OUTER HOUSE, COURT OF SESSION

[2021] CSOH 8

CA92/20

OPINION OF LADY WOLFFE

In the cause

THE FRASERBURGH HARBOUR COMMISSIONERS

Pursuer

against

McLAUGHLIN & HARVEY LIMITED

Defender

Pursuer: Ellis QC; Burness Paull
Defender: MacColl QC; Brodies

26 January 2021

Introduction

Background

The issue

[1] The issue debated in this case is whether clause W2.4 of the NEC 3 Engineering and Construction Contract in the form agreed between the parties operates as a contractual bar to preclude resort to the Court (or to arbitration), if a dispute between the parties falling within the scope of Clause W2 has not first been referred to adjudication.

The pursuer's case on the merits

[2] The pursuer is the statutory harbour authority responsible for Fraserburgh Harbour. The Pursuer wished to carry out works to deepen part of the harbour, known as the North Harbour, to accommodate increasing vessel sizes and to allow a greater efficiency in the port. In November 2012 the pursuer accepted the defender's tender to carry out the works specified by consulting engineers to achieve that purpose. Subsequent to the completion of the contract works, the pursuer identified what it contended are defects in the works, arising from the failure to conduct the works in conformity with the contract and the specified methodology. The pursuer raised the present action alleging a variety of defects and seeking damages in excess of £7 million pounds for the asserted breaches of contract. The pursuer's action was remitted to the Commercial Court on 20 October 2020 and a diet of debate fixed for 25 November 2020.

The defender's plea of contractual bar

[3] The defender met the pursuer's claim with a plea of contractual bar, to the effect that in terms of clause W2 of the contract (as after-noted) a mandatory step prior to the referral of any dispute to a tribunal (whether that is a court or an arbitration) was first to take the matter to adjudication. It is a matter of admission by the pursuer that it has not referred the present dispute to adjudication or arbitration, although the Court was advised at the Debate that a notice of adjudication had been intimated two days earlier, on 23 November 2020. The defender's position was that the pursuer's action should be dismissed.

The pursuer's response to the defender's plea of contractual bar

[4] After admitting that the "tribunal" provided for in the Contract was "arbitration" and that there had as yet been no reference of the parties' dispute to adjudication, the pursuer pled:

> "Explained and averred that the jurisdiction of the court is not wholly removed by the contractual dispute resolution procedures. That clause **may deprive the courts of jurisdiction to inquire into and decide the merits** of any the dispute **if one party insists** on the use of those procedures. The court is however **free to entertain the suit** and inter alia pronounce decree in due course in conformity with the award of the arbitrator. Should the arbitration prove abortive, the full jurisdiction of the court will revive. **If the Defender does not insist in its plea** the jurisdiction of the court will remain. Properly interpreted Clause 2 does not exclude the ability of the court **to entertain this suit**. Explained and averred that the action is also a means of preventing extinction of the claims by effluxion of time, whilst the extent of the claims has been under investigation." (Emphasis added.)

The defender did in fact insist on its plea of contractual bar, and the matter went to debate for determination of that matter on a proper construction of clause W2.

Clause W2 of the Contract and other terms referred to by the parties

[5] The contract between the parties adopted the terms of the NEC3 Engineering and Construction Contract (June 2005) (with amendments June 2006). I shall refer to that *pro forma* document as "the NEC Contract" and to the particular version of that agreed between the parties (i.e. after selection of certain options and specification of certain defined terms) as "the Contract". Clause W2 (as incorporated into the Contract) ("Clause W2"), so far as relevant to the issue, provides as follows:

> "W2.1 (1) A dispute arising under or in connection with this contract is referred to and decided by the Adjudicator. A Party may refer a dispute to the Adjudicator at any time.
>
> […]

> W2.4 (1) A Party does not refer any dispute under or in connection with this contract to the tribunal unless it has first been decided by the Adjudicator in accordance with this contract.
> (2) If, after the Adjudicator notifies his decision a Party is dissatisfied, that Party may notify the other Party of the matter which he disputes and state that he intends to refer it to the tribunal. The dispute may not be referred to the tribunal unless this notification is given within four weeks of the notification of the Adjudicator's decision.
> (3) The tribunal settles the dispute referred to it..." (Emphasis added.)

At debate the parties focused on the words highlighted.

[6] As is common in the use of *pro forma* contracts such as the NEC Contract, parties provided certain contract data and select certain options. In the Contract, the parties opted for the form of dispute resolution embodied in Clause W2, as this was a contract in the UK to which the provisions of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act") applied. They also stipulated that the "tribunal" would be arbitration. They did not specify the adjudicator by name. Instead they specified that this was to be agreed in the event a dispute arose and that the nominating body would be the President for the time being of the Institution of Civil Engineers. The law of the Contract was stipulated to be the law of Scotland.

