FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 58
CA92/20

Lord President
Lord Pentland
Lord Doherty

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

by

THE FRASERBURGH HARBOUR COMMISSIONERS

Pursuers and Reclaimers

against

McLAUGHLIN & HARVEY LIMITED

Defenders and Respondents

Pursuers and Reclaimers: Ellis QC; Burness Paull LLP
Defenders and Respondents: MacColl QC; Brodies LLP

6 October 2021

Introduction and Procedure

[1] In 2010 the pursuers decided to deepen their North Harbour to accommodate increasing vessel sizes and to allow greater efficiency in the port. In November 2012 the pursuers accepted the defenders' tender to carry out the works. The pursuers claim to have identified defects in the works. They have raised the present proceedings for damages of £8.85m.

[2] The defenders have tendered a plea-in-law that the pursuers are "contractually barred" from raising the action because the dispute has not first been referred to adjudication as required by the parties' contract. A second, alternative, plea is to sist the cause pending arbitration.

[3] There was no motion to sist the case pending adjudication or arbitration when the defences were lodged. Rather, on 20 October 2020, the cause was remitted to the commercial court. Parties were permitted to adjust and to lodge written notes of argument prior to a diet of debate on 25 November. By interlocutor dated 3 February 2021 the commercial judge sustained the defenders' plea of contractual bar and dismissed the action. The pursuers reclaim.

[4] An adjudication hearing took place on 22 February 2021. An award was made in favour of the pursuers. Both parties have served notices of dissatisfaction in terms of the contract. The next step in the contractual dispute resolution scheme is arbitration.

The contract

[5] Clause W2 of the NEC3 Engineering and Construction Contract, which was adopted by the parties, provides:

> "Dispute resolution W2
>
> > 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.
> >
> > …
>
> Review by the tribunal W2.4
>
> > 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..."

In the contract data the "tribunal" is defined as "arbitration".

The commercial judge

[6] The commercial judge considered that the general principles governing the procedure of the court when a party founds upon an arbitration clause were of no assistance. The pursuers had accepted that the court could not determine the merits of the action, if the defenders insisted on their primary plea. This had a significant impact on the "utility" or "purpose" of the cause. Although the court may have jurisdiction for certain purposes ancillary to the action, such as the grant of a commission and diligence or to give effect to any arbitral award, none of these was sought. The pursuers had produced no authority to the effect that an action could be raised, in breach of a contractual provision, to interrupt the operation of prescription. On this basis the pursuers' motion to sist the cause fell to be refused as the action could serve no purpose.

[7] Clause W2.4(1) required there to be an adjudication and a notice of dissatisfaction before resort could be had to the tribunal of choice (arbitration). Given that the parties had agreed that the relevant tribunal was to be arbitration, the merits of any dispute fell to be determined by that means. On the pursuers' approach, the defenders would be denied the advantages and speed of that contractually-agreed mode of dispute resolution. The natural reading of Clause W2.4(1) was that it prescribed a sequence for (cascade of) the different modes of resolution.

Submissions

Pursuers

[8] The settled approach, when a dispute required to be referred to an ADR process was for any court action to be sisted pending resolution of the dispute by that process (*Hamlyn & Co* v *Talisker Distillery* (1894) 21 R (HL) 21 at 25). That applied not only to arbitration but to other alternative tribunals (*Brodie* v *Ker* 1952 SC 216 at 223). The common law had been incorporated into section 10 of the Arbitration (Scotland) Act 2010. This provided that there must be a sist if there is a binding requirement for arbitration, even if other procedures had to be exhausted first. This had considerable practical benefit. It allowed a court action to be raised for purposes such as diligence on the dependence, *interim* orders, or to interrupt prescription.

