OPINION OF LORD MACFADYEN – Outer House Court of Session. 17th July 2001

Introduction

[1] The parties to this action are respectively the employer and the contractor in a building contract for the construction of a hotel in Bristol. The contract provided that the date for completion was 25 January 1999. The dispute between the parties is concerned with whether, as the pursuers maintain, that remained the completion date, or whether, as the defenders maintain, they were entitled to an extension of time and, if so, whether they are entitled to the extension of four weeks certified by the architect and in addition the further extension of five weeks awarded by the adjudicator to whom the dispute was initially referred. The pursuers make monetary claims (a) for liquidate and ascertained damages in respect of the period covered by the extension of time granted by the architect, (b) for repayment of a payment made by them which, by virtue of the deduction of further liquidate and ascertained damages, would not have been made if the adjudicator had not awarded the additional five weeks extension of time, and (c) for repayment of a sum of direct loss and expense certified by the architect in consequence of the extension of time that he granted. Those matters come before the court because the contract provided that any disputes would be resolved provisionally by adjudication and finally by the court.

[2] In the course of adjustment of the parties' pleadings in the present action the pursuers put forward the contention that the defenders are not entitled to any extension of time, because they failed to comply with the procedure laid down in clause 13.8 of the contract. In response to the pursuers' reliance on clause 13.8, the defenders, in answer 8, put forward a number of contentions on the basis of which they sought to argue that the pursuers were not entitled so to rely. The pursuers plead that the averments in support of those contentions are irrelevant. The case was appointed to debate in respect of those matters, and also in respect of an issue as to whether the adjudicator's award affected the onus of proof in relation to the question of whether the additional extension of time that he awarded was justified.

Clause 13.8

[3] There were incorporated into the contract between the parties inter alia the conditions of the Standard Form of Building Contract Private Edition With Quantities (1980 Edition), and the schedule of amendments appended to the contract. The schedule of amendments inter alia inserted into the conditions an additional clause 13.8. Clause 13.8 was in the following terms:

> *"13.8.1 Where, in the opinion of the Contractor, any instruction, or other item which, in the opinion of the Contractor, constitutes an instruction issued by the Architect, will require an adjustment to the Contract Sum and/or delay the Completion Date, the Contractor shall not execute such instruction (subject to Clause 13.8.4) unless he shall have first submitted to the Architect, in writing, within 10 working days (or within such other period as may be agreed between the Contractor and the Architect) of receipt of the instruction, details of:*
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> 1. *initial estimate of the adjustment (together with all necessary supporting calculations by reference to the Contract Documents);*
> 2. *initial estimate of the additional resources (if any) required and his method statement for compliance;*
> 3. *initial estimate of the length of any extension of time to which he considers he is entitled under Clause 25 and the new Completion Date (together with all necessary supporting documentation by reference to the Master Programme);*
> 4. *initial estimate if the amount of any direct loss and/or expense to which he may be entitled under Clause 26; and*
> 5. *any such other information as the Architect may reasonably require.*
>
> *13.8.2 The Contractor and the Architect shall then, within 5 working days of receipt by the Architect of the Contractor's estimates, agree the Contractor's assessments. Following such agreement, the Contractor shall immediately thereafter comply with the instruction and the Architect shall grant an extension of time under Clause 25.3 of the agreed length (if any) and the agreed adjustments (if any) in relation to Clauses 13.8.1.1 and 13.8.1.4 shall be made to the Contract Sum.*
>
> *13.8.3 If agreement cannot be reached within 5 working days of the receipt by the Architect of the Contractor's estimate on all or any of the matters set out therein; then:*
>
> 1. *the Architect may nevertheless instruct the Contractor to comply with the instruction; in which case the provisions of Clauses 13.5, 25 and 26 shall apply; or*
> 2. *the Architect may instruct the Contractor not to comply with the instruction, in which case the Contractor shall be reimbursed all reasonable costs associated with the abortive instruction.*

13.8.4 The Architect may, by notice to the Contractor before or after the issue of any instruction, dispense with the Contractor's obligation under Clause 13.8.1, in which case the Contractor shall immediately comply with the instruction and the provisions of Clauses 13.5, 25 and 26 shall apply.

13.8.5 If the Contractor fails to comply with one or more of the provisions of Clause 13.8.1, where the Architect has not dispensed with such compliance under Clause 13.8.4, the Contractor shall not be entitled to any extension of time under Clause 25.3."

The Defenders' Pleadings

[4] The defenders' averments in answer 8 in relation to clause 13.8, which the pursuers attack as irrelevant, are in the following terms:

"Explained further and averred that, in any event:

i. *clause 13.8.5 amounts to a penalty Clause and as such is unenforceable. In the event of a breach by the defenders of clause 13.8.1, the effect of [clause] 13.8.5 would be to deprive the defenders of extensions of time to which they would otherwise have been entitled and to expose the defenders to liability for liquidate and ascertained damages to which they would not otherwise have been exposed. The rate of liquidate and ascertained damages was a pre-estimate of the loss and damage which the pursuers might sustain as a result of delay in completion and not of the loss and damage which they might sustain as a result of the breach of clause 13.8.1;*

ii. *clause 13.8.1 only applied if the defenders, upon receipt of the instruction, actually formed the opinion about the requirements of the instruction as set out therein. The pursuers do not aver that in respect of each instruction the requisite opinion was formed by the defenders at the relevant time (or facts and circumstances justifying an assertion that such an opinion was formed at that time) and their averments in respect of clause 13.8 are accordingly irrelevant. ... Further, on a proper construction of clause 13.8.1 it only applied if the opinion formed by the defenders included the view that the instruction would require an adjustment to the Contract Sum. In all cases to which clause 13.8.1 applied, an initial assessment of the adjustment to the contract sum had to be given in terms of clause 13.8.1.1. Further, on a proper construction, clause 13.8.1 only applied where the opinion formed by the defenders was actually of sufficient definition for the matters referred to in clauses 13.8.1.1-5 to be addressed within the 10 working day period allowed for the written submission to the Architect;*

iii. *further and in any event, on a proper construction thereof, clause 13.8.1 did not apply to instructions for the expenditure of provisional sums included in the Contract Bills. Clause 13.8.1 also did not apply where delay to the completion of the Works was occasioned by the instruction of the Architect not having been received by the defenders in due time (relevant event 25.4.6). Clause 13.8.1 also did not apply where delay to the completion of the Works was occasioned by the supply by the pursuers of materials and goods which the pursuers had agreed to provide for the works or the failure to so supply (relevant event 25.4.8.2). Clause 13.8 and in particular clause 13.8.5 did not affect the carrying out by the Architect of his duty in terms of clause 25.3.3;*

iv. *in any event, it was an implied term of the contract that the pursuers and the Architect would not hinder or prevent the defenders from carrying out their obligations under clause 13.8.1 and that the pursuers and the Architect would do all that was reasonably necessary to enable the defenders to carry out those obligations. These terms were implied as a matter of law et separatim as a matter of fact in order to give the contract business efficacy and to reflect the presumed intention of the parties. In the event that the defenders would have been prevented from carrying out those obligations by failure of the pursuers or the Architect in breach of said implied terms (as was in fact the case), then either the pursuers are disabled by the breach from relying on non-compliance with the provisions of clause 13.8.1 or the time for completion under the contract is rendered at large and the pursuers are not entitled to liquidate and ascertained damages;*

v. *in the event that there was a failure by the defenders to comply with clause 13.8.1 (which is denied) then, in any event, the pursuers have by their conduct or that of the Architect as their agent acquiesced in such failure or they have waived compliance with clause 13.8.1 or they have waived such compliance as a condition precedent to an extension of time under clause 13.8.5 or they are personally barred from now asserting a failure in such compliance in order to defeat the defenders' entitlement to extension of time. As hereinbefore condescended upon, no relevant mention was made of clause 13.8 during the course of the works and thereafter until the adjustments in the present action. In each case where an instruction was given, it was evident that the defenders were proceeding to execute same without the estimates or method statement referred to in clause 13.8.1 yet at no time was any objection taken. In certain cases, in addition, a notice of delay was given within the 10 day period referred to in clause 13.8.1 yet no reference was made to that clause. There was accordingly acquiescence in any failure to comply with clause 13.8.1.*

Varied work instructed by the Architect was valued and paid for without reference to clause 13.8. During the course of the Works and thereafter, notices of delay under clause 25 of the Conditions were given and continued to be given by the defenders to the Architect. No response founding on clause 13.8.5 was made to the notices of delay, the Architect dealt with notices of delay and extensions of time under Clause 25 and clause 13.8 was not founded upon until the adjustments in the present action all as hereinbefore averred. The matter of extension of time was pursued, argued and dealt with under clause 25. In respect of certain instructions: (a) it was a matter of common intention that there would be immediate compliance; (b) the instruction was to accept a quotation from a supplier or sub-contractor; or (c) the instruction was confirmed by the Architect following intimation or awareness that there would be delay to the Works as a consequence and by implication in all these cases compliance with clause 13.8.1 was waived (reference is made to the Schedule aftermentioned). Had the pursuers or the Architect indicated earlier that they sought to rely on clause 13.8 then the defenders would have taken steps to protect their position so far as they were able by (a) seeking that the Architect would dispense with the obligation under [clause] 13.8.1 either prospectively or retrospectively (in the circumstances which obtained it is likely that such dispensation would have been given); or (b) delaying compliance with instructions of the Architect in order to implement clause 13.8.1. As a result of the matters hereinbefore averred, the defenders acted and continued to act on the basis of an understanding that matters regarding extensions of time were being and would fall to be dealt with and determined on the basis of clause 25 of the Conditions. Further, in certain cases compliance with clause 13.8.1 was dispensed with by the Architect."

The defenders made a further point in answer 8(vi), but Mr Keen for the pursuers did not maintain the contention that those averments were irrelevant. It is therefore unnecessary to set them out here.