The NEC 3 Contract Guidance Notes

[7] The defender referred to several passages in the Guidance Notes issued for the NEC 3 Contract ("the Guidance Notes"). The pursuer's position is that (as stipulated at p 1) the Guidance Notes "should not be used for legal interpretation of the meaning of the defender referred to certain passages of the" NEC Contract.

[8] The passages the defender referred to may be summarised as follows:

1) *Dispute resolution (at p 92)*: In this passage of the Guidance Notes it is noted that the NEC Contract has two options for dispute resolution and that option W2 is

for use in the UK in relation to construction contracts falling within sections 104 to 106 of the 1996 Act. It is noted that hitherto the only form of dispute in many building contracts had been either arbitration or litigation, but that these modes were time-consuming and expensive. The Guidance Notes then state: "Whilst the [NEC Contract] recognised the need to have an ultimate means for such a resolution, it introduces an intermediate stage of independent dispute resolution in the form of an adjudication. The intention is that all disputes are first referred to and decided by the *Adjudicator*, who is jointly appointed by the *Employer* and *Contractor* and is to act independently of them" (Italics in the original).

2) *Review by the tribunal (at p 94)*: This passage stipulates that once an adjudicator has reached his decision, parties are to put it into effect and that, if satisfied, that is the end of the matter. It continues: "If either Party is not satisfied with the *Adjudicator's* decision, they have a short period to notify the other of their dissatisfaction, in which case the matter can be dealt with, at any time in the future by the *tribunal*." After noting that the tribunal makes a final and binding decision on the dispute (subject to any appeals procedure allowed), the Guidance Notes provided: "It is important to note that a dispute cannot be referred to the *tribunal* unless it has first been referred to (and in the case of Option W2 decided by) the *Adjudicator".* (Italics in the original).

3) *Review by the tribunal W2.4 (at p 100)*: In relation to Clause W2.4 (1) the Guidance Notes state that "[a] dispute cannot be referred to the *tribunal* unless it has first been decided by the *Adjudicator*." (Italics in the original).

The parties' submissions

The defender's submissions

[9] The defender's position in outline was that the pursuer had agreed that it will not litigate about the present dispute before a court (or, indeed, by way of arbitration) without having first adjudicated upon it. The requirement imposed by Clause W2.4 (1) is that adjudication is a mandatory step in a dispute before there can be any referral of that dispute to another tribunal (be that a court or arbitration). The pursuer has not complied with that mandatory requirement. They are, accordingly, now contractually barred from bringing (or insisting upon) this action.

[10] Mr MacColl QC, who appeared for the defender, submitted that the Contract agreed between the parties contained a deliberate cascade of dispute resolution. In terms of the Contract, if there were a dispute it required first to be referred to adjudication. It was only if, and after, that dispute was determined by the adjudicator, that a dissatisfied party could refer the matter to arbitration by timeous service of a notice of dissatisfaction. This had not been done. In relation to the notice of adjudication the pursuer served two days before the debate, this did not affect the defender's argument. (Mr Ellis QC, who appeared for the pursuer, also accepted that the notice recently served by his client did not affect the issue to be debated.) The Contract clearly required that any resort to the "tribunal" (here, arbitration), there first required to be a determination by an adjudicator and a notice of dissatisfaction.

[11] In support of his position, Mr MacColl referred to the observation in *Keating on NEC3* (at para 11-098) that Clause W2.4(1) meant "that if a party wishes to raise disputes at the end of the project then the matter will have to be referred to adjudication initially" and to two English cases said to be supportive of that analysis, namely, *Anglian Water Services Limited* v

Laing O'Rourke Utilities Limited [2010] EWHC 1529 (TCC) ("*Anglian*") (particularly at paras 16 and 20, in which the court rejected a challenge to a similar provision as inconsistent with the 1996 Act) and *Dawnus Construction Holdings* v *Amey LG Limited* [2017] 1 WLUK 502 ("*Dawnus*") (which applied *Anglian*, albeit in respect of a provision which was not derived from the NEC Contract). These cases were said to be consistent with the older Scots House of Lords authority of *Caledonian Insurance Co* v *Gilmour* (1892) 20 R (HL) 13 ("*Caledonian Insurance*"). He also invoked the passages in the Guidance, noted above, to support the analysis that adjudication was intended to be a quick intermediate means of dispute resolution in any NEC Contract.

