

**OPINION OF LORD MENZIES** OUTER HOUSE, COURT OF SESSION 15<sup>th</sup> July 2008

**Introduction**

[1] In about May 2001 the first defender purchased a house and ground at 17 Fairyknowe Gardens, Bothwell. She and her husband, the second defender, intended to build an extension to this house and thereafter to live in it themselves. The extension was constructed but the work was defective and the defenders decided to demolish the extension and the original house and build a new house on the site. They instructed Mr Gordon Gibb to be their architect and Mr Peter Imrie to be their chartered surveyor. In August 2005 invitations were sent out to contractors to submit tenders for this project, and in September 2005 the pursuers returned the completed tender documents offering to do the works for about £833,000.00. The tenders at this stage were too high, and contractors were invited to tender for a revised project in October 2005. The pursuers returned the completed tender documents for this work in the sum of £521,791.03. The pursuers attended a meeting with the defenders and others on 30 November 2005, and by letter dated 2 December 2005 the pursuers wrote to the defenders' architect offering a saving to the client of £8,000.00, making a revised tender sum of £513,791.03. By letter dated 20 December 2005 Peter Imrie wrote to the pursuers stating *inter alia*

"We have been authorised by the client KWF Holmes Ltd whose registered office is at Silverwells House, 114 Cadzow Street, Hamilton, ML3 6HP, to accept the tenders submitted by you on the 2 November 2005 in the amount of £521,791.03 further revised by your letter dated 2 December 2005 in the amount of £513,791.03."

[2] There was a pre-start meeting on 10 January 2006 and work commenced on the site on about 23 January 2006. On 17 July 2007 the pursuers' solicitors served a notice of adjudication on the defenders. In the course of the adjudication proceedings, the defenders' solicitors submitted *inter alia* that there was no contract between the parties and accordingly the adjudicator had no jurisdiction and should resign. After sundry procedure, including hearing the evidence of three witnesses for the pursuers and four witnesses for the defenders, and legal submissions on behalf of both parties, the adjudicator found that the parties to the contract were the pursuers and the defenders. In her decision letter, which was dated 26 September 2007, she decided that the defenders were to pay the pursuers the sum of £112,598.75, within seven days of the date of the decision, together with interest on sums certified in interim certificates and a joint and several liability for the adjudicator's fees and expenses in relation to the adjudication.

[3] The defenders have made no payment to the pursuers in respect of these sums, so the present commercial action for payment was raised in late October 2007. The matter came before me by way of a preliminary proof, which lasted for eight days in March and May 2008. The issues to be canvassed in this preliminary proof were set out by the Court in interlocutors dated 6 February and 17 March 2008. These were first the issues contained in statement A and B3 of the pursuers' note of issues (No 9 of Process). These were in the following terms:-

"A. Whether or not the Adjudicator's decision is *ultra vires*

1. The power to refer the parties' dispute to adjudication is derived from a clause in the pursuers' revised tender of 2 December 2005. Only if this tender was accepted by the defenders, and a contract concluded between the parties thereby, did the Adjudicator have jurisdiction.
2. The defenders set out additional grounds upon which they seek to have the Adjudicator's decision set aside *ope exceptionis*. These are: that she failed to take account of the evidence of Mr Thomson, and the affidavit of Mr Imrie; and that she failed to have regard to the argument that there was no contract at all (ie. neither with the defenders nor with KWF Homes Ltd). This raises the issue:
  - 2.1 Whether it is open to the defenders to seek to reduce the Adjudicator's decision on any of these grounds;
  - 2.2 Where it is open to them to do so, whether any of these grounds are well-founded.

B. Retention and set-off

3. The defenders have pleaded retention and set-off on the basis of an (as yet) unspecified claim for damages. Whether or not they may do so depends on whether a valid notice of intention to withhold payment was in accordance with the contract."

The Court also allowed the preliminary proof to consider the question "if no notice of intention to withhold was given, does that preclude the right of retention or set off by the defenders?". Finally, the Court extended the scope of the preliminary proof to include the "breach of natural justice" point as contained in paragraph 3 of the defender's note of argument No 18 of process, which was in the following terms:

"3. The adjudicator's decision should in any event be reduced as being contrary to the rules of natural justice.

- 3.1 The principle issue for determination was whether there was a contract between the parties.
- 3.2 A key witness for the Defenders was the QS Mr Peter Imrie. Mr Imrie provided an affidavit confirming that a building contract had been completed in the name of KWF Homes Ltd, and KWF Homes Ltd was to be the party to the contract. Mr Imrie was on holiday and was not contactable during the adjudication. On his return, he advised that he would be willing to participate in a conference call.
- 3.3 Whilst Mr Imrie had provided an affidavit, he did so prior to the issues becoming focused by the adjudication, and it was not possible to put the evidence of the Pursuers' witnesses in respect of the written contract to him. The Defenders were grossly prejudiced by the Adjudicator's refusal to hold a conference call with Mr Imrie. Mr Imrie was available for a conference call on 21<sup>st</sup> September 2007. The adjudicator's decision was not due until 26<sup>th</sup> September 2007. In these circumstances, given the short timescales within which adjudication is meant to operate, it would have been reasonable for the adjudicator to conduct a conference call with Mr Imrie."

[4] There was a considerable body of documentary evidence referred to at the preliminary proof. In addition, I heard evidence from four witnesses on behalf of the pursuers and four witnesses on behalf of the defenders. In their closing submissions parties laid considerable emphasis on the question of the credibility and reliability of these witnesses. In these circumstances it is appropriate that I should attempt to summarise the most important of the productions relied on (although I make it clear that I have taken account of all of the productions and also the terms of the Joint Minute for the Parties, No 20 of process), and thereafter set out the evidence of the witnesses rather more fully than is my normal practice.

#### Documentary Evidence

- By letter dated 22 December 2004 Gordon Gibb wrote to the defenders with an amended fee proposal, the architect's appointment being administered under the terms conditions and limitations of SCA/2000 published by the RIAS.
- The application for building warrant for the erection of a building at 17 Fairyknowe Gardens, Bothwell which was received by the Local Authority on 1 March 2005 was made by Mr & Mrs Forrest. Building Warrant was granted on 14 July 2005.
- By letters dated 11 August 2005 Peter Imrie invited contractors to submit a tender for a proposed new build house at 17 Fairyknowe Gardens, Bothwell for Mr & Mrs Forrest.
- By letter dated 5 September 2005 the pursuers returned completed tender documents; again the covering letter indicated that the proposed new build house was for Mr & Mrs Forrest.
- On 4 October 2005 Peter Imrie wrote to the pursuers inviting them to submit a fresh tender. Again this was for "proposed new build house at 17 Fairyknowe Gardens, Bothwell for Mr & Mrs Forrest".
- By letter dated 2 November 2005, bearing the same heading, the pursuers submitted a tender. The formal tender document, on the page signed on behalf of the pursuers, bore the following heading:  

**Form of Tender**  
*Tender for: New Build House, 17 Fairyknowe Gardens, Bothwell*  
*Client: Mr & Mrs Forrest"*
- The bill of quantities defined the employer "client" as Mr & Mrs Jane Forrest. At page 1/7 it is provided that the works shall be completed in accordance with the SBBC form of contract with contractors Designed Portion with Quantities. (It was not disputed that this was a reference to the SBCC Scottish Building Contract Contractors designed portion with quantities, which provides by clause 7 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.).
- No. 6/17 of process was a minute taken by Ken Rodger of the pursuers of a meeting held at the office of Gibb Architects at 11am on Wednesday 30 November 2005. This minute stated that the meeting followed the revised tender of £521,000,00 for the house, that the architects pointed out that a few areas of the pursuers' tender were higher than others and wondered if the pursuers could look again at their price and get back to them before Friday 2 December. It was recorded that Ken Rodger would look at prices and discuss overall response with other directors. The list of those present included John & Jane Forrest as "clients".
- By letter dated 2 December 2005, the pursuers wrote to John Thomson of Gibb Architects. Again the heading showed the new house "for Mr & Mrs Forrest". The pursuers offered a saving "to your client" of £8,000.00.
- No. 6/19 of Process was a draft letter (apparently not sent) from John Thomson of Gibb Architects to the pursuers, referring to the pursuers' letter of 2 December 2005 and stating "on behalf of our clients, Mr & Mrs Forrest, we accept your tender sum of £513,791.03." The draft is stamped "draft for approval by client".
- On 16 December 2005 John Thomson of Gibb Architects sent an e mail to Peter Imrie in the following terms: "Further to our discussion earlier today, we look forward to receiving a copy of the letter accepting Fleming Buildings' tender on behalf of Jane & William Forrest."
- By letter dated 20 December 2005 Peter Imrie wrote to the pursuers. As noted above, this letter started "we have been authorised by the client KWF Homes Limited whose registered office is at Silverwells House, 114 Cadzow Street, Hamilton, ML3 6HP to accept the tenders submitted by you on the 2 November 2005 in the amount of £521,791.03 further revised by your letter dated 2 December 2005 in the amount of £513,791.03. A formal building contract is being prepared and will be forwarded to you for completion prior to site commencement". The letter went on to specify the conditions of contract which applied to the works.
- By letter dated 20 December 2005, Mr Thomson wrote to Forbes & Whiteford Limited (who were contractors who were competing with the pursuers for this work) stating "we refer to your recent tender submission for the project listed above and subsequent meeting in our office to discuss the details of the project with our clients, Mr & Mrs Forrest. After much deliberation our clients have decided to accept a tender received from Fleming Buildings Limited." This letter was copied to the defenders.
- There was a pre-start meeting on 10 January 2006, attended by, amongst others, the defenders, Mr Mike Burrows and Mr Walter Kerr, both from the pursuers, and John Thomson from Gibb Architects. Minutes of that pre-start meeting were distributed to all those who attended. The defenders were described in the minutes as "client". There was no reference to KWF Homes Limited (hereafter "KWF") in this minute.

- No 7/1 of process was a certified true copy letter dated 9 January 2006 from the Assistant General Manager/Credit of Airdrie Savings Bank addressed to the pursuers, in the following terms:  
"Dear Sirs,  
KWF Homes Limited  
We confirm that bank approval has been granted to provide funding in favour of KWF Homes Limited to contract for the construction of a new build detached property at 17 Fairyknowe Gardens, Bothwell on a fixed price contract basis."
- After the commencement on site there were 25 site meetings, the first of which was on 8 February 2006 and the last of which was on 19 March 2007. Both defenders attended each of these meetings. Minutes were taken by Gibb Architects of each of these meetings, and distributed to all those present. In each of these minutes the defenders are designed as "client". There is no reference to KWF in any of them. Minutes of these meetings were also taken on behalf of the pursuers, but not distributed to others. In many (but not all) of the pursuers' minutes the defenders are designed as "client": there is no reference to KWF in any of the pursuers' minutes.
- By letter dated 10 January 2006 John Thomson of Gibb Architects wrote to the pursuers enclosing for signature a copy of the F10 notification form.
- By letter dated 13 January 2006 the pursuers replied returning a copy of the form and confirming that they had passed the original to the Health & Safety Executive.
- By letter of the same date they sent the form to the Health & Safety Executive. The F10 form is a standard form, partly printed and partly hand written. The hand written sections were completed by John Thomson of Gibb Architects. The defenders were designed as the client. Section 10 of the form, which contained provision for a declaration of a planning supervisor was scored out by Mr Thomson. The form was signed by Mr Mike Burrows on behalf of the pursuers.
- During the course of the works Gibb Architects issued 12 architects instructions, the first being dated 16 February 2006 and the last being dated 19 March 2007. In each of these instructions the defenders were designed as the employer, and the pursuers as the contractor. In none of them is there reference to KWF.
- Gibb Architects issued 9 architects certificates, the first of which was dated 15 March 2006 and the last on 1 December 2006. In each of these certificates the defenders are designed as the employer. In none of them is any reference made to KWF.
- On 13 January 2006 John Thomson sent about 17 letters in identical terms to the occupiers of other properties in Fairyknowe Gardens. Each of these letters was headed "new house - 17 Fairyknowe Gardens, Bothwell" and began "on behalf of our clients, Mr & Mrs Forrest, we would like to notify you that works to their new home will be commencing on site on Monday 23 January 2006." Each of these letters was copied to Mr Mike Burrows of the pursuers.
- Peter Imrie issued several valuation claim forms, on each of which the employer was stated to be the defenders. No reference was made in any of these to KWF.
- By e mail dated 1 December 2006 paving contractors wrote to Gibb Architects stating *inter alia* "your clients Jane & William Forrester (sic) have requested D J Knight Paving Services to quote for the surfacing of the driveway at 17 Fairyknowe Gardens, Bothwell with natural stone paving cubes and to prepare the foundation and drainage."
- By letter dated 19 December 2006 the defenders wrote to the pursuers intimating that they wished to deduct Liquidate and Ascertained Damages. This letter was on paper headed "Mr & Mrs William & Jane Forrest, 17 Fairyknowe Gardens, Bothwell, G71 8RW" and was signed by each of the defenders, above the words William and Jane Forrest. There was no reference to KWF in this letter.
- By letter dated 20 April 2007 the first defender wrote to Gordon Gibb to advise that his appointment would be terminated with immediate effect from the date of the letter. This letter bore the heading "KWF Homes Limited, Flat 2/4, 169 Hamilton Road, Mount Vernon, Glasgow, G32 9QT".
- By letter dated 27 April 2007 Gordon Gibb of Gibb Architects replied to the first defender (making no reference to KWF) maintaining that under the conditions of his appointment he was entitled to reasonable notice in writing, that no such notice had been given, and that Gibb Architects' appointment would be terminated on 4 May 2007, and that they would remain Architects and Contract Administrator for this project until that time.
- In a different category because they are excluded from the terms of the joint minute are letters on headed note paper from KWF Homes Limited, 11 St John's Boulevard, Uddingston, relating to termination of Gibb Architects' employment as Contract Administrator dated 10, 20, 25 & 30 April 2007. That dated 10 April was addressed to the pursuers and signed by the first defender above the words "Jane Forrest KWF Homes Limited" and stated *inter alia*..... "I write to confirm my intention to terminate the employment of Gibb Architects." That dated 20 April was in the same form enclosing a copy of the termination letter to Gibb Architects. That dated 25 April was in the same form and intimated that Mr Brian Patterson had been appointed as the new contract administrator. That dated 30 April was in the same form, addressed to Mr Gibb and maintaining the position that his appointment was terminated with immediate effect from the date of the letter of 20 April "due to professional misconduct and abusive behaviour".