The Pursuers' Preliminary Submissions

[5] Before turning to his submissions on the individual lines of defence expressed in answer 8(i) to (v), Mr Keen for the pursuers advanced a number of general propositions. They may be summarised as follows:

(1) The documents forming a contract must be construed as a whole (**Capital Land Holdings Limited v Secretary of State for the Environment** 1997 SC 109, per Lord Sutherland at 114F);

(2) If possible, all provisions of the contract should be given effect, and no part should be treated as inoperative or surplus (**Muir Construction Limited v Hambly Limited** 1990 SLT 830 per Lord Prosser at 833J-K and 834F);

(3) Where a contract is based on a standard form, but the parties have added special conditions, if any conflict arises between the standard terms and the special conditions, the special conditions will tend to prevail (*Lewison on Interpretation of Contracts*, page 162, paragraph 6.04; **Bravo Maritime (Chartering) Est v Alsayed Abdullah Mohamed Baroom (The "Athinoula")** [1980] 2 Lloyd's Rep. 481); and

(4) Where the wording of a contract is capable of bearing two meanings, of which one would make the contract unlawful or unenforceable, and the other would make it lawful and enforceable, the latter construction is to be preferred; for example, if it is possible to regard a provision either as imposing a penalty or as not doing so, the latter construction is to be preferred.

[6] Mr Keen submitted that clause 13.8 did not stand in isolation. It required to be read in conjunction with other related provisions of the contract, including the contractor's obligation to complete on or before the completion date (clause 23.1.2), the contractor's liability to pay liquidated and ascertained damages for late completion (clause 24.2.1), and the provision regulating the allowance of extensions of time (clause 25). In this contract the liquidated and ascertained damages were fixed at £30,000 per week pro rata. There was no suggestion that that figure was anything other than a genuine pre-estimate of the loss the employer would suffer in the event of completion being delayed. Mr Keen submitted that under the contract there were certain circumstances in which the risk of such loss would be borne by the employer, for example if the contractor was entitled to an extension of time. Equally, there were other circumstances in which that risk would be borne by the contractor by virtue of the provision for liquidate damages. What clause 13.8 was concerned with were particular circumstances in which completion might not be achieved by the completion date originally specified as a result of the issue of architect's instructions. Some of those instructions would be instructions which the architect was obliged to issue (e.g. those concerning the expenditure of provisional sums); other would be optional. What clause 13.8.1 was designed to secure was that the employer was informed if and when the contractor thought that the issue of an architect's instruction would prevent

timeous completion. If so informed, the employer might in some circumstances choose to avoid the delay by having the instruction cancelled. Even if that were not done, the employer would be put in a position in which he could make advance arrangements to cope with the financial consequences of the delay. If the employer was deprived of that information through failure on the part of the contractor to comply with his obligation under clause 13.8.1, clause 13.8.5 secured that the risk of loss would remain with the contractor, by depriving him of entitlement to an extension of time. Clause 13.8.5 did not remove the contractor's entitlement to payment for the instructed work, but deprived him of the opportunity to transfer the risk of loss through delay, by depriving him of his entitlement to an extension of time. In short, clause 13.8 as a whole was concerned with allocation of the burden of risk of the cost of delay.

The Answer 8(i) Issue - Is Clause 13.8.5 a Penalty Clause?

[6] Mr Keen submitted that if the logic of the defenders' contention that clause 13.8.5 amounted to a penalty were correct, it would apply to any situation in which the avoidance of a liability involved fulfilment of a condition precedent, and that would lead to the court interfering to an extraordinary extent with the principle of freedom of contract. The rule as to the unenforceability of penalty clauses ordinarily applied where a provision failed to qualify as liquidate damages because it did not constitute a genuine pre-estimate of the relevant loss. It might also apply where the provision was penal in the sense that it was unconscionable, not a true contractual provision but an attempt to punish; where the provision was incorporated in the contract in terrorem. In order for a provision to be classed as a penalty, it required to involve the concurrence of two events, namely (i) a breach of contract and (ii) a result or consequence which was regarded by the court as unconscionable in that it amounted to oppression or the imposition of a punishment. It was to be borne in mind that the rule against penalties was an exception to freedom of contract, and ought on that account to be kept within strict parameters.

[7] In making his submissions, Mr Keen examined a number of authorities on the subject of penalty clauses. He began with **E.F.T. Commercial Limited v Security Change Limited** 1992 SC 414 in which it was held that the rule about the unenforceability of penalty clauses applied only to cases of breach of contract, and that to extend it to other situations would open up contracts to modification by the court in a manner that could not be reconciled with the principle that contracts are to be enforced according to the agreement made by the parties (per Lord President Hope at 424 and 429-30). Mr Keen then referred to **Gilbert-Ash (Northern) Limited v Modern Engineering (Bristol) Limited** [1974] AC 689. That case concerned a Clause which provided that if the sub-contractor failed to comply with any of the conditions of the sub-contract, the contractor might suspend or withhold payment of any monies due or to become due to the sub-contractor. Lord Reid said (at 698C-D):

"There is no reference to the amount of the contractor's claim in respect of breaches of contract and no requirement that before withholding payment he need even estimate the amount of his claim. Read literally this provision would entitle the contractor to withhold sums far in excess of any fair estimate of the value of his claims. That would simply be to impose a penalty for refusing to admit his claims. Not only would the withholding of the excess permanently deprive the sub-contractor of the interest on that excess which would accrue while the dispute lasted, but it might have most damaging effects on the subcontractor's business. So, as it stands, this provision is unenforceable."

(See also Lord Morris of Borth-y-Gest at 703G, Viscount Dilhorne at 711D-E and Lord Salmon at 723H.) Those dicta, Mr Keen submitted, did not suggest any widening of the ambit of the relief afforded by the law against oppression through the rule rendering unenforceable the imposition of a penalty. Attempts to rely on them for that purpose had been resisted. In **C.V.G. Siderurgicia del Orinoco S.A. v London Steamship Owners' Mutual Insurance Association Limited (The "Vainqueur José")** [1979] 1 Lloyd's Rep. 557 the rules of the defendant P. and I. club, after defining the risks in respect of which members were to be indemnified, made the following proviso in Rule 8(k):

"A member shall at the discretion of the Committee, be liable to have a deduction made from any claim where the Committee shall be of opinion that the Member has not taken such steps to protect his interests as he would have done if the ship had not been entered in this class. This deduction shall be of such an amount as the Committee in its discretion shall decide."

Mocatta J said (at 577-8):

"The next point of law arising is whether a deduction of 100 per cent or any other lesser figure that cannot be shown at least approximately to amount to the quantum of claim that would or might have been avoided had the member acted

as a prudent uninsured owner can be deducted. Would such ill-founded deduction be invalid as being a penalty? I confess it came as a surprise to me to hear [counsel] argue that the penalty doctrine had any place in English law other than in connection with the question whether a Clause in a contract providing for payment by the party in breach of an agreed sum was a genuine pre-estimate of pecuniary loss or was included as a term in terrorem and, therefore, unenforceable as a penalty. The authority upon which [counsel] relied was Gilbert Ash ...

Having given this recent authority careful consideration, I am unable to take the view that it has any application here or to insurance law generally. Here the Committee is given a complete discretion under r. 8(k) ... and while they must comply with the general principles applicable to the exercise of such discretions previously discussed, in my opinion they cannot be faulted on the basis of the law against penalties if they decide ... to make a deduction of 100 per cent under r. 8(k).

... One may further ask how is the penalty argument to be reconciled with the rules in insurance law about warranties ... which must be complied with whether material or not, or about non-disclosure of material facts ... where the insurers may avoid the contract although the fact not disclosed, and quite innocently, has no causal relation to the loss in respect of which indemnity is sought? Apart from insurance law, there are innumerable cases in the books where a defendant, because, for example, of a sudden fall in the market price of a commodity or of freight or hire rates, rescinds the contract on the basis of the breach of a condition precedent, thereby causing heavy loss to the other party, who is left without a remedy, whereas the breach of the condition precedent has of itself caused no loss or damage to the party relying upon it."

Finally, Mr Keen cited **Philips Hong Kong Limited v Attorney General of Hong Kong** (1993) 61 BLR 41 in which Lord Woolf said (at 55 et seq.):

*"Although there is a good deal of disagreement as to how the penalty jurisdiction grew up ... it is recorded in the judgment of Kay LJ in **Law v Local Board of Redditch** [1892] 1 QB 127 at page 133 that originally it was by the Courts of Equity that relief was granted. They did so where a sum of money was agreed to be paid as a penalty for non-performance of a collateral contract where the actual damage which would be sustained could be estimated. In such circumstances the Courts would limit the sum recoverable to the actual loss suffered. The principle would be applied in particular where the penalty was agreed to be paid for the non-payment of a sum of money under a bond. This limited application of the principle was subsequently extended to other situations by the courts of common law, but the principle was always recognised as being subject to fairly narrow constraints and the courts have always avoided claiming that they have any general jurisdiction to rewrite the contracts that the parties have made.*

Guidance as to what are the constraints is authoritatively set out in the speech of Lord Dunedin in **Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co** [1915] AC 79, at page 86, when he said:

"I shall content myself with stating succinctly the various propositions which I think are deducible from the decisions which rank as authoritative: 1. ...

2. *The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (**Clydebank Engineering and Shipbuilding Co v Don José Ramos Yzquierdo y Castaneda** [(1904) 7 F (HL) 77]). ...'."*

Lord Woolf went on to quote with approval the following passage from the joint judgment of Mason and Wilson JJ in the High Court of Australia in **AMEV UDC Finance Ltd v Austin** (1986) 162 CLR 170 at 193:

"But equity and the common law have long maintained a supervisory jurisdiction, not to rewrite contracts imprudently made, but to relieve against provisions which are so unconscionable or oppressive that their nature is penal rather than compensatory. The test to be applied in drawing that distinction is one of degree and will depend on a number of circumstances, including (1) the degree of disproportion between the stipulated sum and the loss likely to be suffered by the plaintiff, a factor relevant to the oppressiveness of the term to the defendant, and (2) the nature of the relationship between the contracting parties, a factor relevant to the unconscionability of the plaintiff's conduct in seeking to enforce the term. The courts should not, however, be too ready to find the requisite degree of disproportion lest they impinge on the parties' freedom to settle for themselves the rights and liabilities following a breach of contract. The doctrine of penalties answers, in situations of the present kind, an important aspect of the criticism often levelled against unqualified freedom of contract, namely the possible inequality of bargaining power. In this way the courts strike a balance between the competing interests of freedom of contract and protection of weak contracting parties."

