Opinion of Lord Drummon Young. Outer House Court of Session. 20th June 2006.

The background to the action

[1] The pursuers and the defenders are respectively the employer and the contractor under a building contract for the construction of a hotel at Finnieston Quay, Glasgow. The contract was governed by the JCT Standard Form of Building Contract Private Edition with Quantities (1980 Edition), together with the Scottish Supplement and a number of amendments prepared specifically for the purposes of the contract; these are contained in a Schedule of Amendments. Clause 23.3.1 of the conditions applicable to the contract obliges the contractor to complete the works on or before the Completion Date; the Completion Date specified in the contract was 20 August 1999. Clause 24.1 provides that, if the contractor fails to complete the works by the Completion Date, the contract architect is to issue a certificate to that effect. Clause 24.2.1 provides that the contractor is obliged to pay liquidated and ascertained damages for the period between the Completion Date and the date of practical completion. The rate of liquidated and ascertained damages was fixed by the parties' contract at £30,000 per week. The foregoing provisions are, however, subject to the possibility of an extension of time under clause 25 of the conditions. Clause 25 permits the architect to grant an extension of time, and in consequence to fix a new Completion Date in terms of clause 25.3.3, if any one or more of the relevant events specified in clause 25.4 has occurred. The relevant events listed in clause 25.4 cover a wide range of circumstances, but the feature that they have in common is that their occurrence is not the fault of the contractor.

[2] The foregoing provisions are subject to clause 13.8 of the Schedule of Amendments prepared for the purposes of the parties' contract. Clause 13.8 is in the following terms:

"13.8.1 Where, in the opinion of the Contractor, any instruction, or other item which, in the opinion of the Contractor, constitutes an instruction issued by the Architect, will require an adjustment to the Contract Sum and/or delay the Completion Date, the Contractor shall not execute such instruction (subject to Clause 13.8.4) unless he shall have first submitted to the Architect, in writing, within 10 working days (or within such other period as may be agreed between the Contractor and the Architect[)] of receipt of the instruction, details of:

1. *Initial estimate of the adjustment (together with all necessary supporting calculations by reference to the Contract Documents);*
2. *Initial estimate of the additional resources (if any) required and his method statement for compliance;*
3. *Initial estimate of the length of any extension of time to which he considers he is entitled under Clause 25 and the new Completion Date (together with all necessary supporting documentation by reference to the Master Programme);*
4. *Initial estimate of the amount of any direct loss and/or expense to which he may be entitled under Clause 26; and*
5. *any such other information as the Architect may reasonably require.*

"13.8.2 The Contractor and the Architect shall then, within 5 working days of receipt by the Architect of the Contractor's estimates, agree the Contractor's assessments. Following such agreement, the Contractor shall immediately thereafter comply with the instruction and the Architect shall grant an extension of time under Clause 25.3 of the agreed length (if any) and the agreed adjustments (if any) and the agreed adjustments (if any) in relation to clauses 13.8.1.1 and 13.8.1.4 shall be made to the Contract Sum.

"13.8.3 If agreement cannot be reached within 5 working days of receipt by the Architect of the Contractor's estimate on all or any of the matters set out therein; then;

1. *the Architect may nevertheless instruct the Contractor to comply with the instruction; in which case the provisions of Clauses 13.5, 25 and 26 shall apply; or*
2. *the Architect may instruct the Contractor not to comply with the instruction, in which case the contractor shall be reimbursed all reasonable costs associated with the abortive [instruction].*

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

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

[3] On 21 August 1999 the architect issued a certificate of non-completion certifying that the defenders had failed to complete the works by the Completion Date. On 28 March 2000 the architect issued a certificate of practical completion certifying that practical completion of the works was achieved on 24 March 2000. The result of these certificates was that the pursuers were entitled under clause 24 to deduct liquidated and ascertained damages for the 31-week period from 20 August 1999 to 24 March 2000 at a weekly rate of £30,000. The pursuers in fact deducted a total of £660,000, representing liquidated and ascertained damages for 22 weeks. By the time the deductions were made an adjudicator had granted an extension of time of nine weeks, thus reducing the period of delay from 31 weeks to 22 weeks.

[4] The defenders referred certain disputes between the parties to adjudication by notices of adjudication dated 5 November 1999 and 21 July 2000. In the first of these adjudications the adjudicator decided that the defenders were entitled to a nine-week extension of time as a result of variations to the scope of the piling works instructed by an architect's instruction. That was the extension of time reflected in the deduction of liquidated and ascertained damages. In the second adjudication the adjudicator decided that the defenders were entitled to a fourteen-week extension of time in consequence of the timing and effect of a number of architect's instructions. Those decisions of the adjudicator are of course not conclusive, and their effects may be reversed by subsequent court proceedings. The present action has been raised by the pursuers in order to obtain a decision by the court on the matters determined by the adjudicator.

[5] The pursuers contend that the defenders were not entitled to any extension of time beyond the original contractual Completion Date of 20 August 1999. The first conclusion of the summons is for declarator that the Completion Date is 20 August 1999. The second end third conclusions are for payment of the total sum of liquidated and ascertained damages that would have been due by the defenders if no extension of time had been granted and the Completion Date was 20 August 1999. Any entitlement that the pursuers have to those sums obviously follows from whether they are correct in contending that no extension of time should have been granted.

[6] As the contract works proceeded certain further disputes were referred to two further adjudications, started by notices of adjudication dated 10 July 2001 and 11 December 2001. In these two adjudications the adjudicators decided that the defenders were entitled to payment of certain sums by the pursuers. The pursuers now seek to reopen the matters that were in dispute in those adjudications, and the third and fourth conclusions of the summons are for repayment of the sums paid in consequence of the adjudicators' decisions. The present opinion is not, however, concerned with that aspect of the action.

[7] The defenders have lodged a counterclaim in which they raise a number of issues. Only one of these is relevant to the present opinion. This relates to the system of piling used in the foundations of the hotel. The defenders aver that they were originally invited to tender on the basis that the piling works would be a combination of continuous flight auger vertical piles and short raking piles. In the course of discussions following the submission of the defenders' tender, the defenders proposed a value engineering solution whereby only vertical piles would be used. The defenders aver that this was accepted by the pursuers and that the contract was concluded on that basis. The architect then varied the piling works by instructing (in architect's instruction no 5, issued on 18 August 1998) a combination of vertical piles and long raking piles in accordance with certain drawings. The accompanying specification required that, where instability might occur due to inadequate lateral support to the ground or the effect of groundwater, permanent casings should be used on the piles. Difficulties were encountered in installing the vertical piles, and as a result the architect agreed that permanent casings could not be used but failed to instruct an alternative. That left the defenders and their piling subcontractor to devise an alternative. The alternative that was devised was a so-called "hybrid piling solution". The architect confirmed that it had no objection to the use of that solution, but stated that it had no authority to issue an instruction for its use. The defenders proceeded with the hybrid piling solution in the absence of an instruction. They aver that the additional work involved in that solution delayed completion of the works, and that the architect ought to have instructed that solution to enable the defenders to carry out and complete the works in accordance with the parties' contract. Against that background the defenders conclude for declarator that (a) the hybrid piling solution constituted a variation to the contract works, (b) the architect's decision not to issue an instruction requiring the hybrid piling solution as a variation was incorrect, and (c) the defenders are entitled to such an instruction and a consequential extension of time in so far as compliance therewith caused delay in completion of the works. As an alternative, the defenders seek declarator that the architect's failure to issue an instruction requiring the hybrid piling solution as a variation was a breach of contract, with the result that time for completion of the works was rendered at large and the defenders have no liability to the pursuers in respect of liquidated and ascertained damages.