[12] In respect of the cases cited by the pursuer, the defender submitted that its approach was misguided. The pursuer sought to suggest that the argument of the defender is that (a) the Court does not have jurisdiction, and (b) that the action is incompetent. It is on that basis that the pursuer made extensive submissions in relation to the well-known authorities relating to the effect of contractual arbitration provisions. The defender submitted that this line of argument was misconceived and failed to address the actual criticism made by the defender – namely that the pursuer is contractually barred from bringing court proceedings (or arbitration) until the stipulated adjudication has taken place.

[13] In developing his submissions, Mr MacColl stressed that the issue is not a matter of whether or not the Court has jurisdiction in respect of a particular dispute, but whether the pursuer has agreed that it will not litigate about the present dispute before a court (or, indeed, by way of arbitration) in circumstances such as the present. The requirement imposed by Clause W2.4 (1) is that adjudication is a mandatory first step in a dispute before there can be any referral of that dispute to another tribunal (be that the Court or arbitration). The defender moved for its first plea to be sustained, which was that the pursuer "being

contractually barred from the bringing of the present action before the Court, the action should be dismissed". For completeness, the defender submitted that that mandatory step is required regardless of any concern that any party may have about prescription. The parties have not agreed that any such concern will avoid the need for adjudication as a mandatory first step in the dispute resolution process.

[14] Finally, the defender advanced a further submission that in any event, the parties have agreed in terms of the Contract that the "tribunal" to which a dispute under it may be referred (following upon a determination of that dispute by the Adjudicator) was arbitration. In these circumstances, even had the dispute been referred to adjudication (which has not happened) and it had, thereafter, been open to the pursuer to refer the dispute to the "tribunal", the dispute would require to be determined by way of arbitration. In such circumstances, this action would fall to be sisted pending the resolution of such an arbitration. Its primary motion, however, was for dismissal.

The pursuer's submission in reply

The pursuer's general propositions of law

[15] Mr Ellis QC, who appeared for the pursuer, began by advancing a number of general propositions of law relating to the jurisdiction of the Court in respect of disputes referable to arbitration, and cited an amplitude of cases to vouch these propositions. (Mr MacColl did not dispute these propositions *per se*, but submitted that they were of no application in light of the terms of Clause W2.4.) The pursuer's legal propositions may be summarised as follows:

1) The law of Scotland is that an arbitration clause does not entirely exclude the jurisdiction of the Court to entertain the suit. It prevents the Court from deciding

on the merits of any dispute: *Wilson* v *Glasgow Tramways* (1877) 5R 981("*Wilson*") *per* Lord Gifford at page 992, *Hamlyn* v *Talisker Distillery* (1894) 21R (HL) 21 ("*Hamlyn*"), *per* Lord Watson at page 25. Mr Ellis drew a distinction between bringing a court action and determining the merits of the dispute. Reference was made to additional authorities, not all of which I need quote. These included a number of textbook references and the Inner House decision of *Brodie* v *Ker* 1952 SC 216 ("*Brodie*"), in which the Inner House applied the observations in *Wilson* and *Hamlyn* (cases dealing with a contractual arbitration clause) to a statutory arbitration clause. The Court in *Brodie* stated (at page 223) that in all cases where a private judge is chosen by the parties or one imposed by statute "it is not accurate to say that the jurisdiction (in the strict sense) of the common law Courts is excluded, or that the common law action is incompetent". The pursuer submitted that normally the court case is sisted pending the decision of the other decision- maker.

2) Further, a contract will not be interpreted as excluding the Court's jurisdiction unless by clear words or necessary implication: see *per* Lord Diplock in *Gilbert Ash* v *Modern Engineering* [1974] AC 689 at page 717H – 718B and 718C. Mr Ellis surmised that the logic behind the principle was that the Court will be slow to infer that parties intended to exclude remedies available to them. The principle applies to procedural rights as well as substantive ones. The principle has been recognised to apply in the law of Scotland to references to private decision makers: *Brodie* at page 224. Mr Ellis made two ancillary points. First, that the parties would only be entitled to a sist if there is a genuine dispute. If there is no real dispute, the Court may proceed to determine the suit: *Woods* v *Co-operative*

Insurance Society 1924 SC 692 per LP Clyde at page 698. Secondly, that a reference to a private judge or arbitrator can be waived by either party in the court action, of which *Inverclyde Mearns Housing Society* v *Lawrence Construction* 1989 SLT 815 was an example.

