SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

[2019] SC ABE 31

ABE-CA43-18

JUDGMENT OF SHERIFF PHILIP MANN

in the cause

D & H DEVELOPMENTS, having a place of business at 30 Whitehall Street, First Floor, Dundee, DD1 4AF

Pursuers

against

ANDOVER DEVELOPMENT COMPANY LIMITED, (SC485674) a company incorporated under the Companies Acts having its registered office at 30 Binghall Road West, Milltimber, Aberdeen, AB13 0BJ

Defenders

Aberdeen 11 April 2019

The sheriff, having resumed consideration of the cause, Sustains the defenders' preliminary plea number 2 in the main action to the extent of excluding from probation (1) the words "pursuant to said Contract" where they appear on line 15 of article 2 of condescendence; (2) the averments commencing with "*Esto* Mr Culloch" on line 23 of that article and ending with "Quantity Surveyor" on the third last line of that article; (3) the averments commencing with "The Pursuers" on line 5 of article 4 of condescendence and ending with "Defenders" where it first appears on the second last line of that article; and (4) article 5 of condescendence; *Qouad ultra,* repels the defenders' preliminary plea number 2; Sustains the defenders' plea in law number 8 but only to the extent of dismissing the pursuers' craves six and seven; thereafter, Allows parties a proof of their averments, as left standing, before answer of the defenders' preliminary plea number 1; Fixes 17 April 2019 at 2:30pm as a Case

Management Conference by way of conference call to identify a suitable date therefor and to discuss whether there might be merit in discharging the debate on the pursuers' plea in law number 1 in the counterclaim which is fixed for 31 July 2019 and extending the proof before answer to include a proof before answer of said last mentioned plea; meantime reserves the expenses of the debate on 2 April 2019.

Note

Introduction

[1] This is a commercial action, which began life as an ordinary cause. It concerns a contract between the parties in terms of which the pursuers carried out building works on behalf of the defenders in connection with the renovation of a former primary school to convert it into residential accommodation.

[2] Parties agree on record that the contract took the form of that standard form of building contract known as the Scottish Building Contract/XQ/Scot2011. In this judgment, the use of initial capitals indicates a technical or defined term in the contract.

[3] The pursuers aver: "Although a completed version of the standard form was agreed the parties have not, as yet executed same [sic]. They have however adopted the terms of the unsigned Contract and are bound, by its terms [sic]". These averments are covered by a general denial by the defenders but their submissions in debate were predicated on the proposition that the parties were bound by the terms of that contract and this judgment is framed accordingly.

[4] There is reference in the record to the Housing Grants, Construction and Regeneration Act 1996. I understand that the standard form contract which the parties adopted in this case was devised so as to comply with that legislation. The legislation may

have a bearing on the rights and obligations of the parties depending on whether or not the particular contract between them is fully compliant with the Act. This was not explored to any great extent in submissions. I propose to say nothing about the Act in this judgment but recognise that it may come up for consideration at any future proof.

[5] The standard form contract is divided into various sections. In the section headed "Articles", Article 4 relates to the identity of "the Quantity Surveyor or the person by whom the functions of the Quantity Surveyor shall be exercised." That Article has been marked "N/A".

[6] The parties are in dispute in respect of three matters. The first is whether or not any person was appointed to exercise the functions of Quantity Surveyor for the purposes of the contract. This has a bearing on the competency of certain Interim Applications and/or Interim Payment Notices issued by the pursuers which in terms of the Contract Conditions, contained in a separate section of the standard form, could only be served upon "the Quantity Surveyor". For ease of reference, when I refer to these Interim Applications/Interim Payment Notices collectively I will refer to them as "the Pursuers' Notices". The second is whether, in any event, the Pursuers' Notices were invalid such that the defenders' admitted failure to issue Pay Less Notices does not render them liable to pay anything to the pursuers. The third issue in dispute is whether or not the defenders are personally barred from asserting that Mr Culloch is not the Quantity Surveyor for the purposes of the contract.