[8] The pursuers have tabled pleas to the relevancy of the defences and the counterclaim. In the course of the case management procedure they intimated that they wished to insist on those pleas, and produced a note of argument. I accordingly ordered a debate on the issues raised in the note of argument. Three distinct matters were argued in the course of the debate. I will deal with each of these in turn.

The application of clause 13.8: acquiescence, personal bar and waiver

[9] Clause 13.8, quoted above at paragraph [2], sets out certain procedures that are to be followed if the contractor considers that any architect's instruction or the equivalent will require either an adjustment to the contract sum or delay the Completion Date. An identical provision was considered by Lord Macfadyen in an earlier case relating to another contract between the same two parties, ***City Inn Ltd.* v *Shepherd Construction Ltd.***, 2002 SLT 781. Lord Macfadyen made the following comments (at 793):

> *"[30] In my opinion, the language of clause 13.8 is prima facie applicable to all architect's instructions, including those in respect of the expenditure of provisional sums. There is no qualification of the reference in clause 13.8.1 to architect's instructions to suggest that any subcategory of such instructions is to be excluded from the scope of the clause. The repetition of the substance of clause 13.3.1 in clause 13.8.6, although apparently redundant, lends support to the contention that clause 13.8 applies, without distinction, to all architect's instructions. ...*
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> *"[32] In my view a distinction falls to be drawn between, on the one hand, a late instruction which, simply because of its lateness, gives rise to a need to adjust the contract sum and/or grant an extension of time and, on the other hand, an instruction which, although late, is of such a nature that it would, whenever issued, have given rise to a need to make such an adjustment or grant such an extension. The latter category of instruction falls, in my view, within the scope of clause 13.8, whereas the former does not. It is in my view difficult to formulate the distinction more precisely in the abstract. It would, in my view, be wrong to say simply that clause 13.8 has no application to late instructions. On the other hand, a failure to comply with clause 13.8 will not, in my view, exclude a claim for extension of time in so far as the extension is made necessary by the lateness of the instruction as distinct from its content. ...*
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> *"[35] In my opinion the architect's power under clause 25.3.3 [to grant extensions of time] must be read subject to the special provision of clause 13.8.5. Clause 13.8.5 defines the effect of failure to comply with the provisions of clause 13.8.1 as being that 'the Contractor shall not be entitled to any extension of time under clause 25.3'.... The contractor's right to [an extension] is, therefore, in my opinion, removed, in terms of clause 13.8.5, if the contractor fails to comply with the provisions of clause 13.8.1".*
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> *The defenders reclaimed against the Lord Ordinary's decision, but his opinion on the foregoing matters was not challenged.*

[10] In the principal action the pursuers contend that the defenders were not entitled to any extension of time beyond the original contractual Completion Date of 20 August 1999. In relation to the matters raised in the first adjudication, they aver that the architect's instruction that gave rise to that adjudication was not a variation to the contract. If it was a variation, they aver that the defenders have not complied with the provisions of article 13.8.1 and that the architect did not dispense with compliance therewith under clause 13.8.4. In relation to the matters raised in the second adjudication, the pursuers aver that the defenders failed to comply with the provisions of article 13.8.1 and that the architect did not dispense with compliance under clause 13.8.4. On that basis the pursuers say that the defenders are not entitled to an extension of time.

[11] In response to the pursuers' averments relating to clause 13.8, the defenders deploy a number of arguments. In the first place they contend that the clause does not apply where delay in completion of the works was caused by the late receipt of instructions from the architect, and that that covers the delays on which they have founded in claiming an extension of time. In the second place, they contend that in any event the pursuers had, either themselves or through the contract architect, who was their agent, acquiesced in the defenders' failure to comply with clause 13.8.1. In the third place, the defenders contend that the pursuers waived compliance with clause 13.8.1 as a condition precedent to an extension of time under clause 13.8.5. In the

fourth place, they contend that in the circumstances of the works carried out under the contract it would have been impossible for the defenders to comply fully with the requirements of clause 13.8.1 and to meet the Completion Date.

[12] At debate, counsel for the pursuers submitted that the defenders' averments on the second and third of the above arguments, those relating to acquiescence and waiver, were irrelevant and should not be remitted to probation. Those averments are in summary as follows. At an early stage of the works, the then architect, RMJM, issued architect's instruction no 5, relating to the piling works. This was issued "for construction", which indicated that the architect required the defenders to proceed to execute the instruction forthwith. Further discussion of the piling took place between RMJM and the defenders, and by letter dated 1 September 1998 RMJM confirmed the instructions regarding piling and stated that they trusted that that would allow the defenders to mobilize their piling subcontractor. The defenders then issued a delay notice under clause 25 of the contract conditions in relation to AI no 5, and discussions took place between them and RMJM regarding the delay. RMJM requested further particulars in support of the application for an extension of time. The defenders aver that that request was consistent with the defenders' application for an extension of time being dealt with under clause 25. On 26 November 1998 RMJM were replaced as contract architect by Keppie Architects, and the defenders aver that, following Keppie's appointment, they proceeded to deal with the defenders' application in terms of clause 25.

[13] The defenders further aver that, in each case where an architect's instruction was given, it was evident that they were proceeding to execute it without the estimates or method statements referred to in clause 13.8.1. Nevertheless, during the course of the works and thereafter notices of delay under clause 25 were given and continued to be given to the architect. No response founding upon clause 13.8.5 was made to the notices of delay. Instead, the architect dealt with the notices of delay and extensions of time under clause 25; no attempt was made to found on clause 13.8 until the second adjudication. Extensions of time were pursued, argued and dealt with under clause 25. In these circumstances the defenders aver that the pursuers and the architect as their agent acted from the start of the project in such a way as to justify the defenders in believing that extensions of time were being, and would fall to be, dealt with on the basis of clause 25 of the contract conditions only, without the necessity of the defenders' complying with the provisions of clause 13.8 if they wished to seek an extension of time and thereby protect themselves against liquidated damages. If the pursuers or the architect had indicated earlier that they would seek to rely on clause 13.8, the defenders aver that they would have taken steps to protect their position by either seeking a dispensation from the architect from compliance with clause 13.8.1 or implementing clause 13.8.1.

[14] In relation to the foregoing averments, counsel for the pursuers submitted that it was erroneous of the defenders to assert that there had been any failure by them to comply with clause 13.8.1 which could be acquiesced in by the pursuers. Clause 13.8.1 did not give rise to any obligation on the part of the defenders. It should rather be characterized as a provision dealing with the allocation of a known risk, namely the risk that an architect's instruction would delay completion of the works and thereby cause extra costs. The function of the clause was to determine whether the employer or the contractor should bear the cost of such delay. It was thus a clause that could be invoked by the defenders if they chose. The pursuers could not acquiesce in the defenders' failure to invoke the clause; acquiescence only made sense if the defenders were subject to an obligation. In any event, on the defenders' averments all that the pursuers had done was to fail to refer to clause 13.8 in dealing with applications made under clause 25. Acquiescence can only be based on silence or failure to object in cases where the party concerned is under a legal duty to speak or object: *William Grant & Sons Ltd.* v *Glen Catrine Bonded Warehouse Ltd.*, 2001 SC 901, per LP Rodger at paragraph [49]. Counsel further submitted that the defenders' case based on general personal bar was ill-founded. It was based on the proposition that the defenders had failed in obligations that they had under clause 13.8. That was wrong; clause 13.8 did not give rise to any obligations. Thus the foundation for the case of personal bar was not there.

