OUTER HOUSE, COURT OF SESSION

[2021] CSOH 115

CA21/21

OPINION OF LORD TYRE

In the cause

GREATER GLASGOW HEALTH BOARD

Pursuer

against

(FIRST) MULTIPLEX CONSTRUCTION EUROPE LIMITED; (SECOND) BPY HOLDINGS LP and BPY HOLDINGS GP LIMITED (previously known as BROOKFIELD EUROPE GP LIMITED); (THIRD) CURRIE & BROWN UK LIMITED; and (FOURTH) CAPITA PROPERTY AND INFRASTRUCTURE LIMITED

Defenders

Pursuer: Dean of Faculty, Broome; MacRoberts LLP
First and Second Defenders: MacColl QC, A Mackenzie; Brodies LLP
Third Defenders: Rt Hon Lord Keen of Elie QC, Manson; Keoghs LLP
Fourth Defenders: Higgins QC, Massaro; Dentons UK and Middle East LLP

5 November 2021

Introduction

[1] In this action the pursuer seeks payment by the first, third and fourth defenders jointly and severally, and by the second defenders jointly and severally, of the sum of £72,800,000 in respect of losses alleged to have been sustained as a consequence of defects in the construction of the Queen Elizabeth University Hospital in Glasgow. The first defender is the main contractor. The second defenders are guarantors of the first defender's

obligations and liabilities to the pursuer. The third defender is the lead consultant. The fourth defender is the project supervisor.

[2] The pursuer's contracts with the first and fourth defenders respectively provided for any dispute arising under or in connection with the contract to be referred to and decided by an adjudicator, and stated that no dispute was to be referred to the court unless it had first been decided by the adjudicator. None of the issues with which this action is concerned has been referred for adjudication. In these circumstances the first, second and fourth defenders submit that the present action is incompetent and should be dismissed. The pursuer contends that the action should be allowed to proceed or, in any event, sisted to allow any adjudication to take place. The pursuer also seeks a declarator that the summons in this action was a relevant claim for the purpose of the Prescription and Limitation (Scotland) Act 1973. The third defender, whose contract did not provide for referral for adjudication, presented a submission supportive of the pursuer in relation to the progress and competency of the action, but not in relation to the declarator sought.

The pursuer's claim

[3] The pursuer pleads that there are a number of issues arising from defects in the hospital, including but not limited to the following:

- Water system
- Standard isolation rooms ventilation
- Adult hospital ward 4B ventilation
- RHC ward 2A ventilation
- Plant and building services capacity
- Toughened glazing

- Doors
- Heating system
- Atrium roof
- Internal fabric moisture ingress
- Pneumatic transport system

In respect of each of these issues, the pursuer pleads that each of the first, third and fourth defenders breached the terms of their contracts and their common law duties.

[4] The summons was served shortly before expiry of the 5-year prescriptive period. Although it contains some specification of the relevant contractual terms in relation to each of the above issues, it provides no detail of the defects alleged to exist, nor any particularisation of the basis of the claims made against each of the first, third and fourth defenders respectively.

The contractual terms

[5] The pursuer's contract with the first defender provided that the works were to be performed in accordance with the NEC3 Engineering and Construction Contract, Option C. The pursuer's contract with the fourth defender provided that the fourth defender's services as project supervisor were to be performed in accordance with the NEC3 Professional Services Contract, Option A. Each of these contracts included NEC clause W2 on dispute resolution. So far as material, that clause states 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.
> …
>
> W2.3 (11) The Adjudicator's decision is binding on the Parties unless and until revised by the tribunal and is enforceable as a matter of contractual obligation

> between the Parties and not as an arbitral award. The Adjudicator's decision is final and binding if neither party has notified the other within the times required by this contract that he is dissatisfied with a matter decided by the Adjudicator and intends to refer the matter to the tribunal.
>
> 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…"

"The tribunal" is defined in each contract as the Scottish Courts.

