Opinion of Lord McEwan, Outer House Court of Session. 17th April 2008

[1] This matter came before me on 19 March on the pursuers' motion for summary decree on six of the conclusions. It relates to work done on contracts to renovate some schools in Midlothian and in the generality involves the construction of terms of a contract, certain documents and sections of an Act of parliament. More particularly it relates to the provision for payment. It seems that the pursuers who asked for periodical payments were met by a refusal since the defenders claimed that they had a large and ongoing fund of *contra* set offs which were always much more than the pursuers claimed. The pursuers got nothing; hence the motion. At the out-set the defenders asked me not to hear the motion. They said it would be wrong to interpret the Statute outside the Procedure Roll and against the rules applying to Summary decree. They pointed to the fact that the Record was still open and that they might adjust in a defence of Personal Bar. The pursuers insisted it proceed and as everyone was ready with clients present, I decided to hear the motion which lasted a full Court-day. I had an up to date record. I allowed the pursuers amendment - which related to interest. Mr Mure also provided a written note of argument - which I refer to for its terms. The underwritten Opinion was issued in draft to the parties at the end of March. They revised it as they wished or not. It is now in its final form.

[2] It is important to notice what is the correct test when considering the issue of summary decree, that has been recently formulated in the House of Lords in ***Henderson v 3052775 Nova Scotia Limited*** 2006 SC (HL) 85. At paragraph 19 Lord Rodger said that summary decree was only appropriate where a judge, considering the defence advanced along with any other relevant material, would conclude that the defender was bound to fail. An unlikelihood of success will not suffice. In my view it is a high test which must be met.

The Housing Grants, Construction and Regeneration Act 1996 provides:-

"*111. Notice of intention to withhold payment -*

(1) A party to a construction contract may not withhold payment...unless he has given effective notice of intention to withhold payment...

(2) To be effective such a notice must specify -

(a) the amount proposed to be withheld and the ground for withholding payment; or

(b) if there is more than one ground, each ground and the amount attributable ***to it...*** *" (my emphasis)*

The Parties' Contract *inter alia* provides:-

"11.2 The consultant shall submit to the Building Contractor monthly by the last day of each calendar month a detailed statement...which shall detail the cumulative value of work executed during the period from commencement of the Services to the end of the relevant month, showing amounts previously paid, and calculated based on the sums to which the Consultant considers himself entitled...

12.4 Not later than five (5) Business Days before the final date for payment, the Building Contractor may give a written notice (the effective notice) to the Consultant which shall specify any amount proposed to be withheld and/or deducted from the amount notified..., the ground or grounds for such withholding and/or deduction and the amount of the withholding and/or deduction attributable ***to each ground...*** *" (my emphasis)*

[3] I now summarise the oral arguments addressed to me. Mr Mure took me to the case of *Henderson* and what was the proper test. He said the present case was one to which the terms of the 1996 Act applied. Looking at the parties contract No 6/1 of process he said the issue was whether the counter notices were effective under clause 12.4 in the contract. Where there was withholding, the notice had to specify an amount, grounds and then an attribution to each ground. Counsel next looked at the Statute pointing to the scheme for adjudication, the rights to stage payments and the careful mechanism for determining these (sections 104 to 110). He drew my attention to the need for any counter notice to be "*effective*" under section 111. He invited my attention to various passages in ***Melville Dundas*** as to the philosophy of the Act and to the judgement of Goff J in ***Humber Oils*** albeit on different wording.

[4] Mr Mure then took me to the six counter notices. He looked at Nos 6/64, 6/63 and 6/62 linking these three. He looked at the letter, the attachments and the 9 listed grounds. He argued that there was no attribution on any of those counter notices and that they were not effective. He pointed out the similarity of figures in each notice. Turning to Nos. 6/59 to 6/61 and linking these he accepted that they were in slightly different terms and gave some more detail. However, he said that although there appeared to be attribution, the sum often exceeded what was admittedly due. Also there was no specification of time or place. Counsel then asked me to look at No 6/67 and 6/68 a document, he said, which demonstrated that the defenders could have afforded a great deal of specification of any complaints they had. He looked at various passages but said all of this came too late. Looking at the Open Record counsel noted that the only defence was one of retention, and that was recently adjusted in. He ended by inviting me to award interest at the higher rate allowed under the Late Payment of Commercial Debts (Interest) Act 1998 and relevant recent order (2002 No 336).