[9] The right to resort to the court could only be excluded by clear wording (*Brodie* v *Ker* at 224). Clause W2.4(1) was limited to requiring a dispute to be adjudicated before it was arbitrated. There were no words which excluded the right to raise an action and to have it sisted to await determination under the contractual dispute resolution procedure. The commercial judge failed to follow well-established procedure and to give effect to the provisions of section 10 of the 2010 Act. She erred in concluding that the terms of the clause meant that the rule in *Hamlyn* did not apply. Two English decisions founded on by the defenders, *viz*: *Anglian Water Services* v *Laing O'Rourke Utilities* [2011] All ER (Comm) 1143 and *Dawnus Construction Holdings* v *Amey LG* [2017] EWHC B13 (TCC), were not in point. *Channel Tunnel Group* v *Balfour Beatty Construction* [1993] AC 334 (at 353-355, 362) supported the principle in *Hamlyn* as did *DGT Steel and Cladding* v *Cubitt Building and Interiors* [2008] Bus LR 132 at paras 5, 12 and 38, although the power to stay was discretionary in England.

That was not the case in Scotland (*North British Railway Co* v *Newburgh and North Fife Railway Co* 1911 SC 710 at 719 and 721).

Defenders

[10] The commercial judge was correct to hold that the pursuers were contractually barred from bringing the present action and that, accordingly, it fell to be dismissed. The pursuers conceded that they could not litigate without having first adjudicated. The pursuers had not complied with that requirement and were now barred from bringing (or insisting upon) this action. The English authorities (*Anglian* and *Dawnus*) were consistent with the commentary on clause W2.4(1) in *Keating on NEC3* (at para 11-098) that: "This does mean 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." The pursuers were contractually required to adjudicate before bringing any dispute before a more formal tribunal. This was consistent with *Caledonian Insurance Co* v *Gilmour* (1892) 20 R (HL) 13. *Hamlyn & Co* v *Talisker Distillery* did not have the cascade of ADR provisions which existed in this case. The sisting of an action pending the outcome of an arbitration, when the parties had engaged in a court action, was addressed in *Hamlyn* in which it was said (at 34) that in accordance with ordinary practice, procedure should be stayed to allow the arbitration to be proceeded as provided by the contract.

[11] The mandatory step of arbitration was required regardless of any concern that a party may have about prescription. The parties had not agreed that any such concern would avoid the need for adjudication as a mandatory first step. Whether the pursuers were contractually barred was not an issue on which the parties had agreed to go to arbitration. As such, section 10 of the 2010 Act was not engaged and the commercial judge was not

obliged to sist the action. *Channel Tunnel Group* v *Balfour Beatty Construction* turned on the specific terms of the clause and English procedure, which enabled an action to continue notwithstanding an arbitration clause. That was not the position in Scotland (*North British Railway Co* v *Newburgh and North Fife Railway Co* at 719).

[12] The commercial judge correctly held that Clause W2.4(1) operated as a contractual bar. She was correct that a sist was not appropriate and that dismissal was appropriate, as had been granted in *North British Railway Co* v *Newburgh and North Fife Railway Co*. There was no purpose to the action continuing. Prescription had been interrupted. If there were an arbitral award, it could be registered for execution (2010 Act s 12(5)). However, the defenders' case rested on contractual bar and not any lack of utility. The pursuers were driving a coach and horses through the contractual provisions.

Decision

[13] This reclaiming motion is conclusively determined on the basis of the well-known and established principles relative to clauses which provide for alternative dispute resolution, whether that is by adjudication or arbitration or both. These are set out clearly and succinctly in the *locus classicus: Hamlyn & Co* v *Talisker Distillery* (1894) 21 R (HL) 21. There, in relation to the arbitration clause in a contract, it was said (Lord Watson, at page 25) that:

> "The jurisdiction of the Court is not wholly ousted by such a contract. It deprives the Court of jurisdiction to inquire into and decide the merits of the case, while it leaves the Court free to entertain the suit, and to pronounce a decree in conformity with the award of the arbiter. Should the arbitration from any cause prove abortive, the full jurisdiction of the Court will revive, to the effect of enabling it to hear and determine the action upon its merits. When a binding reference is pleaded *in limine,* the proper course to take is either to refer the question in dispute to the arbiter named or to stay procedure until it has been settled by arbitration."