3) Finally, the pursuer noted that the only reference of a dispute to a private judge that has been held to exclude a court action in Scotland was where the right to payment sought was conditional upon the award of the private judge. Accordingly, the right to payment did not arise until the award: *Caledonian Insurance, per* Lord Watson at pages 18 and 19. As there had been no award by a private judge in that case, an action could not be raised as the claim had not become due or enforceable. The pursuer submitted that this did not mean that its' action was incompetent. For example, the last part of Lord Watson's speech (at page 22) confirmed that the action was disposed of in that case by sustaining a plea to the merits rather than a preliminary plea. It was not a decision to the effect that the Court had no jurisdiction to entertain the suit; but rather that under the contract no sum had become due. This had been applied in *Lowland Glazing* v *GA Group* 1997 SLT 257 at page 258C – 259B, 259C and 259J-L.

[16] Mr Ellis submitted that these cases represented a distinctive Scottish approach to clauses providing for an alternative mode of dispute resolution and which informed the interpretation of Clause W2, as this approach was known to any Scots lawyer.

The pursuer's submissions on Clause W2

[17] The pursuer's submission in relation to Clause W2 was that Clause W2.1 referred "any dispute" arising under the Contract to a private dispute resolution mechanism - ie to

private judges. Clause W2.1 (1) permits a party to refer a dispute to adjudication. This was to ensure compliance with the right to go to adjudication at any time provided for by section 108 of 1996 Act. It is "any dispute" which is referred to private resolution. The pursuer submitted that this clause operates in the same way as a general reference of all disputes, and which has the effect of removing from the Court the ability to decide on the merits of "any dispute". However, the pursuer submitted that, as in a normal reference of any dispute, the Court is not prevented from *entertaining* the suit in relation to the matter.

[18] In respect of Clause W2.4 (1), the pursuer's submission was that, as the contract data (contained in the tender documents) defined "the tribunal" as "arbitration", the words of this clause therefore require that an arbitration cannot commence without an adjudication having taken place. The adjudication is therefore a precondition for having the merits of the dispute determined by arbitration. While the pursuer's submission up to this point was broadly consistent with the defender's, the pursuer submitted that Clause W2.4 (1) did not exclude the ability of the Court to *entertain* a suit, even if the merits of any dispute in relation to the matter were to be decided by a private decision-making process.

[19] Mr Ellis developed this submission as follows: he submitted that there are no words which seek to exclude or alter the normal jurisdiction of the Court, other than by the reference of the dispute to the process of adjudication followed by arbitration. Further, Clause W2.4 (1) only applies to an arbitration which follows an adjudication. In his submission, it does not purport to restrict the right to bring a court action. Further, there are no words within the Contract which make the pursuer's claims for damages for breach of contract contingent upon a decision in arbitration. Rather, the claims exist and are enforceable upon loss being caused by the breach: *Dunlop* v *McGowans* 1980 SC (HL) 73. It was at that point that a right of action arose. Prescription would run from that date and not

any later date (cf *Lowland Glazing* (*cit. supra*)). Mr Ellis submitted that the Court had full jurisdiction, although its jurisdiction could become more limited if another party insisted on an alternative mode of dispute resolution. Clause W2 contains a reference to a dispute mechanism, the second step of which is an arbitration. However, there is no good reason to regard its effect as restricting the Court's jurisdiction in any wider way than the standard clause of reference of "all disputes". The pursuer submitted that the passage in *Brodie* (at page 223) was instructive. The normal rule (summarised in para [15(1)], above) is not stated to be applicable only to arbitration but to any "private judge" or indeed statutory tribunals. He submitted that the general rule clearly covers the parties' Contract. The provision for an adjudication as a precondition to arbitration does not take the case out of the category of one in which the merits of any dispute are to be decided by a private judge or judges. It does not exclude the Court's jurisdiction to entertain a suit about the matter. It merely excludes the ability of the Court to decide the merits of that dispute. If it turned out there was no dispute, the clause would never operate. Even if the Court were the nominated tribunal (which the pursuer accepted in this case that it was not) it would only mean that the Court (as the nominated tribunal) could not decide the merits of the dispute until those merits had been (provisionally) decided by an adjudication. The pursuer reiterated its submission that this would not prevent the Court from "entertaining" a suit about the matter.

[20] The pursuer submitted that the absence of any words which attempt to exclude the jurisdiction of the Court from entertaining a suit about the matter was telling. Express words or necessary implication from the terms of Contract would be required to exclude the Court's normal jurisdiction where there is a clause of reference to a private decision-maker. The pursuer submitted that there is no basis on which either leg of that test could be met in

the present contract. In any event, the Court should be slow to arrive at the view that the parties intended to exclude the Court's jurisdiction entirely.