[7] The defenders' have stated two preliminary pleas which are in the following terms:

1. The pursuers' averments being irrelevant and separately lacking in specification, the action should be dismissed.

2. The pursuers' averments being irrelevant and separately lacking in specification, should not be admitted to probation."

These preliminary pleas are directed at the averments supporting the pursuers' first, second, fifth, sixth and seventh craves. The first crave seeks declarator that Mr Culloch, whomfailing Mr Riddell, is the Quantity Surveyor in terms of the contract for the purposes of the Interim Application for Payment number 10 dated 22 December 2017. The second crave seeks declarator that Mr Culloch is the Quantity Surveyor in terms of the contract. The fifth crave is a crave for payment and relates to an Interim Application issued by the pursuers dated 22 December 2017. The sixth crave is a crave for payment and relates to an Interim Payment Notice issued by the pursuers on 9 February 2018. The seventh crave is a crave for payment and relates to an Interim Application issued by the pursuers dated 23 May 2018. Although these craves are not stated in the alternative I take them to be such in the sense that the pursuers could not be entitled to payment of all three sums. This is because the Pursuers' Notices are cumulative, the sum stated in any later Application or Notice of necessity including the sums claimed in previous Applications or Notices.

[8] The pursuers maintain that Mr Culloch, who was the appointed Architect/Contract Administrator in terms of the contract, was also appointed as the person to exercise the functions of the Quantity Surveyor. They also maintain that for one particular period Mr Riddell was appointed to exercise the functions of the Quantity Surveyor. The defenders maintain that no person was so appointed.

[9] The defenders maintain that the Pursuers' Notices were invalid because they simply could not conform to the requirement of the contract that they be served on the Quantity Surveyor, no Quantity Surveyor having been appointed; and, in any event, did not conform to the requirements of the relevant clauses in the contract conditions relating to validity and form.

[10] On 2 April 2019 I heard debate on the defenders' preliminary pleas. The pursuers were represented by Mr Barrie, Solicitor Glasgow. The defenders were represented by Mr McDiarmid, Solicitor Aberdeen.

The Relevant Contract Conditions

[11] The standard form Scottish Building Contract is not for the faint hearted. I am indebted to Mr McDiarmid for his extremely clear and helpful explanation of the relevant contract conditions and how they interact with one another. This has assisted me greatly.

[12] The contract conditions relevant to this dispute can be paraphrased as follows:

- Clause 1.7 makes provision for notices and other communications between the parties. It provides, *inter alia*, that notices and other communications are to be in writing. It also provides for where such notices and communications are to be sent.
- Clause 3.5 deals with replacement of, *inter alia*, the Quantity Surveyor.
- Clause 4.9.1 specifies the due dates for monthly Interim Payments as being the monthly dates specified in the Contract Particulars – in this case the 30th day of each month.
- Clause 4.9.2 provides that the amount of each interim payment shall be the Gross Valuation of the works (under clause 4.16) less the aggregate of certain sums, including (1) any amount which may be deducted as a retention by the Employer as provided in clauses 4.18 to 4.20, and (3) the sums stated in previous Interim Certificates.
- Clause 4.10.1 provides that the Architect/Contract Administrator shall not later than 5 days after each due date issue an Interim Certificate stating the sum that he

considers to be due to the Contractor as an interim payment calculated in accordance with clause 4.9.2 and the basis upon which that sum has been calculated.