- Also excluded from agreement in the joint minute were two letters dated 5 May 2007, each on KWF Homes Limited note paper from the address at 11 St John's Boulevard, Uddingston. Neither had the first defender's name on them. Each was addressed to the pursuers. One of these enclosed a withholding notice in the sum of £246,465.00 in respect of architect's certificates 11 and 12. The other stated that "as Gibb Architects issued these to you after he was dismissed on 20 April 2007, they should be ignored."
  - Also excluded from the agreement in the joint minute was a letter from Peter Imrie to the pursuers dated 13 April 2006 in the following terms:  
*"Dear Sir or Madam*  
*New Build House at 17 Fairyknowe Crescent, for KWF Homes Limited*  
*We herewith enclose the Building Contract as discussed and agreed for your attention. We would request that you complete and sign the document and return it to our offices."*
  - As part of the same production there was lodged the standard terms of the Scottish Building Contract Contractors Design Portion with Quantities, with the words "draft for typing" written in pencil at the top of the first page. The gaps in the standard form were completed in pencil and identified the employer as KWF Homes Limited, registered office Silverwells House, 114 Cadzow Street Hamilton, ML3 6HP.
  - Also excluded from the agreement in the joint minute was a letter from Peter Imrie to the pursuers dated 29 June 2006 addressed to the pursuers. This letter stated:  
*"Dear Sir or Madam,*  
*New Build House 17 Fairyknowe Crescent, for KWF Homes Limited*  
*We herewith enclose the SBCC Building Contract with Contractors Design Portion duly completed as discussed and agreed for your attention and agreement. Please complete this document in accordance with the guidance note for signing as attached and return to my office in due course. A copy of the completed and signed document will be issued to you."*
- [5] This production appeared to be a principal rather than a copy. Written across the top in handwriting were the words "file copy", and attached to it was a post it sticker with the words "Ann do not post this as I will hand deliver thanks Peter" written on it.
- [6] The foregoing list of productions is not intended to be exhaustive, but is rather a list of those documents which featured most frequently in the evidence and which were relied upon most heavily in submissions. There were other documents, including mail sheets, extracts from diaries, file notes and internal or personal memos which featured in the evidence but which I have not felt it necessary to list here.

#### Witnesses for the Pursuers

- [7] (i) **Mr Gordon Gibb** had practised as an architect for 22 years before the preliminary proof, his practice involving a mixture of commercial and domestic buildings. He first became involved with the site at 17 Fairyknowe Gardens when the defenders asked him to act as an expert witness in their dispute with their previous architect. Thereafter the defenders asked him to look at drawings prepared by other architects for a new house on the site. He was quite sure that it was not KWF Homes that instructed him; the house was specifically for the defenders' needs and they intended to live in it. His appointment was in terms of SCAA/2000 "Scottish Conditions of Appointment of an Architect" published by the RIAS. At some stage Mr Gibb became aware of KWF; he was involved in carrying out some design work for a commercial development of about 12 flats in Kilmarnock, in which KWF were the developers. By contrast, Mr Gibb was clear that the works at 17 Fairyknowe Gardens were for the defenders as individuals. Mr Gibb was involved principally in dealing with the clients, and Mr Thompson (who was employed by Gibb Architects between about May 2005 and early 2006) was more concerned with the details. Generally Mr Thomson had to report to Mr Gibb and Mr Gibb was responsible for the contractual side of matters.
- [8] That the defenders were personally involved as the employers in these works was clear from the documentation, said Mr Gibb. They were named in the building warrant, and in both sets of tender documents. Mr Gibb was present at the meeting on 30 November 2005 when the defenders interviewed the two potential contractors, including the pursuers. There was no discussion at that meeting about the identity of the contracting parties. The pursuers did not offer to reduce their tender at this meeting - they were asked to go away and see if they could reduce their price. This resulted in their letter of 2 December 2005 in which they offered to reduce the price by £8,000. Mr Gibb stated that he must have discussed this with Mr and Mrs Forrest, and they decided to accept this offer. Neither of the defenders suggested that they would prefer the contract to be with KWF and not themselves. Thereafter the draft letter of 14 December 2005 was prepared, but was not sent to the pursuers because Gibb Architects were waiting for the defenders' consent to issue it. Mr Gibb emphasised that he had a particular concern that a tender is accepted in proper terms on behalf of the client. It would normally be the architect who accepted a tender; he could not explain why Peter Imrie purported to do so in this instance. Until the adjudication he had never seen Peter Imrie's letter dated 20 December 2005 purporting to accept the revised tender on behalf of KWF. If he had seen this earlier, his first reaction would have been that as the offer was made to Mr and Mrs Forrest, it could not be accepted by KWF. He would also have been concerned about Peter Imrie accepting the revised tender rather than Gibb Architects as the contract administrator. There was no doubt in his mind as to who his clients were, namely the defenders.
- [9] Mr Gibb did not attend the main part of the pre-start meeting on 10 January 2006, although he "topped and tailed it". He met with the defenders before the meeting began, and then left, returning just before the end. There

was no discussion while he was there about changing the identity of the employers from the defenders to KWF. Before the meeting he had spent at least half an hour with the defenders, and there was no mention of such a possible change. This was a major change, and Mr Gibb would have expected it to have been brought to his attention and reflected in the minutes.

- [10] When shown No 7/5 of process, which bore to be a note extracted from Peter Imrie's diary headed "Pre-start meeting 17 Fairyknowe Gardens" (the date of which was missing from the production) Mr Gibb observed that Peter Imrie was not at the pre-start meeting (as is clear from the Minutes of that meeting which were circulated). With regard to the entry in this excerpt "*Client re KWF Homes Ltd contractor confirmed acceptable that even if KWF Homes requested bank details + ref*" this was not discussed at the pre-start meeting in his presence, and had not been discussed at the meeting on 30 November. He expressed the view that a contractor would never accept a development company as employer without first having received bank details and a reference in relation to that company, because development companies are here today and gone tomorrow.
- [11] With regard to the Form F10 Notice, this had not been issued by the pre-start meeting (despite the indication to the contrary in the excerpt from Mr Imrie's diary). The F10 was sent to the pursuers for signature on 10 January and completed and sent out on 13 January. It was important to note two things from this form: first, that the client was specified as Mr and Mrs Forrest, and second, that the passage relating to a planning supervisor was scored out. This was because a planning supervisor is not required for a domestic development. It would have been appropriate to delete this passage only if the clients were domestic clients having the works carried out for their only use. If the clients had been KWF, it would not have been appropriate to make this deletion.
- [12] Throughout the whole progress of the works Mr Gibb stated that he considered that his clients were the defenders and that they were the employers of the pursuers. In none of the site meetings which Mr Gibb attended was there any suggestion that KWF had any involvement in the matter. This is why Mr Gibb designed the defenders as the employers in all his architect's instructions and certificates, which were discussed in detail with the defenders. He described the suggestion that the defenders' names appeared on the architect's instructions not as individuals but as directors of KWF as absurd - although Gibb Architects had worked with KWF on other development sites, in Kilmarnock and elsewhere, the project at 17 Fairyknowe Gardens was for the defenders themselves and he was very clear that they were his clients and the employers in the contract. He could not imagine that they were involved not in a personal capacity but as directors of KWF. Although towards the end of the works the defenders questioned the amounts certified as payments to the pursuers, they never questioned the designation on the architect's certificates of themselves as employers. Contractual terms are of the highest importance to an architect, and Mr Gibb was pretty sure that he checked the architect's instructions and certificates before they were sent out.
- [13] Mr Gibb stated that Mrs Forrest asked his advice in March 2006 just as everyone was dispersing from a site meeting at 17 Fairyknowe Gardens; she asked if he thought that it would be a good idea to change the designation of the employers from the defenders to KWF. He replied that he did not think that this was a good idea, and that it would probably not be accepted by the pursuers in any event. He observed that it was an advantage to be a private client, as the chances of a builder going to adjudication against a private client were less than against a developer, and there was no statutory right to adjudication. He could think of no good reason for Mrs Forrest to seek this advice from him if she already believed that KWF were the employers. The advice which he gave at that time was consistent with the advice which he subsequently gave to the defenders by email dated 22 June 2006, in which he observed that
- "one thing in your favour in any subsequent negotiation with the contractor is that, unless anything is written in the Bill to the contrary, there is no statutory right to go to adjudication under a contract for the erection of an individual dwelling for the sole use of the owner."*
- The defenders never responded to this email to correct him or to say that this was not a contract for the erection of an individual dwelling for the sole use of the owner.
- [14] Mr Gibb stated that he had two meetings to discuss liquidate and ascertained damages with the defenders, these being on 19 and 21 December 2006. The first of these meetings was attended by the defenders, and the second by the defenders and Mr Hives, who was the first defender's father. At the first meeting Mr Gibb drafted the letter dated 19 December 2006. He explained very clearly to the defenders the effect of the clause of the standard term contract referred to, and that they were being asked to sign this letter as individuals, being the employers in the contract.
- [15] Increasingly Mrs Forrest's father Mr Hives became involved in the project. He told Mr Gibb that the first defender was ill and could not cope with running the project anymore so he was taking over. He first became involved in a relatively minor way in about April 2006 when the plumbing work commenced, and by about November 2006 he was very involved. Mr Gibb had reservations about Mr Hives' involvement, because he was not the client and nobody had agreed to him becoming the client instead of Mr and Mrs Forrest. Mr Gibb said that Mr Hives was very offensive and threatening to him and to others including Peter Imrie. He remembered one meeting in particular, quite late in the project works, when he was in the house with Mr Hives and Mr Imrie, and Mr Hives was attempting to have the pursuers demolish all internal walls; Mr Imrie observed that the pursuers were merely doing what they were supposed to do under the contract. Mr Hives lost his temper with Mr Imrie and was very offensive him and told him to "*shut up*". Mr Gibb observed that Mr Imrie was a mild man, but eventually he stood up and said "I'm not taking that from you John, you're not even the client, William and Jane are the client" and left the meeting. In about December 2006 Mr Hives told Mr Gibb that the pursuers would not get another penny

for this project, and over the next few months Mr Gibb realised that this was the defenders' intention. He formed the view that Mr Hives was trying to get him to instruct as much additional work as possible, in the knowledge that nobody would be paying for this. In Mr Gibb's opinion, although the pursuers did make some errors (the hardwood floor was poorly fitted and there were some areas of poor workmanship) Mr Hives' position became so extreme that it became almost ludicrous. When Mr Gibb suggested ways in which costs could be saved, and discussed these with Mr and Mrs Forrest, Mr Hives would have none of it. Mr Hives' conduct became increasingly oppressive and threatening towards Mr Gibb, until Mr Gibb's appointment as architect and contract manager was eventually terminated. When Mr Gibb's secretary telephoned him to tell him that the letter from the first defender dated 20 April 2007 and headed "KWF Homes Ltd, Flat 2/4, 169 Hamilton Road, Mount Vernon" had been received, this was the first time that Mr Gibb had received any letter from KWF in relation to this contract. His immediate reaction was two-fold - first, KWF were not the client, and second, that the contract could not be terminated in this way because in terms of his contract he was entitled to reasonable notice. He therefore responded by the letter of 27 April 2007 confirming that his appointment would be terminated seven days from the date of that letter on 4 May 2007. This letter was addressed to the first defender in her individual capacity at her home address, because Mr Gibb's contract was with the defenders as individuals. No-one challenged his assessment of what constituted reasonable notice in the circumstances. When asked if it was possible for the defenders to be Mr Gibb's clients in terms of his contract, but for KWF to be the employers in the building contract, Mr Gibb was of the view that the two contracts must match up: the employer in the building contract had to appoint an architect, and Gibb Architects were named in the contract. Mr Gibb believed his clients to be the defenders and had no reason to believe that KWF were his clients.