[5] Mr Young asked me to refuse the motion. He referred me to ***Reinwood*** and accepted that the Act was concerned with cash flow, stage payments and set-off abuse. He said that none of the counter notices should be subjected to fine textual analysis (***Thomas Vale Construction***). They were not addressed to lawyers but to contract managers and others who were aware of what was happening on site in a ongoing contract concerning several places. Grounds and amounts had been specified and that was enough.

[6] As before, counsel looked 6/59 to 6/61. The retention figures would be bound to change on the contractor went on. Some could be calculated and others not. Even if the attributed figures appeared arbitrary out of a bigger

retention figure that was still proper attribution. Precise accuracy was not required and an estimate would do. Even if the attribution exceeded the sum due that was merely advance notice that larger sums were having to be retained. In any event in each of those counter notices there was attribution. Turning to Nos. 6/62 to 64 he accepted that there was no specific attribution of proportions. Where total retention vastly exceeded any amount claimed, detailed attribution was neither necessary nor realistic. Counsel pointed out the difference between the Act and the contract when "it" became "each ground."

(previously noted by me.)

[7] Finally let me say a word or two about the cases cited. ***Melville Dundas Limited v George Wimpey UK Limited*** 2007 S.C. (H.L) 116 was referred to. That case dealt with the 1996 Act and payments against the background of receivership and the contract being determined. The case is thus not in point for present purposes . It does, however, stress the need for clarity when interim payments are withheld. That is against the background of the machinery of adjudication. Section 111 is also intended to strike at "set-off abuse2 (lord Hope paragraph 42) and promote confidence in "cash flow" (Lord Neuberger (dissenting) at paragraph 64). Plainly these expressions on the purpose behind the Act are helpful and I must follow them.

[8] ***Reinwood Limited v Brown and Sons Limited*** [2008] U.K.H.L. 12 related to the building of houses in Manchester. The facts concerned an application for an extension of time, non completion and withholding. They were thus not in point for present purposes. The case reinforces as did *Melville* that on *interim* payments, parties should know in advance where they stand.

[9] ***Humber Oils Terminal Trs Limited v Hersent Offshore Limited*** (1981) 20 BLR, 16 was referred to as an example of what did not constitute a good notice under a repairing contract. The plaintiffs owned an oil terminal at Immingham. The French defendants and their sub-contractor undertook repair work *inter alia* a damaged berthing dolphin. This complex operation is described by the judge (page 22/3). Problems arose when welding cracked. The defendants sought substantial extra payments from the supervising engineer due to the necessary additional work. The issue was whether they had given notice as the contract required. That contract required specific information to be given as to the reason for the extra work and expected delays. Though two letter were sent, neither individually or together did they constitute the notice required. This case is an example of a very strict construction being given to a contract, of course not in the same terms as the present one. Had the French company's letters given its best estimate on cost the notice might well have been held to the good (page 28). ***Thomas Vale Construction Plc v Brookside System Limited*** [2006] EWHC 3637 (T.C.C.) is a decision of a single judge. It concerned building houses in Leicester. Problems arose and both sides made cross claims. These disputes matured into a claim for payment and the defendants serving a notice to withhold. The notice differs markedly from any I have to consider here. The deputy judge gave the notice a broad construction (see paragraph 43).

[10] I am now going to look at some of the productions which are relevant to this case. What the pursuers have to send to obtain payment is called a detailed statement of request for payment. If the defenders are going to deny payment they have to send a document entitled a notice of intention to withhold payment. For shorthand I am going to call these the notice and the counter notice. In the argument before me no issue arose as to these being timeous.

