

**JUDGMENT OF SHERIFF PRINCIPAL JAMES A TAYLOR, GLASGOW, 28<sup>th</sup> September 2007.**

The Sheriff Principal, having resumed consideration of the cause, Recalls the interlocutor of the learned Sheriff of 6 March 2007 in so far as it makes a finding and substitutes therefor "Finds that on a proper construction condition 4.24.1.1 of the SBCC Domestic Sub-Contract conditions Dom/C/Scot 1997 edition (August 1998 revision) does not operate as a bar to financial claims by the sub-contractor for payment in terms of the contract in circumstances where the sub-contractor has not within six months after practical completion of the sub-contract works sent to the contractor documents necessary for the purpose of completing the ascertained final contract sum such as to include that financial claim"; Recalls the interlocutor of 5 June 2007 in so far as it finds the pursuers' claim to be time barred; Recalls the interlocutor of 5 June 2007 in so far as it grants decree of absolvitor and finds the pursuers liable to the defenders in the expenses of the action; Finds the defenders liable to the pursuers in the expenses of the debate on 29 January 2007 and the appeal proceedings; Remits the case to the commercial roll and Allows a case management conference to be assigned before the learned Sheriff to determine further procedure.

**NOTE:**

[1] The pursuers and appellants entered into a sub-contract with the defenders and respondents which was in the form of a Scottish Building Domestic Sub-Contract Dom/C/Scot. Before the learned Sheriff it was the May 2000 (June 2001 revision) which was said to govern the parties' relationship. The parties now acknowledge that the correct edition was the September 1997 edition with August 1998 revisions, this had always been the defenders' position. I mention this for the sake of completeness. Nothing turns on the point.

[2] The conditions of contract at clause 4.24.11 contain the following provision:-  
"Where Sub-Contract Dom/A/Scot clause 1.2 applies, not later than 6 months after practical completion of the Sub-Contract Works the Sub-Contractor shall send to the contractor all documents necessary for the purpose of computing the Ascertained Final Sub-Contract sum."

The issue which fell to be decided by the learned Sheriff was whether the clause provided a six month time bar in respect of any claim for payment being made by the sub-contractor against the contractor. The learned Sheriff came to the view that a claim could not be pursued after the six month period had expired. The defenders were assolvit from the craves of the Initial Writ. The pursuers appealed.

[3] Mr Sinclair, solicitor, appeared on behalf of the pursuers and Mr Stevenson, solicitor, on behalf of the defenders. I am grateful to both for their succinct submissions. Mr Sinclair's submissions were reduced to writing with a copy made available to myself and Mr Stevenson. Rather than repeat the submissions *ad longum* I attach them to this judgment. Mr Stevenson's position was that the existence of the word "shall" would have no effect if a strict time limit was not imposed by the clause. Indeed if one gave the condition a non-mandatory effect the condition was meaningless and there was no reason to have it in the contract. Whilst he acknowledged that in cases relating to rent review clauses in landlord and tenant disputes, clauses constructed in a manner similar to the condition in question in this case were not interpreted as providing a strict time bar. He submitted that the interpretation of such clauses should not be applied to construction law cases. When it was put to him that the clause might have effect to make the pursuer liable in damages to the defenders should the pursuers fail to provide the necessary documentation within the six month period, he submitted that such a claim for damages would not be permitted in light of the Inner House decision in *City Inns Ltd v Shepherd Construction Ltd* 2003 SLT 885. He urged the court to look at the clause as one which gave to the pursuers a right providing the pursuers acted within six months. In the event of the pursuers failing to act within six months the pursuers were not so much in breach of contract as disenabled from availing themselves of the right. A comparable provision would exist in the main contract governing the relationship between the main contractor and the employer. Recognising that the Outer House decision in *Skanska Construction (UK) Ltd v The ERDC Group Ltd* 2003 SCLR 296 was against him, Mr Stevenson submitted that the case was not entirely analogous as there had been two adjudications prior to the *Skanska* case coming to court. Furthermore there had not been a full analysis of the position before the Outer House Judge. He submitted that the Sheriff had correctly identified that in landlord and tenant cases one was dealing with only two parties whereas in contractual arrangements such as were before the court in this case, one had a tripartite arrangement. He commended to me the passage referred to by the learned Sheriff in *Muir Construction Ltd v Hambly Ltd* 1990 SLT 830 at page 834E-F.

[4] I have come to the view that the appeal should be allowed. When interpreting a commercial contract the court should adopt a businesslike approach and try to ascertain what is the commercially sensible construction which two businessmen might have intended when they agreed to be bound by the contractual terms (Lord Steyn in *Mannai Investment Company Ltd v Eagle Star Life Assurance Company Ltd* [1997] AC 749 at page 771). It seems to me to be unlikely that such businessmen would have intended that the condition in question should preclude an otherwise legitimate claim for payment. The sub-contractor will almost certainly have incurred costs in both materials and labour in the fulfilment of his contractual obligations. The work may have been carried out to an exemplary standard. The counterpart obligation of the contractor is to pay the sub-contractor for such exemplary work all in accordance with the rates agreed in the contract. To deny the sub-contractor payment because he has failed to provide some documentation within a given time frame cannot in my view be a proper commercial interpretation of the contract.