- [16] In cross-examination Mr Gibb agreed that he would expect his minutes of meetings to reflect accurately the capacity in which Mr and Mrs Forrest attended site meetings. He accepted that the Minutes of Site Meeting No 23 held on 23 February 2007 were not accurate in describing Mr Hives as the client, and he remembered thinking how he should describe Mr Hives, but as he was Mrs Forrest's father he took the view that it was appropriate to design him as client along with the defenders. He observed that site meetings were merely a record of what was discussed, and did not have such a significant contractual effect as architect's instructions. It was put to him that Mr Imrie, Mr Thomson and the defenders recalled the pursuers being asked at the tender interview meeting on 30 November 2005 if they were prepared to contract with KWF; Mr Gibb considered that they were wrong in this regard, and he was certain that this was not discussed in his presence. He would have taken issue with this because the identity of the contracting parties was of utmost importance to the architect and contract manager - for example because of health and safety requirements and the need to appoint a planning supervisor if the employer was a corporate developer rather than an individual building for his own occupation. Mr Gibb did not see the acceptance of tender before it was sent out, and neither Mr Thomson nor the defenders nor Mr Imrie ever discussed with him instructions to put this contract in the name of KWF. If such instructions had been given he would have expected to be aware of this - he was overseeing the project and Mr Thomson knew that he had to discuss important contractual matters with Mr Gibb and accept direction from Mr Gibb on these. Indeed, on one occasion, Mr Thomson told Mr Gibb that he did not need Mr Gibb leaning over his shoulder, but Mr Gibb pointed out that he had specialist knowledge about contractual matters and had to supervise Mr Thomson. Something as important as the identity of the employers goes to the heart of the contract, and Mr Gibb was of the view that this would inevitably have been referred to in the Minutes. He had no awareness of KWF being discussed, although he accepted that the pursuers admitted that there was some discussion about this. He would have felt uneasy about KWF being the employers in the building contract, but the defenders being his employers. This would raise difficulties. This was why, when Mrs Forrest wrote to him on KWF headed paper purporting to terminate his contract he replied to her as an individual at her home address, because his contractual relationship was with the defenders and not with KWF.
- [17] Mr Gibb was asked if he ever saw Mr Imrie handing contract documents to the pursuers, and he replied that he saw Mr Imrie handing what he thought was just a blank form to Mr Ronnie Burrows. He observed that Mr Imrie never got down to doing things when he was supposed to do them. At the first site meeting on 8 February 2006, it was noted that Mr Imrie would forward the formal building contract to the pursuers on the following day. This had not been done by 21 February 2006. At the meeting on 9 March 2006 Mr Gibb remembered Mr Imrie saying words to the effect of "here is a form, its not quite the right one but it will do". He understood that this was rejected by the pursuers. On 23 March 2006 Mr Imrie was asked to prepare a completed form for signing, and on 11 April 2006 it was noted that the contract was to be handed over to the pursuers on the following day. Mr Gibb had never seen the letter from Mr Imrie to the pursuers dated 13 April 2006 and was not aware of it. However, the minutes of the meeting of 27 April 2006 record that "we still await completion of the contract document by Pl". The minutes of 18 May 2006 record that the contract documents were handed over to the pursuers by Pl for signing, but it appeared from subsequent minutes that these were the wrong contract documents. Mr Gibb had never seen the letter from Peter Imrie to the pursuers dated 29 June 2006. The reason that the signing of the formal contract documents ceased to be mentioned in the minutes was that nobody mentioned the topic at meetings. Mr Gibb never saw a signed or completed contract. He saw the tender and bill of quantities, but he did not see the purported acceptance of tender by KWF until after the adjudication.
- [18] With regard to the termination of his contract, Mr Gibb observed that Mrs Forrest expressed her desire, erroneously through her company, that she did not want him to continue as architect, and in these circumstances it was appropriate to bring the relationship to an end. Mr Gibb expressed the view that it would have been a breach of contract to terminate immediately. Seven days was the period referred to in the building contract, and

this was the time that he required to put things in place in order that his contract could be concluded properly. He then issued the certificate of extension of time and asked Mr Imrie to provide a valuation of works outstanding, so that he could deduct the appropriate amount from the certificate. He granted an extension of time to the pursuers of 37 weeks, for the reasons carefully stated in his extension of time letter.

- [19] (ii) **Mr Ronald James Burrows** was aged 40 and had been a director of the pursuers for about ten years, this being the family firm. He was responsible for sales and contracts (as senior contract manager). He was not involved in the tender process relating to 17 Fairyknowe Gardens; he first became involved at the start of the site works early in 2006. He understood the defenders to be the employers in the contract, because in any dialogue or discussions about the contract they were the clients. At the commencement of digging works on site, Mr Thomson introduced Mr Forrest to him as the client. He did remember seeing the letter from Mr Imrie dated 20 December 2005 purporting to accept the tender "by the client KWF" but this was before his direct involvement. He attended site meetings. He understood that it was Mr Imrie's role to provide contract documents for signing. Mr Imrie provided no contract documents until the meeting on 9 March 2006; on that date what he provided was simply a standard form of building contract with boxes still to be completed. It was the wrong form, and Mr Burrows' recollection was that it did not have any parties' names or designations filled in. He did not remember Mr Imrie ever handing over a completed form of contract for signature by the pursuers. It was minuted that on 27 April 2006 completion of the contract document by PI was still awaited. At no time during the contract did Mr Burrows see the letter from Peter Imrie dated 13 April 2006 and the standard form with pencilled completions apparently attached to it. If this had been received by the pursuers, Mr Burrows would have seen it. He explained the pursuers' system for logging incoming mail, and the four directors of the pursuers see all incoming mail. He went through mail sheets produced on behalf of the pursuers and explained that these were prepared each day. He would go through this mail sheet, and the mail, and sign the sheet at the bottom. The letter dated 13 April 2006 from Peter Imrie was not recorded in these mail sheets and he had no recollection of seeing it at about that time. At the meeting on 18 May 2006 he did not think that any contract documents handed over for signing contained the identities of the contracting parties. By 6 June 2006 the pursuers had still not received the correct form from Peter Imrie. Mr Burrows explained that Mr Imrie had provided an incorrect document, without designations of parties. This was left at the reception in the pursuers' offices to enable Mr Imrie to collect it. It remained there for some 10-14 days; thereafter Mr Burrows did not know what had happened to it. No replacement document was left at reception. The pursuers' system for logging mail records hand delivered items as well as posted items. The pursuers had also produced mail sheets covering the period 29 June to 7 July 2006; there was no record in these of the letter dated 29 June 2006 from Peter Imrie to the pursuers having been received, either through the post or by hand delivery. Again, there was no reference in Gibb Architects' minute of the meeting of 4 July 2006 to contract documents having been delivered, and Mr Burrows own minutes of that meeting (incorrectly identified as having occurred on 27 April 2006) show that he still had not received contract documents from Peter Imrie. Mr Burrows never signed a contract form and never received a completed correct contract for signature. He was on site throughout the period of the works and during all that time he considered the defenders to be the clients.
- [20] Mr Burrows did not recall seeing the letter dated 10 April 2007 signed by the first defender on KWF notepaper during the contracts works, and he had never seen the letter dated 20 April 2007 addressed to him. He did not recall ever having seen the two letters dated 5 May 2007 from KWF addressed to the pursuers enclosing withholding notices for Valuations 11 and 12. None of these letters were recorded in the pursuers' mail sheets for the relevant periods, each of which was produced. If these had been received by any means by the pursuers then this would have been recorded on the mail sheets.
- [21] In cross-examination Mr Burrows stated that he did not attend the meeting of 30 November 2005, and nobody discussed what had happened at that meeting with him. He saw the letter referring to KWF and this project, but he had no thoughts about this letter when he saw it. He was only introduced to the client when the pursuers started on site, which was 23 January 2006. He did not attend the pre-start meeting on 10 January 2006 and there was no discussion about it within the company. He did not remember any discussion in which Mr Mike Burrows, the managing director of the pursuers, mentioned to him that the defenders wished KWF to be the employers. Although he saw blank draft contracts at site meetings, he never saw a completed document. He did not accept that the contract form which Peter Imrie provided at the meeting on 9 March 2006 was complete apart from the pursuers' insurance details; Mr Burrows observed that normally a quantity surveyor would issue a draft contract, but the pursuers never saw this in this case. Again his recollection was that on 18 May 2006 what was presented was a blank document for the pursuers' comments: Mr Burrows never recalled seeing a standard form contract with blank spaces filled in. Mr Burrows' understanding was that KWF actually paid the pursuers for their work.
- [22] (iii) **Mr Kennedy Matthew Rodger** was aged 60 and was an estimating director with the pursuers. He had worked with the pursuers for almost 37 years. He was involved in the tendering process for the works at 17 Fairyknowe Gardens and in preparing the revised tender. He understood the clients to be the defenders, and nobody suggested to him that anyone else might be the clients. He attended the tender interview meeting on 30 November 2005, as far as he could recollect, all those present remained throughout the meeting. The defenders said that the revised tender was still slightly above their budget and asked if the pursuers could reduce their price. There was no mention of the contracting parties. Following upon this meeting Mr Rodger prepared the letter dated 2 December 2005 offering to reduce the price by £8,000. This was the first occasion on which the pursuers had mentioned this reduction. Thereafter he remembered that the pursuers received a letter from Peter Imrie accepting the tender on behalf of KWF. Michael Burrows spoke to Mr Rodger about this acceptance letter from

Peter Imrie. Mr Rodger understood that someone had spoken to Michael Burrows asking him if the pursuers had any difficulty about contracting with a company rather than individuals, to which Mr Burrows had replied that he wasn't sure if this would be acceptable but he would consider it and investigate the company involved. Then the pursuers received the F10 form stating that the clients were the defenders and with no provision for a planning supervisor, Mr Rodger assumed that they had had second thoughts and were proceeding as individuals. Mr Mike Burrows had been concerned about the possibility of contracting with a company and had said that he would need some time to think about this and to investigate the company. However, when the F10 form was received this was significant to the pursuers in identifying who were the clients.

- [23] Thereafter in the Spring of 2007 Mr Rodger remembered receiving a letter intimating that Mr Gibb's appointment as architect would be terminated. This was handed over at a meeting which Mr Mike Burrows and Mr Rodger attended with the defenders on 5 June 2007. At this meeting they were introduced to the new architect and handed this letter. Apart from this one letter which was on KWF's notepaper, Mr Rodger saw no correspondence from KWF and had not seen the letter dated 5 May 2007 enclosing a withholding notice. Mr Rodger confirmed the details of the mail sheets system operated by the pursuers, which was completed each day and passed around all of the directors, who signed it.
- [24] In cross-examination Mr Rodger reiterated that he was at the meeting of 30 November 2005 and that Mr Mike Burrows was not asked, in his hearing, whether the pursuers would contract with KWF. Walter Kerr was the pursuers' drawing office manager and was not present at the meeting of 30 November 2005. Normally Mr Mike Burrows would acknowledge an acceptance of tender, but this was not done on this occasion because he was not sure if he was willing to work for someone other than the defenders. Mr Rodger left it at that, because Mr Mike Burrows was handling this matter. It was suggested to Mr Rodger that the site meeting minutes showed that a completed contract was handed over to the pursuers for signature, and Mr Rodger disagreed strongly with this and maintained that he had never seen a completed contract for signature. He was certain that it had never been handed over. He agreed that payments for the works were made by KWF, but this raised no suspicions in his mind that they might be the employer - it is not uncommon in building projects for persons other than the employer to make payments. All certificates for payment were made out in the name of the defenders, and as long as the pursuers received the money that was all that concerned them. Mr Rodger never saw any notices of withholding, and if they had been received by post or by hand delivery, they would have been included on the pursuers' mail sheets.
- [25] (iv) **Mr Michael Burrows** was aged 41 and had been managing director of the pursuers for about ten years. After the pursuers' revised tender was sent out, he attended the tender interview meeting on 30 November 2005, together with Mr Rodger. Walter Kerr was not present. The pursuers were told that their plumbing price was too dear, and were asked to see if they could reduce their price; they agreed to go away and see if they could do so. There was no discussion at that meeting as to the identities of the contracting parties. Mr Rodger re-estimated and the pursuers reduced the price by £8,000. Mr Burrows thought that the pursuers then received a fax from John Thomson saying that the defenders were going to accept the tender and identifying a date for a pre-start meeting. The fax dated 19 December 2005 from John Thomson might have been the fax that he was thinking about. Mr Burrows then received the letter from Peter Imrie dated 20 December 2005 bearing to accept the tender on behalf of KWF. At a quick glance he thought that this was an acceptance of the pursuers' offer, but he then realised that it was not in the name of the defenders, so he deliberately refrained from acknowledging the letter. This letter came in just before the Christmas break, when the pursuers shut down for two weeks. The pre-start meeting was the first occasion on which this matter could be discussed. Between receipt of the letter and the pre-start meeting on 10 January 2006, Mr Burrows had no discussions with the defenders or with Gibb Architects as to whether KWF should be the client.
- [26] The pre-start meeting was attended by Mr Mike Burrows together with Walter Kerr, the defenders, John Thomson, and Hector Munro. Peter Imrie was not present. Mr Burrows remembered that during informal discussions after the meeting the first defender asked him if the pursuers would be happy if KWF were the clients. At the same time she gave him the letter from Airdie Savings Bank. He explained that the pursuers were always concerned with unknown companies in case they did not get paid, particularly with regard to retention monies held for a period of twelve months. Generally the pursuers dealt with "blue chip" clients such as Health Boards. His response to the first defender was that the directors of the pursuers would have to consider the point, and that he did not have the power to agree to it there and then. It was clear at that time that the defenders wished to proceed with the contract, and the pursuers presumed that the request about changing the contracting parties was just for funding purposes. The pursuers remained concerned, as the contract price was not guaranteed. At a directors' meeting after the pre-start meeting, concerns remained. Mr Mike Burrows went to Companies House to investigate KWF and found that the defenders were the sole directors of the company, that it had been recently formed, that no trading accounts had been published and that it owned one property which was subject to a bank guarantee. This did not fill him with confidence.
- [27] No record of the discussion between the first defender and Mike Burrows appeared in the minutes of the pre-start meeting, which Mr Burrows received about two or three days later. Mr Thomson, who prepared those minutes, was not party to the conversation between the first defender and Mr Mike Burrows regarding KWF although he was probably in the same room. Mr Burrows referred to his handwritten notes of matters to discuss at the pre-start meeting, item 3 of which was "contract with Mr and Mrs Forrest". He believed that if it had been agreed at the meeting that the client was to be KWF, he would have noted this (in the same way that he noted that the revised sum agreed was £513,000). He was asked about Peter Imrie's handwritten notes (No 7/5 of process), and he



denied that he had stated either at the meeting of 30 November 2005 or the pre-start meeting of 10 January 2006 that KWF would be acceptable as the clients. There was no discussion about bank details or a reference in relation to KWF at the meeting on 30 November 2005, but there was such a discussion in his conversation with the first defender as parties were dispersing after the pre-start meeting. Walter Kerr was not present at the meeting of 30 November (and Mr Rodger's minutes of that meeting do not record him as being present).

