OPINION OF : Lord MacFadyen : Outer House Court of Session : 7th August 2001.

Introduction

[1] This action arises out of a contract in terms of which the pursuers carried out certain construction works for the defenders at their premises at Great Western Retail Park, Glasgow. The pursuers' contention is that they are entitled to an interim payment in terms of a document which they characterise in their pleadings as Application for Payment No. 10, that the defenders have stated no relevant defence to that claim, and that *decree de plano* should accordingly be pronounced. The sum sought is somewhat less than the sum mentioned in the document founded on, because of an adjustment which requires to be made to take account of the terms on which a dispute over the previous interim payment was settled (see article 5 of the condescendence). The defenders' contention is that the document founded on did not constitute an application for an interim payment, and that the pursuers' pleadings are therefore irrelevant and the action should be dismissed. The defenders accept that if, contrary to their contention, the document did constitute an application for payment, the pursuers are entitled to *decree de plano*.

[2] The parties are in dispute as to the terms of the contract between them. The pursuers maintain, however, that whether their contention or the defenders' contention as to the terms of the contract is correct, they are entitled to *decree de plano*. Conversely, the defenders maintain that, whichever view is taken of the terms of the contract, the action should be dismissed. Nevertheless, since I heard argument on the competing contentions as to the terms of the contract, and since the routes by which the parties seek to reach the results respectively contended for vary according to the view taken of the terms of the contract, it is appropriate that I should address that issue.

The Terms of the Contract

a. The Relevant Documents

[3] The document by which the negotiation of the contract was initiated was an Employer's Requirements Document dated March 1999 ("the Employer's Requirements", No. 7/1 of process) which was in effect an invitation to tender prepared by the defenders' agents, Bucknall Austin plc (later called Citex Bucknall Austin). Section 2.6 of the Employer's Requirements set out the contract particulars. Section 2.6.1 stated:

"The form of Contract will be the Scottish Building Contract with Contractor's Design (August 1998 including the correction sheet dated 31 August 1998) and the Appendices thereafter (sic), incorporating amendments as listed herein. ……....

Amendments to the Conditions of Contract are as detailed in Appendix I Scottish Supplement with Contractor's Design and the further amendments detailed Section 2.6.3.2.6 (sic)."

There is no such thing as "Section 2.6.3.2.6", and it seems clear that the last few words of the passage just quoted should be "detailed in Section 2.6.3", because that is the section that sets out the Schedule of Contract Amendments. Section 2.6.2 indicated how the Appendices would be completed. Section 2.6.3, as I have said, contained a "Schedule of Contract Amendments" which set out, by reference to the relevant form of contract, the amendments proposed to that form. In particular, in relation to Clause 30, which dealt with payments, provision was made for the deletion of Clauses 30.3.2, 30.3.3 and 30.3.4 and the substitution of new clauses bearing those numbers.

[4] The pursuers responded to the Employer's Requirements by letter dated 30 March 1999 (No. 6/2 of process) which set out their tender in the form of two attached documents, a "Contractor's Proposals and Design and Build Outline Specification" and a "Contract Sum Analysis". The letter continues:

"With regard to the Employer's Requirements Document dated March 1999 we would comment.

Please note that the scope of works upon which our Contractor's Proposals are based are (sic) at variance with the scope contained within your document.

This is as a result of our interpretation of the client's requirements from our meetings with them allied to the extremely restricted period for tendering afforded to us since the issue of your document.

The following comments and clarifications are deemed to be incorporated within and form part of our tender submission:- ..."

There then follow a number of points which are numbered in a manner which corresponds with the numbers of the paragraphs of the Employer's Requirements. These points include two which relate to amendments to the contract conditions set out in section 2.6.3 (in relation to Clauses 43.1 and 45.0), but they do not include any comment on or rejection of the proposed alterations to Clause 30 of the contract conditions.

[5] The Contractor's Proposals attached to the pursuers' letter of 30 March 1999 were in inter alia the following terms:

"1.0 EMPLOYER'S REQUIREMENTS

The Employer's Requirements are as outlined in Messrs Bucknall Austin's document dated March 1999 [i.e. No 7/1 of process].

2.0 CONTRACTOR'S PROPOSALS

The Contractor's Proposals are outlined in the following document.

Comments with regard to areas of conflict or clarification relative to the Employer's Requirements Document are identified within the enclosed letter.

For the purposes of our submission the Contractor's Proposals take precedence."

3.0 CONDITIONS OF CONTRACT

3.01 The Form of Contract will be the Scottish Building Contract with Contractor's Design 1981 Edition (August 1998 Revision) and the Appendices thereafter, incorporating current and appropriate amendments as listed in the Employer's Requirements and Contractor's Proposals.