The pursuer's reply to the two English cases cited by the defender

[21] The pursuer began by noting that these cases relied on by the defender were both English first instance decisions which do not purport to consider whether the jurisdiction of the Scottish courts is excluded by clauses such as that under consideration. The pursuer submitted that there was high and consistent Scottish authority (noted above, at para [15]) that the Court's jurisdiction was not excluded. *Anglian* concerned an attempt to argue that a clause of a contract which provided that the decision of an adjudicator would be final unless there had been an expression of dissatisfaction within a defined period was invalid, as it would have been inconsistent with the free right to adjudication in section 108 of the 1996 Act. The judge decided that it was not inconsistent with that right as it did not fetter the right to seek adjudication at any time. It only purported to fetter the right to go to the courts or arbitration. Reference was made to paragraphs 16 and 20 of *Anglian*. Mr Ellis sought to distinguish these cases or to suggest that those parts founded on by the pursuer were *obiter*. He submitted that in *Anglian*, the judge made the statement that the clause restricted the right to go to court but it was not necessary to examine the existence of that right or its extent, as the question was whether the right to go to adjudication was being fettered. The last sentence of paragraph 16 is not an accurate statement of the law of Scotland (Mr Ellis accepted it was never intended to be). A reference of "any dispute" to an alternative decision-taker prevents only the merits of that dispute being determined by the courts, if the parties insist on the reference. But precision on this point was not required of the judge for the decision he had to make in that case. In any event, Mr Ellis submitted by

way of contrast, the Contract contains no restriction on the right to raise a court action. It affects the ability of the Court to decide the merits of the case but the Court retains jurisdiction.

[22] In the case of *Dawnus* it was clear (from para 13) that the case involved an express fetter on the right of litigation. That was a critical difference from the present case. The question for decision in the case was in any event whether such a clause was incorporated into the contract (para 17). The judge described (at para 23) the effect as a restriction on the right to litigation but the reference to *Anglian* was only for the proposition that such a clause would not infringe section 108 of 1996 Act, and therefore was not inconsistent with other parts of the contract. Again the judge did not, and had no need to, consider the effect in Scotland of referring any dispute to resolution by a private decision-maker.

[23] Mr Ellis submitted that the contracts in these cases contained markedly different provisions. The parties' Contract does not purport to restrict the ordinary right in Scotland to raise a court action notwithstanding a general reference to a private decision maker. The English cases referred to by the defender do not attempt to consider the Scots rules on the effect of a reference to a private decision maker. They provide no support for a contention that the present action is incompetent. Mr Ellis moved for the action to be sisted.

Discussion

The point at issue

[24] As the debate progressed it became clear that there is less that divides the parties than at first appeared. The pursuer's position is that the Court has a "full" jurisdiction in respect of the merits of the parties' dispute, but it accepts that that jurisdiction becomes more limited if the other party insists on use of any contractually agreed method of

alternative dispute resolution. While the defender may not accept the first part of that proposition, it did not contend that the Court had no jurisdiction. Rather, in this case, the defender does insist that the merits of the dispute are resolved in accordance with the alternative mechanism provided for in the Contract. Accordingly, it moves for dismissal of the pursuer's action on the basis that it is contractually barred by Clause W2.4 (1).

Parties' convergence on the question whether Clause W2.4 (1) wholly ousted the Court's jurisdiction

[25] In these circumstances, I accept as correct the defender's submissions that the pursuer's references to general propositions of law governing the relationship of the Court to disputes referable to arbitration do not assist in resolving the point at issue. Mr Ellis cited a number of cases to vouch the proposition that even in circumstances where the merits of a dispute fall to be determined (or determined first) by an alternative mechanism, the Court's jurisdiction is not wholly excluded. Mr MacColl eschewed any argument that the Court's jurisdiction was wholly excluded. There is no need therefore to consider cases the pursuer cited to meet an argument the defender did not advance. Further, there was no suggestion there was no genuine dispute (the pursuer's first ancillary point (see para [15(2)], above)); nor was the defender waiving compliance with the antecedent requirement to refer the dispute to adjudication (the pursuer's second ancillary point). Indeed, the defender's insistence on the plea has led to this debate.

[26] It is convenient here to deal with the pursuer's submission that nothing in the Contract precludes resort to the Court. This submission may have been advanced, at least in part, in order to avoid meeting the test for implication of a term (eg permitting a direct resort to the Court to determine the merits of a dispute, as the pursuer's action initially

endeavoured to do). Allied to this was the pursuer's submission that clear words were required to exclude the jurisdiction of the Court. In my view, that proposition has no application in this case. While the parties differed as to the meaning of Cause W2.4 (1), neither argued that Clause W2.4 wholly excluded the Court's jurisdiction. The defender advanced a preliminary plea of contractual bar, not one of no jurisdiction.

The utility of the pursuer's action

[27] The pursuer acknowledged that if the defender insisted on its plea, as it does, the Court was precluded from determining the merits of the dispute. This has a significant impact on the utility of this action.