- [28] Mr Burrows confirmed that the F10 form was an important document which had to be completed and sent to the Health and Safety Executive before work commenced. The pursuers received the F10 form on the day after the pre-start meeting. They took it from the terms of this form that the defenders were prepared to continue with the contract as individuals rather than seeking a change so that the employers were KWF - not only were they named as the clients, but if the works had been for a development company such as KWF, there would have been a requirement for the appointment of a planning supervisor. The pursuers were happy to proceed on this basis because this was clearly a domestic contract for individuals who intended to occupy the house themselves. On this basis they signed the form and sent it to the Health and Safety Executive.
- [29] Mr Mike Burrows had no role directing the administration of the contract on site, and attended no site meetings. He anticipated that the pursuers would be presented with a form of contract for signing, but this was never done. They never signed a completed contract form nor were they ever provided with a completed correct contract document for their signature. He was aware that an uncompleted contract form was left in the pursuers' reception area, and after some time it disappeared and the receptionist told him that it had been uplifted by someone, but nothing was left in its place. Until a week before the preliminary proof in March 2008 he had never seen the letter dated 13 April 2006 from Peter Imrie to the pursuers. He checked the incoming mail for the pursuers every day. All incoming mail (whether hand delivered or sent by post) is put on a mail sheet by the office administrator, and then circulated to directors at about 10 or 10.30am each day. Similarly, he never saw the letter from Peter Imrie addressed to the pursuers dated 29 June 2006. Neither of these appeared on the mail sheets for the relevant periods. Again they did not receive either of the letters on KWF notepaper dated 5 May 2007 and addressed to them, at any time during May 2007. Mr Burrows stated that he may have been shown one or both of these when he had a meeting with the defenders in early June and was introduced to Mr Paterson who he was told was to replace Mr Gibb as architect. The list of alleged outstanding defects which was attached to the second (longer) of the letters of 5 May 2007 did not tie up with any complaints being made at that time about alleged defects. No complaints had been received at that time about defects in the front door and the garage floor being laid off-level or doors and frames not being correctly fitted; these complaints were first brought to the attention of the pursuers by a letter dated 21 May 2007 addressed to Mr Ronnie Burrows of the pursuers from Bluestone Chartered Building Surveyors, which letter referred to "a lack of meaningful progress with her house" and which was copied to the first defender but not to KWF. There was no suggestion of any defects in the drainage until the pursuers performed tests for building control in late May. Similarly, Mr Burrows did not receive the letters dated 10 April, 20 April or 25 April which were purportedly sent to the pursuers.
- [30] In cross-examination it was put to Mr Burrows that Mr Rodger had said that Mr Burrows had discussed the purported acceptance of 20 December 2005 shortly after receiving it, and that Mr Burrows had told Mr Rodger that by that time he had discussed with someone the possibility of KWF becoming the clients. Mr Burrows stated that Mr Rodger's evidence in this regard was wrong, and he had had no discussions with anyone regarding KWF before receiving that letter. At that time Mr Burrows did not consider that the pursuers had a contract with anyone - the letter of 20 December 2005 had no effect. Not much happened between the date of receipt of that letter and the pre-start meeting on 10 January as the pursuers were on holiday for two weeks. They did not need to order the timber kit for the project, because they make such things themselves. There was ample time for this work to be done after 10 January and before it was required in the project timetable.
- [31] Mr Burrows was asked if the pursuers had a contract with the defenders as at the pre-start meeting, and he replied that the pursuers thought that it was the defenders' intention to proceed with the project and they were awaiting the necessary documentation to be drawn up. Although they had not accepted the revised tender in writing, they were at the pre-start meeting and told the pursuers to proceed. Although the first defender asked Mr Burrows after the pre-start meeting had concluded whether the pursuers would be prepared to contract with KWF, Mr Burrows was not prepared to undertake to do so. He said that taking the defenders' presence at the pre-start meeting, their instructions at that meeting, and the receipt of the F10 thereafter specifying the defenders as clients and deleting the requirement for a planning supervisor satisfied the pursuers that they were contracting with the defenders. It was then that the pursuers sent out acceptances of tenders by subcontractors. Although he was shown the letter from Airdrie Savings Bank dated 9 January 2006 and although he was asked whether the pursuers would be prepared to contract with KWF, he never agreed to do so. He stated that the pursuers considered the possible change, decided against it, and so carried on as normal. By the time that the pursuers started on site, they were quite clear that their clients were the defenders and not KWF.
- [32] Although Mr Burrows remembered receiving a contract document form, he could not remember if it was a blank form or if any name was filled in for the client; in any event, it was the wrong form of contract, and the pursuers would not have been prepared to sign even if it had been the correct form of contract if the employer was stated to be KWF. He did not recall ever seeing a contract which was ready for signature; a contract form came in, but he did not open it or look at it because he was told that it was the wrong contract. The pursuers received a telephone call as soon as Mr Ronnie Burrows got back with the contract saying that it was to be changed. He was quite sure that the pursuers did not receive the letter from Peter Imrie dated 29 June 2006, nor did they receive

the letters dated 5 May 2007 regarding the withholding notice. He was asked who paid for the works, and he replied that the certificates were sent out to the defenders, and cheques in payment were issued by KWF. This caused him no difficulty, because the pursuers frequently receive payments on company cheques when their clients are individuals, or from funding bodies when clients are corporate or public entities. The pursuers were not concerned with who paid for the works; as long as they receive an architect's certificate, and it is honoured, that was fine by them.

**Witnesses for the Defenders**

[33] (i) **Mr John Thomson** was aged 49 and worked with Gibb Architects between May 2005 and February 2006. He had worked as an architect with another firm for about one year previous to this. He began to work on the Fairyknowe Gardens project within about one week of starting with Gibb Architects; initially the clients were the defenders, and at that time KWF did not exist, but he thought around October 2005 that the defenders told Mr Gibb that things would be managed through KWF. He was asked in whose name the invitation to tender for the works at Fairyknowe Gardens ran; at first he was unable to answer this question, but after some thought he answered that he could not be absolutely 100% certain but he thought that these were in the name of the defenders.

[34] Mr Thomson was at the meeting at about the end of November 2005, which was also attended by Peter Imrie, Gordon Gibb, the defenders, Mike Burrows and Ken Rodgers. The issue of whether KWF Homes might be the employers was raised, and Mike Burrows said that he didn't think that this would be a problem but that he would require a letter of assurance from the company's bankers. The meeting was set up for the client to get a feel for who she (sic) wanted to go forward with. After the meeting, Mr Thomson drafted a letter of acceptance of tender, after the pursuers had offered to reduce their tender price by £8,000. He showed this letter to Mr Gibb who pointed out two errors to him - first that the clients should be KWF and not the defenders, and second that the letter should make reference to the original tender sum and to the revised tender sum. Mr Thomson said that he did not know this, and he remembered this clearly as he learnt something that day. Thereafter he remembered emailing the letter to Mr Imrie. On 16 December 2005 he emailed Mr Imrie stating:

*"Further to our discussion earlier today we look forward to receiving a copy of the letter accepting Fleming Buildings' tender on behalf of Jane and William Forrest."*

He explained this by saying that the contractual implications of KWF did not register with him - he always thought of the clients as Jane and William. He recognised the letter dated 20 December 2005, but he could not say if this was issued by Mr Imrie or by Gibb Architects. He thought it was issued however, and remembered Mike Burrows saying in a telephone conversation that they were in the process of signing the paperwork. At the pre-start meeting he remembered vaguely a discussion between Mike Burrows and the first defender after the business on the agenda had been completed. He did not remember any details of the meeting, but he did remember a letter being handed to Mike Burrows at the end. He did not think that Mike Burrows was surprised to receive this letter; it was handed over because the defenders had asked at the initial interview meeting whether the pursuers would have any difficulties with KWF being the contracting parties. Mr Thomson never saw the letter from the bank, but he thought it was from Airdrie Savings Bank. He confirmed that he had prepared the minutes of the pre-start meeting on 10 January 2006; when asked why he described the defenders as the client, he replied that he tended not to focus on the *"bit at the top of the minutes"* and that this was an error on his part. He made the same error when preparing the minutes of the first site meeting on 8 February 2006. When asked why there was no reference to KWF in those meetings, he replied that he did not know whether there was in fact a signed contract. He understood that KWF were the employers, because the letter accepting the tender went out in their name. Mr Thomson attended no site meetings after the first site meeting.

[35] On the Friday that he left Gibb Architects, he went through with Mr Gibb each of the jobs on which he had been involved. He did not mention to Mr Gibb that he understood the clients to be KWF Homes, because he took this as read - it was common knowledge. Gibb Architects were involved on behalf of KWF in relation to another development in Kilmarnock. Mr Thomson accepted that he issued the first architect's instruction, and that this might have identified the employers as the defenders rather than KWF - he was in a rush to send out the certificate before he left Gibb Architects. He also accepted that he probably drafted the F10 notification, and he was familiar with the health and safety regulations underlying this form. There was no discussion about the contracting parties before this form was sent out - as far as he was concerned, the pursuers had asked for and received an assurance as to KWF's financial status, and there did not appear to be any issue about the identity of the client.

[36] In cross-examination Mr Thomson stated that the defenders told him that in terms of future developments they would like to set up all future contracts through KWF. This was mentioned in about October 2005 in the course of preparations for the Kilmarnock development. The defenders told him at the tender stage in relation to the Fairyknowe Gardens project that they wanted it to be done through KWF Homes.

[37] Mr Thomson conceded that Mr Gibb was better at matters of contract than he was himself, and that Mr Gibb was punctilious about such matters. However, he was adamant that Mr Gibb knew about the change of client from the defenders to KWF; he was sure that this was raised at the tender interview in November, but he had not looked for any handwritten notes of that meeting. He remembered preparing the draft letter dated 14 December 2005 addressed to the pursuers, in which the tender bore to be accepted on behalf of Mr and Mrs Forrest. This was correct at that time, because Mike Burrows had not yet indicated the pursuers' consent to the clients being changed to KWF. It was pointed out to him that he had stated in examination-in-chief that he showed this draft to

Mr Gibb who pointed out to him that one of the errors contained in the draft was that the clients should be KWF; when he was asked how this could be correct, Mr Thomson replied "I know what you are saying", but was unable to provide an explanation for his earlier evidence. He could picture the conversation which he had with Mr Gibb. He also sent out the email of 16 December 2005 in which he looked forward to receiving a copy of the letter accepting the pursuers' tender on behalf of Jane and William Forrest. This was "wrong".

- [38] Mr Thomson maintained that he drafted the letter dated 20 December 2005 which was signed by Peter Imrie, although he could not explain why it was so much more detailed than his first draft dated 14 December, nor from where he had obtained these details. This letter was prepared so that it could be sent out to the pursuers - it was not to be sent to Peter Imrie. Mr Thomson's opinion was that architects should not be sending out acceptances of tender, and it would have been important to point this out, but he could not remember whether it was pointed out or not.
- [39] Mr Thomson prepared the minutes of the pre-start meeting of 10 January 2006. If there had been any discussion about KWF being the clients for this building project, and if Mike Burrows had said that the pursuers were happy to contract with KWF, Mr Thomson said that he would definitely have written this down and it would have appeared in the minutes. There was no reference to this in the minutes, which were prepared shortly after the meeting. He remembered the letter from the bank being handed over to Mike Burrows, and he assumed that Mr Burrows would have to discuss this with his fellow directors. He did not know whether this happened, and he never saw any letter from the pursuers indicating that they were prepared to contract with KWF. He agreed that until the pursuers confirmed that they were prepared to do so, the clients remained the defenders and not KWF, and this was the position at the pre-start meeting. It also remained correct when he completed the F10 notification form, in which the handwritten passages were completed by him and paragraph 10 regarding a planning supervisor was scored out by him. He agreed that if the pursuers' contract was with KWF, it would have been appropriate to have a planning supervisor - it was only because the building was being constructed for the defenders that it was appropriate not to have a planning supervisor. He also agreed that when he wrote to the pursuers on 10 January 2006 enclosing the F10 notification form that the copy of the priced bill for the pursuers' records would have designed the defenders as client, and would not have referred to KWF. All the letters dated 13 January 2006 addressed to neighbouring proprietors were prepared by him, and referred to the clients as the defenders. Again, the first architect's instruction which was dated 16 February 2006 was prepared and signed by him; this identified the employers as being the defenders, and this was correct at that time. Mr Thomson prepared a handwritten draft of this instruction for typing, and wrote the defenders' names as the employers.
- [40] Mr Thomson was sure that his handwritten notes, which formed No 7/35 of process and were described in the defenders' inventory as "copy of John Thomson's handwritten meeting notes of meeting dated 30 November 2005" were not in fact notes of that meeting. He may have described them as such when he gave evidence at the adjudication, but that is not what they were - they were an aide memoire for the pre-start meeting on 10 January 2006. Mr Thomson said that he discussed his draft letter of 14 December 2005 with both Mr Gibb and Mr Imrie, and the letter dated 20 December 2005 which was signed by Mr Imrie reflected these discussions. He had no instructions from the defenders to accept the pursuers' tender as individuals - he was clear that the tender should be accepted on behalf of KWF, and he did not accept on behalf of the defenders as individuals.
- [41] (ii) **Mr Peter Forrest Imrie** was a quantity surveyor and project manager, aged 53. He prepared the Bill of Quantities for the project at 17 Fairyknowe Gardens; he had done three other projects for KWF, and it was always KWF who had been his clients. However, in the early stages of the Fairyknowe Gardens project the clients were the defenders, hence the headings on his letters dated 11 August and 2 November 2005. He was present at the meeting on 30 November 2005, when the question of changing the clients from the defenders to KWF was discussed with the pursuers. At that meeting Mike Burrows said that the pursuers were quite happy to have a change of client if a proper bank reference was provided. Mr Imrie was quite sure that only the pursuers were interviewed that day, and no other tendering contractors came for interview. On the day after this meeting Mr Imrie was instructed by John Thomson to accept the pursuers' tender on behalf of KWF; he was given no explanation as to why the tender should be accepted by KWF and not by the defenders. The pursuers never got in touch with him to object to the designation of KWF as the client.
- [42] Mr Imrie was unable to attend the pre-start meeting; his handwritten notes headed "*Pre-Start Meeting - 17 Fairyknowe Gardens, 10.00*" were in fact a note of the informal interview meeting on 30 November 2005. Those attending that meeting were John Thomson, Hector Munro, Mike Burrows and Walter Kerr and the defenders.
- [43] Mr Imrie was at the first site meeting, and thereafter he hand-delivered the formal building contract to the pursuers, although he could not remember if he did this on 9 February. This contract designed KWF as the clients. He was not at the second site meeting, but it was correct that by 21 February he had still not delivered the contract document. At the site meeting on 9 March the pursuers expressed themselves happy with the contract, and took it away to complete. Mr Imrie was not present at the site meeting of 23 March, but despite the terms of the minutes he was positive that the pursuers had received the completed form of building contract for their signature. Mr Imrie said that he was present at the meeting of 11 April; he was asked to explain the minute which stated that "*contract will be handed over to contractor tomorrow for signing*", and he explained that he had to get another form of contract, and he thought that the pursuers' insurers would not let them sign the other one.
- [44] When faced with the minute of the meeting of 27 April 2006 Mr Imrie initially stated that the minute was wrong because he was present; however, he then remembered that he was not present. It was correct that by 27 April the pursuers still had not received the correct form of contract, because he had experienced difficulty in obtaining

it. With regard to the meeting on 18 May, he stated initially that he was not present, but then stated that he must have been present. The minute was wrong, because the contract documents were not handed over at the meeting - both contracts were handed over at the pursuers' offices. The letter dated 13 April 2006 enclosed the contract and Mr Imrie handed it to the pursuers' receptionist. However, Mr Imrie then changed this evidence and observed that he was clearly wrong and that he did not seem to have the other letter in this file. The contract was typed and hand-delivered to the pursuers. The letter dated 29 June 2006 was what was attached to the contract. This disclosed KWF as the employers; it was delivered by Mr Imrie, but he did not know when - he thought perhaps in early July 2006. He got no response from the pursuers. The reference to the defenders as "client" in the various site meeting minutes was clearly a mistake by the architects, but he never challenged this, nor did anybody else.