[6] In the fourth defender's contract, clause W2 was incorporated without amendment. In the first defender's contract, certain bespoke amendments were made: in clause W2.1(1), the following was added at the end: "The word 'dispute' in this clause W2 includes any difference under or in connection with this contract." In clause W2.3(11), the first sentence was deleted and replaced by: "The decision of the Adjudicator is binding until the dispute is finally determined by the tribunal or by agreement." Nothing turns on the wording of those amendments, although in his argument senior counsel for the first defender placed some weight on the fact that bespoke amendments had been made.

The issues

[7] The following issues arise for determination:

(i) Does the dispute in the present action fall outside the scope of clause W2?

(ii) If not, is the present action incompetent?

(iii) Should the action be sisted or dismissed?

(iv) Is the pursuer entitled to a declarator that the present action is a relevant claim for prescription purposes?

Decision

(i) Does the dispute in the present action fall outside the scope of clause W2?

[8] On behalf of the pursuer it was submitted that on a proper construction of its contracts with the first and fourth defenders, the dispute in the present action was not one that the respective parties had intended would be referred for adjudication. The limitations of adjudication were well known. Only one dispute could be referred for adjudication at a time. There could not be a multiplicity of parties to an adjudication. It had been foreseeable at the time of contracting that this project would give rise to multiple disputes arising at a late stage, when the advantages of adjudication would be absent. There could in theory be as many as 22 adjudications here, with no possibility of consideration of joint and several liability and a risk of mutually inconsistent decisions. The parties should not be taken to have agreed such an obviously inappropriate means of dispute resolution. The approach to the limitations of adjudication adopted by Lord Malcolm in *Whyte and Mackay Ltd* v *Blyth & Blyth Consulting Engineers Ltd* 2013 SLT 555 had been correct and should be followed. No question of incompetency arose, and the action should be allowed to proceed without any antecedent adjudication.

[9] On this issue the third defender aligned itself with the position of the pursuer. Use of the singular "dispute" in clause W2 was important. The dispute as framed for the court could not be referred for adjudication: there were a multitude of "disputes", there were three different contracts, and no adjudication which sought to embrace all of the issues could be determined in the speedy and efficient way expected under the Scheme.

[10] The first, second and fourth defenders submitted that the pursuer's (and third defender's) arguments should be rejected. It was no bar to adjudication that a dispute arose after the works had been completed: "at any time" meant what it said. Nor was a dispute excluded from adjudication because it was complex. If resolution of the issues now raised required multiple adjudications, that was what the parties had agreed. Each of the pursuer's claims against the first or fourth defenders was a "dispute" to be adjudicated upon. If a claim was satisfied against one party there would be no basis to recover from another. The parties could have contracted for resolution of claims of joint and several liability but had chosen not to do so.

[11] It is common ground that the parties' intentions regarding the scope of clause W2 are to be ascertained at the time when the contracts were entered into. It is also common ground that the now well-recognised principles of construction of commercial contracts fall to be applied. In my opinion the application of those principles does not lead to the conclusion that the parties did not intend that the dispute in the present action would fall within the scope of clause W2.

[12] In *Michael J Lonsdale (Electrical) Ltd* v *Bresco Electrical Services Ltd* [2020] Bus LR 1140, the Supreme Court recently emphasised (at paragraphs 13-14) that adjudication is designed to be a mainstream dispute resolution process in its own right, and not merely a mechanism for solving cash flow problems. The court pointed out that adjudication can be and is used to resolve disputes about final accounts after practical completion, and that experience has shown that in most cases adjudication achieves a final resolution of the dispute because the adjudicator's decision is not challenged. Reference was made to observations of Coulson LJ in the same case in the Court of Appeal that adjudication was used, for example, for determination of professional negligence claims. So far as can be discerned from the

summons in the present action, there is nothing inherent in the subject matter of the pursuer's claims that would render any of them so obviously unsuitable for adjudication that parties cannot be taken to have intended clause W2 to apply to them.

