T. 389; ***Stanley Howard (Construction) Ltd v Davis*** 1988 S.L.T. (Sh. Ct) 31; ***Presslie v Cochrane McGregor Group Ltd*** 1996 S.L.T. 989; and *Wylie v Corrigan* (I.H.) 1999 S.C.L.R. 177. He submitted that the general rule was that a plea seeking a sist for arbitration must be stated *in limine*, which meant prior to the closing of the record. However, he conceded that in ***Wylie*** Lord Coulsfield, giving the opinion of the court at p. 181D-E had stated: *"... the question whether the right to insist on arbitration has been abandoned or waived is one which depends on the whole circumstances of the case, and ... there is no absolute rule that the right is lost, even by a failure to state the plea before the record is closed."*

16. In this case the defenders had had their chance to insist on the arbitration plea but they had lost it. It was immaterial that the pleas had been repelled by operation of rule 22.1(3) rather than by being repelled after debate. The amendments should be allowed under deletion of the arbitration pleas.

SUBMISSIONS ON BEHALF OF SECOND AND THIRD DEFENDERS

17. Counsel submitted that the pursuers' objection to the reinstatement of the arbitration plea was entirely technical, being based solely on a requirement of the Ordinary Cause Rules. He submitted that the article by Sheriff Johnston to which Mr Murray had referred did not help matters. The present situation was not that envisaged in the article but a hybrid one. The minute of amendment which sought to reintroduce the arbitration plea contained new matter as some of the averments therein referred to the arbitration provisions of the contract between the parties in greater detail than in the original pleadings.

18. Counsel referred me to ***Inverclyde (Mearns) Housing Society Ltd v Lawrence Construction Co. Ltd*** 1989 S.L.T. 816, especially at 821 where the Lord Ordinary (McCluskey) stated: *"The approach to be adopted by the court in a case where, as here, there is no express waiver by a contracting party of his right to go to arbitration, is to consider all the facts, whether they be established in evidence, admitted for the purposes of the*

discussion or instantly ascertainable by the court by reference to those court documents which contain the history of the litigation. In the light of that consideration of the facts the court must consider whether the actings (including failure to act) of a party must be construed as being inconsistent with an intention to insist upon his contractual right to go to arbitration. I agree ... that, although there might in certain cases be particular actings which of themselves were decisively inconsistent with any intention to continue to exercise the waivable right, the proper course in the absence of any such decisive acting, is to look at the whole actings."

19. Correspondence passing between the parties' solicitors before the action was raised had made it clear that the defenders wished to have the matter referred to arbitration. Arbitration was a contractual right. The actings of the defenders in the present case did not suggest that they had waived their contractual right to go to arbitration. ***Wylie v Corrigan***, *cit. supra* supported the defenders' position rather than that of the pursuers. The question of arbitration had been raised by the defenders' solicitor at the debate in February 2000. The original arbitration plea had not been supported by a rule 22 note and had hence been repealed but this was through inadvertence and had not been done deliberately.

SUBMISSION ON BEHALF OF FIRST DEFENDER

20. Mr Brown adopted the submissions of counsel. In the case of the first defender too the original preliminary plea had been lost as the result of inadvertence.

21. Arbitration was stated in the contract as being the method of resolving any dispute between the parties. The right to go to arbitration was a contractual right. It had been a live issue both in correspondence between the parties and in the pleadings. The absence of a rule 22 note should not be taken as a waiver of the right. The comments of Sheriff Johnston in the article referred to might be appropriate to a preliminary plea such as a general plea to the relevancy but not to a plea seeking to sist for arbitration.

FURTHER SUBMISSION ON BEHALF OF PURSUERS

22. Mr Murray's initial response to the defenders' submissions was to point out that the current Ordinary Cause Rules had been formulated with the intention of enabling litigation to be conducted expeditiously and according to justice. It was therefore important that the rules seeking to achieve these ends should be strictly observed. The terms of rule 22.1(3) were mandatory. The sheriff had had to repel the defenders' preliminary pleas. Once a plea had been repelled it could not then be argued: ***Bell v John Davidson (Pipes) Ltd*** (Sh. Ct) *cit. supra* at 194D-E. There was no reason why a preliminary plea relating to arbitration should be treated differently from any other preliminary plea.