- Clause 4.11.1 provides that in relation to each interim payment the Contractor may not less than 7 days before the due date make an Interim Application to the Quantity Surveyor stating the sum that the Contractor considers will become due to him at the due date in accordance with clause 4.9.2 and the basis upon which that sum has been calculated.
- Clause 4.11.2.1 provides that if the Architect/Contract Administrator fails to issue an Interim Certificate in accordance with clause 4.10.1 then where the Contractor has made an Interim Application under clause 4.11.1 that Interim Application is converted into an Interim Payment Notice.
- Clause 4.11.2.2 provides that if the Architect/Contract Administrator fails to issue an Interim Certificate in accordance with clause 4.10.1 and the Contractor has not made an Interim Application then at any time after the date when the Interim Certificate should have been issued the Contractor may give an Interim Payment Notice to the Quantity Surveyor stating the sum that the Contractor considers to be due or have been due to him at the relevant due date in accordance with clause 4.9.2 and the basis upon which that sum has been calculated.
- Clause 4.12.2 provides that subject to any Pay Less Notice the amount to be paid to the Contractor by the Employer shall be the sum stated in the Interim Certificate.
- Clause 4.12.3 provides that if the Interim Certificate is not issued in accordance with clause 4.10.1 the sum to be paid to the Contractor by the Employer shall, subject to any Pay Less Notice, be the sum stated as due in the Interim Payment Notice.

- Clause 4.12.5 provides that if the Employer intends to pay less than the sum stated as due in the Interim Certificate or Interim Payment Notice he shall within 5 days before the final date for payment of the interim payment (14 days after the due date per clause 4.9.1) give the Contractor a Pay Less Notice in accordance with clause 4.13; and where a Pay Less Notice is given the payment to be made shall be not less than the sum stated in the notice.
- Clause 4.20 provides that the Employer may deduct and retain a certain percentage of the Gross Valuation for an Interim Certificate.
- Clause 4.18.2, which deals with how the employers are to treat the retention, employs the words "to the extent that he [the Employer] exercises his right under clause 4.20".
- Clause 5.2 relates to valuation of variations by the Quantity Surveyor.
- In the Definitions section "Quantity Surveyor" is defined as "the person named in Article 4 or any successor nominated or otherwise agreed under clause 3.5".
- In the Contract Particulars section the first due date for Interim Payments is specified as 30 March 2017.

Submissions

The Defenders' Submissions

[13] In the course of his submissions, Mr McDiarmid emphasised that his attack on the pursuers' pleadings was as to the question of relevancy, not specification.

[14] Mr McDiarmid referred to the pursuers' averment that the parties had entered into the contract on 8 March 2017. They averred that the parties were bound by its terms. One of its terms was Article 4, which was marked "N/A". It followed that the parties had agreed

that there was to be no Quantity Surveyor and no person by whom the functions of the Quantity Surveyor were to be exercised. Mr McDiarmid acknowledged that the fact that there was no Quantity Surveyor effectively meant that the pursuers were unable to take advantage of the contract conditions in their favour relating to Interim Applications and Interim Payment Notices. Such applications and notices required to be sent to the Quantity Surveyor and there was none such appointed.

[15] The pursuers went on to aver that on 7 February 2017, by email, the defenders nominated Mr Culloch as Quantity Surveyor pursuant to the contract. It was impossible to make a nomination in respect of a contract which had not yet been entered into and on that basis that averment had to be irrelevant and fell to be excluded from probation. In any event, the email did not go far enough as it did not mention the words "Quantity Surveyor" nor did it comply with clause 1.7 as it was not sent to the pursuers at their address.

[16] The pursuers averred that, *esto* Mr Culloch was not the Quantity Surveyor for the purposes of the December 2017 interim application (number 10), Mr Riddell had been nominated as the Quantity Surveyor for the purposes of that month by way of a phone call between the parties. That could not be regarded as a valid nomination because, not being in writing, it did not comply with clause 1.7.

[17] Mr McDiarmid pointed out that the pursuers did not aver that the parties had agreed to vary their contract. That was an essential averment. Without it the pursuers' averments were irrelevant. Even if the pursuers proved all of the averments that they did have they were bound to fail because they could not get over the fact that Article 4 had been marked "N/A" and in the definition section "Quantity Surveyor" was defined as "the person named in Article 4 or any successor nominated or otherwise agreed under clause 3.5". No valid

nomination of a Quantity Surveyor or a person by whom the functions of the Quantity Surveyor were to be exercised had been made.