Lord Woolf observed that it was not to be assumed that in that passage Mason and Wilson JJ were setting some broader discretionary approach than that indicated as appropriate by Lord Dunedin. His Lordship

went on to quote, from the judgment of Wilson J in another case from the High Court of Australia, **Esanda Finance Corporation Ltd v Plessing** [1989] ALJ 238, a passage which had in turn been quoted from the judgment of Dickson J in the Supreme Court of Canada in **Elsey v J G Collins Insurance Agencies Ltd** (1978) 83 DLR at 15:

> *"It is now evident that the power to strike down a penalty Clause is a blatant interference with the freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression."*

[8] Turning to the circumstances of the present case, Mr Keen submitted that in specifically agreeing to the inclusion in the contract of clause 13.8, the parties had made additional provision, over and above that contained in the standard conditions, for the allocation of the risk of delay in completion. It was perfectly legitimate for the employer to require and the contractor to accept that, in relation to architect's instructions, the employer should be forewarned of anticipated consequential delay, and for it to be agreed that, in the event of the contractor failing to provide such forewarning in accordance with clause 13.8.1, the risk of loss through delay should shift from the shoulders of the employer to those of the contractor. Such a provision did not constitute a penalty. The parties had accepted, by providing for liquidate damages, that in the event of delay in completion the employer would suffer loss which was genuinely pre-estimated to amount to £30,000 per week. There was nothing to justify labelling such a provision reallocating the burden of risk in respect of that loss as extravagant, penal or oppressive. The averments in answer 8(i) were accordingly irrelevant, and should be excluded from probation.

[9] In responding to the defenders' submissions, Mr Keen stressed the need in construing clause 13.8 to have regard to its structure and the place which it occupied in the contract as a whole. The completion date lay at the heart of the contract. It was recognised that if completion was delayed the employer would suffer loss, in respect of which the contract made provision for payment of liquidate damages by the contractor. The contract also recognised, however, that circumstances might exist in which the contractor should not bear that liability, but should be given an extension of time. One aspect of those circumstances was the nature of the relevant event that caused the delay. Clause 13.8, however, also identified circumstances which would affect the contractor's entitlement to an extension of time. Faced with an architect's instruction, the contractor was placed under an obligation to consider what its effect would be on completion of the works. If he was of opinion that it would delay completion, he was obliged, if he was to preserve his entitlement to an extension of time, to give notice to the architect. That did not impose an intolerable burden on the contractor, since he would already have identified the critical path of the works and the resources required for their completion. The contractor might, however, take the view that he would not give notice to the architect, either because he foresaw no delay resulting from the instruction, or because the cost implications were acceptable to him. It was not correct to represent clause 13.8 as making liability in liquidate damages turn on matters of mere procedure. Under clause 13.8.3 the architect was given the opportunity to review the instruction in light of the contractor's opinion as to its consequences for the time of completion of the works, and to withdraw the instruction if he preferred not to incur those consequences. Or he might adhere to the instruction, but curtail the extent of the works in some other respect to balance the consequences of the instruction. Those matters went to substance, not mere procedure. They showed that the Clause was not intended to operate in terrorem, but served a genuine purpose in relation to the progress of the works.

[10] In making his submission in support of the proposition that clause 13.8.5 was a penalty clause, Mr Cormack, junior counsel for the defenders, submitted that it was important to recognise that the Clause was not concerned with the allocation of the risk of loss through delay in completion. Rather, it was concerned with the consequences of a particular form of breach of contract on the part of the defenders, namely failure to comply with the requirements of clause 13.8.1. It was vital, he submitted, to distinguish between what had to happen to trigger the operation of the Clause and, on the other hand, the obligations which arose if the operation of the Clause was triggered. The flaw in the pursuers' submissions was that that distinction was overlooked. The contract contained separate machinery (the provisions about the completion date, liquidate damages and extension of time) to regulate the risk of loss caused by delay in completion. The essence of those provisions was that they allocated the cost of delay to the party responsible for causing it. Clause 13.8, on the other hand, was not concerned with actual responsibility for delay. Clause 13.8.5 came into operation on the occurrence of a breach of contract which did not bear upon the progress of the work. It imposed

consequences with regard to extension of time which arose from procedural matters rather than from responsibility for the rate of progress of the works. In order to consider the issue of whether the averments in answer 8(i) were relevant, it was necessary to consider two separate issues, which Mr Keen had run together, namely (i) whether the rule against the enforceability of penalty clauses applied to provisions of the sort exemplified by clause 13.8.5, and (ii) whether clause 13.8.5 was properly to be regarded as a penalty clause.

[11] Dealing with the first of those issues, Mr Cormack submitted that the law relating to penalty clauses was applicable. Properly construed, clause 13.8.5 applied only in the event of a breach of contract on the part of the contractor, in the form of failure to comply with the provisions of clause 13.8.1 ("If the Contractor fails to comply with one or more of the provisions of Clause 13.8.1 ..."). If the operation of clause 13.8.1 was once triggered (by the contractor forming the opinion there mentioned), the effect was to impose obligations on the contractor rather than merely to confer on him an option which he might exercise or not, at his choice. If clause 13.8.1 was triggered the contractor came under an obligation not to execute the instruction unless he had first submitted to the architect the material required by clause 13.8.1.1 to 13.8.1.5. Since clause 13.8.5 thus applied only in the event of a breach of contract on the part of the contractor, **E.F.T. Commercial Limited v Security Change Limited** was distinguishable. In so far as the pursuers' argument relied on the view that liquidate damages were payable in respect of failure to complete the works on time, and not for failure to comply with clause 13.8.1, it was artificial and incorrect. Clause 13.8.5 only had practical effect if completion was delayed by the instructions in question. But in that event, liability in liquidate damages arose only because the failure to comply with clause 13.8.1 prevented the contractor from obtaining an extension of time to which he would otherwise have been entitled. It was therefore unsound to argue that liquidate damages were not payable in respect of the breach of the obligations which arose under clause 13.8.1. What rendered clause 13.8.5 penal was that the amount of liquidate damages bore no relation to any loss caused by breach of clause 13.8.1. Mr Cormack referred to **E.F.T. Commercial Limited**, per Lord President Hope at 428, per Lord Weir at 430 and per Lord Caplan at 432-3. Under reference to the last-mentioned passage he pointed out that if clause 13.8.5 were held to be a penalty clause, that would not prevent the pursuers from recovering any loss they could prove was caused by the defenders' failure to comply with their obligations under clause 13.8.1.

[12] Turning to the second of the two issues that he had identified, Mr Cormack submitted that clause 13.8.5, properly construed, was a penalty clause. It was not disputed that the liquidate damages provided for in the contract were a genuine pre-estimate for the loss that the employer would suffer in the event of delay in completion of the works. It was plain that they were not a genuine pre-estimate of the loss likely to flow from a breach of clause 13.8.1. In that connection he cited the dictum of Lord Roskill in **Export Credits Guarantee Department v Universal Oil Products Limited** [1983] 1 WLR 399 at 403H quoted in **E.F.T. Commercial Limited** at 429-30. It was to be noted that clause 13.8.5 was triggered by any failure to comply with clause 13.8.1, although some such failures could cause substantial damage, while others would cause none. In these circumstances, clause 13.8.5 should be held to be a penalty Clause (**Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co** [1915] 79 per Lord Dunedin at 86, paragraph (c)). In that event the pursuers' attempt to rely on clause 13.8.5 to exclude the defenders' claim to entitlement to extensions of time was irrelevant.

[13] Mr Currie, senior counsel for the defenders, submitted that it was wrong to characterise clause 13.8 as being concerned with the allocation of the risk of loss through delay. It dealt not with the risk of loss through late completion, but with the consequences of the contractor's failure to comply with the requirements of clause 13.8.1. The adverse consequence, in the form of disentitlement to extension of time, and thus liability in liquidate damages, flowed from failure to comply with any provision of clause 13.8.1. It flowed whether the breach in question was technical or substantial. The liquidate damages were not in any sense a genuine pre-estimate of the consequences of breach of clause 13.8. It was therefore right to identify clause 13.8.5 as a penalty clause.

[14] In my view this issue turns on the proper construction of clause 13.8.5 in the context of the contract as a whole. For a contractual provision to be regarded as imposing a penalty, and therefore as being unenforceable, it must, in my opinion, stipulate for payment by one party to another of a sum of money which (a) is payable on the occurrence of a breach of contract committed by the former party (**E.F.T. Commercial Limited**) and (b) does not constitute a genuine pre-estimate of the loss likely to be suffered by the latter party as a result of the relevant breach of contract, but is instead unconscionable in respect that it is

designed to operate in terrorem, or oppressively or punitively (**Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co**, per Lord Dunedin at 86, paragraph 2; **Clydebank Engineering and Shipbuilding Co v Castaneda**; **AMEV UDC Finance Ltd v Austin**). I did not understand there to be any real dispute as to the soundness of that proposition. What is in issue is how it ought properly to be applied to clause 13.8.5.

[15] For the purpose of analysis of the relevant provisions of the contract, the appropriate starting point, in my opinion, is clause 23.1.1, which provides inter alia that:

"... the Contractor ... shall ... regularly and diligently proceed with the [Works] and shall complete the same on or before the Completion Date".

The consequence of failure to complete the works by the completion date is set out in clause 24.2.1 as follows:

"... the Contractor shall ... pay or allow to the Employer liquidated and ascertained damages at the rate stated in the Appendix ... for the period between the Completion Date and the Date of Practical Completion".