- [45] He was aware that an adjudication process was proceeding, but he did not give evidence in that. He could not explain why that was, and he did not know when the adjudication happened.
- [46] In cross-examination Mr Imrie stated that the defenders asked him to do this for them, but he was not formally appointed. He had never been appointed by them or by Mr Hives on any previous occasion, although the firm that he worked for was project manager for a site at Mount Vernon for Jane Forrest and her father, Mr Hives. He thought that it was highly unlikely that the first defender would have sought advice from Gordon Gibb about whether he (Mr Imrie) should be replaced.
- [47] Probably before the meeting of 30 November 2005 the defenders asked him if it would be alright for the contract to be with KWF, and he replied "Why not, as long as that is agreed". He had been involved with two other developments for KWF, although the Fairyknowe Gardens project was quite different in scale and was for the defenders themselves. He was quite certain that his handwritten note of the meeting of 30 November 2005 was correct, and Mr Gibb was not present at that meeting - even if Mr Thomson and Mr Gibb said that he was present, Mr Imrie was "more than convinced" that he was not there. He was quite sure that the meeting was held in the evening. The pursuers had already offered to carry out the works for £513,791 - that is to say, the deduction of £8,000 had already been made before the meeting. There was discussion at that meeting about whether KWF should be the clients, and Mike Burrows said that this would be okay. It therefore surprised him that the pursuers' letter dated 2 December 2005 offering to reduce the tender sum by £8,000 referred to the defenders as clients - he had expected KWF to be the clients, but he never queried the point. He received the email dated 16 December 2005 from John Thomson looking forward to receiving a copy of the letter accepting Fleming Buildings' tender on behalf of Jane and William Forrest, but John Thomson never sent a draft letter to him - Mr Imrie had a standard form of acceptance letter. The email was incorrect in referring to the defenders, because it had been agreed at the meeting on 30 November that the clients would be KWF. Accordingly Mr Imrie just ignored this.
- [48] Mr Imrie stated that the pursuers should have received his letter dated 13 April 2006, although it is attached in the productions to the wrong contract. He did not enclose a typed version of the contract with that letter. Mr Imrie was pretty sure that the contract was delivered to the pursuers before 27 April, and that the correct version was delivered in late June or early July. All the documents in which reference was made to the defenders as clients or employers (including minutes, certificates and notices) were mistaken; Mr Imrie however never questioned this usage and accepted that he was at fault for this.
- [49] Mr Imrie remembered an occasion on which the first defender's father John Hives was present on site. Mr Imrie had strong reservations about the role played by Mr Hives. He remembered on one occasion pointing out that Mr Hives was in error, and Mr Hives shouted at him. Mr Imrie left at that point, and said to Mr Hives "You are not even the client, Jane and William are the clients".
- [50] Mr Imrie was shown a valuation claim form in respect of Valuation 8 dated 18 October 2006 (No 6/186 of process). He confirmed that this was prepared by him. It specified the employer as the defenders, and made no reference to KWF. Mr Imrie said that this was another mistake.
- [51] (iii) **Mrs Jane Forrest**, the first defender, was aged 34 and was a company director who lived at 998 Great Western Road, Glasgow. She was the owner of the property at 17 Fairyknowe Gardens, Bothwell, which she purchased in May 2001. She originally intended to build an extension to the existing property, but because of defective workmanship by the contractors then carrying out the work, she and her husband decided to demolish the property and develop a new house. She instructed Gordon Gibb as her architect to take over the design of the house from her previous architects. She instructed Peter Imrie as her quantity surveyor; he had worked for a firm who had been employed by her father. In August or September 2005 several contractors were invited to tender to perform the project; Mrs Forrest was expecting the costs to be less than £350,000, and she was surprised when the tenders were in excess of £800,000. She and her husband met with Gordon Gibb and Peter Imrie in order to try to find savings; at that point she realised that she was not in a financial position to continue. Although her original intention had been to develop the house for her residential use, after the initial tender procedure she and her husband knew that they could not afford to keep the house. She therefore contacted her bankers, Airdrie Savings Bank, and they agreed in principle that the house should be developed commercially by KWF. She told her development team of her intention that the project would be carried out on behalf of KWF in about September or October 2005, when work was being done on a revised Bill of Quantities. Her development team included Gordon Gibb and Peter Imrie. She told them this verbally, and then emailed Gibb Architects with the details of KWF, as at that time Gordon Gibb was running another job in Kilmarnock and John Thomson was working with him. When pressed, she had difficulty trying to recall how and where she told Gordon Gibb that KWF was to be the client in the Fairyknowe Gardens Project; she knew that at the savings meeting they would

probably consider this a commercial venture as she could not afford to continue at this price. She was sure that there would have been telephone conversations after that meeting and she was trying to think if they had another meeting, but she could not remember the exact time. However, as far as she knew the second invitation to tender ran in the name of herself and her husband, not KWF.

- [52] There were two interview meetings in November 2005, both of which she attended. She visited a house being built by Whiteford and Forbes, a firm of contractors based in Kilmarnock. She did not like what she saw. She then had a meeting with the pursuers. The price at which the pursuers tendered was substantially higher than the alternative, and at her request the pursuers said that they would go away, think about their price and see if they could reduce it. They reduced their price by £8,000. On reflection, she could not remember whether there were one or two meetings in November 2005 - perhaps there was only one. Those present were Ken Rodgers and Mike Burrows of the pursuers, John Thomson of Gibb Architects, her husband and herself. At this meeting she basically asked Mike Burrows if he would have any objection to contracting with KWF instead of herself and her husband. He clearly stated that he didn't have any objection to the employer being a limited company, the only thing he asked her to do was to prove a bank reference. After this meeting, she contacted the general manager of Airdrie Savings Bank and asked him to provide confirmation that KWF were in a position to fund this project. The letter dated 9 January 2006 was a copy of this letter. She then stated:

*"I decided that I wished to proceed with Fleming Builders. I instructed John Thomson to put matters into motion for Fleming Builders to construct a detached house. I actually wrote to Gibb Architects confirming that my preference was Fleming Builders."*

Notwithstanding this evidence, she stated that John Thomson knew that the employers would be KWF as he was present at the November meeting and she was not in a position to contract personally.

- [53] She attended the pre-start meeting in January 2006, and at that meeting she handed the letter from the bank to Mike Burrows. She told him that this was the bank reference that he had requested concerning KWF and he thanked her and told her that he preferred it to be a limited company. He expressed no concerns about KWF or the letter. After that meeting neither Mike Burrows nor anyone else from the pursuers expressed the view that they were not prepared to contract with KWF. She probably did see the architect's instruction No 1 dated 16 February 2006 in which the employers were stated to be herself and her husband, but she was more concerned with the instructions being given than with the details at the top. The works were paid for by KWF by cheques drawn on KWF's account with Airdrie Savings Bank.
- [54] Mrs Forrest confirmed that her signature appeared at the foot of the letter dated 19 December 2006 intimating that she wished to deduct liquidate and ascertained damages. She accepted that this letter was headed "*Mr and Mrs William and Jane Forrest*" and that the words "*William and Jane Forrest*" appeared below the two signatures, but she did not prepare the letter - it was prepared by Mr Gibb. She went to Mr Gibb's office and she was given this document to read through. She got very upset and said to Mr Gibb's secretary that this was wrong, but the secretary would not phone Mr Gibb. She was in a panic and very distressed, and so she signed the letter. Mrs Forrest then stated that the secretary did in fact call Mr Gibb as she was so upset, but he would not speak to her on the phone, and the secretary told her that Mr Gibb had said that she should sign the document, it would all be okay. She eventually signed it.
- [55] She had instructed Peter Imrie to deliver a building contract to the pursuers for them to check and sign, and the employers were to be KWF. Originally she and her husband had instructed Mr Gibb as individuals, but then she sent an email to Mr Gibb giving the details of KWF and telling him that both projects should run in KWF's name. This was sent to John Thomson. Gibb Architects were the architects on the project until she terminated their employment by the letter dated 20 April 2007. She stated that by that point she was suffering from a mental illness, and her husband and father had become more involved in the project. The withholding notices were issued in respect of certificates issued by Mr Gibb without her consent. She does not live at 17 Fairyknowe Gardens, which still has numerous defects and is not habitable. As far as she was concerned, the pursuers' contract was with KWF. When asked by the Court when KWF decided to contract with the pursuers, she stated that this was decided between her and her husband after the savings exercise meeting in about September or October 2005.
- [56] In cross-examination Mrs Forrest was pressed as to where she resided at various times. She stated that in about August 2007 she thought that she was with her sister in 8 Lavender Court. In September and October 2007 she was an in-patient at a private clinic. Although her medical records gave her address as 17 Fairyknowe Gardens in August 2007, her doctor knew that she was not living there. She was asked why her husband gave his address in a petition to this court as 17 Fairyknowe Gardens in September 2007, and she answered that she presumed that he might be using it as a correspondence address - he was not living there. It was put to her that in October 2007 sheriff officers stated that 17 Fairyknowe Gardens was a forwarding address and that 998 Great Western Road had not been used for a number of years: she reiterated that at that time she was an in-patient in a clinic, and she maintained that 998 Great Western Road was lived in. When sheriff officers tried to serve a summons on her there on 13 November 2007 and said that the house was unoccupied, this was incorrect - she was living there then. It was put to her that her neighbours reported that they were unaware that anyone was living there, and she observed that she had no neighbours there. It was put to her that in 2007 service was effected on her at 17 Fairyknowe Gardens and that neighbours said that she was in residence there, and she stated that this was incorrect - she went back and forward to this address for security purposes, and to meet with her professional advisors and to give the illusion that the house was occupied, for security purposes. She had the

occasional use of a Bentley motor car, but it was not hers. A black Range Rover is registered in her name but her husband drives it. She understood quite well the importance of her status and residence for these proceedings.

- [57] Mrs Forrest was clear that before the second tender procedure began, it had been decided that this project would be a commercial venture which would result in the sale of the property rather than its occupation by the defenders for their personal use. At some stage between 5 September and 5 October 2005 she told Gordon Gibb that the client would be KWF rather than herself and her husband. Peter Imrie was issued with the same instructions. She could not explain why Peter Imrie put the project out to tender for the second time in the name of the defenders - this was probably just a mistake. She could not remember what evidence she had given at the adjudication, because at that time she was suffering from mental illness and stress, and was receiving counselling and medication. She was still suffering from depression at the time of the preliminary proof, but was receiving treatment for this. She had difficulty recalling the details of her life at the time of and before the adjudication.
- [58] With regard to her earlier evidence as to the number of meetings in November 2005, Mrs Forrest was now of the view that there was only one such meeting. She did not recall Gordon Gibb attending that meeting. Peter Imrie did not attend the meeting either. She could not be sure when the meeting on 30 November 2005 took place, but it might have been in the morning.
- [59] She saw the pursuers' tender of 2 November 2005 headed "*For Mr and Mrs Forrest*", but she disregarded the letter as it did not have the correct figure on it. She was sure that the contract had come down to £513,000. However, when pressed on this she admitted that she was confused and that she was not involved in discussions to secure the saving of £8,000. She had discussions with John Thomson who suggested that the pursuers should be questioned why their plumbing costs were so high.
- [60] She had no difficulty with Gibb Architects and others referring to the clients as Mr and Mrs Forrest - she trusted Mr Gibb and did not perceive a problem. She asked the bank to provide a letter of assurance regarding KWF shortly after the interview meeting on 30 November 2005, and they provided this on 9 January 2006; she did not think there was any urgency for the letter because the building trade closed down for a lengthy period over the Christmas holidays. At the pre-start meeting on 10 January 2006 she gave this letter to Mike Burrows and he said that he accepted it from her - as far as she was concerned, accepting the bank letter which he had requested constituted a contract between KWF and the pursuers. Mike Burrows did not say to her that he would have to speak to his fellow directors before agreeing to this. She gave him no other information about KWF such as what assets the company had, who the directors were and whether there were any charges over the company's assets.
- [61] Mrs Forrest accepted that the minutes of the pre-start meeting, and all site meetings, showed her and her husband as the clients, but at that time she did not understand the consequences; she had no great understanding of contract law. She did not know if she ever raised this matter with anybody. She never challenged her designation as employer in the architect's instructions, because her main concern was what was being instructed. She knew that she was not in a financial position to carry out this project herself.
- [62] With regard to the notice about deduction of liquidate and ascertained damages, she remembered having two meetings to discuss these notices with Gordon Gibb, on 19 and 21 December 2006. She was almost forced to sign the letter of 19 December 2006, when Gordon Gibb was not there. This had followed on a telephone conversation in which Mr Gibb told her that the pursuers were leaving the site. She and her husband attended a meeting with Peter Imrie and Gordon Gibb to discuss the situation and Mr Gibb was going to prepare this letter and she was asked to return and sign it. When she did so she knew that there was something fundamentally wrong with the figures. There were two meetings, one before and one after this letter. It was not correct that Mr Gibb got out of his sick bed to see her - she signed this letter in the presence of Mr Gibb's secretary, Mr William McDonald and her husband. Eventually Mr Gibb telephoned her to say that his secretary had made a mistake and that he was going to revoke Certificate No 10.
- [63] Mrs Forrest was asked whether the letter dated 20 April 2007 addressed to Mr Gordon Gibb and signed by her with an address starting "*KWF Homes Ltd, Flat 2/4, 169 Hamilton Road*" was the first letter that she had ever sent to Mr Gibb from KWF, and she disagreed with this and thought that there might have been others. He received plenty of cheques from KWF and she thought that he had other letters from KWF. She was asked when she emailed Gordon Gibb or John Thomson to tell them that KWF should be the client on both the Kilmarnock and Fairknowe Gardens projects and she replied that she would need to look at the documents. However, she then stated that she had no backup and did not have a copy of the email.
- [64] Mrs Forrest was asked about the letter dated 10 April 2007 signed by her and addressed to R J Burrows of the pursuers, on KWF headed notepaper, and it was pointed out to her that Mr Burrows denied receiving this letter or seeing it at all until the adjudication; she replied that she thought that it was sent to them, because the meeting happened and Mike and Ronnie Burrows were quite happy for Gordon Gibb to be dismissed. With regard to the letters dated 20 and 25 April 2007, she said that she was quite seriously ill at the time, and although she signed them, they were hand delivered by her husband or her father. She did this because the only other director of KWF was her husband, and he did not have the in-depth knowledge of this contract that she had.
- [65] Mrs Forrest was asked why the two letters dated 20 April 2007 had a different set up and address, that addressed to Mr Ronnie Burrows bearing a printed heading "*KWF Homes Limited, 11 St John's Boulevard, Uddingston*", and that addressed to Mr Gordon Gibb bearing a typed heading "*KWF Homes Limited, Flat 2/4, 169 Hamilton Road, Mount Vernon*". She replied that she completed the letter to Mr Gibb herself, and this was the address at which she resided.