[18] Mr McDiarmid had further arguments relating to the averments in support of craves five, six and seven. He acknowledged that the Pursuers' Notices had gone unanswered by way of a Pay Less Notice and that this ordinarily gave rise to the obligation to pay. However, his position was that the Pursuers' Notices were invalid for want of form. Parties were agreed that I could look at the Pursuers' Notices even though their terms had not been incorporated into the record.

[19] Mr McDiarmid maintained that the Interim Payment Application dated 22 December 2017 was invalid because it did not specify the due date. He referred to the case of *Henia Investments Inc* v *Beck Interiors Limited* [2015] EWHC 2433 as an example of how the courts dealt with such notices. If it was not clear what interim payment date the notice was referring to then it was not valid. The Interim Payment Notice issued on 9 February 2018 was invalid because it did not state what was due as at the due date. It did not set out the gross valuation. It specified a number of variations which did not accord with the contract. It did not set out the sums stated in previous Interim Certificates. It did not specify the retention. It did not set out the claim in the way envisaged by clause 4.9.2. Mr McDiarmid took me to the Interim Certificate issued by the Architect/Contract Administrator in response to the Interim Application dated 22 December 2017, albeit that it was late. It was a model of how Certificates, Applications and Notices in respect of Interim Payments should be prepared. The Interim Application dated 23 May 2018 was invalid for much the same reasons as the Interim Payment Notice dated 9 February 2018. Mr McDiarmid maintained that the pursuers' averments relating to the Pursuers' Notices were irrelevant and thus should not be admitted to probation.

[20] Mr McDiarmid attacked the pursuers' averments relating to personal bar. I need not rehearse his submissions on that point because Mr Barrie expressly stated that he was not now relying on personal bar. Suffice to say that, in any event, I agree with Mr McDiarmid. I have excluded these averments from probation.

[21] Mr McDiarmid asked me to sustain the defenders' first preliminary plea and as a consequence to sustain their third, fourth and eighth pleas in law with the result that the pursuers' first, second, fifth, sixth and seventh craves should be dismissed. Alternatively, he asked me to sustain the defenders' second preliminary plea and to exclude from probation the pursers' averments relating to their fifth, sixth and seventh craves. This should result in the pursuers' craves five, six and seven being dismissed.

The Pursuers' Submissions

[22] Mr Barrie's submissions were quite simple and straightforward. The fact that Article 4 in the contract had been marked "N/A" did not mean that no Quantity Surveyor had been appointed. The contract could not operate without a Quantity Surveyor. In addition to the conditions relating to Interim Payments, clause 5.2 relating to valuation of variations required a Quantity Surveyor. Only the Quantity Surveyor could carry out such valuations. The pursuers were offering to prove that the person agreed upon or appointed for that purpose was Mr Culloch or, for a particular month, Mr Riddell. The nomination provisions in clause 3.5.1 had nothing to do with that initial appointment. Clause 3.5.1 was relevant only in the event that the Quantity Surveyor ceased to hold his post. In that event, clause 3.5.1 enabled the Employer to impose his choice of Quantity Surveyor on the Contractor.

[23] Mr Barrie pointed to the averment in article 2 of condescendence that on 8 March, the same date as the parties agreed to be bound by the standard form contract, it was minuted at

a pre-start meeting that "valuation procedures" were to be actioned by Mr Culloch on behalf of the defenders. Since valuation required a Quantity Surveyor this was an offer to prove that Mr Culloch was the person appointed to that position. The pursuers also offered to prove that all Interim Applications were sent to Mr Culloch. That was a further reference to Mr Culloch's role as Quantity Surveyor because Interim Applications could only be sent to the Quantity Surveyor.

[24] In relation to the validity of the Pursuers' Notices Mr Barrie's position was that the issue was what the reasonable recipient would understand the pursuers to be claiming. He maintained that the reasonable recipient would have no difficulty in understanding exactly what the pursuers were claiming but he accepted that that was a matter for proof. The reasonable recipient test was one that had been applied in the case law, including *Grove Developments Limited* v *S&T (UK) Limited* [2018] EWHC 123 and *Oil States Industries (UK) Limited* v *Lagan Building Contractors Limited* [2018] CSOH 22.