[15] Counsel for the pursuers further submitted that the defenders' case based on waiver was irrelevant. Clause 13.8 did not impose any obligation on the defenders, or confer any correlative right on the pursuers; consequently there was nothing that the pursuers could waive. He referred to ***Armia Ltd.* v *Daejan Developments Ltd.***, 1979 SC (HL) 56, where Lord Fraser referred to waiver as involving the idea of giving up or abandoning a right. On the basis of that authority, he submitted that there were three requirements of waiver: first, there must be a definite right; secondly, it must be determined whether that right had been permanently abandoned; and, thirdly, it was necessary to identify conduct which had been carried on in reliance on the permanent abandonment of the right. Counsel further referred to ***Oak Mall Greenock Ltd. v McDonald's Restaurants Ltd.*, 9 May 2003**, and ***E & J Glasgow Ltd.* v *UGC Estates Ltd.***, 16 May 2005. In the latter case Lord Eassie held that a contractual term which is definitional of a contractual entitlement may be waived. Counsel submitted that the present case did not involve a definitional term; clause 13.8.1 provided the contractor with an additional right, but the employer was not given any right that it could waive. Reference was also made to ***Evans v Argus Healthcare (Glenesk) Ltd.***, 2001 SCLR 117, where Lord Macfadyen indicated (at paragraph [11]) that circumstances that are consistent with retention of the right in question will not support an inference that the right has been abandoned.

[16] In the light of those cases, counsel submitted that certain conclusions followed. First, the pursuers had no right to insist that the contractor should invoke clause 13.8.1. That was sufficient to preclude waiver, which required abandonment of a right. Secondly, even if the pursuers had such a right but did not invoke clause 13.8.1, they did not thereby waive any right under clause 13.8.5; the latter clause merely set out the circumstances in which the contractor would be entitled to an extension of time under clause 25. Thirdly, clause 13.8.4 provided expressly when there was to be a dispensation from the requirements of clause 13.8; this involved a notice from the architect. The defenders did not aver that any such notice had been given by the architect. Fourthly, counsel submitted that the circumstances that the defenders did aver were not inconsistent with retention of any right to insist on compliance with clause 13.8. All that the defenders said was that the architect had received notices under clause 25 and dealt with them under that clause. It was not possible to infer from that fact that the pursuers' rights under clause 13.8 been abandoned. Fifthly, the defenders did not specify when the pursuers abandoned permanently any rights. The result was that the averments of waiver were irrelevant.

[17] On the question of waiver, counsel for the defenders submitted that the principle of waiver can operate to prevent a defence from being stated; it is not confined to the waiver of an affirmative right. That was the position in the present case. The pursuers sought to invoke clause 13.8, in particular clause 13.8.5. Under clause 13.8, if the defenders were to have an entitlement to an extension of time, they had to satisfy the contractual parameters set out in the clause. The right that was waived by the pursuers was the right to due fulfilment of those contractual parameters. That was what the defenders had averred in the passage summarized at paragraphs [12] and [13] above. The import of those averments was that the

defenders and the architect had gone through the clause 25 procedures in detail, without any attempt by the pursuers or the architect to invoke clause 13.8.5. That meant that the inference could legitimately be drawn from the averments that the parties conducted themselves under reference to clause 25 only, with any entitlement under clause 13.8 being waived. This result was in accordance with the decision of Lord Eassie in ***E & J Glasgow Ltd.* v *UGC Estates Ltd***, *supra*.

[18] On the question of acquiescence, counsel for the defenders submitted that the defenders' averments were capable of supporting an inference of acquiescence by the pursuers. In effect, what was said was that the pursuers had acquiesced in the defenders' presenting claims under clause 25 without reference to the procedures set out in clause 13.8. In relation to general personal bar, counsel for the defenders submitted that his averments were once again sufficient. He referred to the decision of the Second Division in *City Inn Ltd. v Shepherd Construction Ltd., supra*, at paragraph [24], where the Lord Justice Clerk stated, in relation to clause 13.8, that it "merely provides the contractor with an option to take certain action if he seeks the protection of an extension of time in the circumstances in which the clause applies". According to the defenders' averments, the pursuers had acted from the start of the project in such a way as to justify the defenders in believing that extensions of time would be dealt with on the basis of clause 25 only, and that the defenders did not require to invoke the protection accorded by clause 13.8. Reference was made to ***Gatty* v *Maclaine***, 1921 SC (HL) 1. Counsel further submitted that it could not be said that the defenders' averments on acquiescence and personal bar were bound to fail; consequently they should not be refused probation at this stage.

[19] In my opinion the defenders' averments founded on waiver, acquiescence and personal bar should be remitted to probation in their entirety. I will deal first with waiver. Waiver has been described as the abandonment or giving up of a right: ***Armia Ltd.* v *Daejan Developments Ltd***, *supra,* at 1979 SC (HL) 69 per Lord Fraser of Tullybelton and 72 per Lord Keith of Kinkel. The pursuers' primary argument focused on the word "right"; only a legal right could be waived, and clause 13.8 did not confer any such right on the pursuers. On that basis, the precise characterization of the entitlement that is conferred on the employer by clause 13.8.5 is of importance. In my view that entitlement should properly be characterized as an immunity; if the contractor fails to comply with clause 13.8.1, and the architect has not dispensed with compliance under clause 13.8.4, the employer is immune from any claim by the contractor for an extension of time. Correspondingly, the contractor is disabled from making any such claim. (In characterizing the employer's entitlement and contractor's disability in this way, I rely on the well-known analysis of legal rights by W.N. Hohfeld in Fundamental Legal Conceptions as Applied in Judicial Reasoning (New Haven, 1923)). The critical question is accordingly whether an immunity of this nature can be the subject of waiver. In my opinion it can. The term "right" is commonly, albeit loosely, used to describe a range of legal entitlements. The basic meaning is the claim right (once again Hohfeld's terminology), or right having a correlative obligation, but that is merely one of such entitlements. An immunity, or freedom from a power vested in another person, is another. I can see no reason for limiting the doctrine of waiver to the claim right with a corresponding obligation. In my opinion it makes perfectly good sense to talk about the abandonment of an immunity. An immunity is a right to prevent the exercise of a legal power (in the present case, the power to claim an extension of time if certain conditions are fulfilled). If the person having the immunity abandons it, either expressly or impliedly, the result is that the power may be exercised. I consider that that falls squarely within the concept of waiver as described in ***Armia***. Indeed, that is recognized in the decision of Lord Eassie in ***E & J Glasgow Ltd. v UGC Estates Ltd.***, *supra*. The question that arose in that case related to a clause in a contract to lease property that was in the process of development. That clause permitted the prospective tenant to request variations or amendments to the development, but certain requirements had to be fulfilled before such a request could be made. The prospective tenant averred that the developer had, by its actings, abandoned the right to insist upon strict compliance with those requirements by the prospective tenant. Lord Eassie refused to hold those averments irrelevant. He stated (at paragraph [33]):

"However, while it is of course the case that in his speech in ***Armia*** *Lord Keith described the doctrine of waiver as connoting the abandonment of a right, I am not persuaded by the principal proposition for the [developer] that waiver cannot be deployed so as to cause something which does not come within the terms of a contractual provision to be treated as if it did. In a contractual context, waiver of a contractual term may necessarily imply that something which does not satisfy all the contractual provisions is yet to be treated as being within those provisions because the party having an interest to insist on full satisfaction has either expressly, or by implication arising from the factual circumstances, waived his right to insist on one or more of the contractual conditions being duly fulfilled. In ordinary usage, waiving a contractual term is indeed to say that one is not insisting on one's right to require due observance of the term.... [T]he authorities illustrate that a contractual term which is definitional of a contractual entitlement may be waived".*

Two cases, ***Donnison* v *Employers Accident and Livestock Insurance Company Ltd.***, 1897, 24 R 681, and ***Minevco Ltd. v Barrett (Southern) Ltd.***, unreported, 16 March 2000, were cited in support. I respectfully agree with Lord Eassie's analysis, which amounts to holding that legal entitlements in the widest sense can be the subjects of waiver.