The other letter addressed to Mr Burrows had been prepared by her father and her husband and was only signed by her. She was sure that the letter of 30 April 2007 was sent to Gordon Gibb (although she was not sure whether this was sent through the post or hand delivered). She was shown the two letters from KWF to the pursuers both dated 5 May 2007, and she thought that the signature on each of these letters was that of her husband. She could not comment on the pursuers' position that they received neither of them.

- [66] (iv) **Mr William Forrest**, the second defender, was aged 57 and lived at 28 Aberuthven Drive, Glasgow. He was not working at the time of the preliminary proof. When he and his wife were first involved in the project at Fairyknowe Gardens in 2001 the client was really his wife to start with - him and his wife at first. After receipt of the first set of tenders which were much more expensive than expected, his wife decided that this had to be a commercial venture which would be carried on through KWF. It was made clear for the second tendering process that the project was to be done through KWF (although he did not remember in whose name the invitation to tender ran). He interviewed the tendering contractors, both Forbes and Whiteford and the pursuers. He believed that Mike Burrows and someone else from the pursuers was at that interview meeting, but he could not remember if Gordon Gibb or John Thomson was there. Towards the end of the meeting he thought that his wife mentioned KWF, to see if the pursuers had any problem about that; Mike Burrows said that he would prefer it to be a company anyway, but he wanted a letter from the bank confirming the company's financial ability to proceed.
- [67] Mr Forrest said that he really had no day to day involvement in the project - his wife was the main worker and he was more of a househusband. If his wife went to a meeting and he had nothing else to do, he would go along as well.
- [68] One or two weeks after the interview meeting a pre-start meeting was held at which Mrs Forrest handed over the bank letter regarding KWF. Mike Burrows opened this and said "that seems fine". He was not surprised to get this. Mr Forrest was shown the minutes of the pre-start meeting on 10 January 2006 and he said that he may well have been there, but he did not study the minutes or take any notice of them. After the tenders came in, he did not consider himself to be contracting with the pursuers as an individual. All the way through the contract he had a hands-off approach - he had no knowledge of the building, and his wife was driving the works and knew what she wanted. He attended most of the meetings, but he was listening rather than giving instructions.
- [69] He remembered the two letters dated 5 May 2007 addressed to the pursuers on KWF notepaper. His wife's sister typed these and he signed them and hand-delivered them to the pursuers on the dates that they were typed. He was present at the meeting on 4 April 2007 to which reference was made in the letter dated 10 April 2007. The others present at the meeting were Mike Burrows, Ronnie Burrows and Mr Hives. This letter was probably sent, by himself or his wife. With regard to the letters of 20, 25 and 30 April 2004, these were certainly sent to the pursuers and it was possible as well that they might have been hand-delivered. He hand-delivered some of them himself but he could not remember which ones. They were both sent and hand-delivered to make sure that they got there; his father-in-law, Mr Hives, delivered some as well. He travelled from Uddingston to Lenzie to deliver these letters. Mr Forrest was shown the letter dated 19 December 2006 and remembered seeing this. He did not find anything unusual about the letter being headed "Mr and Mrs William and Jane Forrest" with no reference to KWF; he stated that he was not very contractually minded, so he didn't think anything of it.
- [70] In cross-examination Mr Forrest confirmed that he received service of the present proceedings at 28 Aberuthven Drive, Glasgow. He lived there for about one month. Before that he had lived at 20 Battlesburn Drive. It was put to him that in September 2007 he caused a petition to be lodged in the Court of Session in which his residence was stated to be 17 Fairyknowe Gardens, Bothwell; his response was "*No. I stayed in a caravan at 17 Fairyknowe Gardens, Bothwell from time to time. It was not a permanent address as such - it was a correspondence address since 2001 although I had not resided at the property.*" He did not remember receiving service of the summons on 13 November 2007, and when it was put to him that it was served on him personally on that date at 17 Fairyknowe Gardens he replied that it was news to him. It was suggested to him that when the sheriff officers first spoke to him he claimed to be the gardener and then accepted service, but he did not remember this. At the date of the proof he did not own a car, although he occasionally drove his mother's Renault Laguna. He had never driven a Bentley, but he had driven a black Range Rover which was not his. His wife had driven a black Range Rover which he had also driven. The neighbours might be under the impression that he lived at 17 Fairyknowe Gardens but they would be wrong on this.
- [71] Mr Forrest stated that the decision to change from the contract being in the names of the defenders to being in the name of KWF was taken sometime between 5 September and 4 October 2005. He was asked why the second invitation to tender was in the name of Mr and Mrs Forrest, and he replied that they did not attach any importance to this. He was aware of the duties of company directors, but he claimed that he did not understand the obligation to separate clearly the activities of the company and of the directors/shareholders of the company.
- [72] He was asked when the Airdrie Savings Bank were requested to provide a letter of assurance regarding KWF, and he replied that this was late 2005 or early 2006; he could not explain why this was not provided until 9 January 2006. At the pre-start meeting, there was an informal discussion between his wife and Mike Burrows when the letter from the bank was handed over and Mr Burrows said "thanks very much"; Mr Forrest believed that Mike Burrows opened it and said that it seemed fine. Mr Burrows did not say that he would have to discuss the matter with his fellow directors - as far as Mr Forrest was concerned, there was no problem and they were "*all singing from the same hymn sheet*". Mr Forrest accepted that he probably could have attended all of the site

meetings. He thought nothing about his designation as client on the minutes of these meetings. Again, he thought nothing of his description as employer in the architect's instructions. He left this to Jane - she was doing this on his behalf as well.

- [73] With regard to the letter dated 19 December 2006 regarding liquidate and ascertained damages, he could not remember whether he was present at this meeting or not - he may well have been, but his wife and her father were in charge. However, he did sign the letter. With regard to the letter dated 20 April 2007 to Gordon Gibb, he could not remember any other letters sent by KWF to Gordon Gibb. Gordon Gibb may have still been appointed by him and his wife, but that was different from the building contract. He did not know for sure whether he and his wife were always Gordon Gibb's clients. Mr Hives became involved in about December 2006, but Mr Forrest denied that Mr Hives instructed more and more architects' instructions and said that he had no intention of paying the pursuers. He was sure that the letters addressed to the pursuers in April 2007 were sent to them and delivered to them, but he was unable to explain the difference between the letterheads of the two letters dated 20 April 2007 (one of which came from Flat 2/4, 169 Hamilton Road, Mount Vernon and the other from 11 St John's Boulevard, Uddingston) - he did not have any involvement in typing or administration nor did he have a hand in dismissing Gordon Gibb. He maintained that he delivered the two letters dated 5 May 2007 regarding withholding notices by hand himself to the pursuers. He could not comment on the suggestion that the various complaints attached to one of those letters had not arisen by 5 May 2007; he thought that the list of defects may have been compiled by Bluestone, but he could not comment and was not an expert. He could not explain Bluestone's list in the letter dated 21 May 2007, which he took at face value.

#### Submissions for the parties

- [74] Having set out at considerable length the evidence at the preliminary proof, I can deal with parties' submissions more briefly, as written submissions were helpfully lodged on behalf of each of the parties, and the submissions in court followed these written submissions very closely. The written submissions are in the court process, and I refer to these for their whole terms. I summarise briefly these submissions for present purposes.

#### Submissions for the pursuers

- [75] Mr Smith for the pursuers moved for decree in terms of the first and second conclusions, or in the event that the Court was against him on any point, for the case to be put out By Order to consider further procedure. (Ultimately having heard submissions for the defenders, he agreed with Mr Malone's position that the case should be put out By Order in any event). He submitted that the credibility and reliability of the various witnesses was central to the main issue of the identity of the parties to the contract. He submitted that the witnesses for the pursuers were both credible and reliable, and that their evidence was preferable to that given by the defenders' witnesses, who were neither credible nor reliable. The question as to whether the adjudicator's decision was *ultra vires* or not depended largely on whether there was a contract between the pursuers and the defenders. He invited me to find that there was such a contract, and that the adjudicator therefore had jurisdiction. With regard to the defenders' argument in paragraph 1.11 of their Note of Arguments (which was to the effect that if a contract was formed between KWF and the pursuers at or before the pre-start meeting on 10 January 2006, subsequent contractual documentation falls to be construed as relating to that contract), counsel submitted that the factual basis for this hypothesis was absent. In any event, the case of *John Stirling v Westminster Properties Scotland Ltd* [2007] BLR 537 was not authority for the defenders' proposition.
- [76] With regard to the additional grounds which the defenders relied on in order to have the adjudicator's decision set aside *ope exceptionis* (as narrated in paragraph A2 of the pursuers' Note of Issues and quoted at paragraph [3] above), counsel relied on the observations of the Lord Justice Clerk in *Diamond v PJW Enterprises Ltd* 2004 SC 430 to the effect that the adjudicator should be assumed to have considered the relevant information submitted to her unless her decision and reasons suggest otherwise. Some of the defenders' complaints about the adjudicator's decision come close to challenges on the basis of *intra vires* errors of law, which challenges are not admissible.
- [77] With regard to the defenders' attack on the adjudicator's decision as being contrary to the rules of natural justice, counsel observed that adjudication was a form of rough justice, intended to provide a speedy but provisional resolution of disputes. He pointed out that the adjudicator was required to reach her decision with 28 days (unless parties agreed to an extension) and that the adjudicator had power to set her own procedure and at her absolute discretion might take the initiative in ascertaining the facts and the law. The defenders' averments did not even amount to a relevant case that the adjudicator had breached any of the rules of impartiality binding upon her. The defenders' position amounted to no more than an assertion that it would have been reasonable for the adjudicator to conduct a conference call with Mr Imrie. There was no suggestion that the adjudicator acted unreasonably (in the *Wednesbury* sense) by adopting the procedure which she adopted. In any event, the adjudicator acted both fairly and reasonably in the circumstances and there was no substance to this complaint.
- [78] With regard to the question of retention and set-off (which was contained in paragraph B3 of the pursuers' Note of Issues and is quoted at paragraph [3] above), the adjudicator found the defenders liable to pay the pursuers for sums certified as due by the architects in their interim certificates Nos 9, 11 and 12. The only Withholding Notice that might be relevant in this regard was the pretended letter dated 5 May 2007. Counsel submitted that even if this letter was sent, it was not a valid Notice of Withholding, as it was sent by KWF who were not the employer. In any event, there was no satisfactory evidence that the letter of withholding dated 5 May 2007 was ever sent or delivered to the pursuers. Even if the adjudicator made any error in her treatment of this issue, such error was *intra vires* and therefore not subject to challenge in these proceedings.



- [79] With regard to the defenders' subsidiary argument that in any event the right of retention or set-off is not excluded by the failure to serve a valid Withholding Notice timeously, counsel submitted that this was simply wrong. He referred me to clause 30.1.1.5 of the Contract which provided that where the employer did not give any notice pursuant to either of the immediately preceding sub-clauses, the employer shall pay the contractor the sum certified within 14 days from the date of issue of an architects' interim certificate. He referred me to **Robert Morgan Building Services v David Jervis** [2004] BLR 18.
- [80] Counsel submitted that no valid reason had been given for setting aside the adjudicator's decision, which was properly within her jurisdiction and which was not *ultra vires*. It was accordingly binding on the parties until the dispute or difference is finally determined. The defenders had given no valid reason for continuing to withhold sums due in terms of the decision. The pursuers were accordingly entitled to decree in terms of the first and second conclusions of the summons.