[13] The pursuer's argument is founded rather upon the complexity of the claims made in the present action: 11 categories of defects, for each of which three defenders (contractor, lead consultant and project supervisor) are alleged to be jointly and severally responsible. I am not, however, persuaded that clause W2 ought to be construed as impliedly excluding complex disputes. If the parties to the respective contracts had wished to exclude complex disputes, including disputes in which joint and several liability was asserted, they could have done so. It was foreseeable at the time of contracting that in a project of this scale disputes might arise, but the parties have not seen fit to make any special provision for disputes of any particular complexity. Instead they have entered into contracts in terms of which "any dispute" may be referred "at any time" for adjudication.

[14] I am not prepared to accept, on the basis of the detail contained in the summons, that it would be impossible for some or even all of the issues identified to be resolved by an adjudication process. There may have to be multiple adjudications. It is of course generally accepted that only a single dispute can be referred to an adjudicator at any one time, and it is conceivable that difficulties may arise in identifying what is or is not a single dispute. That is not an uncommon difficulty, as the case law demonstrates. It may also be that a particular dispute is so complex that the adjudicator is unable to decide it within the time limit imposed by section 108 of the Housing Grants, Construction and Regeneration Act 1996. But as Judge John Toulmin QC observed in *CIB Properties Ltd* v *Birse Construction Ltd* [2005] 1 WLR 2252 at paragraph 24:

> "The Act confers a general right to refer a dispute or difference to adjudication provided it can be adjudicated in accordance with a procedure complying with section 108(2). This general right exists irrespective of the apparent complexity of the dispute but it does not require an adjudicator to reach a decision if he is unable to do so within the time limits imposed by section 108(2) of the Act."

I consider it would be premature, at a time when no reference for adjudication has yet been made, to conclude that any referral would be bound to fail because no reference could be competently framed, or because no adjudicator could reach a decision within the statutory time limit.

[15] Nor am I prepared to accept at this stage that 22 separate adjudications would necessarily have to take place. I have already noted that the basis of the claim made against each of the first, third and fourth defenders in relation to each of the issues is currently inspecific. The process of reference for adjudication should serve to focus the basis of each claim and may not result in all of the claims being pressed against all of these defenders. Finally, I am not prepared to assume at this stage that none of the issues will be resolved in relation to the first and fourth defenders by adjudication. That would run contrary to the experience described in *Bresco* (above).

[16] If, however, some or even all of the issues were to remain unresolved by the adjudication process, whether because it proved to be impossible for an adjudicator to reach a decision within the time limit, or because one or other party was dissatisfied with the decision and gave timeous notice to that effect, then such matters would fall to be decided by the court. That is what is envisaged by clause W2.4.

[17] The pursuer placed considerable weight on the (*obiter*) observations of Lord Malcolm in *Whyte and Mackay Ltd* v *Blyth & Blyth Consulting Engineers Ltd* (above). In that case a claim for damages initiated several years after completion was referred for adjudication. When the pursuer raised an action to enforce the adjudicator's decision, it was held that there had

been a significant omission in the adjudicator's reasoning, and his decision was reduced. Lord Malcolm went on, however, to express the view that although *ex facie* competent, proceeding to adjudication had been unnecessary and inappropriate, and that enforcement of the award would have amounted to an interference with the defender's rights in terms of Article 1 of the First Protocol to the European Convention on Human Rights. At paragraph 47, he observed:

> "…(T)he adjudicator was presented with a next to impossible task. Even a judge would struggle to identify a procedure which would allow the complex issues of fact and law arising between the parties to be determined in any semi-satisfactory manner within six weeks. In the circumstances of the present case, the well known problems, disadvantages and potential injustices of an adjudication are not counter balanced, let alone outweighed, by any of the aims and purposes lying behind the 1996 Act. It is those public interest benefits which justify enforcement of an adjudicator's award, even a substandard and obviously wrong award…, but they are more or less wholly absent in the present case. It follows that it would be disproportionate and wrong to enforce the award…"

These observations were cited with approval in *Coulson on Construction Adjudication* (4th ed, 2018) at paragraph 13.28, the learned author commenting that "Finally there is a case that concludes that, sometimes, a claim will be too large and/or too complicated and/or raised too long after completion to be suitable for adjudication".