[20] That is in my opinion sufficient to reject the pursuers' argument. The defenders' averments amount to an assertion that the pursuers impliedly abandoned their entitlement to insist that the defenders go through the procedures set out in clause 13.8.1 before any claim for an extension of time could be made. That entitlement is properly characterized as an immunity, and an immunity is one of the categories of "right", in the broadest sense, that can be the subject of waiver.

[21] In the course of his submissions counsel for the pursuers provided an analysis of clause 13.8.1. He commented in particular that the clause did not give rise to any obligation on the part of the defenders, but should be characterized as a provision dealing with the allocation of the risk that an AI would cause delay and extra expense. No doubt the application of clause 13.8 has an effect on the allocation of the risk in question. Nevertheless, neither the language of the clause nor its underlying conceptual structure says anything about the allocation of risk. The clause is rather framed in terms of powers and immunities. Clause 13.8.1 confers power on the contractor, if he wishes to seek the protection of an extension of time in the circumstances to which the clause applies, to submit certain estimates to the architect. That is subject to clause 13.8.4, which confers power on the architect to dispense with the requirements of clause 13.8.1. If the contractor does not make use of the power in clause 13.8.1, and the architect does not dispense with the requirements of that clause under clause 13.8.4, clause 13.8.5 confers on the employer an immunity against any claim for an extension of time. All of those provisions are framed in typical legal language applicable to powers, immunities and the like. There is no reference to "allocation of risk", or anything of that nature. This is hardly surprising. The law is normally structured in terms of "rights" (using that expression in the widest sense) and correlative duties or liabilities. It is not structured in terms of the allocation of risk, which is an essentially economic or commercial concept. For this reason I do not agree with the attempt to analyze the clause in terms of the allocation of risk.

[22] A further argument for the pursuers was that the circumstances averred by the defenders were not inconsistent with the retention of the immunity in clause 13.8. In ***Evans v Argus Healthcare (Glenesk) Ltd***. *supra*, Lord Macfadyen stated (at paragraph [11]): *"[C]ircumstances which are also consistent with retention of the right in question will not support an inference that the right has been abandoned"*.

The defenders averred that the architect had received notices under clause 25 and had dealt with them under that clause, but that was consistent with retention of the immunity; clause 13.8 was separate from clause 25, and operating clause 25 did not give rise to any inference about the pursuers' attitude to clause 13.8. Thus the architect, faced with a claim for extension of time, might form the view that no relevant event was disclosed in terms of clause 25. In such a case he could reject the claim on that ground without any consideration of clause 13.8. If he did so that was consistent with the pursuers' retaining the right to insist on the application of clause 13.8 in an appropriate case.

[23] In my opinion there might be considerable force in an argument of this nature. That is particularly so if it appeared that applications for extension of time were simply rejected on grounds arising under clause 25, without any further discussion of the claims or requests for further particulars. If, however, the architect entered into discussion of the merits of the claims, that takes some force out of the argument. In such a case the clause 13.8 point would be a complete answer to the pursuers' claim, and failing to invoke it at the outset might be taken to suggest that clause 13.8 was being waived. In the present case the pursuers's averments suggest that the successive architects did enter into some discussion of the merits of the applications for extension of time. Thus in relation to AI no 5, dated 17 August 1998, the defenders aver that when they applied for an extension of time the original architect, RMJM, asked for further particulars in support of the application. It is further averred that, once Keppie had replaced RMJM as architect, they proceeded to deal with the defenders' application in terms of clause 25. Reference is made to certain correspondence between the defenders and Keppie. On the basis of that correspondence, it does appear that Keppie may have entered into detailed discussion of the claim for an extension of time in terms of clause 25, including requests for further particulars. No such detail is given in relation to later requests for an extension of time, but the discussions regarding AI no 5 appear to have been the first occasion when an extension was applied for, and consequently the architect's conduct in relation to that instruction may be of particular significance. In any event, without examining that correspondence in detail, I do not think that it is possible to hold that the other applications for an extension of time were simply rejected on clause 25 grounds. At present I am concerned with the relevancy of the defenders' averments, and on that basis I am of opinion that I cannot sustain the pursuers' argument at this stage. At proof the detailed terms of the correspondence can be considered, and in the light of that it will be possible to reach a considered view of the architect's conduct.

[24] Counsel for the pursuers also argued that the defenders did not specify when the pursuers abandoned permanently any rights that they had under clause 13.8.5. In my opinion it is not necessary to specify precisely when a right is said to have been abandoned. In perhaps the majority of cases where implied waiver is claimed, the actings that are said to give rise to abandonment of the right in question are likely to have taken place over a period. In such a case all that matters is that at the end of the series of actings the inference can be drawn that the right has been abandoned. No doubt that involves an element of vagueness, but the law can readily tolerate that degree of imprecision; the critical question is whether waiver can be inferred by the time when the right said to have been waived has been invoked. Where a claim for an extension under clause 25 is dealt with under that clause without invoking the qualifications in clause 13.8, the material time would in my opinion be when clause 13.8 is subsequently invoked by the pursuers. The defenders' averments, if established, appear to point to abandonment by that time. Counsel for the pursuers also placed some stress on the proposition that waiver involves the permanent abandonment of a right. That is undoubtedly correct. Nevertheless, there is an ambiguity in the notion of permanent abandonment in a case such as the present. The immunity in clause 13.8.5 may be abandoned permanently in relation to one specific application for an extension of time, or it may be abandoned generally on a permanent basis. The defenders' averments contain elements of both of these; indeed, specific abandonment in relation to particular applications for an extension is relied on as one of the factors pointing towards general abandonment. At this stage of relevancy I do not think that it is necessary, or indeed possible, to separate out the different ways in which waiver could occur, either specifically or generally. Instead, the whole case of waiver must proceed to proof before answer.

[25] Before leading the topic of waiver, I should mention clause 13.8.4, which confers on the architect and express power to dispense with the contractor's obligation under clause 13.8.1. That is a form of waiver that is specifically contemplated by the parties' contract. The defenders do not aver that that power was ever used. Nevertheless, I do not think that the existence of an express power to dispense with contractual requirements has the effect of excluding waiver at common law, if the necessary conditions are satisfied. The power in clause 13.8.4 is conferred on the employer's representative, the architect, and it seems likely that it will be exercised in the interests of the employer, where dispensing with the requirements of clause 13.8.1 is thought desirable in the interests of the proper progress of the works. Waiver at common law, by contrast, may operate to protect the interests of either party. The inference of waiver may be drawn from circumstances that might not prompt the architect to consider the application of clause 13.8.4. For these reasons I think that the two possibilities, waiver at common law and the dispensing power in clause 13.8.4, are conceptually quite distinct, and neither has any necessary bearing on the other. The existence of the contractual power might possibly have a bearing on the inferences to be drawn from the architect's conduct, but that is an issue that must be reserved for proof.

[26] Counsel for the pursuers also challenged the relevancy of the defenders' averments relating to acquiescence and personal bar. I am of opinion that these averments too must be remitted to probation. Counsel submitted in this connection that clause 13.8 did not give rise to any obligation on the part of the defenders. That is correct. The clause does, however, create a power in the defenders to qualify for an extension of time by performing the acts set out in clause 13.8.1, and if that power is not exercised clause 13.8.5 confers on the pursuers an immunity against any such claim for an extension. In my opinion it is possible to apply the principle of acquiescence to such a structure. The defenders' case is, in essence, that they made claims for extension of time without going through the procedures in clause 13.8.1, and the pursuers, through their agent, the architect, did not seek to invoke the immunity conferred by clause 13.8.5. That, it is said, amounts to acquiescence in the defenders' making claims for an extension of time without going through the contractual mechanism in clause 13.8. In my opinion it is not possible to hold that those averments cannot give rise to acquiescence.