3.02 Detailed terms and conditions of the Contract are to be mutually agreed and based on the Employer's Requirements and Contractor's Proposals."

[6] There followed further correspondence from the pursuers to Bucknall Austin (Nos. 6/3, 6/4, and 6/5 of process) which added nothing on the subject of the amendments to the contract conditions. The last mentioned letter, dated 22 April 1999, had attached to it a revised cost summary. By letter dated 4 May 1999 (No. 6/6 of process) Bucknall Austin replied in inter alia the following terms:

"On behalf of Mortons Rolls Limited we accept your tender to carry out the ... works as described in your letter of 22 April 1999 and attached Revised Cost Summary.

The price for the works package is to be £583,000.00 as agreed verbally with our Mr Colin Smith on 28 April 1999.

The acceptance is issued on the basis of the agreement that the Design and Build Contract documentation prepared by Bucknall Austin will be fully signed and completed by Maxi Construction.

The Form of Contract is the Scottish Building Contract with Contractor's Design (August 1998 including the correction sheet dated 31 August 1998) issued by the Joint Contracts Tribunal, as amended and modified by the provisions contained in the Scottish Supplement. The scope of works are as indicated on Bucknall Austin's drawings and contained in relevant correspondence and minutes of meetings to achieve a fit for purpose installation complying with all authority requirements. Please acknowledge your acceptance of this letter and trust this allows you to proceed diligently as agreed. We will contact you regarding programme and pre-start meeting."

[7] To that letter the pursuers responded, by letter dated 12 May 1999 (No. 6/7 of process) in inter alia the following terms:

"Thank you for your letter of acceptance for the above project dated 4th May 1999.

For the sake of clarity will you please note the following points which we consider to be key components of the contract between ourselves and Mortons Rolls Limited:-

The contract is between Maxi Construction Management Limited and Mortons Rolls Limited.

Our offer is based on the following key items of correspondence:-

Tender dated 30th March 1999, inclusive of Contractor's Proposals, Design and Build Outline Specification and Contract Sum Analysis. This specification clearly defines the limits covered by our offer and our understanding of the scope and conditions of the project. ..... The project will be Design and Build in accordance with the Contractor's Proposals and Specification.

Maxi Construction Management letter of 12th April 1999.

Maxi Construction Management letter of 19th April 1999.

Maxi Construction Management letter dated 22nd April 1999 and revised Cost Summary.

The revised Tender Sum agreement between Colin Smith and David McMillan in the sum of £583,000 on 28th April 1999.

Your acceptance anchors the contract back to the Design and Build contract documentation prepared by Bucknall Austin. We pointed out to you that this was received virtually the day before the tender was due to be submitted and therefore our offer is based on our own documentation as stated above. Should there be any need for rationalisation between these then we suggest that this is the subject of a meeting in the very near future to iron out any areas of ambiguity. The scope of the works are (sic) as indicated in our Contractor's Proposals and we specifically request that you identify at this stage any areas with which you are concerned. ...".

[8] It is common ground that thereafter there was no further contractual correspondence, and that no formal contract was executed, but that the pursuers were instructed to proceed, and did proceed, with the works.

b. The Pursuers' Submissions

[9] The pursuers' contention was that, on a proper construction of the contract documents, the amendments to Clause 30 proposed in the Employer's Requirements did not form part of the concluded contract. That, they argued, was the effect of the combination of a number of circumstances. The first was the stipulation in Clause 2.0 of the Contractor's Proposals appended to the pursuers' letter of 30 March 1999 (No. 6/2 of process) that the Contractor's Proposals were to take precedence over the Employer's Requirements. The second was the stipulation in Clause 3.02 of the Contractor's Proposals that "Detailed terms and conditions of the Contract are to be mutually agreed", which operated, it was contended, as a rejection of the proposed amendment of Clause 30. The reference to amendments in Clause 3.01 of the Contractor's Proposals was not inconsistent with that contention, because that was to be construed as a reference to the general amendments contained in the Appendix to the Scottish Building Contract, and not to the further ad hoc amendments proposed in the Employer's Requirements. The third was that the attempt by Bucknall Austin in their letter of 4 May 1999 (No. 6/6 of process) to re-assert the primacy of the Employer's Requirements was rejected by the pursuers in their letter of 12 May (No. 6/7 of process), and the subsequent instruction of the work was an acceptance on the defenders' part of the position asserted by the pursuers in the letter of 12 May. The last was that no such mutual agreement on terms and conditions as was contemplated in Clause 3.02 of No. 6/2 of process ever followed. The result was that the amendments to Clause 30 did not form part of the contract.