[11] I was not asked to look at any of the notices in detail but I do observe that over the relevant period they are couched in the most general terms and seek payments for "*professional services*". They are typed (possibly computer generated) not signed and their author is not stated. They are marked for the attention of a different person in the defenders' organisation.

[12] Of the six relevant counter notices it is to be observed that they are letters sent to the pursuer in Glasgow. They have a square box stamp indicating that a director of the pursuers has seen it and that someone (by initials) is to take action. The letters usually have about four detailed attached sheets giving figures and other details. The letters are mostly signed by a Mr MacLeod who is an operations director of the defenders. I am going to look at them in groups of three as did both counsel. Nos. 6/59 to 6/61 (August to October) contained the standard letter of withholding with attachments. The withheld amount is on sheet 2 showing net, V.A.T, then a gross figure. Two are the same and one markedly higher in the productions. Any sums due are calculated on the value of the work to date less previous payments. Then follows more paperwork with nine set-ff charges in general terms and valuations against four. These almost amount to one million pounds and greatly exceed the sum claimed in any particular notice (or indeed all of these added together). The last sheet details the nine grounds and attributes sums against some of them (where calculated). These, when placed against the sums due either equal (6/59) them or substantially indicate a debit (6/60 and 6/61).

[13] At this stage I pause to observe that I will appreciate the problems caused to both parties by all of this. The pursuers wish the clarity demanded by the Act. Both parties can take adjudications at any *interim* stage. The defenders who say they have a substantial (and ongoing) set off may not want to part with money. In any commercial matter there is always the risk of insolvency (see e.g. ***Melville Dundas***) or delays and cash flow difficulties (as happened to the sub-contractor in ***Humber Oil***). I believe any adjudicator would hear evidence about the (disputed) counter notices, ask questions and would not have to make a decision based solely on the documents. The judge in ***Humber Oil*** certainly considered matters beyond the letters. If proof were allowed in this case evidence could be led.

[14] The other counter notices 6/62 to 64 have to be looked at in the same way but with this important difference. The ongoing set-off figure had increased by the end of the year to over one million pounds. However, the schedule showing attribution, in each production, merely attributes the whole figure to all the calculated grounds (5 out of 9). It is the same figure in each counter notice. As I have already said this sharply raises the question of whether the counter notice has made an effective attribution.

[15] What then is to be done in this situation? I have to apply the *Henderson* test and ask myself whether the defence as it exists is bound to fail. Do I have to do this only on the documents before me or is it proper to consider that some evidence one day may have to be led on the point. Do I have to decide in this motion whether the counter notices are *"effective"* within the meaning of the Act. I have to take no account of the possibility that the defenders may table other defences. That I think is clear.

[16] I have come to the opinion for a number of reasons that the motion cannot succeed. I am unable to say on what I have seen and heard that the defence is bound to fail. I do not think the matter can properly be disposed of, only on the counter notices. It seems to me that where, as here, the documents are referred to for their terms, issues of fact can arise and this would allow evidence of meetings and conversations to explain the letters and the events surrounding the notices. Form example, the defenders would be entitled to explain why they were unable to make any financial attribution against particular terms.

[17] If I am wrong about this then I am also of the opinion that the documents themselves are "*effective*" under section 111. I think the matter is clear for items 6/59 to 61. In these, sufficient attribution has been made against five of the enumerated grounds. That in itself is enough to hold that it cannot be said the defence is bound to fail.

[18] As to the last three, 6/62 to 64, what has been done is to debit the whole attribution against any money due. The contract demands attribution to each ground. It does not ask for any apportionments and in my view it is a competent way to proceed by debiting all sums. The Statute speaking of "*each ground*" says attribution "*to it*" must take place. In my view that also is what the counter notice has done. All the grounds which can be calculated have so been and a global figure debited. That in my opinion is compliance.

[19] In the result the motion fails though the points were properly taken and well argued. Needless to say had I been able to find for the pursuer I would have awarded interest at the higher rate.

Pursers: Mure; DLA Piper
Defenders: Young, QC; Dundas & Wilson, LLP