[27] In relation to acquiescence, counsel for the pursuers further founded on certain parts of the decision in ***William Grant & Sons Ltd. v Glen Catrine Bonded Warehouse Ltd***., *supra*. He relied first on a passage that occurs at paragraph [48] of the Lord

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

This passage is obviously concerned with the question of whether acquiescence extends not only to the immediate act that is acquiesced in but also to similar acts that may take place in future. It assumes that acquiescence is effective in relation to the immediate act. In the present case, the defenders rely to some extent on the pursuers' acquiescence in specific applications for extension of time that were made without using the procedures in clause 13.8.1. To that extent, the passage that I have quoted is not relevant. The defenders also rely, however, on acquiescence as having a future effect; they say, in summary, that the architect did not invoke the immunity conferred by clause 13.8.5 on a number of occasions, and as a result of that the inference should be drawn that the pursuers acquiesced in claims for extension of time they made in future without going through the clause 13.8.1 procedure. In my opinion it is not possible at this stage to hold that that case is irrelevant. It is clear from the passage that I have quoted that acquiescence is capable of having future effect, even though such instances may be rare. If a party to a contract acquiesces in a departure from contractual procedures on a sufficient number of occasions, it may be possible to draw the inference that he acquiesces in the departure from those procedures on future occasions. That is essentially a question of fact, and is one that must I think be reserved for proof.

[28] A second passage in ***William Grant & Sons Ltd.* v *Glen Catrine Bonded Warehouse Ltd.***, *supra,* was founded on by counsel for the pursuers. At paragraph [49] of his opinion the Lord President stated *"I should add that the defenders' plea of acquiescence is based on an inference which they seek to draw from the pursuers' silence or failure to object. Inferences of that kind are legitimate only where a party concerned is under a legal duty to speak or object".*

Counsel submitted that in the present case there was no duty on the pursuers, or the architect, to speak or object when the defenders considered claims for an extension of time under clause 25 without going through the clause 13.8.1 procedure. In this connection, it is important in my opinion to consider the context of the passage quoted above. ***William Grant & Sons Ltd.* v *Glen Catrine Bonded Warehouse Ltd.,*** *supra,* involved an allegation that the defenders had passed off their goods as the pursuers'. The defenders countered by alleging that the pursuers had acquiesced in their using the pursuers' name on their goods. It was that contention that was rejected on the ground that there was no duty to speak or object. It is clear, however, that the defenders' activities in producing and marketing their goods proceeded wholly without reference to the pursuers. It is in that context that the Lord President's remarks must be read. In the present case, by contrast, the pursuers and the defenders were in a continuing contractual relationship. In that situation, if one party to the contract makes claims without going through contractual procedures, and the other party deals with those claims without objection, I think it clear that acquiescence is capable of operating. It could be said that, standing the continuing contractual relationship, there is a duty to speak or object. Alternatively, it might be said that the absence of a duty to speak or object is simply irrelevant where the parties have a continuing consensual legal relationship. On either basis, I do not think that the passage quoted can be determinative of the present case.

[29] In relation to general personal bar, counsel for the pursuers argued that the defenders' case was based on the proposition that they had failed in the obligations incumbent upon them under clause 13.8. They had no such obligations, and consequently this part of the case was irrelevant. It is clear that this part of the argument mirrored the argument on waiver. In my opinion it should be rejected at this stage, for essentially the same reasons as the argument on waiver. The defenders found not on an obligation to use the procedures in clause 13.8.1 but on a power to do so. They assert, as I understand their averments, that the pursuers are personally barred from relying on the immunity conferred by clause 13.8.5 because of their agent's failure to invoke that immunity at an earlier stage when claims for an extension of time were first made. I do not think that such a case can be rejected as a matter of relevancy.

Status of the hybrid piling solution and any consequential extension of time

[30] In their counterclaim the defenders aver that they encountered difficulties in installing the piling system instructed by the architect, but that the architect failed to instruct an alternative, leaving it to the defenders and their subcontractors to do so. The defenders ultimately adopted a hybrid piling solution. They now claim that the architect should have instructed a variation, and that they are therefore entitled to an extension of time for delays that arose out of the hybrid piling works. The relevant averments are summarized at paragraph [7] above.

[31] In relation to these averments, counsel for the defenders submitted that the piling works were performance specified work in terms of the parties' contract. As a result, the defenders were obliged to provide piles to satisfy the structural arrangement and loadings specified by the architect, but the choice of pile type, pile design and method of installation was left to the defenders. It followed that the use of a hybrid piling solution was a matter for the defenders to decide, and was not a matter in respect of which the architect was obliged to issue an instruction. All that the architect required to do in terms of the contract was to comment on any detailed proposals in relation to pile design produced by the defenders. In these circumstances counsel argued that the hybrid piling solution did not constitute a variation to the works. As a result the pursuers' averments were irrelevant. As an alternative, counsel submitted that the defenders should be taken to have treated the architect's comments on their proposed hybrid piling solution as constituting an instruction to vary the works and progress them in accordance with that solution. In that event, if they were to claim an extension of time the defenders required to comply with clause 13.8.1 of the contract. They did not, however, make any averments to that effect.

[32] Counsel for the defenders drew attention to the specification that had been attached to architect's instruction no 5, dealing with the piling works. This provided (at paragraph 0501) that "Permanent casings shall be required for those piles where instability may occur due to inadequate lateral support from the ground or the effect of groundwater". That specification, he submitted, had the force of an architect's instruction. Moreover, the accompanying drawing (no 1056.10 (16) 001), dealing with the piles and pile layout, was described as an "instruction". In that drawing considerable specification was provided, covering the concrete, its reinforcement and the required loading capacity. What the defenders averred was that piling in accordance with those instructions had not been successful, and the architect had agreed that it was not possible but had failed to instruct an alternative. The defenders sought to have the court remedy that under clause 41C.2 of the JCT form. Their case was based on the particular circumstances averred, where the architect had, in architect's instruction no 5, prescribed what was to be done when ground instability was encountered but subsequently accepted that its solution was unworkable. In that event, regardless of whether the piling was performance specified work or not, the architect had taken it upon itself to prescribe by means of an architect's instruction what the contractor was required to do in a particular situation. Evidence might be required

on this matter, however, in order to determine whether the issuing of architect's instruction no 5 should be characterized as design work carried out by the architect. In that event, clause 2.4.5 of the particular conditions applicable to the parties' contract could be relevant; it provided that the contractor should not be responsible for design work which had been prepared by the employer's professional consultants. In relation to the alternative argument presented by counsel for the pursuers, counsel for the defenders submitted that his pleadings were based on the proposition that the architect did not issue any instruction in relation to the hybrid piling solution. Consequently the hypothesis on which the pursuers' alternative argument proceeded, namely that the architect's comments should be treated as an instruction, was incorrect.

[33] The piling works are identified as performance specified work in the relevant appendix to the parties' contract. Performance specified work is dealt with by clause 42 of the JCT standard form of contract. The expression refers to work identified as such for which certain requirements have been predetermined and are shown on the contract drawings. The performance required by the employer for such work must be stated in the contract bills. Under clause 42.2, before carrying out any performance specified work, the contractor is obliged to provide the architect with a document, known as the "contractor's statement", setting out how the contractor proposes to execute the performance specified work. The contractor is obliged to carry out such work in accordance with that statement. Clause 42.11 provides that the architect may issue instructions under clause 13.2 requiring a variation to performance specified work. Clause 42.14 states that the architect shall, within a reasonable time before the contractor intends to carry out the performance specified work, issue any instructions necessary for the integration of such work with the design of the general contract works. The contractor is obliged to comply with any such instruction. In addition to the provisions of the JCT form the parties agreed certain additional contractual provisions. One of these is significant for present purposes. Clause 2.4.5 of the additional conditions provides that the contractor will not be responsible for any design work which has been or will be prepared by the professional consultants appointed by the employer from time to time in connection with the works.