[28] As originally framed the pursuer's summons sought to place the merits of the dispute before the Court. It should be noted that while the pursuer has adjusted its pleadings, it has not introduced any ancillary order of the kind figured in the course of submissions and in respect of which the Court may exercise a more limited jurisdiction. What, then, is the pursuer's rationale for maintaining the action in the face of the defender's plea of contractual bar? As noted above, Mr Ellis distinguished between *bringing* a court action and *determining* the merits of the parties' dispute. Given that the original purpose of this action had been to seek a determination of the merits of the dispute (see para [2], above), and which it was now accepted is not open to the pursuer to do in these proceedings, the pursuer is driven to rely on the first part of this distinction, namely, "bringing" an action. However, the question arises: for what purpose?

[29] For this part of its argument the pursuer consistently referred to the Court's power to "entertain" the dispute: see this usage in paragraphs [4] and [15] to [20], above. I understand Mr Ellis's use of this formulation to mean no more than that, while the merits of

the dispute fall to be determined by a different decision-taker, the Court may still entertain a suit for certain more limited purposes: for example, to give effect to an arbiter's award (had there been one); to secure the production of documents for any ongoing arbitration; to secure any protective order *ad interim* (an example provided in oral submissions); or to preserve the prospect of the Court's jurisdiction over the merits reviving, if any arbitration proved abortive. The immediate, and in my view insurmountable, difficulty for the pursuer is that none of these more limited ancillary purposes in bringing an action (or the Court entertaining the pursuer's suit) is sought in this action. There is no ongoing arbitration which the Court can assist, nor any arbiter's award the Court can enforce. In respect of the use of proceedings to interrupt prescription, that may be so (although I express no opinion on whether an action raised in breach of any contractual bar could have that effect), but the pursuer placed no authority before the Court to suggest that that incidental purpose would excuse the need to comply with any mandated antecedent procedural step agreed by the parties. Absent that, the defender's submission went unchallenged, that if parties contracted in a manner which may make it more difficult to interrupt prescription, that was (as Mr MacColl put it) "tough". Even then, Mr MacColl suggested that the dispute between the parties had been live for some years and there was nothing in this point. (I note that, in any event, any difficulty in interrupting the running of prescription arising from the requirement to use an alternative mode of dispute resolution is likely to affect the parties in the same way, and it is therefore difficult to see how this might favour one construction over another.)

[30] *Prima facie*, therefore, none of the circumstances in which the Court might "entertain a suit" (i.e. in circumstances where any jurisdiction to determine the merits is ousted or in abeyance) is present in this case. If that is correct, the pursuer's alternative motion for a sist of the action would fall to be refused. There would be no live purpose which the present

action could serve. In relation to the interruption of prescription, it would be the raising of this action (not its maintenance) which would be the critical step (assuming it were effective, and on which I express no view). I turn to consider the central issue, namely, whether the pursuer was required first to refer any dispute to adjudication. This depends on the proper construction of Clause W2.4 (1), to which I now turn.

Clause W2.4 (1)

Does Clause W2.4 (1) wholly oust the Court's jurisdiction?

[31] As I understood it, the pursuer accepts the defender's construction, insofar as it applies to arbitration as the mode of dispute resolution expressly stipulated in the Contract. (I did not understand the defender to argue that the effect of Clause W2 was to render the *existence* of any claim contingent on the taking of certain steps (an example of which was found in *Caledonian Insurance*, although its facts are far removed from the present case).) However, the pursuer contends that, albeit the Contract is silent on the point, the Contract does not preclude a party from essentially side-stepping the contractually-agreed route to resolve any dispute in order to advance directly to the Court to do so. It was in this context that the pursuer prayed in aid the line of authority that clear words were required to oust the Court's jurisdiction. That may be so, but this submission assumes that Clause W2.4 operates as an ouster of the Court's jurisdiction. This was a matter that was implicit in Mr Ellis' submissions, although he did not make an express submission that the terms of Clause W2.4 had that effect. In my view, Clause W2.4 does not have that effect: it simply requires that a precondition to resort to the "tribunal" of choice (in this Contract, that tribunal is arbitration) is that there is first an adjudication on the matter in dispute, and which is followed by a timeous notice of dissatisfaction with that determination. Accordingly, I

prefer the defender's characterisation of the issue as one of contractual bar, to the pursuer's characterisation of the issue as one of competency.

[32] Separately, in light of the contractually agreed definition of "tribunal" as arbitration, the merits of any dispute fall to be determined by that means (once the prerequisite steps are satisfied). The difference between the parties narrowed to a question of whether the pursuer could as of right first bring the merits of the dispute direct to the Court, notwithstanding the terms of Clause W2. If the defender declined to waive compliance with Clause W2.4 (1) (as the pursuer surmised in its answers, might occur) but took the plea of contractual bar, this gave rise to an ancillary dispute as to what should be done with this action meantime.