In this contract the rate stated in the Appendix is £30,000 per week pro rata. It is not disputed that that sum is a genuine pre-estimate of the rate at which loss is likely to be suffered by the employer if completion of the works is delayed. The agreement between the parties is therefore that for each week or part of a week that completion of the works is delayed, the defenders will be liable to pay to the pursuers (or to have deducted from the sums due to them by the pursuers) liquidate damages at the rate of £30,000 per week. The next stage of analysis requires attention to be focused on the date on which the period in respect of which liquidate damages are to be payable begins. It is important to note that the completion date mentioned in clauses 23.1.1 and 24.2.1 is not necessarily the date of completion specified in the Appendix. In clause 1.3 the expression *"Date for Completion"* is defined as meaning *"the date fixed and stated in the Appendix"*, and the expression "Completion Date" is defined as meaning "the Date for Completion as fixed and stated in the Appendix or any date fixed under either clause 25 or 33.1.3." (Clause 33.1.3 relates to war damage, and can be ignored for present purposes.) Attention must therefore turn to clause 25. That is a provision of some complexity, but its broad effect is to permit the architect to grant extensions of time where delay is caused by a relevant event as defined in clause 25.4. clause 25.4 lists as relevant events a variety of circumstances, which have the common feature that their occurrence is not the fault of the contractor. The result is that the contract contemplates a procedure by which, if delay occurs as a result of one of the relevant events (broadly for a reason for which the contractor is not responsible), an extension of time may be obtained, which has the effect that the completion date is postponed, and the period of delay resulting from the relevant event is therefore not taken into account in computing any period in respect of which liquidate damages must be paid or allowed. Consequently, where delay occurs because of a relevant event and an extension of time is granted, the employer himself bears any loss caused to him by the delay, whereas otherwise the employer is compensated for loss caused by delay of the completion of the works to the pre-estimated extent provided for in the liquidate damages provision.

[16] That is the standard form contractual scheme onto which the parties chose to graft clause 13.8. That Clause is concerned with the effects of architect's instructions. Clause 13.8.1 places on the contractor certain obligations on the occurrence of certain events. I shall leave aside until I come to deal with the averments in answer 8(ii) the question whether those obligations are triggered by receipt of the architect's instruction, or by the formation by the contractor of a certain view as to the consequences of the instruction. Whichever view is correct on that point, Clause 13.8.1 provides that where the contractor is of opinion that the instruction will (i) require an adjustment to the contract sum, and/or (ii) delay the completion date, he comes under an obligation not to execute the instruction unless he has submitted to the architect certain details of his estimate of the consequences of implementing the instruction. Clause 13.8.2 then contemplates agreement between the contractor and the architect as to the consequences of the instruction, on the basis of which the contractor will then proceed to implement the instruction and the architect will grant an extension of time (compliance with an architect's instruction being a relevant event in terms of clause 25.4.5) and adjust the contract sum. If such agreement is not reached, clause 13.8.3 confers on the architect a choice. He may instruct the contractor to comply with the instruction, in which event the provisions of clauses 13.5, 25 and 26 (dealing respectively with the valuation of variations, the granting of extension of time, and claims for direct loss and expense) will apply. Alternatively, he may instruct the contractor not to comply with the instruction, in which case the employer's liability will be restricted to reimbursing the contractor's reasonable costs associated with the abortive instruction. It therefore seems to me that one major aspect of the purpose of clause 13.8 is to give the

architect an opportunity to think again about his instruction in light of the contractor's view as to its consequences in terms of time and money, and to choose whether to insist in it or not. Clause 13.8.4 gives the architect the opportunity to dispense with the contractor's obligations under clause 13.8.1. He can thus, by so dispensing in advance, avoid the lapse of time between the giving and the implementation of the instruction which is inherent in the operation of the clause 13.8 procedure, or, by dispensing after the instruction has been given but before the procedure has been brought to a conclusion, curtail that lapse of time. Finally, clause 13.8.5 provides that the contractor who, in the absence of dispensation under clause 13.8.4, fails to comply with one or more of the provisions of clause 13.8.1 shall not be entitled to any extension of time under clause 25.3. In the course of the debate attention was directed to the fact that, although clause 13.8.1 referred both to extension of time and to adjustment of the contract sum and the possibility of a claim for direct loss and expense, clause 13.8.5 bore to exclude only the contractor's entitlement to an extension of time, and not to exclude his entitlement to adjustment of the contract sum or to claim direct loss and expense. I was informed that the original draft of the Clause had sought to effect those further exclusions, but that the final form of the clause was the result of negotiation. I was not clear whether parties were agreed that that was so, and I heard no detailed argument as to what the effect (if any) of failure to comply with clause 13.8.1 on entitlement to seek adjustment of the contract sum or claim direct loss and expense would (in the absence of an express equivalent of clause 13.8.5) be. I therefore express no view on that matter. For present purposes, what is significant is that the clause 13.8.5 clearly states that the consequence of failure on the part of the contractor to comply with any one or more of the provisions of clause 13.8.1 is loss of entitlement to an extension of time.

[17] As I have already mentioned, it is not disputed that the liquidate damages provided for in the contract do constitute a genuine pre-estimate of the rate at which the employer is likely to suffer loss as a result of delay in the completion of the works. Conversely, it is in my view clear that the liquidate damages cannot be regarded as a genuine pre-estimate of the loss likely to be suffered by the employer as a result of non-compliance on the part of the contractor with any of the provisions of clause 13.8.1. It therefore seems to me that in order to determine whether the defenders are right in their contention that clause 13.8.5 is a penalty clause, it is necessary to answer two questions, namely (1) whether the event which brings clause 13.8.5 into operation, namely failure on the part of the contractor to comply with one or more of the provisions of clause 13.8.1, constitutes a breach of contract, so as to come within the proper scope of the rule against penalty clauses (E.F.T. Commercial Limited), and (2) whether the effect of clause 13.8.5, in depriving the contractor of the entitlement which he would otherwise have to an extension of time, and thus bringing about liability on his part to pay or allow liquidate damages, should be regarded as turning the liquidate damages into a penalty for breach of clause 13.8.1.

[18] It is, it seems to me, possible to characterise clause 13.8 as laying down the procedure which the contractor must follow if he is to preserve his entitlement to an extension of time when the relevant event is compliance with an architect's instruction. That is descriptive of one aspect of its operation. It does not, however, amount to a complete account of the effect of the clause. So to view the Clause seems to me to fail to give proper weight to clause 13.8.3. If the contractor, having formed the opinion mentioned in clause 13.8.1, elects not to do what the Clause requires of him, he not only deprives himself of any entitlement he would otherwise have had to an extension of time; he also deprives the architect of the opportunity, stipulated for by the employer, of reviewing the instruction in light of the contractor's opinion of its consequences, and of choosing whether to insist in it, or to withdraw it. In reviewing the instruction, the architect would be entitled to have in mind not only the effect of the instruction in producing delay, but also its effect on the contract sum and any claim for direct loss and expense. It therefore seems to me that clause 13.8.3 is of material value to the employer, and that it would therefore not be right to construe the apparently obligatory words of clause 13.8.1 as merely conferring an option, rather than imposing an obligation, on the contractor. I am therefore of opinion that failure on the part of the contractor to comply with one or more of the provisions of clause 13.8.1 is properly to be regarded as a breach of contract on his part. I am therefore of opinion that the defenders' contention that clause 13.8.5 is a penalty clause does not fail on the ground that the Clause operates in a context other than breach of contract.

[19] On the other hand, I am not persuaded that it is right to regard the contractor's liability to pay £30,000 per week in respect of any delay resulting from an architect's instruction in respect of which he has not followed the clause 13.8.1 procedure as a penalty for failing to follow that procedure. It is no doubt right (1) that the

contractor will bear liability for the sum of £30,000 for each week of delay attributable to architect's instructions if he fails to comply with clause 13.8.1 and so fails to obtain an extension of time, (2) that he will not bear that liability if on the contrary he complies with clause 13.8.1 and obtains an extension of time, and (3) that that liability, if it is incurred, is not, and does not bear to be, a genuine pre-estimate of any loss suffered as a result of the contractor's failure to comply with clause 13.8.1. There is thus, in a sense, a causal connection between the contractor's failure to comply with clause 13.8.1 and his liability to pay a sum of money which bears no relation to the loss resulting to the employer from that breach of contract. It is by viewing the matter in that light that plausibility can be conferred on the defenders' submission that clause 13.8.5 is a penalty clause. That view is, however, in my view a partial one. What it overlooks is that the delay in question, caused by the architect's instruction, is delay of a sort that the parties have agreed is likely to cause the employer loss which is pre-estimated at £30,000 per week. The fact that the cause of the delay is compliance with an architect's instruction does not alter the fact that the employer will suffer loss as a result of it. The fact that the contract provides that delay of that sort is one example of the categories of delay in respect of which the contractor may ask for, and the architect may grant, an extension of time, means that the contractor may follow a procedure which procures the result that the delay in completion of the works is not a delay which places him in breach of his obligation under clause 23.1.1, but does not alter the fact that the employer will suffer loss. It merely means that the employer does not have the benefit of being indemnified against that loss to a pre-estimated extent. If the contract adds a further provision that, if he fails to take certain additional steps, the contractor will not be entitled to an extension of time, that preserves for the employer, in the event of such failure, the entitlement to pre-estimated damages for delay that might have been taken away by the award of an extension of time. In that event, the employer remains in the position that he receives damages, at the pre-estimated rate agreed upon, for the loss consequent upon delay in completion of the contract works. It seems to me, therefore, that the sum of £30,000 remains payable by the contractor on the basis that it is a genuine pre-estimate of the loss suffered by the employer as a result of the delay in completion, and is not converted, by the fact that the contractor might have avoided that liability by taking certain steps which the contract obliged him to take, but failed to do so, into a penalty for failing to take those steps. The fact that the contractor is laid under an obligation to comply with clause 13.8.1, rather than merely given an option to do so, does not in my opinion deprive compliance with clause 13.8.1 of the character of a condition precedent to entitlement to an extension of time. Non-compliance with a condition precedent may in many situations result in a party to a contract losing a benefit which he would otherwise have gained or incurring a liability which he would otherwise have avoided. The benefit lost or the liability incurred may not be in any way commensurate with any loss inflicted on the other party by the failure to comply with the condition. But the law does not, on that account regard the loss or liability as a penalty for the failure to comply with the condition (**The "Vainqueur José"**, per Mocatta J at 578, col. 2). In my opinion, it would be wrong to regard the "liquidate damages" to which the defenders remained liable because they failed to comply with clause 13.8.1, and thus lost their entitlement to an extension of time, as being a penalty for that failure. On the contrary they remain liquidate damages for the delay in completion of the works, albeit the defenders might have avoided that liability if they had fulfilled the condition precedent of complying with the requirements of clause 13.8.1, and thus been able to obtain an extension of time, and thereby procure that the delay caused by the architect's instruction did not place them in breach of their obligation under clause 13.1.1. In these circumstances, I am of opinion that the defenders have not relevantly averred that clause 13.8.5 is a penalty clause.