[34] In my opinion the defenders' averments relating to the hybrid piling solution and the consequential claim for extension of time should be remitted to proof before answer; I do not think that they can be held irrelevant at this stage. It is true, as counsel for the pursuers submitted, that normally the manner in which performance specified work is carried out is a matter for the contractor; that is clear from the general provisions of clause 42 of the JCT form. There may be exceptions to this general rule, however. Clause 42.11 permits the architect to issue instructions under clause 13.2 to require a variation to performance specified work. That is hardly surprising, because the whole project must obviously remain under the control of the architect, and if the architect thinks that there is good reason to vary any part of the works he should be free to do so. If the architect does issue an instruction under clause 42.11, that inevitably involves an element of design of his part, although obviously the element of design may be greater or lesser in its scope. In that event, clause 2.4.5 of the parties' additional conditions excludes responsibility on part of the contractor for any design work that has been carried out by the architect. Once again, that is hardly a surprising provision.

[35] The defenders' averments relating to the hybrid piling solution must be considered against that contractual background. What they aver is that architect's instruction no 5 amounted to a variation of the piling works. In the course of the debate reference was made to the drawing (no 1056.10 (16) 001) and specification that accompanied the instruction. It is clear that these are detailed documents, and at this stage I do not think it possible to hold that they could not amount to a variation. I am likewise of opinion that it cannot be held as a matter of relevancy that architect's instruction no 5 and the accompanying drawing and specification did not involve design work on the part of the architect; that too is a matter that must be decided at proof. In view of the terms of clause 42.11, if these documents do amount to a variation, it is immaterial that it relates to performance specified work; it still has the contractual force of a variation, and to the extent that it represents design work by the architect clause 2.4.5 excludes the contractor's responsibility. Against that background, the defenders aver that the solution put forward in the variation proved unworkable in practice, in that permanent casings could not be used. They aver that the architect agreed with that conclusion, but failed to instruct an alternative, leaving it to the defenders and their subcontractors to do so. The defenders then put forward the hybrid piling solution but, it is averred, the architect stated that it had no objection but had no authority to issue any instructions. If architect's instruction no 5 and its accompanying documents did amount to a variation involving design work by the architect, it is in my opinion arguable that the architect had to take responsibility for dealing with the consequences if that instruction proved unworkable. At the very least the instruction would require to be cancelled (although that might have happened impliedly in the present case). It is arguable, however, that more is required, and that the architect must devise an alternative solution; the fact that a variation was issued might be said to indicate that the architect wished to qualify the contractor's own proposed solution. All of these, however, are matters that should properly be the subject of proof before answer. At that stage it can be discovered whether architect's instruction no 5 amounted to a variation involving design work. If it did, it can then be decided whether the architect thereby became responsible for issuing an alternative instruction at the stage when its first proposals were discovered to be unworkable.

[36] The pursuers' alternative argument was that the defenders had made a claim for extension of time without going through the procedures in clause 13.8.1. On this matter I am of opinion that the submission by counsel for the defenders was correct. The defenders' case is based on the proposition that the architect failed to issue an instruction. They make the following particular averments: *"At a meeting on 9 November 1998, the Architect agreed that permanent casings could not be used, but failed to issue an alternative.... On 16 November 1998, the Architect confirmed that it had no objection to the use of that solution, but when the defenders sought an instruction for its use on 17 November 1998, the Architect responded on 18 November 1998 stating that it had no authority to issue such an instruction".*

Moreover, the defenders go on to aver that they, together with their piling subcontractors, devised an alternative solution. In these circumstances, it is apparent that the defenders are alleging that neither an instruction nor any "other item which, in the opinion of the Contractor, constitutes an instruction" (the wording of clause 13.8.1) was issued. In those circumstances their case is that the necessary precondition of clause 13.8.1 was not satisfied, and that clause never came into operation. The averments in question must obviously be the subject of proof, but I am of opinion that at this stage I cannot hold them irrelevant.

Averments of breach of contract

[37] In their defences to the principal action, the defenders make certain further averments that are based on the proposition that the pursuers were in breach of contract by reason of the architect's failure to issue an instruction relating to the hybrid piling solution. In answer 7 they make the following averment: *"Explained further and averred esto the defenders are not entitled under the contract to said extensions of time (which is denied) then the defenders having been prevented from completing the works to*

time by breach of contract of the pursuers, the time for completion under the contract is rendered at large and the pursuers are not entitled to liquidate and ascertained damages".

The pleadings then make reference to the counterclaim. The defenders further aver, in answer 7.3, that it would have been impossible for them to comply fully with the provisions of clause 13.8.1, and to meet the contractual Completion Date; the provisions of clause 13.8.1 inevitably involved delay for which there was no provision for extension of time. In those circumstances, it is averred, either the pursuers are disabled from relying upon clause 13.8 to defeat the defenders' entitlement to an extension of time or the time for completion under the contract is rendered at large, with the consequence that the pursuers are not entitled to liquidate and ascertained damages. Those averments are expanded upon in the counterclaim.

[38] In the counterclaim the defenders seek a number of declarators. These are expressed as follows:
(a) For declarator that the hybrid piling solution constructed by the defenders constituted a Variation to the Works.
(b) For declarator that (i) the Architect (RMJM Scotland Ltd) decided not to issue an instruction requiring the hybrid piling solution as a Variation, and (ii) the said decision was incorrect.
(c) For declarator that the defenders are entitled to an instruction requiring the hybrid piling solution as a Variation and an extension of time in so far as compliance therewith caused delay in completion of the Works.
(d) Separatim, esto in the event that the defenders are not entitled to an extension of time as concluded for at 1(c), for declarator that the Architect's failure to issue an instruction requiring the said hybrid piling solution as Variation was a breach of contract, with the result that (i) time for completion of the Works was rendered at large, and (ii) the defenders have no liability to the pursuers in respect of liquidated and ascertained damages under the Contract.

The essential averments in the counterclaim are as follows. On 18 August 1998 the architect issued AI no 5, which instructed a combination of vertical piles and long raking piles, with permanent casings where instability might occur. When the defenders attempted to install vertical piles at the eastern end of the site they were unsuccessful owing to ground instability. At a meeting on 9 November 1998 the architect agreed that permanent casings could not be used but failed to instruct an alternative. The defenders and their subcontractors were left to devise an alternative, and they proposed the hybrid piling solution mentioned above. On 16 November 1998 the architect confirmed that it had no objection to the use of that solution, but when the defenders sought an instruction for its use on 17 November 1998 the architect responded on 18 November to state that it had no authority to issue such an instruction. As the piling works were critical to completion of the Works, the defenders had no option but to progress them in accordance with the hybrid piling solution in the absence of an instruction. The additional work in carrying out the hybrid piling solution delayed completion of the Works.

[39] The defenders then make the following averments: *"It was reasonably necessary for the Architect to instruct the hybrid piling solution in order to enable the Contractor to carry out and complete the Works in accordance with the Contract. The Architect was obliged to do so in accordance with clause 5.4 of the Contract. If doing so required a Variation to the Works then the Architect should have instructed a variation in accordance with clause 13.2 of the Contract. The Architect refused to do so".*

Thereafter the defenders aver that the architect erred in deciding not to issue an instruction requiring a variation. They aver that they are entitled to an extension of time in terms of clause 25.4.5.1 because they have been delayed in completion of the Works as a result of carrying out the work that should have been the subject of that instruction. A declarator to that effect is sought in the counterclaim, that being declarator (c) in paragraph [38] above.