c. The Defenders' Submissions

[10] The defenders, on the other hand, submitted that on a sound construction of the documents the amendments to Clause 30 proposed in the Employer's Requirements did form part of the contract. According to their analysis, the amendments proposed in the Employer's Requirements were specifically responded to in the part of the pursuers' letter of 30 March 1999 (No. 6/2 of process) beginning "The following comments and clarifications are deemed to be incorporated in ...". Non-acceptance of the amendments proposed in section 2.6.3 of the Employer's Requirements was expressed only in relation to the amendments dealing with Clauses 43.1 and 45. Clause 2.0 of the Contractor's Proposals made it clear that the proposed amendments were disputed only to the extent identified in the letter. The result was that the defenders accepted inter alia the proposed amendments to Clause 30. Clause 3.02 of the Contractor's Proposals should not be construed as reserving to future agreement the whole terms and conditions of the contract. So to construe that clause would be inconsistent both with the terms of the letter of 30 March and also with the first three clauses of the Contractor's Proposals. Thus, on a sound construction of the contractual documents, the amendments to Clause 30 were incorporated in the contract.

d. Discussion

[11] In my opinion, the defenders' submission on this issue are correct. It seems to me to be clear that the effect of the pursuers' letter of 12 May (No. 6/7 of process) and the subsequent instruction, without further discussion of the contractual terms, that the work proceed, is that the defenders' attempt to re-assert the primacy of the Employer's Requirements over the Contractor's Proposals was ineffective.

The contract was therefore concluded on the basis of the Employer's Requirements as modified by (i) the letter of 30 March and the Contractor's Proposals, (ii) the pursuers' subsequent correspondence and (iii) the oral agreement that the tender sum would be £583,000, all as set out in the pursuers' letter of 12 May, paragraph 2 (see paragraph [7] above). The question therefore comes to be: what effect did the letter of 30 March and the Contractor's Proposals have on the amendment to Clause 30 proposed in the Employer's Requirements? The pursuers' contention on that issue depends on construing Clause 3.02 of the Contractor's Proposals as a wholesale reservation of the terms and conditions of the contract to future mutual agreement. In my view, however, that contention gives Clause 3.02 a much wider effect that it was intended to have. Clause 3.02 cannot, in my view, be read in isolation, but must be construed in the context of the other provisions of the Contractor's Proposals and the terms of the letter of 30 March. Clause 2.0 of the Contractor's Proposals indicates that "areas of conflict" are identified in the letter of 30 March. That letter identifies inter alia respects in which the proposed amendments to the contract conditions are not accepted. Those are the amendments relating to Clauses 43.1 and 45. None of the other amendments proposed in section 2.6.3 are disputed. In particular, no issue is taken with the proposed amendment to Clause 30. I am therefore of opinion that the correct interpretation of the documents is that the defenders accepted the proposed amendments to Clause 30. That is, in my view, reflected in Clause 3.01 of the Contractor's Proposals, which identified the conditions of contract as including "current and appropriate amendments as listed in the Employer's Requirements and Contractor's Proposals". I do not agree with the pursuers' submission that that refers only to the amendments in the Appendix to the Scottish Building Contract. As expressed, it seems to me to cover all amendments mentioned in the Employer's Requirements and the Contractor's Proposals. In the context in which it appears, therefore, I do not consider that Clause 3.02 can be read as reserving for future agreement all matters of terms and conditions of the contract. The defenders had, by that stage, in my view, accepted the amendments to Clause 30, and Clause 3.02 does not retract that acceptance. I am therefore of opinion that the amended version of Clause 30 provided for in section 2.6.3 of the Employer's Requirements formed part of the contract between the parties.

The Legislative Provisions

[12] Before I turn to consider the submissions that were made in relation to the principal issue of whether the pursuers are entitled to *decree de plano* as concluded for, it is convenient to set out the statutory provisions to which reference was made in the course of argument on that issue.

[13] It is common ground that the contract between the parties, whatever its precise terms may be, was a construction contract within the meaning of section 104 of the Housing Grants, Construction and Regeneration Act 1996 ("the Act"). Section 110 of the Act provides inter alia as follows:

"(1) Every construction contract shall -

(a) provide an adequate mechanism for determining what payments become due under the contract, and when, and

(b) provide for a final date for payment in relation to any sum which becomes due.

The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

(2) Every construction contract shall provide for the giving of notice by a party not later than five days after the date on which a payment becomes due from him under the contract ... specifying the amount (if any) of the payments made or proposed to be made, and the basis on which that amount was calculated.

(3) If or to the extent that a contract does not contain such provision as is mentioned in subsections (1) or (2), the relevant provisions of the Scheme for Construction Contracts apply."