The Defenders' Response

[25] Mr McDiarmid reiterated that by marking Article 4 "N/A" the parties had agreed that there would be no Quantity Surveyor. The court could not rewrite the parties' contract. The parties had to live with it even if it meant that parties had elected not to use certain provisions in the standard form contract. As a matter of relevancy the pursuers would need to aver that the parties had agreed that Article 4 should be read as if it had been completed with Mr Culloch's name. As regards the validity of the Pursuers' Notices he maintained that Mr Barrie's reliance on the reasonable recipient test was misconceived.

Further Submissions

[26] During the debate I directed parties' attention to the case of *H Widdop & Company Limited* v *J & J Hay Limited* 1961 S.L.T. (Notes) 35 which I thought might have a bearing on the issue of construction of the parties' contract. In that case Lord Kilbrandon, albeit against a different factual background, said:

> "The pursuers do not aver a contract in writing. They aver an agreement entered into in the course of letters and personal contacts. Nothing is commoner in business, and nothing would be less reasonable than to select out of the communings between parties those which happen to be in writing and to maintain that there, and there only, is the contract to be found."

In the limited court time available it was not possible to give parties a reasonable opportunity to consider that case and make any submissions thereon. I therefore allowed them a period of 7 days in which to provide written submissions by email relating to that case, if so advised.

[27] Mr McDiarmid took advantage of that opportunity within two or three days of the debate by emailing the court. His position was that the pursuers had pled that the parties were bound by the terms of the written contract. They did not plead that the parties had varied that contract or that additional contract terms could be found outwith the written contract. On that basis *H Widdop & Company* could be distinguished.

[28] Mr McDiarmid went on in his email to take the opportunity to introduce additional arguments on the question of the reasonable recipient test as argued by Mr Barrie at the debate. He justified this by pointing out that Mr Barrie had cited the case of *Grove Developments Limited* without prior warning and he had had to respond "on the hoof". He attached the report in the case of *R M Prow (Motors) Limited Directors Pension Fund Trustees* v *Argyll & Bute Council* [2013] CSIH 23 and developed a more detailed argument on the question whether or not the Pursuers' Notices were formally valid and thus whether or not

it was appropriate to apply the reasonable recipient test. In *Prow* the Lord Justice Clerk (Carloway) said:

> "The commercial judge correctly identified six fundamental requirements of a valid rent review notice in terms of Clause 25. It required: (1) to be in writing; (2) to be given by the landlords; (3) to be received by the tenants; (4) to be issued at least three months prior to the relevant term; (5) to specify the new rent proposed; and (6) to specify the relevant term at which the rent was to be assessed. The judge properly identified the "reasonable recipient" test as the one to be adopted in respect of the construction of notices which met the stipulated fundamental requirements."

[29] Mr Barrie also took advantage of the opportunity to comment on *H Widdop & Company*. He did so several days after Mr McDiarmid's email. He expressly acknowledged that he had had the opportunity and benefit of considering Mr McDiarmid's email. He took no exception to Mr McDiarmid having revisited the issue of the reasonable recipient test and went on to make further submissions.

[30] In relation to the *H Widdop & Company* case he maintained that the pursuers averred that there were communings between the parties, for example at the pre-start meeting for which there were minutes, that had relevance to the constitution of the contract that required to be explored at proof before the court could decide what the entirety of the contract was. That was the same kind of situation as faced Lord Kilbrandon when he made the comments that I have already quoted. He said that he was not asking the court to rewrite the contract between the parties. The pursuers were simply seeking to prove that Mr Culloch was appointed as the Quantity Surveyor for the purposes of that contract. There was no "entire agreement" clause in the standard form contract. So far as "N/A" was concerned he pointed out that that might have a different meaning, such as "not available", but whatever the meaning was the reality which the pursuers were seeking to prove was that Mr Culloch acted as the Quantity Surveyor with the blessing of both parties.