23. It was accepted that there had in this case been a contractual right to proceed to arbitration in the event of a dispute covered by the arbitration clause, but this right could be waived. If the preliminary plea were not insisted on that in itself could amount to a waiver, or it could be considered as an act inconsistent with the desire to go to arbitration.

24. There had never, at any stage of the case, been a motion to sist for arbitration, even though both sets of defender had had a plea to that effect.

25. It must have been realised that the lack of a rule 22 note would result in the plea being repelled but there had been no motion to invoke the dispensing power in terms of rule 2 to allow a note to be lodged late. The defenders' actings were not consistent with a desire to proceed to arbitration.

OPINION

26. It is to be noted that none of the authorities to which I was referred deals directly with the subject of reinstating by amendment a preliminary plea seeking a sist for arbitration which has previously been repelled. Nor of course does any of them deal with the situation where that plea has been repelled in terms of the Ordinary Cause Rules because of a failure to lodge the appropriate note. The point which I have to decide is therefore a novel one.

27. It is well established that a contractual right to go to arbitration can be waived. It now seems to be equally clearly established that the whole circumstances of a case should be looked at in order to ascertain whether the right to go to arbitration has in fact been waived by any party. In this connection I refer to the various cases cited to me but especially to the most recent case to which I was referred: ***Wylie v Corrigan***, *cit. supra*.

28. In the present case, contrary to the way in which arguments were presented to me, the position of the first defender on the one hand and that of the second and third defenders on the other are not identical. As the arbitration plea for the second and third defenders did appear in the pleadings prior to the closing of the record, they are in a stronger position than is the first defender. I propose therefore to analyse the situation from the point of view of these defenders first.

29. I begin with the assumption that, in the course of adjustment of these defenders' pleadings it was realised that the contract between the parties contained an arbitration clause and that those acting for these defenders decided, at that stage, that they did not wish to waive the right to proceed to arbitration. For that reason an arbitration plea was added. It was not suggested by counsel for the second and third defenders that their solicitor was not aware that an arbitration plea was a preliminary plea, and, in any event, the matter is, in my opinion, put beyond doubt by the decision of Sheriff Principal Risk in ***Dinardo Partnership v Thomas Tait & Sons***, *cit supra*, which was not challenged in the present case. The only explanation given for the failure to lodge a rule 22 note prior to the options hearing was inadvertence. I accept that this may well have been the case. What is, however, in my opinion, of considerable significance is that, a *continuation* of the options hearing having been granted, the solicitors for the second and third defenders *still* made no attempt to lodge a note.

30. It is not uncommon in the sheriff court at a continued options hearing for such a note to be tendered even though, according to the letter of the rules, it should have been lodged in advance of the original options hearing. In such a situation the late tendering of the note is almost never opposed by any other party and the sheriff will consider it on its merits as if it had been timeously presented.

31. The interlocutor pronounced following the continued options hearing (albeit it was erroneous as purporting to repel *all* the pleas-in-law for the second and third defenders) should surely have set the warning bells ringing in the ears of those advising these defenders. It might still, possibly, have been open to them to lodge a motion to have a rule 22 note received late in exercise of the dispensing power. If this avenue were not open to them, they could have attempted to appeal to the sheriff principal on the matter (*cf* ***Colvin v Montgomery Preservations Ltd*** (Sh. Ct) 1995 S.C.L.R. 40). In fact nothing was done. The case was simply allowed to drift along until the debate before me some nine months after the record had been closed. Only at that stage was it tentatively suggested that the question of arbitration was still a live issue.

32. In my opinion, the inactivity on the part of the second and third defenders must, viewed objectively, be taken as meaning that they were to be presumed to have waived their right to proceed to arbitration. A point which was not touched on in the course of the submissions to me on the matter, but which is, I think, of some importance, is the effect which the defenders' lack of action was likely to have on the pursuers. The latter were, of course, aware that the question of arbitration had been raised in correspondence prior to the raising of the action. They were aware that these defenders had had a preliminary plea directed to the question. They were surely entitled to assume that, in the light of nothing happening between May 1999 and February 2000, these defenders were no longer interested in arbitration.