[14] Section 111 of the Act provides inter alia as follows:

"(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment. ...

(2) To be effective such a notice must ... be given not later than the prescribed period before the final date for payment.

(3) The parties are free to agree what that prescribed period is to be.

In the absence of such agreement, the period shall be that provided by the Scheme for Construction Contracts."

[15] The Scheme for Construction Contracts referred to in the Act ("the Scheme") is contained in the Schedule to the Scheme for Construction Contracts (Scotland) Regulations 1998 (SI 1998 No. 687). Part II of the Scheme deals with payment. Paragraph 1 of Part II provides inter alia as follows:

"Where the parties to a relevant construction contract fail to agree - ...
(b) the intervals at which, or circumstances in which, [any instalment or stage or periodic payments for any work under the contract] become due under that contract ...
the relevant provisions of paragraphs 2 to 4 shall apply."

Paragraph 2 provides inter alia as follows:
"(1) The amount of any payment by way of instalments or stage or periodic payments in respect of a relevant period shall be the difference between the amount determined in accordance with sub-paragraph (2) and the amount determined in accordance with sub-paragraph (3)."

Paragraph 3 provides:
"Where the parties to a construction contract fail to provide an adequate mechanism for determining either what payments become due under the contract, or when they become due for payment, or both, the relevant provisions of paragraphs 4 to 7 shall apply."

Paragraph 4 provides:
"Any payment of a kind mentioned in paragraph 2 above shall become due on whichever of the following dates occurs later:-
(a) the expiry of 7 days following the relevant period mentioned in paragraph 2(1); or
(b) the making of a claim by the payee."

Paragraph 8 provides:
"(1) Where the parties to a construction contract fail to provide a final date for payment in relation to any sum which becomes due under a construction contract, the provisions of this paragraph shall apply.
(2) The final date for the making of any payment of a kind mentioned in paragraph 2 ... shall be 17 days from the date that payment becomes due."

Paragraph 9 provides inter alia that:
"A party to a construction contract shall, not later than five days after the date on which any payment -
(a) becomes due from him ...
give notice to the other party to the contract specifying the amount (if any) of the payment he has made or proposes to make, specifying to what the payment relates and the basis on which the amount is calculated."

Paragraph 10 provides:
"Any notice of intention to withhold payment mentioned in section 111 of the Act shall be given not later than the prescribed period, which is to say not later than 7 days before the final date for payment determined either in accordance with the construction contract or, where no such provision is made in the contract, in accordance with paragraph 8."

In paragraph 12 the expression "claim by the payee" is defined as meaning:
"a written notice given by the party carrying out work under a construction contract to the other party specifying the amount of any payment or payments which he considers to be due, specifying to what the payment relates (or payments relate) and the basis on which it is, or they are, calculated".

"**Application for Payment No. 10**"

[16] It is also convenient, before turning to the submissions, to note the general nature of the document on which the pursuers found as constituting their claim for payment. Although in their pleadings the pursuers choose to call it "Application for Payment No. 10", the document is in fact headed "Interim Valuation No. 10". Together with the letter under cover of which it was submitted to Bucknall Austin, it constitutes No. 6/8 of process. The covering letter is dated 15 September 2000, and is addressed to "Citex" (i.e. Bucknall Austin). Its first two paragraphs are in the following terms:

"We refer to our meeting with the Client on the 31st August and now enclose our Interim Valuation No. 10 as requested. Please note that this is dated the date of the meeting as discussed.

We therefore formally request that this is valued and certified in accordance with the terms of the contract. Should you have any other queries on the enclosed please contact the writer directly."

[17] Interim Valuation No 10 itself is in tabular form. It sets out in the left-hand column a series of items, and sets against them, in the right-hand column, sums of money. It falls into a number of sections. The first lists design, demolitions and alterations, site preparation, substructure, superstructure, external works, drainage and preliminaries. The total of the sums of money set against these items is £539,575. The second section is headed "Tender Variations" and sets out nine items. Some of them result in additional sums and some result in deductions. The net total is an additional sum of £32,075. The third section is headed "Variations/Contract Instructions". It contains a list of 62 items, again some resulting

in additions and some resulting in deductions. The net total is an additional sum of £161,455. The sum of these three totals is £733,105. There follow deductions of £18,328 in respect of retention, and £641,060 in respect of sums previously certified, yielding as the "Amount of Interim Valuation No. 10" the sum of £73,717. It is noted that VAT at 17.5% would amount to £12,900.48.