[18] The factual context of Lord Malcolm's observations in *Whyte & Mackay* was peculiar: the adjudicator's award consisted of compensation for a loss, caused by defective foundations, that would not emerge for 20 years. The focus was on the considerations to which the court should have regard in deciding whether to refuse to enforce an adjudicator's decision. Different considerations arise where, as in the present case, the court is asked to form a view, before any referral for adjudication has been made, as to whether adjudication of the pursuer's claims will be impossible or at least so impracticable that parties must have intended that they would not fall within the scope of an adjudication clause in their contract.

In my view the observations do not support the existence of a general proposition that some disputes must be held, in advance of any referral, to be (adopting the description in Coulson) too large and/or too complicated and/or raised too long after completion to be suitable for adjudication. *A fortiori* they do not compel clause W2 of NEC3 to be construed as limiting the parties' agreement to refer disputes for adjudication to disputes not falling within that description.

[19] The pursuer's argument was presented as one of contractual interpretation and not as one of exercise of court discretion. My attention was drawn to a Northern Irish decision, *Abbas* v *Rotary International Ltd* [2012] NIQB 41, in which the court declined to stay court proceedings which had been commenced despite the parties' contract containing a binding agreement to adjudicate. The reasons for refusing a stay were that part of the claim did not fall within the adjudication agreement, and that the claim had been outstanding for a long period of time. This decision may be contrasted with *Peterborough City Council* v *Enterprise Managed Services Ltd* [2014] 2 CLC 684, in which the judge (Edwards-Stuart J) expressed sympathy for the claimant's submission that adjudication was likely to be a lengthy and unproductive exercise, but nevertheless held that the "presumption in favour of adopting the method of dispute resolution chosen by the parties in their contract" ought to prevail. In the present case neither the pursuer nor the third defender contended that the court in Scotland had a general discretion to override the terms of a mandatory adjudication provision.

(ii) Is the present action incompetent?

[20] On behalf of the first, second and fourth defenders, it was submitted that the pursuer was contractually barred from pursuing this dispute by way of court action, and moreover

was in breach of contract by serving the summons and lodging it for calling. The action was, in the circumstances, incompetent. The requirement to refer any dispute for adjudication was mandatory. It had been expressly agreed as opposed to being compelled by application of the statutory Scheme. Cases concerning arbitration were distinguishable because of the express terms of clause W2. The defect could not be cured by amendment. Each step in the dispute resolution procedure under clause W2 was a condition precedent to the next, so adjudication now could not cure the defect.

[21] On behalf of the pursuer it was argued that contractual bar did not equate to incompetency. The summons was not a fundamental nullity. Any entitlement of the defenders to have the dispute referred for adjudication could be waived, which told against incompetency. Questions of competency were not fixed as at the moment when an action was raised; any incompetency at the time of raising would be cured now by sist and referral for adjudication. The parties were highly likely to return to the court to pursue final resolution of their disputes, and could make use in the meantime of the court proceedings, for example to pursue document recovery.

[22] In *Fraserburgh Harbour Commissioners* v *McLaughlin & Harvey* 2021 SLT 1009, Lady Wolffe (at paragraph 31) characterised clause W2.4 as a contractual bar on resorting to the "tribunal" of choice - in that case arbitration - without first having referred the dispute for adjudication. I respectfully agree with that characterisation. The argument that proceedings raised in breach of clause W2.4 were not only contractually barred but also incompetent was not pursued in *Fraserburgh*.