[31] In relation to the reasonable recipient test Mr Barrie maintained that the terms of clauses 4.9.2 and 4.11 were not "clearly prescriptive". In the *Henia* case the judge held that it was not necessary to state the due date within the body of the certificate. In the Interim Application dated 22 December 2017 the due date had been effectively specified in the covering email.

[32] With Mr Barrie's consent at the debate Mr McDiarmid was also given the opportunity to email the court within 7 days to clarify and confirm which of the pursuers' averments he maintained should not be remitted to probation. This was because, at the start of the debate and with Mr McDiarmid's consent, Mr Barrie had lodged an updated record which incorporated some additional pleadings which Mr McDiarmid had not had time to factor into his submissions. Mr McDiarmid took up this opportunity, for which I am grateful.

Discussion and Decision

The Issue of the Quantity Surveyor

[33] On a fair reading of the pursuers' averments they are saying that the parties agreed, or the defenders nominated, the person who was to be the Quantity Surveyor for the purposes of the contract between them. On a fair reading they are saying that that was done independently of the standard form contract. They also aver "Thereafter, said Mr Culloch undertook the role of Quantity Surveyor throughout the currency of the works and both parties have treated Mr Culloch as Quantity Surveyor for the purposes of the contract". Whether the pursuers' averments are relevant such that they should go to proof depends on the effect of the fact that Article 4 was marked "N/A".

[34] Mr McDiarmid's interpretation of the effect of marking Article 4 "N/A" does serious violence to the contract conditions relating to Interim Payments. The result of the way that Article 4 was completed was, he said, that, applying the definition of "Quantity Surveyor" in the definition section, no person had been appointed as the Quantity Surveyor. That rendered inoperative the conditions relating to Interim Payments with the result that the pursuers could not rely on them for the purpose of obtaining an interim payment in the absence of an Interim Certificate issued by the Architect/Contract Administrator. His position was that "Quantity Surveyor" was a defined term. In effect, he said that "Quantity Surveyor" was defined as "no-one". If the Quantity Surveyor was no-one then it was impossible for the pursuers to serve Interim Applications and Interim Payment Notices on the Quantity Surveyor as is required to make them valid. In my view, that cannot have been what the parties contemplated.

[35] Mr McDiarmid's interpretation ignores the fact that the pursuers offer to prove that the parties are bound by the contract terms, which must include all of the contract conditions relating to Interim Payments. It ignores the fact that it is Article 4 that is stated to be "N/A", not the contract conditions relating to Interim Payments or anything else.

[36] There is another possible interpretation that does not result in important provisions of the contract being held to be inoperative. "N/A" is normally taken to mean "not applicable". Whether or not that is what parties agreed it to mean is a matter for proof. Once it is established what the parties meant by "N/A" consideration can be given to what effect that has on the other contract terms, but if it is to be taken to mean "not applicable" it follows that parties were agreed that Article 4 was not applicable to their contract. "Not applicable" means what it says. Article 4 simply has to be ignored. If it has to be ignored it cannot be referred to for the purposes of defining who the Quantity Surveyor is. Therefore,

the effect of Article 4 being not applicable is that the definition of Quantity Surveyor in the definitions section is also not applicable and requires to be ignored. In my opinion, that particular effect spreads no further than the definitions section. The contract conditions relating to Interim Payments, as with all other contract conditions that the parties are bound by, remain applicable.

[37] However, the fact that Article 4 is not applicable has a different effect on the contract conditions relating to Interim Payments. That is that in referring to the Quantity Surveyor those conditions are referring to an undefined term. It follows that by a means other than stating it in Article 4 it became necessary for the parties to define, in other words to agree or nominate, who the Quantity Surveyor was for the purposes of the contract by which they were bound. On a fair reading of the pursuers' averments they offer to prove that that is what happened and that that person was Mr Culloch or, for the purposes of one particular month, Mr Riddell.