The Pursuers' Submissions

[18] Although the pursuers' contention, as I have recorded, was that the amendments to Clause 30 were not incorporated in the contract, Mr Cowie for the pursuers, in his submissions on whether the pursuers were entitled to *decree de plano* in respect of Interim Valuation No. 10, addressed first the eventuality that the amendments were incorporated. On that hypothesis, his starting point was that the amended provisions of Clause 30 did not comply with the requirements of sections 110 and 111, and that it was therefore necessary to look to the provisions of the Scheme. The reason for that non-compliance was to be found in an inconsistency between Clause 30.3.3 (as amended) and Clause 30.3.6. The former provided:

"Subject to Clause 30.3.4 the Employer shall pay the amount stated as due in the Application for Interim Payment within 28 days of the date of delivery to the Employer or the Employer's agent in accordance with Clause 30.3.2 of each Application for Interim Payment".

The latter provided:

"The final date for payment of an amount due in an Interim Payment shall be 14 days from the date of receipt by the Employer of the Contractor's Application for Interim Payment".

These provisions were irreconcilable, and as a result the conditions did not comply with section 110(1)(a). Moreover, there was, in the amended version of Clause 30, no provision complying with section 110(2), and no provision for the giving of such a notice as is contemplated by section 111(1). In these circumstances, the effects of applying the Scheme were:

that the due date for payment was seven days from the date of the making of a claim by the pursuers (paragraph 4);

that within five days of that date the defenders were obliged to give the pursuers notice specifying the amount of the payment made or proposed to be made, and specifying to what the payment related and the basis on which the amount was calculated (paragraph 9); and

that, there being no provision for the giving of a notice of intention to withhold payment, such notice was to be given not later than seven days before the final date for payment.

Clause 30.3.5 provided that in the absence of notices of the sort contemplated in section 110(2) or 111(1), the defenders should pay to the pursuers the amount stated in the application for interim payment. Since, therefore, there had been no such notices, the sum mentioned in Interim Valuation No. 10 fell to be paid by the defenders to the pursuers. Applying these considerations to the circumstances of the case, the due date for payment was 22 September 2000, the last date for a paragraph 9 notice was 28 September (sic), the latest date for a paragraph 10 notice was 25 September, and the final date for payment was 2 October.

[19] The timetable set out in those submissions was dependent on the proposition that Interim Valuation No. 10 constituted the making of a claim by the pursuers as payees. Mr Cowie submitted that Interim Valuation No.10 fell within the definition of "a claim by the payee" set out in paragraph 12 of Part II of the Scheme. It was a written notice. It was given by the pursuers, as the party carrying out the work under the construction contract. It was given to the defenders through their agents "Citex" (Bucknall Austin). It specified (i) the amount of the payment which the pursuers considered due, (ii) to what the payment related and (iii) the basis on which it was calculated. It was not appropriate to look at each valuation in isolation. It was appropriate to infer that the payments made under earlier valuations covered the first and second sections of the valuation. What remained unpaid was part of what was claimed in respect of "Variations/Contract Instructions". The basis on which these were calculated was adequately set out. The result was that, since no notice of intention to withhold payment had been timeously given, the pursuers were entitled to *decree de plano*.

[20] Mr Cowie's alternative contention proceeded on the hypothesis that, as he contended, Clause 30 of the contract conditions had not been amended in the way proposed in the Employer's Requirements. In that event the relevant provisions regulating the making of interim payments were to be found in the unamended version of Clause 30. Clause 30.3.2 provided for the making of an application "accompanied by such details as may be stated in the Employer's Requirements". The relevant provisions of the Employer's Requirements were contained in section 2.5.20, the second and third paragraphs of which were in the following terms:

"The Contractor shall provide, at each valuation date, a detailed build-up of the values of work executed which shall be derived from the Contract Sum Analysis and from supplementary priced schedules agreed prior to appointment together with priced schedules of materials on site.

The Contractor will be required to agree the amount of each valuation with the Employer's Agent before submitting his application. The valuation and the subsequent application is to be broken down into the specific cost headings detailed in the contract sum analysis. This is a key requirement of the Employer's payment process and failure to comply will delay the Contractor's payment."

The latter paragraph, in so far as it required the valuation to be agreed with the Employer's Agent, without imposing any timetable or any mechanism for resolving a failure to reach agreement, did not comply with section 110(1)(a), because it failed to provide an adequate mechanism for determining what payments became due under the contract, and when. The requirement for agreement with the Employer's Agent was therefore ineffective. In other respects Interim Valuation No. 10 was an application for interim payment which complied with the requirements of the contract. Clause 30.6 made the final date for payment 14 days after "receipt by the Employer of the Contractor's Application for Interim Payment". Clause 30.5 provided that:

"Where the Employer does not give any written notice pursuant to clause 30.3.3 and/or to clause 30.3.4 the Employer shall pay the Contractor the amount stated in the Application for Interim Payment".