**Submissions for the defenders**

- [81] Mr Malone for the defenders submitted that on the evidence there was a contract between KWF and the pursuers, created by Mr and Mrs Forrest as directors of KWF asking the pursuers to contract with KWF, and the pursuers either expressly agreeing to do so or in any event starting on site following the request to contract with KWF. Alternatively, no contract had been formed, because the identity of the parties was an essential term of the contract. It was clear from the evidence that the defenders did not intend to contract in their personal capacity, and their actions were inconsistent with an intention to do so. In any event, there was no contract between the pursuers and the defenders. Without such a contract, the reference to adjudication was ineffective, and the adjudicator had no jurisdiction.
- [82] In the event of the Court rejecting the above submissions and finding that there was a contract between the pursuers and the defenders, Mr Malone made submissions regarding natural justice and that an adjudicator is in reality a type of arbiter and accordingly the courts could review misconduct on the part of the arbiter at common law.
- [83] With regard to the evidence, Mr Malone invited me to prefer the evidence of the witnesses for the defenders to that of the witnesses for the pursuers. He submitted that the defenders' evidence was consistent with the verifiable facts. The pursuers were asked to contract with KWF and were provided with a bank letter to that end. They never indicated that they would not contract with KWF (and indeed on the evidence for the defenders they indicated that they were quite happy to do so), and they subsequently commenced the works. Thereafter all payments were made by KWF, which although not conclusive is consistent with the defenders' position that the pursuers' contract was with KWF.
- [84] Although he conceded that Mr Imrie's evidence about the handing over of a contract was not completely clear regarding date, it was clear that a completed contract was handed over and was in the name of KWF. At no time did the pursuers state that they did not wish to contract with KWF; when they commenced work on site they knew that the defenders wished the contract to be with KWF. He submitted that the essence of performance in a building contract was that the contractor was to build and the client was to pay; in this case payment was made by KWF. The adjudicator was wrong in finding that there was no contract with KWF. In any event, even if there as no contract with KWF, there was no consensus and therefore no contract.
- [85] Under reference to **John Stirling v Westminster Properties Scotland Ltd** it was submitted that if a contract was formed between KWF and the pursuers at or before the pre-start meeting, subsequent contractual documentation falls to be construed as relating to that contract. In this case, there was an element of confusion all around; the parties were not experts in contract law, and the paperwork referring to the defenders as individuals should be construed as suggested in *Stirling*. Accordingly, properly analysed the evidence showed that there was a contract between the pursuers and KWF; alternatively, the evidence showed that there was no contract at all.
- [86] If the Court was against him on the arguments narrated above, and found that there was a contract between the pursuers and the defenders, the adjudication was not a statutory adjudication, but purely contractual. The contract must be in writing, as the adjudicator should not require to decide what the terms of the contract were. There was no contract in writing in this case, and accordingly the adjudicator had no jurisdiction. Moreover, as this is not a statutory adjudication, it can only be regarded as a form of arbitration. I was referred to **Domsalla v Dyason** [2007] EWHC 1174, **Costain Ltd v Strathclyde Builders Ltd** 2004 SLT 102 in which the view was expressed (at paragraph [7]) that an adjudicator must be regarded as a type of arbiter, and that the well-established rules that govern the judicial control of arbiters apply to adjudicators, and to the contrary view expressed by the Second Division in **Diamond** (*supra*) at paragraphs [19] and [20]. However, Mr Malone submitted that **Diamond** was concerned with a statutory adjudication, and not a contractual adjudication as in this case. He submitted that a contractual adjudication is merely a form of arbitration, binding on a temporary basis only, but otherwise having all the hallmarks of an arbitration under Scots Law. If it is properly viewed as a form of arbitration, the adjudicator's decision may be reviewed on grounds of misconduct, and if the adjudicator made an error of law so serious as to undermine the whole process this would constitute misconduct. Moreover, it is open to the defenders to set off sums awarded by the adjudicator unless the contract specifically excludes this right. Clear words in the contract would be necessary to effect such an exclusion in a situation where the 1996 Act does not apply. Moreover, although the withholding notices were in the name of KWF, it should be inferred that KWF were acting as *ad hoc* agents of the defenders.

- [87] With regard to the question of natural justice, it was submitted that Mr Imrie, who had provided an affidavit for the purposes of the adjudication, was on holiday during the adjudication and on his return he advised that he would be willing to participate in a conference call. He was available for a conference call on 21 September, and the adjudicator's decision was not due until 26 September. It would have been reasonable for the adjudicator to conduct a conference call with Mr Imrie. Her failure to do so created a possibility of a breach of natural justice in that the defenders were denied the opportunity to put the evidence of the pursuers to Mr Imrie. The possibility of prejudice to the defenders as a result of this procedure was sufficient to amount to a breach of natural justice.
- [88] Finally, it was submitted that the adjudicator failed to apply her mind to the possibility that there was no contract at all - it appeared that she proceeded on the basis that if there was no contract with KWF, there must have been a contract with the defenders, but this was a *non sequitur*. This was an *intra vires* error of law, and as such it was conceded that it could not have been argued if the adjudication was a statutory adjudication; however, because it was a contractual adjudication and therefore a species of arbitration the Court was entitled to have regard to this.
- [89] Mr Malone moved me to sustain the pleas-in-law for the defenders. With regard to further procedure, if I held that the pursuers' contract was with KWF, the adjudicator had no jurisdiction and decree of *absolutor* should be pronounced. The same would apply if I held that there was no contract at all. Similarly, if I held that there was a contract between the pursuers and the defenders but that the adjudicator's decision was vitiated by a breach of natural justice and/or misconduct, *absolutor* should be granted. If I held that there was a contract between the parties and there was no breach of natural justice and no misconduct, Mr Malone sought to have the case put out By Order in order to seek leave to lodge a counterclaim.

#### Discussion

- [90] Understandably, both parties laid great importance on the question of credibility and reliability of the various witnesses, and I deal with this matter first.
- [91] I found the evidence of the four witnesses led on behalf of the pursuers to be generally credible and reliable. Gordon Gibb in particular gave his evidence in a careful and professional manner, without apparent exaggeration, and I found him to be a most impressive witness. His evidence was precise and detailed, and was consistent with the documentary evidence and also with much of the other evidence led on behalf of the pursuers. It was he who dealt primarily with the clients - John Thomson was employed by his practice for about nine months and reported to Mr Gibb, but Mr Gibb had much greater professional experience and dealt mainly with Mr and Mrs Forrest. His own contract was with them, and his view that the defenders were the employers of the pursuers in the building contract was supported by much of the documentation, including both the first and second invitations to tender, the Bills of Quantities, site meeting minutes, architects' instructions and certificates and correspondence. His recollection of the meeting of 30 November 2005 appeared clear and was consistent with that of Michael Burrows and Ronnie Burrows, and with the pursuers' letter dated 2 December offering to reduce the price. He had a particular expertise and interest in contractual terms, and Mr Thomson accepted that Mr Gibb was much more expert in these matters than he was himself.
- [92] Mr Ronnie Burrows and Mr Ken Rodger each gave their evidence in a clear, honest and open manner and I found them to be entirely truthful. Their evidence was internally consistent and also consistent with that of the other witnesses for the pursuers. They spoke to the system of logging incoming mail and deliveries, and their evidence was consistent with the documentary productions. Mr Rodger was clear that the pursuers did not offer to reduce their price by £8,000 before or at the meeting of 30 November 2005 and that this offer was first made in their letter dated 2 December 2005. He was also clear that there was no mention of KWF at the meeting of 30 November 2005. I accepted their evidence in these respects.
- [93] Mr Michael Burrows was also clear and open in his evidence and had a detailed recollection of events. He explained why he did not respond to the letter from Peter Imrie dated 20 December 2005 accepting the tender on behalf of KWF. Mr Burrows accepted that in hindsight it might have been better to have replied expressly declining to contract with KWF. He explained his reluctance to deal with an unknown company, and his evidence in this regard was consistent with that of Gordon Gibb and Ronnie Burrows, and is readily understandable on the basis of commercial logic. Again, his evidence was substantially supported by the documentary productions; he too spoke to the pursuers' system for logging incoming mail and deliveries, and to his not having had sight before the adjudication of the various documents alleged to have been sent or delivered to the pursuers, which were excluded from agreement in the Joint Minute.
- [94] By contrast, I did not find the evidence for the defenders to be satisfactory, and none of the four witnesses led for the defenders was in my view entirely credible or reliable. John Thomson maintained that he knew some time before the meeting on 30 November 2005 that the employers were to be KWF. This is inconsistent with the second invitation to tender; it is inconsistent with the letter from the pursuers dated 2 December 2005 relating to a new house "for Mr and Mrs Forrest"; it is inconsistent with the draft letter No 6/19 of process prepared by Mr Thomson, and also with his email dated 16 December 2005 addressed to Peter Imrie. It is inconsistent with the letter dated 20 December 2005 from Mr Thomson to Forbes and Whiteford; it is inconsistent with Mr Thomson's minute of the pre-start meeting on 10 January 2006 and with his minute of the first site meeting and the first (and subsequent) architects' instructions. It is also inconsistent with the F10 form which he prepared - a matter on which he prevaricated in evidence, contradicted himself and was ultimately unable to provide satisfactory evidence. It is also inconsistent with the 17 letters which he wrote to neighbours dated 13 January 2006. Even allowing for the

fact that Mr Thomson was much less experienced in matters of contract than Mr Gibb, I am unable to accept that he would have written so many documents in which the clients or employers are described as the defenders, if he knew that the clients and employers were truly KWF. He stated that he drafted the letter dated 20 December 2005 accepting the pursuers' tender on behalf of KWF, but he could not explain where he obtained the details contained in that letter, and his evidence was flatly contradicted by Peter Imrie. His evidence was confused and contradictory, and I did not feel able to place any reliance on it.

- [95] Peter Imrie was an equally unsatisfactory witness. He was unable to provide any satisfactory explanation as to how he came to prepare the second invitation to tender, and accompanying Bill of Quantities, which was sent out on 4 October 2005 in the name of the defenders if KWF were indeed the clients. His evidence with regard to the meeting on 30 November 2005 was (as Mr Malone conceded in his submissions) completely at variance with the evidence of all others who attended the meeting - he maintained that Gordon Gibb was not present at that meeting, he maintained that the meeting happened in the evening, and he maintained that the offer of a reduction of £8,000 in the revised tender price had already been made. This conflicted with the evidence of Mr Gibb, Mr Ronnie Burrows, Mr John Thomson and the first defender. His evidence about the hand-written note (No 7/5 of process) was very confused, and I was not confident that this note related at all to the meeting on 30 November 2005. His evidence about handing over contract documents to the pursuers was internally inconsistent, as was his evidence about what was said or done at site meetings. His claim to have handed over completed contract documents to the pursuers on more than one occasion with KWF named as the employers does not sit easily with the entries in the minutes of site meetings, which were sent to him and which he did not challenge. Ultimately I felt unable to place any reliance on Mr Imrie's evidence.
- [96] The first defender gave her evidence in an evasive and reluctant manner. In several passages of her evidence she claimed to recollect an incident, but would then change this evidence or retreat from it and claim that she could not remember what had happened. She stated that she was suffering from a mental illness throughout much of the relevant period and that she could not remember much of what happened at or before the adjudication. She could explain why she did not correct Gordon Gibb's remarks in his email dated 22 June 2006 about this being "*a contract for the erection of an individual dwelling for the sole use of the owner*". She was very evasive in answering questions about when and how she told Gordon Gibb that KWF were to be the clients and why the second invitation to tender was not in the name of KWF. When cross-examined about her addresses and places of residence, she was again evasive and unconvincing.
- [97] Mr Forrest was not an impressive witness either. He claimed that he had no day to day involvement in this project and was more of a "house husband", that he had no knowledge of the building and adopted a "hands-off" approach. However, ultimately he accepted that he had attended the meeting on 30 November 2005, the pre-start meeting on 10 January 2006 and every site meeting, although he had not paid much attention either to what was said at these meetings or to the contents of minutes subsequently sent to him. He too was evasive and unimpressive in his evidence about where he lived and about service of these proceedings on him. He could not explain why the second invitation to tender was not in the name of KWF, and he was unable to explain the differences in the various letterheads of letters bearing to come from KWF. He could not remember which letters he hand-delivered and which were sent. Throughout his evidence he appeared to seek to distance himself from involvement in the whole matter, and to hide from awkward questions by resorting to a poor memory or lack of direct involvement.
- [98] Where there was a conflict of evidence between the evidence for the pursuers and that for the defenders, I had little hesitation for the reasons given above in preferring the evidence on behalf of the pursuers. I am satisfied that at the meeting on 30 November 2005, which followed upon the pursuers' revised tender to perform works for the defenders, the question of whether KWF should be the employers, instead of the defenders themselves, was not raised. Prior to that meeting, there had been no request by the defenders to the pursuers to reduce their price further; at the meeting this was discussed, and this resulted in the pursuers' letter dated 2 December 2005 offering to reduce the price by £8,000. This letter referred to the works being for the defenders, as did Mr Thomson's email dated 16 December and his fax dated 19 December. The first mention of KWF was in Peter Imrie's letter dated 20 December 2005, which was never acknowledged by the pursuers. Towards the end of the pre-start meeting on 10 January 2006 the first defender handed to Mike Burrows the letter from Airdrie Savings Bank and asked him if the pursuers would agree to contract with KWF rather than the defenders. Mr Burrows did not agree to do so, but said that this would need to be considered by the pursuers and that he did not have the power to accept this change himself. The pursuers never accepted that KWF would be the employers for this project. Thereafter they received the F10 form indicating that the defenders were the clients, and that there was no planning supervisor to be appointed. At this time there was again reference to the pursuers' priced bill which was returned to them for their records, which document referred to the defenders as the clients. The defenders allowed the pursuers to commence works on the site (which was owned by the first defender) on about 23 February 2006. Minutes of all site meetings referred to the defenders as clients; these minutes were circulated to the defenders, who took no issue with this designation. All architects' instructions referred to the defenders as employer, as did all architects' certificates. The defenders never questioned these. In March 2006 the first defender asked Mr Gibb if it would be good to change the identity of the employers from the defenders to KWF, and Mr Gibb advised against this.
- [99] The notice regarding deduction of liquidate and ascertained damages dated 19 December 2006 was issued in the defenders' own names, Mr Gibb having dictated the content and having explained to the defenders the

significance of the letter coming from them as individuals. The notice referred to clause 30.1.1.4 in the Standard Terms of Contract referred to in the pursuers' tender addressed to the defenders.