33. On that broad basis, I am of opinion that, the preliminary plea directed at arbitration having been repelled, these defenders are not entitled to reinstate it as they must be presumed to have departed from their contractual right to go to arbitration.

34. However, I am also of opinion that on the narrower and more technical pleading point the pursuers are entitled to succeed. I respectfully concur with the thrust of the view expressed by Sheriff Johnston in the article at 1995 Civ.P.B.6-5 to which I was directed by Mr Murray. What he says is this:- *"...what actually happens to a preliminary plea when it is repelled? Is it repelled in* ***hoc statu****, being capable of being resuscitated later on if a note is lodged? Where does it place a party who in the course of amendment makes averments which another party may wish to debate? Strictly speaking, if the preliminary pleas are repelled they should take no further part in the proceedings and will effectively be lost from the pleadings.* ***But it seems open to a party on amendment to put fresh preliminary pleas on record provided these pleas are directed towards the amendments and not the original averments.***" (emphasis added)

35. The purpose of rules 22.1(1) [or (2)] and (3) is to ensure that parties apply their minds to the question whether a preliminary plea is to be insisted on at the time when the record is closed. This is part and parcel of the philosophy of the Ordinary Cause Rules which requires the expeditious disposal of litigation. If a preliminary plea has been repelled at the options hearing, whether because there is no rule 22 note, or because the party concerned indicates that he is not insisting on it, or because it has been repelled by the sheriff and proof allowed because the sheriff is not *"satisfied that there is a preliminary matter of law which justifies a debate"* (rule 9.12(3)(c)), it would, in my opinion, be quite unjust to permit that party to reinstate his preliminary plea by amendment unless the other party had first by *his* amendment introduced new material which justified the preliminary plea of new. If this were not the principle to be applied, where would be the end of reinstated preliminary pleas? At least in theory it would be in the infinite.

36. I see no reason why the principle which I have endeavoured to enunciate in the preceding paragraph should not apply equally to all preliminary pleas, including those seeking to refer a dispute to arbitration. Indeed it may be argued that the reason for applying the principle to such a plea is even stronger than in the case of other pleas. If a case is sent to arbitration, it is highly probable that the ultimate resolution of the dispute will lie further in the future than if the action is allowed to proceed as an ordinary cause. It is therefore all the more important, in the interests of the speedy achievement of justice, that a party who wishes to send a case to arbitration should not be permitted to let his opportunity of doing so fall by the wayside only to seek to grasp it again some time later.

37. For all these reasons I am not prepared to allow the plea-in-law for the second and third defenders seeking a remit to arbitration to be reinstated.

38. What I have said about the second and third defenders applies *a fortiori* to the first defender. In his case the arbitration plea was inserted only after the record had been closed. The minute of amendment in which it first appeared was not supported by a rule 18 note. Whether this was the result of inadvertence or for some other reason, an objective observer could do little else but conclude that the first defender did not wish to insist on arbitration and had waived his contractual right to do so.

39. On the more narrow, technical pleading point my comments on the consequences of a failure to lodge a rule 22 note apply equally to a failure to lodge a rule 18 note, and I shall say nothing further on that matter.

40. Amendment of the record in terms of that part of the first defender's minute of amendment seeking to reinstate the arbitration plea is therefore refused.

EXPENSES

41. I was asked to reserve all questions of expenses arising from the debate before me in February and the amendment procedure, and this I have done. However, counsel moved me to certify the cause (or was it only the hearing, I am not quite clear?) as suitable for the employment of junior counsel. I have reserved a decision on this matter also. All outstanding matters in the case, including future procedure, will be discussed at the date stated in the interlocutor.

LEAVE TO APPEAL

42. Because parties did not know what my decision was going to be on the amendment relating to the arbitration pleas-in-law no motion for leave to appeal was made. However, as it is clear that the point raised in the debate before me is a novel one as well as one of some importance, I have considered it appropriate *ex proprio motu* to grant leave to appeal against my interlocutor.

Act: Gregor Murray of Blackadder Reid Johnston incorporating Carltons, Solicitors, Dundee
Alt: Jack Brown of Jack Brown & Co., Solicitors, Dundee, for first defender
Lindhorst, Advocate; Muir, Myles, Laverty, Solicitors, Dundee for second and third defenders