The correct construction of Clause W2.4

[33] On the question of the correct construction of Clause W2.4, I prefer the defender's submissions for the following reasons. First and foremost, the pursuer's reading of Clause W2.4 (1) is inconsistent with the express words of the Contract, which provide for "any dispute" to be resolved in accordance with the specified procedure, being an adjudication and, if a party is dissatisfied with that determination, an appeal from that to the stipulated "tribunal" (here, arbitration) within the time period specified in Clause W2.4 (2). In my view, it is clear from the language used, as well as its interrelationship with other parts of Clause W4.2, that these provisions were intended to be definitive as to the means for determining any disputes between the parties and the sequence in which they were to be taken. On the pursuer's approach, these provisions could simply be ignored in favour of an unqualified right of direct recourse to the Court without any stipulated timeframe. This would, in effect, permit a parallel regime of dispute resolution which is wholly at odds with the clear words and detailed specification of the means for dispute resolution provided for

in the Contract. Such a reading would, in my view, render nugatory the expressly stipulated terms of Clause W2.4. While I heard no submissions on the 1996 Act, the pursuer's reading is also dissonant with section 108 of the 1996 Act, as the pursuer's approach makes no allowance for exercise of the right to refer a dispute to adjudication. Section 108 created a right to refer a dispute to adjudication (s 108(1)), which determination is binding until that dispute is finally determined by legal proceedings or arbitration (if the contract so provided) or by agreement. The need for a quick and inexpensive means of *interim* dispute resolution underpinned this part of the 1996 Act. Indeed, so important is the right to refer a dispute to adjudication, that any provision of a contract which frustrates this right is displaced in favour of the adjudication provisions of the Scheme for Construction Contracts (*per* section 108(5)). The pursuer's approach cuts across that right. Nor would it be a sufficient answer that on the pursuer's construction direct resort to court is an alternative to, but preserves, the exercise of the right to adjudicate. It respectfully seems to me that *all* parties to a dispute have an interest in having their dispute resolved (even if only provisionally) by adjudication. On the pursuer's approach, the defender is being denied the advantages and speed of that contractually-agreed first mode of dispute resolution.

[34] While these observations relate to a statutory right to adjudicate, in my view, they may inform construction of a contractual provision defining the circumstances in which a party may have recourse to the Court where a right to adjudicate subsists. In light of the features of the 1996 Act just noted, the existence of the right to go to adjudication is part of the given background of the Contract. It is not surprising, therefore, that the exercise of that right might be accommodated or required as an antecedent step (as it was in *Anglian*) in any separate provision governing recourse to the Court contained in a contract derived from the NEC Contract. On a natural reading of Clause W2.4 (1), it prescribes a sequence for the

different modes of dispute resolution, Mr MacColl's "cascade of dispute resolution", of which adjudication is the first step and which is, by virtue of Clause W2.4 (1), a condition precedent to resort to the "tribunal" (however defined). By contrast, the pursuer's approach (that there is an unstipulated but implied right to litigate the merits of any dispute by a court action without any anterior adjudication) is inconsistent with the clear words of the Contract and it is inimical with the purpose of the 1996 Act. It respectfully seems to me that the pursuer's argument is premised on an assumed dichotomy between the Court having full jurisdiction and no jurisdiction, where there exists a contractually agreed alternative mode of dispute resolution. Such a dichotomy does not withstand scrutiny. Even in respect of a statutory right to adjudicate provided for by section 108 of the 1996 Act, that provision does not wholly oust the Court's jurisdiction. Rather, as Chadwick LJ made clear in the leading case of *Carillion Construction Limited* v *Devonport Royal Dockyard Limited* [2005] EWCA Civ 1358; [2006] BLR 15, the courts proceed with a high degree of circumspection in reviewing adjudications (eg, in any challenge to an adjudicator's decision: "[it] should be only in rare circumstances that the courts will interfere with the decision of an adjudicator" (at para 85)).

[35] The *dicta* Mr Ellis cited (to the effect that clear words were required to oust the Court's jurisdiction) have no application either to an adjudication clause, because, the Court's jurisdiction is not wholly ousted, or to Clause W2.4 because, properly construed, it mandates that the merits of any dispute be resolved by the contractually-agreed alternative means. Neither party contended that Clause W2.4 removed the residual jurisdiction the Court retained in respect of ancillary matters.

[36] For completeness, I should record that I have not found it necessary to consider the Guidance Mr Ellis referred to (and summarised at para [8], above) and I express no view on

the circumstance, if any, in which it may permissibly be used as an aid to construction of an NEC Contract.