- [100] I am satisfied on the evidence that in the course of a heated discussion between Mr Hives and Mr Imrie towards the end of the contract Mr Hives was abusive to Mr Imrie and Mr Imrie replied that Mr Hives was "not even the client - William and Jane Forrest are the clients." Mr Gibb's appointment as architect was on behalf of the defenders as individuals.
- [101] Despite the evidence of Mr Imrie, I am not satisfied that any completed standard form contract identifying KWF as the employers was ever sent, handed over or delivered to the pursuers. I am not satisfied that the two letters dated 5 May 2007 which form part of No 6/3 of process were ever received by the pursuers, nor am I satisfied that the letters dated 10, 20, 25 and 30 April 2007 which form part of No 6/5 of process were ever received by their addressees.
- [102] In light of the above findings, the first question which arises, and which is focussed in paragraph A1 of the pursuers' Note of Issues (quoted at paragraph [3] above) is whether there was a contract between the pursuers and the defenders which entitled the pursuers to refer the parties' dispute to adjudication. There are three possibilities regarding the formation of a contract - (a) there was a contract between the pursuers and KWF, (b) there was no consensus between the parties as to the identity of the contracting parties, and so no contract, and (c) there was a contract between the pursuers and the defenders. In light of the evidence I am entirely satisfied that there was no contract between the pursuers and KWF. The pursuers never offered to carry out works for KWF, nor did they ever agree to KWF becoming the employers in a building contract to which the pursuers were or might become a party. Nothing done by the pursuers could legitimately give rise to the inference that they were prepared to work for KWF. They offered to work for the defenders; they never responded to Mr Imrie's letter dated 20 December 2005; and, as I have found, they never agreed verbally to carry out works for KWF. Nothing in their actings could be construed as amounting to an agreement to work for KWF. This case is therefore quite different on its facts from the case of *John Stirling v Westminster Properties Scotland Ltd*. No doubt there may be cases in which loosely worded correspondence sent after the formation of a contract, for example running in the name of a company rather than in the name of the individual who was the true contracting party, may be construed liberally so that the company is acting as an *ad hoc* agent for the individual contracting party. That is a quite distinct situation from the present. In the present case, there is no evidence pointing to the formation of a contract between the pursuers and KWF. Mr Imrie's letter of 20 December 2005 could not by itself effect such a contract, and the pursuers never signified (by words or actings) their agreement to being a party to such a contract. The fact that payments for works performed under the contract were made from an account in KWF's name is in my view neither here nor there.
- [103] I have given careful consideration to the second possibility, namely that there was no contract. However, in light of the documentary evidence and the view which I have reached as to the credibility and reliability of the various witnesses, on the balance of probabilities I reject this. The defenders put this project out to tender, and the pursuers tendered for the work. The first defender then asked, at the end of the meeting of 10 January 2006, whether the pursuers would be agreeable to contracting with KWF. The pursuers never agreed to this, and the defenders allowed the pursuers to take entry to the site and proceed with the works. I cannot accept that everything that was done in the name of the defenders, whether by Mr Thomson or by Mr Imrie (or, as the defenders would have it, Mr Gibb) was simply a mistake. I cannot imagine that a professional man - even one with relatively short experience, such as Mr Thomson - could make such an important mistake repeatedly in minutes, correspondence by letters, email and fax, and important contract documents such as architects' instructions, nor can I accept that a professional man of Mr Imrie's experience could make such a repeated mistake on such an important matter in documents of obvious significance, such as the Bill of Quantities and invitation to tender sent out on 4 October 2005, or valuation claim forms all of which stated that the defenders were the employers. I cannot accept that the defenders (who had experience of other building contracts and commercial development projects) were so naïve or disinterested that when they received important documents such as minutes of site meetings, architects' instructions, architects' certificates and valuation claim forms in which they as individuals, rather than KWF, were designed as the employers, they never raised this matter with anyone. Looking at the whole of the evidence, I am driven to the conclusion that this is not a case in which there was lack of consensus, but rather that both parties were aware that they were parties to a contract in which the employers were the defenders and the contractors were the pursuers. Moreover, the contract made provision for any dispute between the parties to be referred to adjudication. The defenders' attack on the adjudicator's decision as *ultra vires* for want of jurisdiction accordingly fails.
- [104] Turning to the issues raised in paragraph A2 of the pursuers' Note of Issues, it is correct that there is an averment in the defences which has never been deleted to the effect that "the adjudicator has misdirected herself in failing to take into account the evidence of Mr Thomson, and the affidavit of Mr Imrie". However, this criticism was not repeated in the defenders' written submissions, nor did Mr Malone develop any argument along these lines before me. No mention was made at all of an alleged failure to take account of the evidence of Mr Thomson. There was discussion about the adjudicator's attitude towards Mr Imrie, but this was in the context of the allegation that she should have held a conference call with him between 21 and 26 September 2007, in relation to the submission of alleged breach of the rules of natural justice. This is a separate matter, with which I deal below. The argument that the adjudicator failed to address the defenders' argument that there was no contract between the parties was the subject of submission, albeit again in the context of the breach of natural justice point

(see paragraph 3.4 of the defenders' written submissions). I am not persuaded that there is any substance in these attacks on the adjudicator's decision. There is nothing in her decision to suggest that she has failed to take account of the possibility that there was no consensus and accordingly no contract. On the contrary, at paragraph 6.29 of her decision she stated that she had considered both parties' positions, together with their respective legal arguments regarding the contracting parties. She reached the conclusion that the parties to the contract were the pursuers and the defenders. Bearing in mind the observations of the Second Division in *Diamond v P J W Enterprises Ltd* (particularly per the Lord Justice Clerk at paragraph [28]), I do not consider that there is any force in these criticisms of the adjudicator's decision.

- [105] In any event, this attack by the defenders on the adjudicator's decision amounts to little more than a complaint that the adjudicator was guilty of an *intra vires* error of law. I do not consider that it is open to the defenders to seek to reduce the adjudicator's decision on this basis. Mr Malone sought to distinguish a statutory adjudication (ie one which falls within the provisions of the Housing Grants, Construction and Regeneration Act 1996) from a purely contractual adjudication. He submitted that this fell into the latter category, and that purely contractual adjudications must be regarded as a species of arbitration and accordingly the well-established principles on which the Court may interfere with an arbiter's decision apply equally to a case such as this. I consider that this is an artificial and misconceived distinction. It is true that the Second Division in *Diamond* were considering an adjudication that fell within the provisions of section 104 of the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (Scotland) Regulations 1998. However, I see no justification for a distinction between the way in which the Court will approach the decision of an adjudicator who has dealt with a dispute under the Act and the Scheme, and the way in which the Court will deal with an adjudicator who has dealt with a dispute under this contract. The observations of the Lord Justice Clerk in *Diamond* at paragraph [20] appear to be general and not confined to adjudications within the context of the Act and the Scheme. The adjudication in the present case is a form of provisional resolution only; it does not oust the jurisdiction of the courts or of an arbiter; and its primary purpose is to regulate the dispute *ad interim*, pending a definitive resolution of it by litigation, arbitration or agreement. Particularly when read with Lord Macfadyen's Opinion in *Diamond*, it seems to me clear that the position of an adjudicator is quite distinct from that of an arbiter. I see no reason, in principle or in practice, why the Court faced with the decision of an adjudicator appointed under the relevant clauses of this standard form of contract should treat this as an arbitration rather than an adjudication, nor why it should treat the decision any differently from one made in the context of section 104 of the 1996 Act and the 1998 Scheme.
- [106] The arguments discussed in the immediately foregoing paragraphs also have relevance to the issue raised in Statement B3 of the pursuers' Note of Issues, quoted at paragraph [3] above, which relates to retention and set-off. Several points arise in relation to this. First, the adjudicator found that the letter dated 5 May 2007 was not a valid Withholding Notice in terms of clause 30.1.1.4 of the contract, because it was in the name of KWF and accordingly not from the employer, whom she had found to be the defenders. I agree with her reasoning on this point. In any event, even if she was wrong on this point, any error was *intra vires* and accordingly not subject to challenge in these proceedings. Moreover, as I have indicated above, I was not satisfied on the evidence that the letter dated 5 May 2007 was ever received by the pursuers. (I do not therefore require to deal with the argument advanced at paragraph 2.7.2 of the defenders' written submissions, to the effect that the Withholding Notice should be seen as given by KWF as *ad hoc* agents for the defenders, on the basis of *Stirling v Westminster Properties Scotland Ltd*.) The defenders' argument for retention and set-off based on the Withholding Notice according fails.
- [107] However, the defenders' argument for retention and set-off does not end with the Withholding Notice. They argue that unless the contract specifically excludes the right at common law of retention and set-off then they are entitled to retain and set-off sums due to them against any decision of the adjudicator. They say that their right to retain and set-off at common law was not excluded by the contract. Having regard to the terms of the contract, I do not consider that this argument is well-founded. The scheme for payment of sums certified under architects' certificates is to be found at clause 30.1.1.1 to clause 30.1.1.5 of the contract. This scheme provides that the architect shall issue *interim* certificates from time to time and that the final date for payment of the sum certified will be 14 days from the date of issue. Not later than five days from the issue of the certificate the employer shall issue a notice of the amount proposed to be paid. Not later than five days before the final date for payment the employer may give a Notice of Withholding. Where the employer does not give either of these notices, the employer shall pay the contractor the amount due under the certificate.
- [108] I consider that this scheme within the contract clearly excludes the right to common law retention or set-off: the only means by which an employer may properly refrain from making payment of a sum due under an architect's certificate is by the contractual mechanism contained in this scheme. It would defeat the whole purpose of the contractual scheme if common law retention or set-off was available in any event. It would also defeat the purpose of adjudication to provide a swift but provisional regulation of a dispute *ad interim* if it were open to a party to seek to retain or set-off sums against a decision of an adjudicator. I consider that in the context of the present contract, no such retention or set-off is available to the defenders. I note that this is consistent with the reasoning (albeit in a somewhat different context) in *Rupert Morgan Building Services (LLC) v David Jervis* [2004] BLR 18, and the comments in *Keating on Construction Contracts* (8<sup>th</sup> edition) at 17-056. It follows that the defenders' arguments for retention and set-off, whether based on the Withholding Notice or at common law, fail.

- [109] I turn finally to the defenders' argument based on alleged breach of natural justice, as contained in paragraph 3 of the Note of Argument, No 18 of process and set out above in paragraph [3]. Put shortly, the defenders submit that Mr Imrie's evidence as to who were the parties to the contract was critical; that although he provided an affidavit on this matter, he was on holiday during much of the adjudication procedure; on his return he expressed willingness to participate in a conference call; and that it would have been reasonable for the adjudicator to conduct a conference call with Mr Imrie at some time between his return from holiday on 21 September and the date on which her decision was due, being 26 September.
- [110] It seems to me that the defenders have an evidential difficulty in this regard, standing that part of Mr Imrie's evidence before me which is summarised at paragraph [45]. Mr Imrie was not asked when he was away on holiday, nor was he asked whether he would have been willing to participate in a conference call, nor was he asked if he ever expressed willingness to do so. His position was that he did not know when the adjudication happened, nor could he explain why he did not give evidence at it. The best evidence of Mr Imrie's being willing to participate in a conference call with the adjudicator would have been Mr Imrie's own evidence. The best evidence of Mr Imrie's availability for a conference call on or about 21 September 2007 would have been the evidence of Mr Imrie himself. There was no such evidence.
- [111] In any event, the terms of the contract provided wide powers to the adjudicator in reaching her decision. Clause 41A.6.5 provides (in the masculine) that  
*"in reaching his decision the Adjudicator shall act impartially, set his own procedure and at his absolute discretion may take the initiative in ascertaining the facts and the law as he considers necessary in respect of the referral and his powers shall include the following....requiring from the parties further information than that contained in ..... any written statement provided by the parties; ... giving directions as to the timetable for the Adjudication, any deadlines..."*
- The defenders do not aver, nor did they submit before me, that the adjudicator acted in breach of these powers or outwith her discretion. They do not even aver that in the circumstances of this case, and the email correspondence set out in productions 6/199 to 6/211 of process, no reasonable adjudicator would have failed to conduct a conference call with Mr Imrie. The highest that the defenders' submissions go is to assert that *"given the short timescales within which adjudication is meant to operate, it would have been reasonable for the adjudicator to conduct a conference call with Mr Imrie"*.
- [112] In light of the lack of evidence from Mr Imrie to support this line of attack, and in the absence of any argument that the adjudicator acted outwith the wide powers and discretion conferred on her in terms of the contract, I do not consider that there is any force in the defenders' attack on the adjudicator based on a possibility of a breach of natural justice. The adjudicator was required to give her decision within a short timescale. She had before her the affidavit of Mr Imrie, and also had the benefit of having heard evidence from witnesses for both sides and full legal submissions together with a substantial body of documentary evidence. Even if Mr Imrie was available for a conference call at or around 21 September, and even if he was willing to participate in such a call, I do not consider that the adjudicator can be criticised for proceeding to reach her decision without such a conference call.

#### **Conclusion**

- [113] It follows from the above that I reject all the ably presented submissions made on behalf of the defenders. The adjudicator had jurisdiction in this matter. There is nothing before me to suggest that she acted *ultra vires*. There is nothing to suggest that her decision was contrary to the rules of natural justice. Finally, there are no grounds on which the defenders may seek to retain or set-off sums against the adjudicator's decision. Standing my decision on these matters, I have doubts as to what may be achieved by putting this case out By Order. However, as I understood parties finally to be in agreement that this is what should happen following upon the issuing of this opinion, I consider that it is proper that I should follow this course of action. Unless parties indicate that they are both in agreement that I should proceed to issue an interlocutor, the case will be put out By Order as soon as practicable after the issuing of this Opinion.

Pursuers: S. Smith, MacRoberts

Defenders: Malone, Solicitor Advocate, Bell & Scott