[5] It does not assist the defenders to say that the sub-contract provisions are mirrored in the main contract and that the interpretation advanced by the defender is necessary for the main contractor's protection. If both clauses are interpreted in the same manner, such protection is unnecessary as the main contractor's claim against the employer will not in turn be time barred by the provision in the main contract (condition 30.6.1.1). Although I was not referred

to the case in argument my own researches disclosed that the main contract provision was the subject of discussion in the case of *Penwith District Council v VP Developments Ltd* [1999] APP.L.R. 05/21. The judgment of the Technology and Construction Court in England at paragraph 20 contains the following passage:-

*"Clause 30.6.1.1 is included to promote the process of finality by giving the contractor a last opportunity to put its house in order and to ensure that the employer's representatives know of the full extent of the entitlement to which the contractor considers itself entitled and of the evidence to justify the amount of that entitlement. If the contractor does not take advantage of this opportunity and fails to submit the documents needed to establish the amount then the CA and QS will have to do the best they can using such information as was provided by the contractor and their own knowledge."*

Thus, if the contractor fails to provide the necessary documents his claim for payment from the employer is not time barred. There is thus no requirement to protect the contractor from the possibility that the sub-contractor might have a claim against the contractor which the contractor is unable to pass on to the employer. The sub-contract clause also seems to me to fail to give the protection contended for by the defenders even if the defenders' interpretation is preferred. As Mr Sinclair submitted, the sub-contractor might delay providing the contractor with the necessary documents until the very last minute of the six month period. Accordingly the contractor, due to time constraints, would be unable to formulate its claim against the employer within the six month period from practical completion. If a regime involving strict adherence to time was in place the contractor would be prejudiced rather than protected. The claim by the sub-contractor would be good against the contractor. However, the contractor would have no ability to pass the claim on to the employer. Furthermore, had it been the intention of the draughtsman to create a strict six month time limit it would have been very easy to have so specified. The fact that there was no such specification tends to suggest that it was not the intention of the parties to create a time limit.

[6] Mr Stevenson's submission that the clause has no content if it is not interpreted as providing a time limit for claims would be a difficult hurdle for the pursuers to overcome were it a correct analysis. However it is in my opinion an incorrect analysis. To hold that the contractual provision in the sub-contract does not create a time bar does not mean to say that the sub-contractor can ignore the provisions with impunity. If the sub-contractor fails to provide the documentation within the six month period it will be in breach of contract. Accordingly it will be liable in damages should any be sustained by the main contractor by virtue of the sub-contractor's breach. I do not consider that the case of *City Inns Ltd* precludes this approach. The clause in issue in that case entitled the contractor to apply for an extension of time should he consider that an architect's instruction would require an adjustment to the contract sum and/or delay the completion date. The clause gives the contractor a right which it may or may not decide to exercise depending on the contractor's opinion of the impact of the architect's instruction. Should he not exercise that right there are consequences: the contractor will not be entitled to an extension of time should it apply for such after execution of the work specified in the architect's instruction. The clause is properly characterised as bestowing a right on the contractor which may or may not be exercised. In my opinion the clause in the sub-contract before me is not of the same genre as the clause under scrutiny in *City Inns Ltd*. The clause which has to be interpreted in this case imposes an obligation as opposed to bestowing a right. The two clauses do not bear comparison. I appreciate that the passage from the judgment in the *Penwith District Council* case quoted *supra* tends to suggest that the Technology and Construction Court favours the view that the clause gives to the sub-contractor an opportunity or right. It must be remembered that the context in which a case is heard can influence how a judge expresses himself. In the context of a case where the main contract falls to be interpreted it is perhaps not surprising that such terminology was used. Should the main contractor fail to provide the employer with the necessary documentation the only loser will be the main contractor. Thus the court might not have had in contemplation the concept of the employer being owed an obligation by the main contractor to provide documentation within six months which obligation, if breached, might sound in damages. Thus a discussion in the context of the clause appearing in a main contract as opposed to a similarly worded clause in a sub-contract will have a different backdrop. However, for present purposes, all I need be satisfied upon is that the term in the sub-contract has some content. I am satisfied that it does. It either imposes an obligation, the interpretation which I favour, or gives an opportunity or right.

[7] I agree with Mr Stevenson that one should not place too much reliance on what is said in cases involving the operation of rent review clauses. However what is said by Mr Justice Donaldson, as he then was, in *Bunge v Deutsche Conti* [1980] 1 Lloyd's Rep. 352 is of assistance in construing the provisions before me. At page 358 Mr Justice Donaldson states:-

*"Two principles of construction apply here. One is that the contract should be construed as a whole. The second is that if there is any doubt about the matter, any ambiguity, the contract should not be construed in such a way as to bar a legitimate claim..."*

In my view there must be some doubt in this case as to what was intended. Applying the second of the two principles of construction outlined by Mr Justice Donaldson it follows that the pursuers' claim should not fall at this hurdle.

[8] Although not fully discussed in her opinion, I am comforted that Lady Paton in *Skanska Construction (UK) Ltd v The ERDC Group Ltd* 2003 SCLR 296 comes to the same view as that to which I have come.