[23] Incompetency is a somewhat elusive concept. McLaren in *Court of Session Practice* at page 388 described a plea to competency as "an objection to either the form of the summons in general or in a particular set of circumstances, as distinguished from irrelevancy, which is

an objection to the condescendence." It covers a range of circumstances in which the action as laid before the court cannot proceed, but it is not always the case that the defect that prevents the action from proceeding is incurable. Some examples serve to make this clear.

[24] In *Bank of Scotland* v *W&G Fergusson* (1898) 1F 96, an action was raised for payment of a sum due under a bill of exchange, but the contents of the bill were not set out in full in the summons (as opposed to the condescendence) as was then required by statute and rules of court. Allowing the summons to be amended outwith the prescriptive period to cure the defect, Lord President Robertson observed at page 101:

> "…(T)he summons as it stands now is not in competent form. I use that phrase in order to add that I think that a summons which is not in competent form may be described, as it has been described already in the previous decisions, as incompetent. But then, it is, I think, equally clear, and indeed was conceded, that that is a defect in the summons which is susceptible of amendment and cure under the 29th section of the Court of Session Act, 1868; and accordingly it is not one of those fatal defects which impart nullity to the action, and the action is one which, when put into shape under the statute, can proceed, and decree can be obtained in it."

A distinction is thus drawn between, on the one hand, a curable incompetency and, on the other, incompetency which is incurable so that the action is fundamentally null.

[25] This distinction was applied by Lord Eassie in *Thomas Menzies (Builders) Ltd* v *Anderson & Menzies* 1998 SLT 794, where the incompetency arose because two associated companies had sued the defenders for damages in a single action on different grounds. The action was amended by deleting the claim of one of the companies, which then raised a separate action outwith the prescriptive period. The defenders argued that the first action ("the 1993 action") had been incurably incompetent and therefore fundamentally null, so that the second action was time barred. After noting that the incompetency of the first action was not such as would have prevented it from proceeding if the defender had not taken objection, Lord Eassie continued (at page 798):

> "…The conclusions in the 1993 action taken individually did not seek a decree which the Court of Session could not competently pronounce. It did not seek decree against parties not subject to the court's territorial jurisdiction. There was no question of an action proceeding on an illegal contract or the like. There was no formal defect in the initiating summons. There was no real obstacle to the defenders' lodging a tender in the 1993 action and that tender being accepted by one or other of the pursuers. In my view, had the 1993 action been undefended, decree could competently have been obtained in it as respects both of the conclusions for the pursuers. Accordingly, I consider that it is not possible to characterise the 1993 action as being a fundamental nullity."

[26] By way of contrast, Lord McLaren referred in *Bank of Scotland* v *W&G Fergusson* (at page 102) to defects that were so radical as to be incurable by amendment: "for example, if no defenders were called, or if the summons contained no will". In *Balfour* v *Baird* 1959 SC 64, an employee who had successfully sued one of his former employers for damages for contracting pneumoconiosis raised a second action against another of his employers in respect of the same disability, explaining that damages had not been properly assessed in the first action. The second action was dismissed and the defender's plea to competency was upheld. Lord Justice-Clerk Thomson stated that the pursuer's damage had in law ceased to exist and the obligation to the defender in the second action had been extinguished. The recent decision of Lord Clark in *Kidd* v *Lime Rock Management LLP* 2021 SLT 35 (at paragraphs 41-42) is to the same effect.

[27] From these authorities the following propositions may be distilled. Firstly, incompetency is different from fundamental nullity. The label "incompetent" when attached to a summons means that the action cannot proceed as matters stand, but does not determine whether the defect is curable. Secondly, just as incompetency may arise for a variety of reasons, so the means of curing the defect may vary. There is no single test such as whether the defect can be cured by amendment of the summons. The obstacle may be removable by other means. Thirdly, the fact that an action could proceed if a competency

point were not taken by the defender is an indicator that it is not a nullity for the purposes of the interruption of the operation of prescription.