There had in fact been no compliance with clauses 30.3.3 or 30.3.4 (which provided respectively for the sorts of notices contemplated in sections 110(2) and 111(1)). It followed that, on the hypothesis on which this submission proceeded, in terms of Clause 30.5 the pursuers were entitled to *decree de plano*.

The Defenders' Submissions

[21] Mr McIlvride, for the defenders, began his submissions by making clear the narrow basis of the defence. The only contention on which the defenders relied was that Interim Valuation No. 10, when read with the letter under cover of which it was submitted, did not constitute either a "claim by the payee" within the meaning of paragraph 12 of the Scheme or an "Application for Interim Payment" within the meaning of Clause 30.3.2 of the unamended contract conditions. If that contention was correct, the pursuers were not entitled to *decree de plano*. On the other hand, if that contention was not correct, it was accepted that the defenders had not given timeous notice under paragraphs 9 and 10 of the Schedule, or under clauses 30.3.3 and 30.3.4 of the unamended contract conditions, and that it followed that the pursuers were entitled to *decree de plano*. There was no dispute as to the modified amount in respect of which decree should pass, or as to the pursuers' entitlement to interest at the contractual rate concluded for.

[22] As I have recorded earlier, Mr McIlvride's submission was that the amendments to Clause 30 were incorporated into the parties' contract. He accepted that in certain respects those amended provisions did not comply with the requirements of the Act. He accepted that because of the conflict between Clause 30.3.3 (as amended) and Clause 30.3.6, there was no adequate mechanism for determining when payments became due under the contract, and no operable provision as to the final date for payment. He also accepted that there was no provision for the service of section 110(2) and section 111(1) notices. In those respects, he accepted, the provisions of the Scheme had to prevail. He sought, however, to distinguish between a failure to provide an adequate mechanism for determining what payments became due and a failure to provide an adequate mechanism for determining when they became due. Although the parties' contract (if it incorporated the amendments to Clause 30) failed in the latter respect, it did not fail in the former. The contract provided an adequate mechanism

for determining what payments became due. The amounts of the payments and the circumstances in which they became due were matters on which the parties were free to agree (section 109(2)).

[23] Mr McIlvride submitted that in terms of paragraph 4 of the Scheme, the timetable on which the pursuers founded depended on the making of a "claim by the payee", within the meaning of paragraph 12. To constitute such a claim, the document in question required to specify "the amount of any payment or payments which [the payee] considers to be due". Interim Valuation No. 10, with its covering letter, could not be regarded as specifying the amount which the pursuers considered was due, because the covering letter made it plain that what was sought was not yet payment, but rather valuation and certification (sic). The context in which that document was submitted to Bucknall Austin was to be found in Clause 12 of the contract conditions. Clause 12 is headed "Changes in the Employer's Requirements and provisional sums". In Clause 12.1 the term "Changes in the Employer's Requirements" is defined. Clause 12.4.1 provides that valuation of changes shall be made under [in this contract] Alternative B in clause 12.4.2. Clause 12.4.2 (Alternative B) provides:

"The valuation shall be made in accordance with the provisions of clauses 12.5.1 to 12.5.6."

Clause 12.5.1 provides:

"The valuation of additional or substituted work shall be consistent with the values of work of a similar character set out in the Contract Sum Analysis making due allowance for any change in the conditions under which the work is carried out and/or any significant change in the quantity of the work so set out. Where there is no work of a similar character set out in the Contract Sum Analysis a fair valuation shall be made."

Nothing in clauses 12.5.1 to 12.5.6 made provision for valuation by any third party or authority, or for any form of certification. The Employer's Requirements, however, in paragraph 2.5.20 imposed the requirement (as already noted in paragraph [20] above) of agreement of the amount of each valuation between the Contractor and the Employer's Agent before submission of "his [the Contractor's] applications". Those provisions, when read together, reinforced the view that Interim Valuation No. 10 was concerned with the pre-application stage of seeking agreement on the valuation, and did not constitute a claim for payment.