[40] In the alternative, the defenders aver that the architect acted as the pursuers' agent in this regard, and that the pursuers are accordingly in breach of contract on account of the architect's failure to issue the necessary instruction. Reliance is placed on clauses 5.4 and 13.2 of the parties' contract. The defenders aver that, in the event that they are not entitled to an extension of time because of that breach of contract, time for completion was rendered at large; consequently the defenders have no liability to pay liquidated and ascertained damages under the contract. A declarator to that effect is also sought, in the form of declarator (d) in paragraph [38] above.

[41] A further alternative case is then set out. This may be summarized as follows. Esto the architect did not apply his mind to clause 13.8, the pursuers were thereby rendered in breach of contract. In terms of clause 13.8.4, the architect may, before or after the issue of an instruction, dispense with the contractor's obligations under clause 13.8.1. In order to be able to exercise the discretion contemplated by clause 13.8.4, the architect requires to apply his mind to clause 13.8, and in particular as to whether or not to dispense with the contractor's obligation under clause 13.8 in the circumstances of a particular instruction. In these matters the architect was acting as the agent of the pursuers. Consequently, in the event that the architect failed to apply his mind to clause 13.8, and in particular to the issue of dispensation under clause 13.8.4, the pursuers were thereby rendered in breach of contract. In these circumstances, it is said, clause 13.8 has no application.

[42] Counsel for the pursuers attacked these averments on a number of grounds. In the first place, he attacked the defenders' averments of breach of contract in the defences, on the basis that no specification was given of the relevant obligations, how they were breached, how this made it impossible for the defenders to comply with clause 13.8.1, and how this would have made it impossible to meet the completion date. These criticisms were to some extent developed in relation to the counterclaim. In the second place, counsel for the pursuers attacked the defenders' reliance in the counterclaim on clauses 5.4 and 13.2 of the JCT conditions. Neither of these, it was said, placed any contractual obligation upon the pursuers or the architect to instruct variations. On that basis it was said that the averments founded on those clauses were irrelevant and should not be remitted to probation. In the third place, counsel for the pursuers attacked the defenders' alternative case as set out in paragraph [40] above. Counsel submitted that clause 13.8 imposed no contractual obligation upon the architect to apply his mind to the clause unless an application was made by the defenders under clause 13.8.1. The defenders did not aver that any such application was made. In addition, clause 13.8.4 did not impose any obligation on the architect. It other conferred a discretion upon him which he might or might not exercise. On that basis it was said that the relevant averments were irrelevant and should not be remitted to probation. Conclusion 1(d), which relied on those averments, should accordingly be repelled. I will first of all consider the second of these arguments, which I think is the most fundamental in nature. Thereafter I will deal with the first and third arguments.

[43] The second argument was an attack on the defenders' reliance in the counterclaim on clauses 5.4 and 13.2 of the JCT conditions. In this part of the defenders' case the primary obligation relied upon is that mentioned in paragraph [39] above. The defenders' contention is that clause 5.4 imposed an obligation on the architect to give an instruction relating to the hybrid

piling solution. A secondary obligation is also averred: if the instruction required a variation that should also have been instructed in accordance with clause 13.2. Clause 5.4 is in the following terms: *"As and when from time to time may be necessary the Architect without charge to the Contractor shall provide him with 2 copies of such further drawings or details as are reasonably necessary either to explain and amplify the Contract Drawings or to enable the Contractor to carry out and complete the Works in accordance with the Conditions".*

In my opinion that clause, which uses the verb "shall", imposes an obligation. That obligation is obviously fairly general in nature. It requires the provision of such drawings as are "reasonably necessary" to proceed with and complete the Works. Consequently the question whether it applies in any particular case must depend on the facts and circumstances of that case. Nevertheless, I do not think that this form of vagueness detracts from the obligatory nature of the clause; ultimately the court must decide what is "reasonably necessary". Moreover, the obligation does appear fundamental to the contractual scheme; it is the primary obligation on the architect to provide any necessary information that goes beyond the original contract drawings. In ***London Borough of Merton*** **v** ***Stanley Hugh Leach Ltd.***, 1985, 32 BLR 51, Vinelott J commented on the equivalent of clause 5.4, clause 3(4), in the 1963 edition of the JCT Contract; the two clauses were in almost identical terms. Vinelott J stated (at 82) *"Clause 3(4) imposes on the architect an obligation to furnish the contractor with drawings and details as and when necessary".*

That is in accordance with my own view of the clause.

[44] The piling work was performance specified work governed by clause 42, but nothing in the latter clause excludes the application of clause 5.4. Indeed, clause 42 specifically contemplates that instructions may be given by the architect in respect of such work. Thus clause 42.1.3 contemplates that requirements for the performance specified work will be predetermined and shown on the contract drawings. Clause 42.11 authorizes the architect to issue instructions under clause 13.2 requiring a variation to performance specified work. Clause 42.14 provides that the architect should give any instructions necessary for the integration of the performance specified work with the design of the works. These provisions are in my opinion a clear indication that the architect may be obliged to provide drawings relating to aspects of performance specified work, and that clause 5.4 may thus operate.

[45] Clause 13.2, unlike clause 5.4, is permissive rather than obligatory in nature; it provides that the architect "may" issue instructions requiring a variation subject to the right of the contractor to make reasonable objection. Nevertheless, the defenders' reference to clause 13.2 (quoted at paragraph [38] above) does not, I think, suggest that clause 13.2 is the source of any obligation. It proceeds rather on the premise that the obligation is found in clause 5.4, and the power in clause 13.2 is one that the architect should use if that proves necessary in the course of fulfilling his duties under clause 5.4. Overall, therefore, I am of opinion that the defenders rely on obligations that may be incumbent on the architect, in appropriate circumstances. Whether those obligations to apply in the present case is, of course, a matter that must await proof.

[46] Counsel for the pursuers' first argument was an attack on the specification, and to some extent the relevancy, of the defenders' averments of breach of contract as contained in the defences and, to some extent, the counterclaim. In my opinion this argument is largely justified. In answer 7 of the defences it is averred, in a passage quoted at paragraph [37] above, that the defenders were prevented from completing the works to time by the pursuers' breach of contract, with the consequence that time for completion was rendered at large. No specification is given in answer 7 of the breach of contract that is referred to. Reference is made to the counterclaim, where it is averred that the pursuers, through the architect, were in breach of clause 5.4. No indication is given, however, as to how the failure to issue an instruction in relation to the hybrid piling solution prevented the defenders from completing the works timeously. The adoption of that solution might have caused delay and hence a failure to complete on time, but in that event it is the works themselves, rather than the lack of an instruction, that is the clause. Likewise, the architect's failure to issue an instruction might have disabled the defenders from making use of the procedure in clause 13.8.1, but I find it impossible to see how that can have caused any delay. For these reasons I am of opinion that the passage quoted in paragraph [36] above is irrelevant.