[28] In my opinion the circumstances of the present case are indistinguishable from the cases in which court proceedings were raised despite the agreement of parties to have their disputes resolved by arbitration. The effect on the jurisdiction of the court of an agreement to submit to arbitration is long established: jurisdiction is not wholly ousted although the court is for the time being deprived of jurisdiction to inquire into and decide the merits of the case. Should the arbitration prove abortive, the full jurisdiction of the court revives: *Hamlyn & Co* v *Talisker Distillery* (1894) 21R (HL) 21, Lord Watson at 25.

[29] The application of that basic principle to the statutory provisions for arbitration in relation to agricultural tenancies was considered by a court of seven judges in *Brodie* v *Ker* 1952 SC 216. The defender's plea in law was that:

> "the present dispute being one which falls to be referred to arbitration in terms of section 74 of the Agricultural Holdings (Scotland) Act, 1949, *et separatim* in terms of clause 14 of the General Articles of Let, the action should be dismissed."

Having referred to the observations of Lord Watson in *Hamlyn & Co*, the consulted judges stated (at page 223):

> "By parity of reasoning it appears to us that, whenever a Court is satisfied that the parties are at issue on a question the decision of which is confided by Parliament to some other tribunal, the powers of the Court to investigate and determine that question cannot (at any rate in the meantime) be put into operation; the action will normally be sisted to await the expiscation of the matter by that other tribunal, and, this having been done, the Court will then resume its interrupted task—usually by pronouncing an order to effectuate the decision of the other tribunal."

It may be noted that neither in *Hamlyn & Co* nor in *Brodie* v *Ker* was the matter treated as one of competency. As it was put by the consulted judges in *Brodie* v *Ker*, the court simply could not "in the meantime" exercise its power to investigate and determine the issue between the parties.

[30] In one respect the position in relation to an agreement to adjudicate may be said to be *a fortiori* of the position in relation to arbitration. The court's power to interfere with the decision of an arbitrator is extremely limited, whereas the decision of an adjudicator is final and binding only unless and until the dispute is timeously objected to and then brought before the court for a decision on the merits. There is, however, no material difference in the situation that subsists while the reference is taking place: in relation to both arbitration and adjudication the court's jurisdiction to investigate and determine the dispute is "in the meantime" ousted.

[31] The first and fourth defenders sought to distinguish the arbitration cases on the ground that there were here express contractual provisions which not only required any dispute to be referred for adjudication but also (in clause W2.4(1)) specifically prohibited the reference of any dispute to the court unless it had first been decided by the adjudicator in accordance with the contract. In my view the prohibition adds nothing of substance to the obligation in clause W2.1(1) to refer any dispute to the adjudicator. Although that clause uses the present tense favoured by the drafters of the NEC contracts, it is in mandatory terms ("Any dispute arising under or in connection with this contract *is* referred to and decided by the Adjudicator" - my emphasis). The position is therefore analogous to statutory provisions such as the one at issue in *Brodie* v *Ker* which require parties to a contract to submit their disputes for determination by arbitration.

[32] It is not, in my opinion, accurate to describe reference to and determination by the adjudicator as a "condition precedent" of the bringing of a court action. Although clause W2.4(1) operates as a contractual bar on referral of a dispute to the court unless it has first been decided by the adjudicator, it is a bar that may be waived by the other party to the contract and which does no more than prevent the court from entertaining the dispute so

long as the bar remains unwaived and the matter has yet to be decided by the adjudicator. Gloag (*Contract*, 2nd ed, at page 273) defines a condition precedent (or suspensive condition) as a contractual term of such materiality that its non-fulfilment amounts to a discharge of the contract and liberates the other party from its obligations. *Caledonian Insurance Co* v *Gilmour* (1892) 20R (HL) 13 provides a useful illustration of a case where the decision of an arbiter as to whether any sum, and if so how much, was due under an insurance policy was a condition precedent to the insurer's obligation to make any payment under the policy, and hence to the raising of a court action. Lord Herschell L-C explained the distinction thus (at page 15):

> "The question is not whether, where a contract creates an obligation to pay a sum of money, it is a good answer to an action to recover it that disputes have arisen as to the liability to pay the sum, and that the contract provides for the reference of such differences to arbitration; but whether, where the only obligation created is to pay a sum ascertained in a particular manner, where, in other words, such ascertainment is made a condition precedent to the obligation to pay, the Courts can enforce an obligation without reference to such ascertainment. If they could do so they would not be enforcing the contract made by the parties, but one of a different nature."