The English cases of Anglian and Dawnus

[37] Turning to the English cases of *Anglian* and *Dawnus*, I am not persuaded that the pursuer's grounds for distinguishing these cases are well-founded or that these cases are inimical to the Scottish approach found in cases such as *Wilson*, *Hamyln* or *Brodie*. Mr Ellis submitted that *Anglian* was principally concerned with the asserted failure to serve a notice of dissatisfaction and any discussion of clause 93.1 (a provision in terms similar to Clause W2.4 (1)) was *obiter*. In my view, that is not a correct reading of the case. In that case the judge, Edwards-Stuart J, identified three issues (at para 10), the first of which was whether clause 93.1 was incompatible with the 1996 Act. The asserted incompatibility was founded on the features of clause 93.1 which precluded a party from referring a dispute to arbitration unless it had first referred the matter to adjudication and served a notice of dissatisfaction within four weeks of the determination of the adjudicator- precisely the terms which defender founds on and the pursuer seeks to elide in this case. The other issues in *Anglian*, concerning the efficacy of the notice given (which had not been delivered to the address specified in the contract), were contingent on the determination of the first issue.

[38] In *Anglian*, clause 93.1 of the parties' contract contained a provision in terms similar to Clause W2.4(1), in that it precluded reference of any dispute to the "tribunal" unless the dissatisfied party had first gone to adjudication and given notice of dissatisfaction within four weeks of the adjudicator's decision. That provision was challenged as inconsistent with the provisions of the 1996 Act and the statutory right of a party to refer a dispute to the

parties' agreed mode of dispute resolution (which, in *Anglian*, was arbitration). Edwards-Stuart J robustly rejected this challenge, holding that

> "a contract that obliges a party to refer a dispute to adjudication before he can pursue it by either litigation or arbitration does not, in my view, impose any fetter on the right to refer a dispute to adjudication at any time. However, **it does prevent a party from starting proceedings in the courts or by way of an arbitration at any time, because he cannot do so without having first referred the dispute to adjudication**." (Emphasis added.)

I respectfully agree with and adopt this analysis. In my view, the Court should accord primacy to the terms of the parties' Contract, so long as those terms are not inconsistent with the 1996 Act.

[39] It follows that I also reject Mr Ellis' submission that *Anglian* does not offer any guidance on the position in Scotland. Mr Ellis did not argue that Clause W 2.4 (1) was inconsistent with the 1996 Act. (To this extent, he accepts the correctness of the determination of the first issue in *Anglian*.) However, Mr Ellis' argument that parties were free to use an alternative mode of dispute resolution not stipulated within the Contract (e.g. because the Contract did not expressly preclude this) echoed the submission in *Anglian* (recorded at para 13 in that case), to the effect that a right to refer a dispute arising under the contract for adjudication must "carry with it a right not to refer a dispute for adjudication but to refer it to some other method of dispute resolution". This argument failed in *Anglian* and I also reject it as unsound, as a matter of the proper construction of Clause W2.4 (1), which I have set out above.

[40] Finally, I should note that I did not find the case of *Caledonian Insurance*, to which both parties referred, to be of much assistance. It concerned a very different context and otherwise vouched the proposition (accepted by both parties) that there can be conditions precedent (in that case, a reference to and determination by arbitration) before an action at

law could be initiated. As observed by Lord Watson in *Caledonian Insurance*, such a provision was not an ouster of the courts' jurisdiction "because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrators have determined".

Disposal

[41] For the foregoing reasons, I accept the defender's submissions and propose to sustain its first plea, of contractual bar. I have rejected the pursuer's argument on the principal issue. That itself would not necessarily have been determinative of disposal, as the Court could entertain an action (other than for the purposes of determining the merits, or doing so in the first instance) in the circumstances Mr Ellis figured. The degree of flexibility or discretion afforded to the Court in similar circumstances was described by Lord Gifford in *Wilson* (at p 992):

> "**If** [the Court] decides that there has been a valid contract of arbitration [it] may take several courses. [The Court] may dismiss the action, leaning the parties to go to their arbiter and come back again if necessary, for execution or powers, or [it] may remit to the arbitrator, or suspend proceedings, or give effect to the award". (Emphasis added.)

These observations presume a live arbitration. However, in circumstances where there is no live arbitration, and therefore no ancillary matter in respect of which the Court might exercise the limited jurisdiction it retains, the pursuer's action should be dismissed. Out of deference to Mr Ellis' request that the Court put the matter out by order in the event the Court was against him, I shall do so. I will reserve the defender's motion for dismissal meantime and also reserve all question of expenses.