The Answer 8(ii) Issue - What Triggers the Clause 13.8.1 Obligation?

[20] The obligation on the contractor to refrain from executing an architect's instruction if he has not first submitted the requisite details to the architect arises, according to the terms of clause 13.8.1, where, in his opinion, the instruction will require an adjustment to the contract sum and/or delay the completion date. The defenders' contention is that the obligation only arises if the contractor actually forms such an opinion, and that the pursuers' averments of breach of clause 13.8.1 are therefore irrelevant because they do not assert that the defenders actually formed such an opinion. Their position was that they could not claim that they applied their minds to the point when they received the instructions is question. Mr Keen submitted that if the Clause were construed in the way contended for by the defenders it would be deprived of efficacy. In his submission, on a sound construction of clause 13.8.1 receipt by the contractor of an architect's instruction obliged him (1) to apply his mind to whether the instruction would have the effect of requiring an adjustment

of the contract sum or of delaying completion, and (2) if he formed the opinion that it would have such effect, (a) to refrain from executing the instruction and (b) to provide the specified details of his estimate of the consequences of executing it. A party was not entitled to rely on his own wrongful failure to address an issue in order to evade the consequences of that failure. Reference was made to **Mackay v Dick & Stevenson** (1881) 7 R (HL) 37 per Lord Watson at 45. It was incumbent on the defenders to aver either that they had formed the opinion contemplated in clause 13.8.1 and had complied with the obligations that thereupon came to be incumbent on them, or that they had not taken those steps because they had formed the contrary opinion. It was not sufficient for them to say that they had not applied their minds to whether the instructions received would have the effects contemplated in clause 13.8.1. The subsidiary suggestion in the defenders' pleadings that the obligation imposed by clause 13.8.1 arose only if the defenders' opinion was that the instruction would require an adjustment of the contract sum could not be correct. Such a contention flew in the face of the terms of clause 13.8.1, which referred to the formation of the opinion that the instruction "will require an adjustment to the Contract Sum and/or delay the Completion Date".

[21] Mr Cormack submitted that on a sound construction of clause 13.8.1 the obligation to refrain from execution and to give the architect the requisite details arose only if the contractor actually formed the opinion mentioned in the clause. A relevant case of failure to comply with the requirements of clause 13.8.1 could therefore only be made if it was averred that the contractor had actually formed the requisite opinion. If the contractor did not apply his mind to whether the instruction would have the contemplated effects, the obligation to refrain from execution of the instruction and provide the requisite details did not arise. The proper approach to the construction of clause 13.8 1 was to consider, first, the literal meaning of the words of the clause, then to judge whether the application of that literal meaning gave rise to an absurd result. The literal meaning was that the obligation only arose if the contractor actually formed the opinion that the instruction would have the specified effects. The obligation only arose *"Where, in the opinion of the contractor, any instruction ... will require an adjustment ... or delay the Completion Date"*. Given the literal meaning for which Mr Cormack contended, it could not, he submitted, be said that it yielded an absurd result. There was nothing absurd about reading the Clause as imposing a duty to refrain from execution of the instruction, and warn the architect of the contractor's view of its effect in terms of money and time, only where the contractor realised that it would have such effects. It would be wrong to construe clause 13.8.5 as coming into operation simply because the contractor did not apply his mind to whether the instruction would have the contemplated effects. Such a construction was illegitimate, because it deprived the reference to the contractor's opinion of content. The Clause would be of massively onerous effect if it were construed as obliging the contractor to apply his mind to whether each architect's instruction would require adjustment to the contract sum or delay completion. **Mackay v Dick & Stevenson** was distinguishable. This was not a case where the pursuers had been thwarted in their attempt to fulfil a condition by inaction on the part of the defenders. The pursuers could only treat the absence of an opinion as to the consequences of an instruction as a breach of the defenders' obligation if they were able to establish that the evaluation of the instruction was subject to some sort of standard such as reasonableness, and that that standard had not been met. As they stood the pursuers' pleadings were irrelevant because they failed to aver that the defenders formed the opinion which, in terms of the clause, operated to trigger the defenders' obligation. Mr Cormack did not seek to maintain the subsidiary contention that clause 13.8.1 only applied if the opinion was formed that the instruction required adjustment of the contract sum. He recognised that that contention could not stand with the use of the phrase *"require an adjustment to the Contract Sum and/or delay the Completion Date"*.

[22] In adopting and elaborating upon Mr Cormack's submissions, Mr Currie laid emphasis on the draconian effect of clause 13.8.5 in depriving the contractor of the right, which he would otherwise have, to obtain an extension of time. The court should therefore, he submitted, be slow to adopt a construction of clause 13.8.1 which went beyond the language used, and implied an obligation to consider whether the architects' instruction would have the contemplated effects. It would have an adverse effect on the progress of the contract works if, in response to each and every architect's instruction, the contractor had to consider whether it would require adjustment of the contract price or an extension of time. Those considerations supported the conclusions that the language of the Clause should be given its natural meaning; that no obligation was imposed on the contractor to address his mind to the question whether the architect's instruction would have the contemplated effects; and that therefore a contractor could not be said to have failed to comply with the

provisions of clause 13.8.1 unless he had actually formed the opinion that the instruction would have those effects but had nevertheless not deferred execution of the instruction and had not given the architect the requisite details.

[23] The context in which this issue arises is, in my opinion, provided by clause 13.8.5, which disentitles the contractor from obtaining an extension of time where (a) he has failed *"to comply with one or more of the provisions of Clause 13.8.1"* and (b) the architect has not dispensed with such compliance under clause 13.8.4. No question of dispensation arises in the present case. The issue is therefore whether the defenders failed to comply with the provisions of clause 13.8.1. In order to determine what those provisions, properly construed, required of the defenders, it is in my view appropriate to consider the consequences of compliance with them. Compliance involves the provision by the contractor to the architect of details of the contractor's estimate of the effects of compliance with the instruction in question on such matters as adjustment of the contract sum, the provision of additional resources, extension of time and claims for direct loss and expense (clause 13.8.1.1-4). Provided with that information, the architect is given the opportunity to review his instruction, discuss it with the contractor with a view to agreement on the consequences (clause 13.8.2), and either, failing agreement, to insist on it, in which case the contract sum may fall to be adjusted, and extension of time may fall to be granted, and a claim for direct loss and expense may arise, or alternatively to cancel it, at the limited expense of bearing any costs arising from the abortive instruction (clause 13.8.3). It is, in my view, appropriate to bear in mind that those are the consequences which flow from implement of the obligations imposed by clause 13.8.1, when construing that provision. There is, no doubt, at first sight some force in Mr Cormack's submission that, literally construed, the words of clause 13.8.1 do not place on the contractor a positive obligation to consider an architect's instruction in order to form an opinion as to whether it will have any of the consequences contemplated in the clause. The Clause contains no such words as: *"On receipt of an architect's instruction, the contractor shall consider whether the instruction will require an adjustment of the Contract Sum and/or delay the Completion Date, and shall, if he is of opinion that it will have any such effect, ..."*. Mr Currie, too, was no doubt right to emphasise the severe consequences for the contractor which clause 13.8.5 attaches to failure to comply with the provisions of clause 13.8.1. It seems to me, however, balancing those consequences against the plain purpose of the Clause of giving the architect an opportunity to review his instruction in light of the contractor's opinion of its effects on time and price, that the construction contended for by the defenders is not a commercially sensible one. In my view what was contemplated was that on receipt of an instruction, the contractor would apply his mind to it, and form a view as to its likely consequences in terms of time and money. It does not seem to me that that construction would impose an excessive burden on the contractor who, after all, would have his own interest in identifying the consequences of the instruction. If the contractor were not under an obligation to consider the effects of the instruction, the further procedure under clauses 13.8.2 and 13.8.3 might or might not operate, according to whether the contractor bothered (or chose) to think about the consequences of the instruction. I do not consider it reasonable to suppose that what was intended was such an uncertain operation of the clause. I am therefore of opinion that on a sound construction of clause 13.8.1 the contractor, on receipt of an architect's instruction, was obliged to consider whether it would require adjustment of the contract sum and/or an extension of time, so as to place himself in a position (if he formed the opinion that it would have that effect) to comply with his obligations to defer executing the instruction and to provide the requisite details to the architect. The wording of the Clause is, it seems to me, less than perfect. It does not expressly address the eventuality of the contractor reasonably and in good faith forming the opinion that the contemplated consequences will not follow from the instruction, and consequently not doing what Clause 13.8.1 required, and the need for an extension of time later becoming evident. It is unnecessary, however, for the purposes of this case to decide whether in that event the contractor would have lost his entitlement to an extension of time. That is not the position with which this case is concerned. Here the contractor did not, as the Clause (as I construe it) contemplated that he would do, apply his mind to the effect of the instructions on time and money. That was why he did not follow the clause 13.8 procedure. In the absence of any averment by the defenders that if they had applied their mind to the matter they would not have formed the relevant opinion, I am of opinion that the pursuers have relevantly averred that the defenders failed to comply with the provisions of clause 13.8.1. It follows, in my opinion, that the pursuers relevantly invoke clause 13.8.5.

The Answer 8(iii) Issue - Circumstances to which Clause 13.8.1 Does Not Apply

[24] The defenders, in answer 8(iii), put forward three propositions identifying circumstances in which, in their contention, clause 13.8.1 does not apply. Those circumstances may be summarised as being:

1. where the architect's instruction is for the expenditure of provisional sums included in the contract bills;
2. where delay has been occasioned by the architect's instruction not having been received by the defenders in due time; and
3. where delay was occasioned by the supply by the pursuers of material and goods which they had agreed to provide or their failure so to supply.

in addition, answer 8(iii) contains the further proposition that:

4. Clause 13.8, and in particular Clause 13.8.5 does not affect the carrying out by the architect of his duty in terms of Clause 25.3.3.