[24] If Interim Valuation No. 10 could be regarded as expressing a claim for payment, Mr McIlvride submitted, it was not one which satisfied the requirements of the definition in paragraph 12 of the Scheme. It did not "specify ... the basis on which it is ... calculated". As illustrations of the point, Mr McIlvride pointed to certain of the items under the heading "Variations/Contract Instructions". It was a matter of admission by the pursuers that these were "additional or substituted work which required to be valued in accordance with Clauses 12.5.1 to 12.5.6 of the contract conditions". The document, however, contained nothing to indicate how the sums sought were based in the approach to valuation stipulated for in Clause 12.5. For example, item 20 was in respect of *"Suspension/additional/ prolongation costs associated with formal instruction to halt operations on site. Citex [letter] 22.07.99"*, and item 21 was in respect of *"Extension of time costs associated with formal instruction to suspend site operations ... and other factors"*. Together they were reflected in an addition to the contract sum of £35,000. No explanation of the basis of calculation of that sum was offered. Further, item 25 was in respect of "Complete revision and installation of drainage due to inaccurate 'as fitted' drawings", and was reflected in a deduction of £37,500 from, and an addition of £60,000 to, the contract sum. Again there was nothing to indicate what the basis of calculation of those sums was. These illustrations, it was submitted, were of sufficient significance to secure that Interim Valuation No. 10 could not be regarded as a claim for payment complying with paragraph 12.

[25] Mr McIlvride's alternative submission, which proceeded on the hypothesis that the position was regulated by the unamended contract conditions rather than by the Scheme, was that there were no relevant averments that the pursuers had made an Application for Interim Payment within the meaning of Clause 30.3.2. Interim Valuation No. 10 was, in that context too, an application for agreement of the valuation, not an application for payment. In that context he referred to Bank of Scotland v Dunedin Property Investment Co Ltd 1998 SC 657, and to the passage there quoted by Lord President Rodger (at 661G) from the speech of Lord Mustill in **Charter Reinsurance Co Ltd v Fagan** [1997] AC 313 at 384:

"... the inquiry [as to the meaning of an expression in a contract] will start, and usually finish, by asking what is the ordinary meaning of the words used".

There was, he submitted, no reason to give the expression "application for ... payment" a meaning other than the ordinary meaning of the words. Why, he asked, should a request for valuation be treated as falling within the scope of the expression "application for ... payment"?

[26] The other aspect of Mr McIlvride's alternative submission was founded on Clause 30.3.2. An application for interim payment required in terms of that clause to be "accompanied by such details as may be stated in the Employer's Requirements". Paragraph 2.5.20 of the Employer's Requirements stipulated for a "detailed build-up of the values of work executed". No such detailed build-up was provided.

Discussion

[27] Dealing first with the hypothesis which I have held (in paragraph [11] above) to be the sound one, namely that the amendments to Clause 30 proposed by the defenders were incorporated into the parties' contract, I am of opinion that the only issue to be determined is whether the pursuers' Interim Valuation No. 10 is to be regarded as a claim by the payee within the meaning of paragraph 12 of the Scheme. The defenders accept that, if it is to be so regarded, the rest of the pursuers' reasoning is sound and they are entitled to *decree de plano* as concluded for.

[28] It is, in my opinion, necessary for this purpose to read the whole of No. 6/8 of process (i.e. Interim Valuation No. 10 and the letter of 15 September 2000 under cover of which it was submitted to Bucknall Austin) together. It is also, in my view, appropriate to construe it in the context of the relevant provisions of the contract. Those provisions included Clause 12, which provided for the valuation of changes in the Employer's Requirements. They also included paragraph 2.5.20 of the Employer's Requirements which (whether effectively or not) bore to require that the amount of each valuation be agreed between the pursuers and Bucknall Austin before submission of the pursuers' applications for payment. The contract thus made a clear distinction between two procedural stages, namely (i) the agreement of the valuation and (ii) the subsequent application for payment of the sum agreed to be due. There is, in my view, force in Mr Cowie's submission that Interim Valuation No. 10 (at least if viewed on its own in isolation from its covering letter) meets the requirement of paragraph 12 of the Scheme that it specify the amount of the payment which the pursuers considered was due. But it seems to me that it is clear from the terms of the covering letter that Interim Valuation No.10 was not intended by the pursuers, when it was submitted, to operate as a claim for payment. The terms of the covering letter are somewhat inappropriate, in that they make reference to valuation and certification, although the contract makes no provision for certification. What is, however, in my view clear is that in submitting Interim Valuation No. 10 the pursuers were not asking the defenders there and then to make payment of the sum brought out in the valuation, but were on the contrary inviting Bucknall Austin to agree the valuation as contemplated in paragraph 2.5.20 of the Employers' Requirements. There is, in my opinion, force in Mr Cowie's submission that the requirements of paragraph 2.5.20 are inconsistent with the requirements of section 110(1)(a). A requirement that a valuation be agreed by the employer's agent before a claim for payment can be made is not necessarily, in my view, incompatible with section 110(1)(a), provided a timetable for the process of agreement, and a means of resolving a failure to reach agreement are provided. But paragraph 2.5.20 makes no such provision. Failure on the part of Bucknall Austin to agree a valuation could hold up the making of a claim for payment indefinitely. That, in my view, means that the contract does not provide an adequate mechanism for determining when payments become due under the contract. Although I understand the distinction which Mr McIlvride sought to draw between machinery for determining what payments become due and machinery for determining when those payments become due, I do not consider that paragraph 2.5.20 can be regarded as bearing only on "what" and not on "when". The absence of a timetable and of a means for resolving deadlock has the effect that paragraph 2.5.20 renders inadequate the machinery for determining when payments are due. I therefore take the view that, if the pursuers had presented a claim for payment as such, without first obtaining the agreement of Bucknall Austin to their valuation, they would have been well-placed to