[38] On that alternative interpretation, the process of agreeing or nominating the Quantity Surveyor by a means other than stating it in Article 4 can be seen as not involving the parties amending their contract. It can be seen as part of the process of agreeing the overall contract by which the parties were to be bound. In such circumstances I think that the words of Lord Kilbrandon in *H Widdop and Company* are quite apt. As a matter of relevancy, it is my view that there is no need for the pursuers to aver that the parties agreed to vary the contract.

[39] The email of 7 February 2017 is relevant as an adminicle of evidence demonstrating the defenders' intentions, although I agree that it cannot be said, on the basis of the pleadings, that it was issued pursuant to the standard form contract. Therefore, the words "pursuant to said contract" occurring on line 15 of article 2 of condescendence fall to be

excluded from probation. The consequence of the email not being pursuant to the contract is, of course, that the requirements of clause 1.7 cannot apply to it. Its validity cannot be attacked on the basis suggested by Mr McDiarmid. In any event, it was the defenders who chose to send the email. If, in doing so, they breached a contract term it is arguable against them that they cannot rely on that breach.

[40] Mr McDiarmid relied on clause 1.7 in saying that the purported nomination of Mr Riddell as Quantity Surveyor for the month of December by way of a phone call, as averred by the pursuers, was invalid. This was because in terms of the clause any such nomination required to be in writing. In my view, the defenders cannot avail themselves of their own breach of contract by not making the nomination in writing in terms of clause 1.7. On the other hand, the pursuers could have availed themselves of the clause to object to a verbal nomination but if they accepted it and thus agreed to it, that is that. Parties are free to agree a departure from the contract terms if they so wish.

The Validity of the Pursuers' Notices

[41] I now turn to the issue of the validity of the Pursuers' Notices. The case of *Prow* illustrates the Scottish approach to the reasonable recipient test. It is that before that test can come into play the notice which is being considered must be shown to be formally valid in the sense that it complies with the fundamental requirements specified for it in the contract. The fundamental requirements for Interim Applications and Interim Payment Notices in this case can be said to be (1) that they are timeous – in the case of the former to be issued not less than 7 days before the relevant due date and in the case of the latter at any time after the date when the Interim certificate ought to have been issued, which is 5 days after the relevant due date; (2) that they are issued by the Contractor; (3) that they are issued to the

Quantity Surveyor; (4) that they state the sum that the Contractor considers will become or has become due to him; (5) that they specify the relevant due date; and (6) that they state the basis on which the stated sum has been calculated.

The Interim Application dated 22 December 2017

[42] The first due date is specified in the contract as 30 March 2017. The tenth due date is, therefore, 30 December 2017. The Interim Application dated 22 December 2017 comprises an email to which is attached an excel spreadsheet. 22 December is not less than 7 days before the due date of 30 December 2017 (requirement 1). The email emanates from the Pursuers (requirement 2). It is sent to Mr Culloch, the person who, according to the Pursuers, is the Quantity Surveyor (requirement 3). The excel attachment specifies the sum claimed (requirement 4). The subject matter of the email is "Application 10 Andover School Brechin Nursery Lane". The name of the attachment is "App for Pay No 10 – RH Rev 22.12.17.xlsx". That, in my view, is sufficient specification that the relevant due date is 30 December 2017 (requirement 5). The excel attachment shows how the sum claimed is calculated (requirement 6). The Interim Application meets all of the fundamental requirements.

[43] Before I examine the Interim Application by applying the reasonable recipient test it is worth noting that an Interim Certificate must show the interim payment, *calculated in accordance with clause 4.9.2* (my emphasis), and the basis upon which it is calculated. Interim Applications and Interim Payment Notices, on the other hand, need only show the sum considered to be due at the relevant date *in accordance with clause 4.9.2* and the basis upon which it is calculated. There is no requirement that the sum be *calculated* in accordance with clause 4.9.2. Clearly, the Contractor needs to apply his mind to what is due to him in

accordance with clause 4.9.2 but it seems to me that more latitude is allowed to the Contractor than is allowed to the Architect/Contract Administrator in the way that the sum is set out.