Mr Keen accepted that proposition (3) was sound. It is therefore only necessary to discuss propositions (1), (2) and (4).

(1) Provisional Sums

[25] Mr Keen submitted that proposition (1) was unsound. Clause 13.8.1 refers in unqualified terms to "any instruction ... issued by the Architect". Clause 13 as a whole was entitled "Variations and provisional sums". Clause 13.8.6 provides:

"The Architect shall issue instructions in regard to the expenditure of provisional items included in these Bills of Quantities".

There was therefore nothing to justify the contention that the reference to architect's instructions in clause 13.8.1 did not include instructions with respect of the expenditure of a provisional sum.

[26] According to Mr Cormack's submissions, the combined effect of two considerations showed that proposition (1) was sound. First, the architect was obliged in terms of the contract to issue instructions for the expenditure of provisional sums - see clause 13.3.1 (and, somewhat repetitively, clause 13.8.6). Secondly, all such instructions necessarily require an adjustment of the contract sum, with the provisional sum being deleted and replaced by the quantity surveyor's valuation under clause 13.4.1.1. Valuation by the QS, as required by clause 13.4.1.1, was inconsistent with the operation of the procedure by way of agreement between the contractor and the architect contemplated in clause 13.8.2. No attempt had been made in clause 13.8 to deal with the tension between it and clause 13.4. Because of the "penal" effect of clause 13.8.5, it was proper to construe clause 13.8 narrowly, rather than to attempt to devise a way of reconciling it with clause 13.4, when no attempt had been made to achieve such reconciliation in the terms of the contract. The absence of any cross reference to clause 13.4 in clause 13.8 supported the inference that the latter Clause was not intended to apply to instructions for the expenditure of provisional sums.

[27] In response to those submissions, Mr Keen argued that it was not sound to say that the architect was obliged to issue an instruction for the expenditure of a provisional sum; he could instruct the omission of the provisional item - see clause 13.1.1.1. The mischief against which clause 13.8 was directed was to be found as much in an instruction in respect of the expenditure of a provisional sum as in any other type of instruction. Clause 13.4 was not irreconcilable with clause 13.8; clause 13.4.1.1 contemplated the valuation being "otherwise agreed by the Employer and the Contractor". In any event, any inconsistency between clause 13.8 and clause 13.4 related only to payment for the provisional item, whereas clause 13.8.5 was directed at extensions of time.

[28] Mr Currie submitted that Mr Keen's submission that the architect could instruct omission of provisional items was unrealistic. There were in the present contract a large number of provisional items, the majority of which required to be implemented if the original design was to be executed. The court should recoil from the sophistication of the construction necessary to make clause 13.8 apply to instructions for the expenditure of provisional sums.

[29] In my opinion, the language of clause 13.8 is prima facie applicable to all architect's instructions, including those in respect of the expenditure of provisional sums. There is no qualification of the reference in clause 13.8.1 to architect's instructions, to suggest that any sub-category of such instructions is to be excluded from the scope of the clause. The repetition of the substance of clause 13.3.1 in clause 13.8.6, although apparently redundant, lends support to the contention that clause 13.8 applies, without distinction, to all

architect's instructions. The fact that, unless the provisional item is to be excluded by the instruction of a variation to that effect under clause 13.1.1.1, the architect is obliged to issue an instruction for the expenditure of the provisional sum (clauses 13.3.1 and 13.8.6) does not seem to me to be a sufficient basis for an inference that such instructions fall outside the scope of clause 13.8. The fact that the architect, if he is to implement the original design, must give some instruction for the expenditure of a provisional sum, does not seem to me to render pointless the opportunity secured to the architect by clause 13.8 to review his instruction in light of the contractor's view as to its effect on price and time. He might, on reconsideration, decide to give a modified instruction for the expenditure of the particular provisional sum. I do not consider that clauses 13.4.1.1 and 13.8.2 are irreconcilable. Clause 13.4.1.1 certainly contemplates valuation by the QS as the primary method of determining the price to be paid for a provisional item, but it seems to me that the reference in that Clause to the possibility of agreement between the contractor and the employer leaves open the possibility of the superimposition on the standard provision of clause 13.4 of a special provision in clause 13.8. It seems to me that, except to such extent as it is impossible to do so consistently with clause 13.4, clause 13.8 should be given the unrestricted meaning that its language initially suggests. I am therefore of opinion that clause 13.8 cannot be said to be inapplicable to architect's instructions for the expenditure of provisional sums.

(2) Late Instructions

[30] Mr Keen submitted that there was no good reason to exclude late instructions from the scope of clause 13.8. The cross-reference to clause 25.4.6 made in answer 8(iii) afforded no assistance in the construction of clause 13.8. Mr Cormack, on the other hand, submitted that where the delay was occasioned by the lateness of the instruction rather than by the content of the instruction, clause 13.8 had no application, because it was concerned only with cases where the instruction caused delay. In the case of a late instruction, the cause of delay is not the instruction as such, but the failure to issue it earlier. Moreover, in practice the application of clause 13.8 to late instructions would cause absurd results; it would merely cause further delay. Mr Keen responded by saying that the mischief against which clause 13.8 was directed was the effect on time and price of the content of the instruction. A late instruction which, because of its content rather than its timing, affected price or time for completion, properly fell within the scope of clause 13.8. It was therefore wrong to say that late instructions necessarily fell outside the scope of clause 13.8.

[31] In my view a distinction falls to be drawn between, on the one hand, a late instruction which, simply because of its lateness, gives rise to a need to adjust the contract sum and/or grant an extension of time and, on the other hand, an instruction which, although late, is of such a nature that it would, whenever issued, have given rise to a need to make such an adjustment or grant such an extension. The latter category of instruction falls, in my view, within the scope of clause 13.8, whereas the former does not. It is in my view difficult to formulate the distinction more precisely in the abstract. It would, in my view, be wrong to say simply that clause 13.8 has no application to late instructions. On the other hand, a failure to comply with clause 13.8 will not, in my view, exclude a claim for extension of time in so far as the extension is made necessary by the lateness of the instruction as distinct from its content.

(4) The Architect's Duty under Clause 25.3.3

[32] Clause 25.3.3 provides that:

> *"After the Completion Date, if this occurs before the date of Practical Completion, the Architect may, and not later than the expiry of twelve weeks after the date of Practical Completion shall, in writing to the Contractor either*
>
> *.1 fix a Completion Date later than that previously fixed if in his opinion the fixing of such later Completion Date is fair and reasonable having regard to any of the Relevant Events, whether upon reviewing a previous decision or otherwise and whether or not the Relevant Event has been specifically notified by the Contractor under clause 25.2.1.1; or*
>
> *.2 Fix a Completion Date earlier than that previously fixed under clause 25 if [certain conditions are fulfilled]".*

[33] Mr Keen submitted that in approaching his task under clause 25.3.3 the architect required to consider the effect of clause 13.8. If there was a tension between the clauses, clause 13.8, as the special provision added to the standard form, should prevail. The result was that when implementing clause 25.3.3 the architect, in having regard to relevant events, required to bear in mind that some relevant events, namely those relating to an architect's instruction, could only be regarded as qualifying for an extension of time if clause 13.8 had been complied with. Although clause 25.3.3 was not expressly qualified to that effect, that was the proper effect of reading clauses 25.3.3 and 13.8 together. That was in accordance with the principles of construction

enunciated earlier (see paragraph [5] above). It would be inconsistent with those principles for the court to adopt a construction of clause 25.3.3 that deprived clause 13.8.5 of effect.

[34] Mr Cormack's submission was that clause 13.8 was not expressed as removing certain architect's instructions from the category of relevant events. It followed that when clause 25.3.3 referred to relevant events, it applied to architect's instructions (clause 25.4.5) irrespective of whether clause 13.8 had been complied with. Clause 25.3.3 was not qualified by any ad hoc cross-reference to clause 13.8. That was to be contrasted with Amendment 13, which specifically modified clause 25.3.3 to take account of the introduction of clause 13A. The result was that the effect of clause 13.8.5 was that the contractor could not obtain an immediate extension of time under clause 25.3.1, but that there was nothing to prevent his obtaining an extension of time after the completion date by virtue of the architect's performing his duty under clause 25.3.3. Mr Currie, while accepting that there was a tendency to treat special provisions as overriding standard terms, submitted that the court should be slow to treat a special condition like clause 13.8 as disapplying the standard term implicitly when it did not do so expressly.

[35] In my opinion the architect's power under clause 25.3.3 must be read subject to the special provision of clause 13.8.5. Clause 13.8.5 defines the effect of failure to comply with the provisions of clause 13.8.1 as being that "the Contractor shall not be entitled to any extension of time under clause 25.3". The contractor's entitlement to an extension of time under clause 25.3 falls into two parts. First, there is his entitlement, having given notice under clause 25.2.1 and 25.2.2, to an immediate extension of time under clause 25.3.1. Secondly there is his entitlement to have the matter reviewed by the architect after the completion date in terms of clause 25.3.3. The latter right does not depend, as the former does, on notice under clause 25.2.1.1. Nevertheless, those are both, in my view, aspects of the contractor's entitlement to an extension of time under clause 25.3. Any extension of time granted by the architect under clause 25.3.3 is as much an "extension of time under clause 25.3" as is an extension of time under clause 25.2.1. The contractor's right to both is, therefore, in my opinion, removed, in terms of clause 13.8.5, if the contractor fails to comply with the provisions of clause 13.8.1. It follows, in my opinion, that proposition (4) in answer 8(iii) is unsound.

The Answer 8(iv) Issue - Implied Terms

[36] On this issue, Mr Keen initially made three points. In the first place, the defenders' averments addressed an event which they did not aver had occurred. It was said that "[in] the event that the defenders would have been prevented from carrying out [their clause 13.8.1] obligations by failure of the pursuers or the Architect in breach of [the alleged] implied terms", certain consequences followed; but there was no averment that that the defenders were so prevented. In the second place, Mr Keen submitted that the implied terms contended for by the defenders could not be said to be necessary to give business efficacy to the contract. Thirdly, he submitted that the defenders could not say they were prevented from carrying out their obligations under clause 13.8.1 by failure on the part of the pursuers or the architect when their position was that they had not addressed their minds to the clause 13.8.1 issue.