argue that that was, despite paragraph 2.5.20, a valid claim for payment. But I do not consider that that is what they in fact did. They made no attempt, at the time when Interim Valuation No. 10 was presented, to argue that paragraph 2.5.20 was invalid and that they were entitled to claim payment on the basis of their own valuation without the agreement of Bucknall Austin. Instead they submitted Interim Valuation No. 10 under cover of a request (albeit erroneously expressed so far as it referred to "certification") for agreement of their valuation in terms of paragraph 2.5.20. In these circumstances, I am of opinion that Bucknall Austin were entitled to take Interim Valuation No. 10 and its covering letter at face value, and treat them as constituting no more than a request for agreement of the valuation, as a preliminary to the subsequent making of a claim for payment. It would, in my view, be quite unfair to the defenders, on the basis of an argument as to the invalidity of paragraph 2.5.20 presented *ex post facto*, to treat Interim Valuation No. 10 as a claim for payment when it was not presented at the time as such.

[29] That is sufficient to dispose of the matter, but it is appropriate also to deal with the second aspect of the question whether Interim Valuation No. 10 can be regarded as constituting a "claim by the payee" within the meaning of paragraph 12. Mr McIlvride argued that Interim Valuation No. 10 was, in effect, lacking in specification. It did not "specify ... the basis on which [the payment claimed] is ... calculated". In my opinion that submission too is well founded. I accept Mr Cowie's submission that it is appropriate to look at Interim Valuation No. 10 in the context of the other applications for payment that had gone before. It is not, in my view, appropriate to demand of an application for an interim payment that it set out in full detail the basis of calculation of items already paid for under earlier applications. But paragraph 12 does, in my view, require specification of the basis of calculation of the new matter included in the application in question. In my opinion many of the items in the "Variations/Contract Instructions" part of Interim Valuation No. 10 cannot be regarded as specifying the basis on which they are calculated. Items 20, 21 and 25 (see paragraph [24] above) seems to me to be particularly clear examples of such lack of specification. I therefore take the view that, on that account too, Interim Valuation No. 10 cannot be regarded as a claim by the payee in a form which satisfies paragraph 12 of the Scheme.

[30] I am therefore of opinion that Interim Valuation No. 10 did not constitute a "claim by the payee" within the meaning of paragraph 12 of the Scheme, (a) because it was an application for agreement of the pursuers' valuation in terms of paragraph 2.5.20 of the Employer's Requirements, and not a claim for payment at all, and (b) because it did not, in any event, comply with the requirements of paragraph 12 of the Scheme in that it did not specify the basis on which it was calculated. Since I have held (in paragraph [11] above) that the the amended version of Clause 30 formed part of the contract, and since it was common ground that if that were so, the Scheme fell to be applied, I am of opinion that for those reasons the pursuers' are not entitled to *decree de plano*.

[31] In these circumstances, it is not necessary for me to deal fully with the other hypothesis, namely that the matter falls to be regulated by the application of the unamended version of Clause 30. It is sufficient for me to indicate that on that hypothesis I would have reached the same result. For broadly the same reasons as I have discussed in paragraph [28] above, I would have held that Interim Valuation No. 10 could not be regarded as an Application for Interim Payment within the meaning of Clause 30.3.2. For the reasons discussed in paragraph [29] above, I would have held that it also failed to comply with the requirement stated in paragraph 2.5.20 of the Employer's Requirements that an application for interim payment be accompanied by a detailed build-up of the values of the work executed.

Result

[32] For these reasons I am minded to sustain the defenders' first plea-in-law and dismiss the action. Mr Cowie, however, suggested that if in the result my decision was against the pursuers, I should put the case out By Order before finally disposing of the matter. I am prepared to do that, although I am not entirely clear what purpose it is conceived that it will serve.

Pursuers: Cowie, Dundas & Wilson, C.S.
Defenders: McIlvride, Solicitor Advocate, Bennett & Robertson