[44] Applying a reasonable recipient test to the Interim Application, it can be seen that the excel spreadsheet states a "Gross Total". Given the latitude that I have referred to, the reasonable recipient would regard that as a statement of the "Gross Valuation" referred to in clause 4.9.2. The spreadsheet then sets out the retention at the contractual rate and, finally, sets out "Less Previously Certified (Valuation Nr. 9)" before setting out the net sum as the "Amount due". I am in no doubt that this Interim Application is valid.

The Interim Payment Notice Dated 9 February 2018

[45] This Notice is timeous in that it is issued more than 5 days after the due date of 30 January 2018. It is issued by the Contractor. It is issued to "Culloch Architecture Ltd". It is not immediately obvious that it is issued to Mr Culloch, but for reasons which I think will become clear I do not need to decide whether or not that meets the fundamental requirement that it be issued to the Quantity Surveyor. For present purposes I shall assume that it does. It sets out the sum claimed. It specifies the relevant due date of 30 January 2018. Finally, it sets out the basis upon which the sum is calculated. I shall assume for present purposes that the Notice meets all of the fundamental requirements.

[46] Applying the reasonable recipient test to this Notice it can be seen that it specifies a "Gross Cumulative Claim". Given the latitude previously referred to the reasonable recipient would take this as a reference to the "Gross Valuation". It deducts "Previous Payments". Whether or not that would be taken by the reasonable recipient as a statement

of the sums stated in previous Interim Certificates is debateable but for reasons that I think will become clear I do not need to decide that point.

[47] The Notice does not deduct any retention. That is fatal to the validity of this Notice because, in my view, it suggests that it is not interim in nature. The pursuers might say that retention is at the discretion of the Defenders (as indicated in clause 4.18.2 already referred to) and they could not know in advance whether or not the discretion would be exercised in relation to this particular due date. However, it is clear from the Interim Application dated 22 December 2017 that retentions had been made in previous Interim Certificates. Therefore, the reasonable recipient would view this as a claim by the Pursuers for release of the sums already retained. That gives this Notice the look and feel of a final, rather than an interim, claim. In my view, the reasonable recipient would be entitled to regard this notice as not being interim in nature. Therefore, even if it is formally valid by meeting all of the fundamental requirements it is invalid because it is defective in form.

[48] That being the case the pursuers' averments relating to this Notice fall to be excluded from probation and their crave six falls to be dismissed.

The Interim Application Dated 23 May 2018

[49] This Application must suffer the same fate as the Interim Payment Notice dated 9 February 2018 because it, too, omits to deduct any retention and so whether or not it is formally valid it is invalid because it is defective in form and fails the reasonable recipient test.

[50] That being the case the pursuers' averments relating to this Application fall to be excluded from probation and their crave seven falls to be dismissed.

Disposal and Further Procedure

[51] It cannot be said in respect of the pursuers' averments in support of their craves one, two and five that they will necessarily fail even if all of their averments are proved. They are entitled to a proof before answer in respect of them as suggested by Mr Barrie. The pursuers' averments in support of their craves six and seven are irrelevant and those craves fall to be dismissed.

[52] There is a recently added counterclaim in this case. A further debate has been fixed on the pursuers' preliminary plea in that counterclaim. The question of the validity of the Pursuers' Interim Application dated 22 December 2017 has a significant bearing on whether they were entitled to suspend their works under the contract. The issue of suspension will have a significant bearing on the outcome of the counterclaim. It seems to me that there is merit in discharging the debate in the counterclaim and setting the whole matter down for a proof before answer. That is something that I will expect parties to be in a position to discuss at the case management conference that I have fixed.

Expenses

[53] I was not addressed on the question of expenses. I have reserved that matter.