The reason for this rule is not too difficult to understand. The right of access to the courts is the most basic of principles.

[14] A contract will not be interpreted as excluding the Court's jurisdiction unless by clear words or necessary implication; *Brodie* v *Ker* 1952 SC 216 consulted judges (LP (Cooper), Lords Carmont and Russell) at 224; *Gilbert-Ash* v *Modern Engineering* [1974] AC 689 Lord Diplock at 717–718.

[15] The contractual terms in the present case go no further than stating that adjudication (and a notice of dissatisfaction) is necessary before proceeding to arbitration. The terms do not seek to attempt to deprive the pursuers of their right to raise court proceedings. They do not refer to the court at all. Raising a court action does not *per se* breach the terms. A party relying on an ADR provision is entitled to tender the appropriate plea and, if sustained, the court will not entertain the merits of the dispute (*Brodie* v *Ker* consulted judges at 223). Here, the defenders have insisted on the dispute being determined by the contractual ADR procedure. In those circumstances the court will enforce the parties' agreement (*North British Railway Co* v *Newburgh and North Fife Railway Co* 1911 SC 710 LP (Dunedin) at 719). It will not engage with the merits of the dispute unless the agreed method fails to resolve the dispute. Otherwise, the court's competence to hear the case is not affected. The right to proceed by the alternative method may be waived or it may fail for a variety of reasons.

[16] Whether the action is of any utility or purpose is not a matter which the court is required to determine at this stage. There is no plea that the action is either hypothetical, academic or premature. It is, *ex facie*, a competent action seeking a practical result. Even if it cannot be pressed to a conclusion at present, the raising of an action may, whether or not there is an ADR provision, be necessary to prevent the operation of prescription, to secure diligence on the dependence or for other reasons. For aught yet seen, the arbitration, which

is now in prospect, may fail. Whether that is so or not, the procedure to be followed is to sist the cause meantime.

[17] Section 10 of the Arbitration (Scotland) Act 2010 provides that, on an application by a party to legal proceedings concerning any matter under dispute, the court "must" sist those proceedings, if there is an arbitration agreement covering that matter (whether immediately or after other ADR processes), unless the applicant has indicated a desire to have the dispute resolved by the legal proceedings. Notwithstanding the defenders' submission to the contrary, it is plain that the legal proceedings (ie the present action) concern a "matter under dispute" arising under the parties' contract. The court heard argument on who the applicant might be for the purposes of section 10 and whether, if it was the pursuers, they had indicated a desire to have the dispute resolved by the legal proceedings. Given that the pursuers are content that the dispute proceeds to arbitration, and have explained that the reason for raising the action related to fears about the application of prescription, it is by no means clear that they have indicated a desire that the merits of the dispute be resolved by the court. Be that as it may, the issue of the application of section 10 is better resolved by having regard to the defenders' second plea-in-law. This seeks a reference to arbitration, if the raising of the action is not contractually barred. Since the court has rejected the latter argument, it becomes the defenders who are seeking a sist in terms of that plea. That being so, the court must sist the cause in terms of section 10.

[18] For completeness, the two first instance cases from, respectively, England and Wales are not in point. In any event considerable care would require to be taken before applying *dicta* in them to this court's procedure. *Anglian Water Services* v *Laing O'Rourke Utilities* [2011] All ER (Comm) 1143 was about the validity of a notice of dissatisfaction. Edwards-Stuart J's reference (at para [16]) to "starting" proceedings, if correct in English law (cf

Channel Tunnel Group v *Balfour Beatty Construction* [1993] AC 334 Lord Mustill at 353-355), runs contrary to *Hamlyn & Co* v *Talisker Distillery*. In *Dawnus Construction Holdings* v *Amey LG* [2017] EWHC B13 (TCC), HHJ Keyser QC asked the correct question of whether the failure to serve a notice of dissatisfaction prevented the court from "finally determining" the relevant issue.

[19] The reclaiming motion must be allowed, the commercial judge's interlocutor of 3 February 2021 will be recalled and the action will be sisted pending the outcome of the ADR processes.