The dispute in the present case falls within the first of Lord Herschell's categories, where reference to arbitration (or adjudication) for a determination does not create the obligation and is not therefore to be characterised as a condition precedent.

[33] For these reasons I am not persuaded that any issue of competency arises in the present case. The action is not incompetent, but by virtue of the terms of clause W2, and in the absence of a waiver by the defenders of the contractual requirement to refer any dispute to an adjudicator, it cannot be entertained by the court until the adjudication process has concluded.

(iii) Should the action be sisted or dismissed?

[34] The pursuer submitted that if the action was not allowed to proceed it should be sisted to await the outcome of adjudication, and not dismissed. That was the appropriate and usual course in Scotland as well as in England. There was no material distinction between arbitration clauses and the contractual provisions with which this action was concerned. The first, second and fourth defenders submitted that the court should adopt the same approach as in *Fraserburgh Harbour Commissioners* (above) and dismiss the action.

[35] In my opinion the appropriate course is to sist the action to await the outcome of the adjudication(s). I agree that that is the usual course and I see no reason to depart from it. Even if I had held that the contractual bar created by clause W2 was properly to be characterised as a curable incompetency I would not have regarded dismissal as appropriate. On any view the summons is not a nullity. No reference for adjudication has yet been made by any party, and it is conceivable that all parties may yet decide that it would be preferable to allow the court action to proceed. As was pointed out during the hearing, the existence of the court proceedings may expedite the recovery of documents for the purposes of an adjudication.

[36] In *Fraserburgh Harbour Commissioners*, Lady Wolffe, having held that clause W2 operated as a contractual bar on the pursuer proceeding to litigate in court without having referred the dispute to the adjudicator, dismissed the action. Since the hearing took place in the present action, and shortly before my opinion was due to be issued, the court issued its opinion ([2021] CSIH 58) in a reclaiming motion against Lady Wolffe's decision. The court recalled Lady Wolffe's interlocutor and sisted the action pending the outcome of the ADR processes. My reasons (above) for sisting the present action are in accordance with the reasoning of the court.

(iv) Should the court grant the declarator sought?

[37] In the light of my decision that the present action is not incompetent, and that it should be sisted and not dismissed, I understood it to be accepted by the pursuer that the conclusion for declarator is unnecessary.

[38] For the sake of completeness I should say that if for whatever reason I had decided to dismiss this action, I would not have been minded to grant the declarator sought. I agree with the submissions on behalf of all of the defenders that the question whether the summons is a relevant claim for prescription purposes should not be determined in these proceedings. If this action were to be dismissed, and a prescription issue arose in subsequent proceedings, that, in my view, would be the appropriate place to determine whether, in relation to *that* claim, the present summons had interrupted the running of prescription. It was, moreover, pointed out on behalf of the fourth defender that that defender has a plea and averments that the pursuer's right of action has prescribed, which would necessitate inquiry and which would preclude the grant of any declarator at this stage.

Disposal

[39] I shall repel the pleas in law that the action is incompetent, being the first plea in law for the first and second defenders and the first plea in law for the fourth defenders. I shall repel the second plea in law for the first and second defenders and the second plea in law for the fourth defenders to the extent that they seek dismissal of the action on the ground of contractual bar. I shall leave all other pleas standing and sist the action to await the outcome of adjudication. Questions of expenses are reserved.