[47] The pursuers also challenge the specification of the averments in answer 7.3 where the defenders say that, because of the pursuers' or their architect's breach of express and implied obligations under the contract, it would be impossible for the defenders to comply fully with the provisions of clause 13.8.1 and to meet the contractual completion date. In my opinion the criticism of this part of the defenders' pleadings is also justified. The obligations in question are not specified, beyond a reference to the counterclaim. The reference to implied obligations seems to go beyond the obligation contained in clause 5.4. In my opinion the obligations should be set out properly in answer 7.3. In any event, for the reasons stated in the last paragraph, I do not understand how the failure to issue an instruction under clause 5.4 could itself cause delay; any delay is likely to have been caused by the additional work that was required rather than the failure to issue an instruction. Answer 7.3 also seems to suggest that the failure to issue an instruction prevents the pursuers from relying on clause 13.8 to defeat the defenders' entitlement to an extension of time. In this respect, I do not think that the answer is clearly expressed. What is intended may be that, because no instruction was issued, the defenders could not follow the procedures in clause 13.8, which relate specifically to an instruction or a document which in the opinion of the contractor constitutes an instruction. If that is so, however, I think that it should be more clearly stated. In addition, in the principal action the defenders have no plea in law dealing with breach of contract and its consequences. For these reasons I propose to hold that the whole of the existing answer 7.3 is irrelevant. It may be that the foregoing criticisms can be cured by amendment, and I will give the defenders an opportunity, if they wish, to produce a minute of amendment.

[48] Counsel for the defenders submitted that the necessary specification in relation to answer 7, and in particular answer 7.3, was given in the counterclaim. He founded particularly on the averments summarized in paragraph [38] above. These are designed to support the claim for an extension of time that is specified at head (c) of the declaratory conclusion of the counterclaim. In my opinion those averments do set out with reasonable clarity a case for an extension of time. In particular, the averments specify the breach of contract that is relied on, namely the failure to issue an instruction, and if appropriate a variation, in terms of clause 5.4 of the contract. No doubt there is a dispute as to whether the architect was justified in not issuing an instruction; that is an issue that must await proof. The nature of the obligation asserted by the defenders, however, seems clear. The consequence that is said to follow from the breach of contract is that the defenders were unable to claim an extension of time according to the terms of clause 25.4.5.1. The result, it is said, is that they can now claim to be put in the same position as they would have been in had the instruction been properly issued. This point could perhaps be spelled out more clearly in the pleadings, but I think that it is sufficiently clear to satisfy the test of relevancy so far as the counterclaim is

concerned. In relation to the principal action, however, for the reasons set out in the last paragraph I am of opinion that the defenders' pleadings in answer 7.3 are irrelevant, and are not saved by reference to the counterclaim.

[49] Counsel for the defenders further submitted that the breach of contract has a further consequence in relation to the operation of clause 13.8. That clause could not apply in a situation where no instruction was issued. I can understand the latter point. According to its terms clause 13.8.1 applies where any instruction or other item constituting an instruction will require adjustment to the contract sum or delay the completion date. It is thus dependent on the issue of an instruction or equivalent document. If there is no instruction, and in particular if there is a refusal to issue an instruction, it is difficult to see how the clause can come into operation. The difficulty so far as the defenders' pleadings is concerned, however, is that this link is not spelled out in the counterclaim. It is perhaps hinted at in answer 7.3, where it is averred that, because of the architect's breach of its obligations, "it would have impossible for the defenders to fully comply with the provisions of clause 13.8.1... and to meet the Completion Date". The problem with that averment is that it appears to suggest that the impossibility of complying with clause 13.8 was somehow linked with an inability to meet the completion date. I do not understand how that is said to follow; the architect's breach of its obligations would rather disable the defenders from making use of the clause 13.8 procedure. In that event, the defenders' remedy would seem to be a claim that they should be placed in the same position financially as they would have been in had an instruction been issued; that is the normal remedy for a breach of contract. That is not spelled out in answer 7.3, however; nor does it appear in the counterclaim. For this reason I do not think that the defenders' case in relation to breach of contract and clause 13.8 has been relevantly averred. As indicated above, I propose to exclude the averments in answer 7.3 from probation.

[50] Counsel for the pursuers' third ground of challenge to the damages claim was to the defenders' alternative case as set out in paragraph [41] above. Counsel submitted that clause 13.8 imposed no contractual obligation upon the architect to apply his mind to the clause unless an application was made by the defenders under clause 13.8.1. It rather conferred a discretion upon him which he might or might not exercise. In any event, the defenders did not aver that any such application had been made. On that basis it was said that the averments in question were irrelevant and should not be remitted to probation. Conclusion 1(d), which relied on those averments, should accordingly be repelled. Counsel for the defenders submitted that there was an obligation on the architect to apply his mind to the discretion under clause 13.8.4 before issuing any instruction. He drew attention to the fact that clause 13.8.4 allowed the architect to dispense with the obligation under clause 13.8.1 by notice to the contractor either before or after the issue of any instruction.

[51] In my opinion the pursuers' argument on this matter is correct. According to its terms, clause 13.8.4 confers a discretionary power on the architect. Discretionary powers arise in a wide range of contexts. In some cases the holder of such a power may be under a duty to exercise it, as may occur with some powers of apportionment conferred on trustees. In other cases there is no duty to exercise the power but the holder may be subject to a duty to consider the exercise of the discretion. That is true of many trust powers, for example those relating to the application of income or the advancement of capital; in such cases the trustees are obliged to keep the application of income under constant review and to consider from time to time whether it is appropriate to make advances of capital. In yet other cases the power is purely discretionary, and that is no general obligation to consider its exercise. The question as to which of these categories applies to any particular power must obviously depend upon the context in which the power arises. Clause 13.8.4 is a contractual power, and must be looked at in the context of the parties' contract, and in particular clause 13.8 of that contract.

[52] In my opinion the power in clause 13.8.4 falls into the third of the foregoing categories; there is no general obligation on the architect to consider whether or not to exercise it. I reach this conclusion for two reasons. First, clause 13.8.4 permits the architect to dispense with certain contractual requirements, namely those in clause 13.8.1-.3; those requirements apply unless the power is exercised. It follows that the requirements of clause 13.8.1-.3 are the norm, and the power in clause 13.8.4 is exceptional in nature. In such a case I consider that it is unlikely that there will be any continuing duty to consider whether the power is exercised; the power is to deal with exceptional circumstances, and it is only if the architect thinks that there are exceptional circumstances that he is any need to consider the exercise of the power. Secondly, it appears likely that the power, which is conferred on the employer's representative, is most likely to be exercised in the interests of the employer, to ensure the proper progress of the works. It may be invoked, for example, if urgent action is required or if it is clear that an instruction is necessary, regardless of its implications for the progress or costs of the works. A power of that nature need not in my view be the subject of constant consideration; it is only when the architect thinks that the contractual procedures in clause 13.8.1-.3 are inappropriate that he requires to consider the exercise of the power. It follows that the architect is not required to address his mind to clause 13.8.4 before issuing any instruction. It is true that the power in that clause may be exercised before the issue of an instruction, but in my view that does not alter the fundamental nature of the power. I will accordingly hold the defenders' alternative case, based on the architect's failure to apply his mind to clause 13.8, to be irrelevant, and I will exclude the averments relating to that argument from probation.

Conclusion

[53] For the foregoing reasons I will sustain the pursuers' pleas to the relevancy of the defenders' averments, but only to the extent indicated in paragraphs [46], [47] and [52] above. I will exclude from probation the passage in answer 7 quoted in paragraph [37], the whole of answer 7.3, and the passage at the end of statement 3 of the counterclaim dealing with the architect's failure to apply his mind to clause 13.8. Otherwise I will allow a proof before answer. I will have the case put out by order to discuss further procedure, including the possibility of a minute of amendment by the defenders. A further issue is whether the scope of any proof should be restricted. In this connection parties may care to consider whether the next stage in procedure should be a proof before answer restricted to questions of waiver, acquiescence and personal bar.

Pursuers: Keen, QC; McGrigor Donald
Defenders: Borland; Pinsent Masons