[37] Mr Cormack submitted that on a fair reading of the defenders' averment in answer 8(iv) beginning *"In the event..."* their effect was that the defenders were asserting that, if they had addressed their mind to the clause 13.8.1 question, they would have been prevented from operating that Clause by the failure of the pursuers and the architect to fulfil their obligations under the implied terms contended for. The detail of the defenders' position was to be found set out in their Statement of Case in the adjudication, which was incorporated in their pleadings, and to which the Schedule of Clause 13.8 Submissions (No. 7/4 of process) formed an index. In these circumstances, the issues to be addressed at this stage were (i) whether there was a relevant case for inquiry as to whether the implied terms contended for formed part of the contract, and (ii) whether the defenders could relevantly rely on the pursuers' and the architect's failure to comply with the implied terms, when it was their position that they accepted that they had not applied their mind to the clause 13.8.1 issues.

[38] In support of his submission that the averments as to the implied terms were relevant, Mr Cormack referred to my own decision in **Scottish Power plc v Kvaerner Construction (Regions) Ltd** 1999 SLT 721, and to the authorities discussed in that case. He submitted that the implied terms contended for were a fortiori incumbent on the pursuers and the architect if, as Mr Keen contended (and as I have held - see paragraph [23] above), the defenders were obliged to apply their minds to the clause 13.8.1 issues. In this case, there was no argument from the pursuers (as there was in **Scottish Power v Kvaerner**) that such implied terms would be

contradictory of express terms of the contract. In the circumstances, the question of the implication of terms was best left to be determined at proof before answer.

[39] Mr Cormack further submitted that it was relevant for the defenders to rely on the implied terms on the basis that, if they had addressed the matter, they "would have" been prevented from complying with the provisions of clause 13.8.1 by the pursuers' or the architect's failure to comply with the implied terms. The matter should be regarded as one of mutuality of obligations. If the pursuers' case is that the defenders' obligations under clause 13.8.1 were triggered by the issue of the architect's instructions rather than by the actual formation of a particular opinion by the defenders, they can only rely on the consequent effect of clause 13.8.5 if they have themselves fulfilled their counterpart implied obligations.

[40] In response to Mr Cormack's argument based on mutuality, Mr Keen submitted that the effect of that doctrine was that one party could not demand performance by the other party while failing to perform his own reciprocal obligation. Here the defenders did not make a case that they were prevented from performing their obligations by any breach of the implied obligations on the part of the pursuers or the architect. If they had tried to do what clause 13.8.1 required of them, but had been prevented from doing so by the pursuers' or the architect's failure to fulfil their implied obligations, they would have been entitled to invoke the principle of mutuality, but they could not do so when they had wholly failed to address their obligations under clause 13.8.1.

[41] Mr Currie submitted that the focus of the dispute on this issue was whether the defenders could rely on the doctrine of mutuality, where they accepted that the reason for their not operating the clause 13.8.1 procedure was not anything directly done by the pursuers or the architect to prevent them from doing so, but rather their own failure to apply their mind to the matter. He submitted that in face of the defenders' averments that they could not have complied with the requirements of clause 13.8.1 because of actings on the part of the pursuers or the architect, their failure to address the matter became entirely academic or technical.

[42] In my opinion the defenders' averments relating to the alleged implied terms are relevant to be admitted to inquiry. As the authorities discussed in **Scottish Power v Kvaerner** show, such obligations have been held in a number of cases to be implied in construction contracts. Whether they are properly to be implied in the case of a particular contract is a matter of circumstances. They may be excluded or modified to the extent necessary to give proper effect to the express provisions of the particular contract. No such issue is, however, raised in the present case. I am therefore of opinion that it would be inappropriate to exclude those averments from probation. Although, if attention is confined to the averments expressly contained in answer 8(iv), there is some force in Mr Keen's submission that the defenders do not actually assert that failure on the part of the pursuers or the architect would have prevented the defenders from implementing their clause 13.8.1 obligations, it seems to me to be necessary to bear in mind that the defenders incorporate in their pleadings the terms of their Statement of Case in the adjudication. While that document was not referred to in the course of the debate, Mr Cormack made some illustrative reference to No. 7/4 of process, which operates in effect as an index to the points made in the Statement of Case. Mr Keen made no submissions directed against the relevancy of the incorporation of the Statement of Case. In these circumstances, I am not prepared to hold at this stage that the defenders have made no relevant averments of failure on the part of the pursuers or the architect to comply with the allegedly implied obligations. Likewise, it seems to me that the proper application of the doctrine of mutuality to the somewhat unusual circumstances of this case is a matter better left for resolution after the circumstances have been explored in evidence. I am therefore of opinion that the issues raised in answer 8(iv) should be remitted to proof before answer.

The Answer 8(v) Issues - Acquiescence, Waiver and Personal Bar

[43] The defenders' averments in answer 8(v) make four separate but related cases. They are that, if the defenders did fail to comply with clause 13.8.1, the pursuers are not entitled to rely on that fact because by their conduct or that of the architect as their agent they have (1) acquiesced in such failure, or (2) waived compliance with clause 13.8.1, or (3) waived such compliance as a condition precedent to an extension of time, or (4) become personally barred from relying on such failure for the purpose of defeating the defenders' claim for an extension of time. In submitting that the defenders' averments in support of those propositions are irrelevant, and should not be admitted to probation, Mr Keen made a number of separate points.

[44] First, he submitted that a case of waiver could not be made on the basis of actings which were consistent with retention of the right in question. Waiver involved abandonment of the right in question and abandonment could not be inferred from actings which were consistent with its retention (**Evans v Argus Healthcare (Glenesk) Ltd**, 2001 SCLR 117 at 124C-D). Moreover, it was necessary for the party taking the plea of waiver to aver that he had conducted his affairs on the basis that the right had been abandoned (**James Howden & Co Ltd v Taylor Woodrow Property Co Ltd** 1998 SC 853, per Lord Kirkwood at 867C-869D). Here the actings relied upon by the defenders were consistent with the pursuers having assumed that in not following the clause 13.8.1 procedure the defenders were merely reflecting the view that the instructions in question were not going to affect price or time. Moreover, there were no relevant averments that the defenders had altered their position in reliance on the actings of the pursuers and the architect. The defenders aver that had the pursuers or the architect made clear earlier that they sought to rely on clause 13.8 they would have conducted themselves differently in two respects: (i) they would have sought prospective or retrospective dispensation from the architect with the obligations under clause 13.8.1, and such dispensation would probably have been given; and (ii) they would have delayed compliance with the instruction in order to comply with clause 13.8.1. In relation to the first of those points, Mr Keen submitted that clause 13.8.4 did not provide for retrospective dispensation. The second point, he submitted, was wholly lacking in specification. At what stage was it suggested that, if the pursuers had made it clear that they sought to rely on clause 13.8, the defenders would have acted differently?

[44] Secondly, Mr Keen submitted that so far as the case of personal bar was concerned, it was necessary for the defenders to aver that they had suffered prejudice. He cited the often-quoted passage from the speech of Lord Birkenhead LC in **Gatty v Maclaine** 1921 SC (HL) 1 at 7:

> *"... the rule of estoppel or bar, as I have always understood it, is capable of extremely simple statement. Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time."*

The difficulties faced by the defenders in making a case of waiver were thus compounded when they sought to make a case of personal bar by the absence of relevant averments that they had acted to their prejudice in the belief that the pursuers were not standing on their rights under clause 13.8. The defenders did not aver that they altered their position to their detriment on the basis of any representation to that effect by the pursuers or on their behalf by the architect.

[45] So far as the case of acquiescence was concerned, Mr Keen submitted that acquiescence could only arise where the party against whom it was pled was aware of the state of facts in which they were alleged to have acquiesced (**Cumming v Quartzag Ltd** 1980 SC 276 at 287). There were no averments by the defenders that the pursuers or the architect acted in knowledge that the defenders were failing to follow the clause 13.8 procedure in circumstances in which they ought to have followed it.

[46] Finally, Mr Keen challenged the relevancy of the defenders' averments so far as relying on actings on the part of the architect. He submitted that the architect had no authority, actual or ostensible, to waive compliance with clause 13.8. In so far as he was carrying out his functions relating to granting certificates, the architect exercised an independent function and did not act as agent for the employer (**London Borough of Hounslow v Twickenham Garden Developments Ltd** [1970] 3 All ER 326 per Megarry J at 347f and 348h).

[47] Mr Cormack's broad proposition in relation to this aspect of the case was that the issues required to be reserved for resolution after proof before answer. Sufficient had been averred to justify the allowance of a proof before answer. In relation to the case of acquiescence, Mr Cormack drew my attention to the recent discussion of the law of acquiescence in the Inner House in **William Grant & Sons Ltd v Glen Catrine Bonded Warehouse Ltd** (16 May 2001, unreported). In that case, the defenders sought to argue that "the plea of acquiescence could operate where the defender acted, the pursuer remained silent, the defender changed his position to his prejudice and the pursuer then complained", and that the plea could thus operate "without the defender having acted to his prejudice upon a belief as to a certain state of facts induced by the pursuer's words or conduct" (paragraphs [30] and [31] of the opinion of Lord President Rodger). That argument was rejected. As Lord Nimmo Smith concisely expressed the matter (at paragraph [4] of his opinion):

"... in order for a defender to succeed in a plea of acquiescence he must be able to establish a causal relationship between the pursuer's failure to act and his own actings; that he would not have acted as he did if the pursuer had not induced a reasonable belief that he consented to his doing so."

Mr Cormack laid some stress on Lord Clarke's formulation of the following proposition (in paragraph [5] of his opinion):

"For [acquiescence] to operate with legal effect there must be conduct, words or inaction, on the part of one, which can be shown to have had a causal effect on another's actings, in altering his position in some way."

He said that it afforded support for the view that "negative reliance" was sufficient. It is in my view necessary in that context to bear in mind a passage in the opinion of the Lord President (at paragraph [49]) where he said:

"I should add that the defenders' plea of acquiescence is based on an inference which they seek to draw from the pursuers' silence or failure to object. Inferences of that kind are legitimate only where the party concerned is under a legal duty to speak or object."

Against the background of that authority, Mr Cormack submitted that the averments in answer 8(v) were sufficient to instruct a case that the pursuers or their agent, the architect, acted in such a way as to induce or confirm a reasonable belief that the matter of extensions of time were being, and would fall to be, dealt with on the basis of clause 25, without the assertion of any right outwith that Clause to prevent the granting of extensions of time. In effect, he submitted, the representation was that, notwithstanding the absence of reliance on clause 13.8, the correct contractual procedure was being followed. It was enough to instruct a case of acquiescence that the defenders altered their position in reliance on the belief induced by that representation. The defenders averred that, had the pursuers or the architect indicated earlier that they sought to rely on clause 13.8, the defenders would thereafter have acted differently in certain specified ways. That was a reference to the fact that, according to the defenders, a large number of architect's instructions were issued together at late stages which would have caused even more delay if clause 13.8 had been complied with. It was accepted that, as Mr Keen had submitted, the architect could not dispense with clause 13.8.1 retrospectively after the contractor had commenced compliance with the instruction. The defenders' case, however, in the adjudication demonstrated a picture of architect's instructions issued from an early stage in the contract. The defenders' position was that, had reference to clause 13.8 been made in respect of those early instructions, they could thereafter have protected their position by seeking dispensation, or delaying implementation in compliance with clause 13.8, in respect of subsequent instructions. Mr Cormack submitted that the defenders' averments were also sufficient to make a case that the pursuers or the architect had, or should have had, an awareness that clause 13.8 was not being complied with. It was clear that it would have been obvious to them that certain instructions would have an impact on the contract sum. The point was illustrated by reference to No. 7/4 of process. In certain cases, it was averred, notice of delay under clause 25 had been given within the 10 day period contemplated in clause 13.8. That made it clear to the pursuers and the architect that clause 13.8 was not being operated according to its terms. In all these circumstances, enough had been averred to allow the averments in answer 8(v) to be remitted to proof before answer.

[48] So far as the position of the architect was concerned, Mr Cormack accepted that there were certain functions which he required to carry out independently. There were, however, other respects in which the architect did operate as the agent of the employer. That was so, for example, when he issued instructions for variations. It was also so in the context of clause 13.8. In operating the clause 13.8 procedures the architect was acting as the pursuers' agent, not as an independent certifying authority.

[49] Mr Cormack accepted that the circumstances founded on by the defenders in answer 8(v) were more a case of personal bar than a case of waiver. There were, however, he submitted, elements of waiver. Reliance was placed, in that connection, on the averments in the sentence beginning: *"In respect of certain instructions ..."*. Abandonment of the right to prevent immediate implementation of the instruction without fulfilment by the contractor of the clause 13.8.1 obligations could be inferred. At no time during the contract or during the subsequent adjudication was reliance placed by the pursuers on the defenders' failure to comply with clause 13.8 (c.f. Lord Keith of Kinkel's reference in **Armia v Daejan** 1979 SC (HL) 56 at 72 *to "cases where one party to a contract has plainly accepted as being conform to contract performance tendered by the other party which he might, if so minded at the time, have rejected as defective").*

[50] In response to those submissions, Mr Keen submitted that the effect of Grant v Glen Catrine was to show that the formulation adopted by Lord Birkinhead LC in **Gatty v Maclaine** was correct. He referred to the opinion of the Lord President in **Grant v Glen Catrine** at paragraph [48]:

"While acquiescence may indeed be capable of barring action in the case of future wrongs, it will have that effect only in those rare cases where it can be inferred that the pursuer intended to consent not only to wrongs which have occurred without objection, but also to all similar wrongs, whenever they might occur."

The defenders were here seeking to make a case of that rare sort. The pursuers were, in that context, entitled to notice of precisely when the acquiescence was said to have occurred. When was the representation made? When did the defenders alter their position in reliance on it? Further, the defenders could not have altered their position in reliance on the understanding that the pursuers were not insisting on compliance with clause 13.8 if, as they accepted, they did not apply their minds to the requirements imposed by clause 13.8. Why, Mr Keen asked, should silence on the part of the pursuers be interpreted as acceptance that for an extension of time the contract required nothing more than compliance with clause 25? As regards the position of the architect as agent of the pursuers, he had no authority to vary the contract, and therefore could have no authority to waive its terms.

[51] Mr Currie submitted that the pursuers and the architect had, throughout the contract carried on a consistent course of conduct which involved no attempt to rely on clause 13.8. The course of conduct included acceptance of clause 25 applications for extension of time, and supporting in the adjudication the extension of time which the architect had allowed. That course of conduct was capable of bearing the inference that the pursuers had abandoned their right to enforce clause 13.8 according to its terms. The defenders' averment that, if the pursuers and the architect had done anything to indicate that they were maintaining their right under clause 13.8, the defenders would have acted differently was a relevant averment of reliance. There was thus sufficient in the defenders' averments to justify the allowance of a proof before answer on the issues raised in answer 8(v). It was not correct that the defenders required to identify the precise time at which the personal bar or acquiescence operated.

[52] It is, in my view, unfortunate that the defenders plead (i) acquiescence, (ii) waiver and (iii) personal bar without clearly differentiating which averments bear on which aspect of the case. There is, however, a degree of overlap among the concepts founded on, and various circumstances may no doubt be relevant to more than one. The principles of law which fall to be applied are not in my view seriously in doubt. I accept the propositions of law that Mr Keen advanced (a) as regards waiver, under reference to **Evans v Argus Healthcare (Glenesk) Ltd** and **James Howden & Co Ltd v Taylor Woodrow Property Co Ltd**, (b) as regards personal bar, by reference to **Gatty v Maclaine**, and (c) as regards acquiescence by reference to **Cumming v Quartzag Ltd**. I have, moreover, no difficulty in accepting the points made by reference to **Grant v Glen Catrine**, which is in any event binding upon me. The difficulty, it seems to me, lies in determining how the principles established in these cases are to be applied to the circumstances of the present case. That is, in my view, inevitably a matter of circumstance. Having considered carefully the points which Mr Keen made, I recognise that there may well be difficulties in the way of the defenders, but I am not persuaded that it would be appropriate to conclude at this stage that their cases of acquiescence/personal bar/waiver must necessarily fail. I take the view that the appropriate course for me to follow is to remit the averments in answer 8(v) to proof before answer. That being so, it would not be appropriate for me to make more detailed comments at this stage on the submissions that were made.

[53] I should add that I do not consider that the averments relating to the actings of the architect as agent for the pursuers ought to be excluded from probation. While under the normal forms of construction contract there are aspects of the actings of the architect (or engineer) which he undertakes as an authority independent of the employer, it does not in my opinion follow that nothing that the architect does is done as agent of the employer. On the contrary, I am of opinion that in issuing instructions and, in particular, operating clause 13.8, the architect does act as agent of the employer. How far his authority as such goes is, in my view, best left to be determined after the whole circumstances have been explored at proof.

The Effect of the Adjudicator's Decision on the Onus of Proof

[54] The contract between the pursuers and the defenders provides inter alia that:

"If any dispute or difference arises under or by reason of breach of this Contract either Party may refer it to Adjudication in accordance with Clause 41A."

Clause 41A.8.1 provides:

"The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or by court proceedings or by an agreement in writing between the parties made after the decision of the Adjudicator has been given".

[55] The dispute was referred to adjudication, and the adjudicator held that, in addition to the extension of time awarded by the architect, the defenders were entitled to a further extension of time of five weeks. The issue which has arisen, and which was briefly debated, is whether the adjudicator's decision to award an extension of time has any effect on the onus of proof in this action.

[56] Mr Keen submitted that the adjudicator's decision on extension of time had no effect on the burden of proof in the action. It remained for the defenders to justify the extension of time which they sought. He referred to the marginal note which appears beside clause 41A.8.1 in the Scottish Building Contract With Quantities (April 1998 Revision) which was incorporated into the parties' contract. That note is in the following terms:

"The arbitration or court proceedings are not an appeal against the decision of the Adjudicator but are a consideration of the dispute or difference as if no decision had been made by the Adjudicator."

Mr Keen submitted that the note correctly stated the law.

[57] Mr Cormack, on the other hand, submitted that the effect of the adjudicator's decision was to throw onto the pursuers the burden of showing that the extension of time which the adjudicator awarded was not justified. That, he submitted, was the effect of clause 41A.8.1, which implemented section 108(3) of the Housing Grants, Construction and Regeneration Act 1996. The binding quality of the adjudicator's decision continued, not merely until the dispute was made the subject of litigation, but until the court proceedings were finally determined. That must mean that, during the proceedings, the adjudicator's decision remained binding, and had to be rebutted by the party arguing for a different result.

[58] In my opinion, Mr Keen's submission is correct. As has been observed in a number of cases, the function of adjudication, as contemplated in the 1996 Act, is to provide a speedy means of reaching a binding interim determination of disputes arising under construction contracts. It goes no further than that. I agree with Mr Keen that the side note to clause 41A.8.1 correctly states the law. It is, in my view, no part of the function of an adjudicator's decision to reverse the onus of proof in any arbitration or litigation to which the parties require to resort to obtain a final determination of the dispute between them. It is reading too much into the reference in clause 41A.8.1 (and section 108(3)) to the adjudicator's decision being binding "until the dispute or difference is finally determined" to construe it as affecting the burden of proof in the arbitration or court proceedings. The burden of proof in any such action lies where the law places it, and is unaffected by the terms of the adjudicator's decision.

Result

[59] I am minded to give effect to the foregoing views by -

1. excluding from probation the averments in answer 8(i) and (ii);
2. in relation to answer 8(iii), by excluding from probation the first and fourth sentences, but admitting to probation the second sentence (for the reasons given in paragraph [31] above) and the third sentence (the relevancy of which was not disputed); and
3. quoad ultra allowing a proof before answer.

Before I pronounce an interlocutor to that effect, however, I propose to put the case out By Order for the purpose of discussing what further procedure, if any, is appropriate before a proof before answer is allowed.

Pursuers: Keen, Q.C.; McGrigor Donald
Defenders: Currie, Q.C., McCormack; Masons