Opinion Lord Drummond Young. Outer House. Court of Session. 7th September 2006.

[1] The defenders are the owners of the Sheraton Hotel in Edinburgh. The pursuers are building contractors. Prior to 2003 the parties entered into a contract for the internal fit out of the Sheraton Hotel Spa Building. The shell of the building had previously been constructed by Balfour Beatty. Following completion of the main works various defects, some of them substantial, emerged in the work that had been carried out. The most significant of the defects related to the external glazing around the spa area, where major areas of cracking had appeared. The parties were in dispute as to the responsibility for the cracking; in particular, they disputed what the causes of the cracking were and whether those were the responsibility of the pursuers or of Balfour Beatty. The parties were also in dispute as to whether the cost of the necessary remedial work was covered by the defenders' works insurance. The defenders commissioned a report from the Building Research Establishment as to the causes of the glazing problem; this was not available at the time of the agreement referred to below, but it was expected to be available shortly thereafter.

[2] In February 2003 Mr Robert McGowan, an accountant who specialized in the management of companies in financial difficulty, was appointed by the Bank of Scotland to take over the management of the pursuers. Mr McGowan gave evidence about his involvement with the pursuers; that evidence was not challenged by the defenders. Mr McGowan stated that he reviewed the pursuers' financial position and recommended that receivers should be appointed over their property and undertaking. The Bank of Scotland appointed receivers. Thereafter Mr McGowan continued to manage the pursuers' business on the receivers' behalf. That involved bringing to a close the various contracts that had been concluded by the pursuers. One of these was the contract with the defenders. The works under that contract had been completed some time previously, but defects had emerged and those still had to be rectified. In addition the final account still had to be agreed. Mr McGowan contacted the defenders with a view to reaching agreement on the various matters that remained outstanding. The defenders were also anxious to make progress, and a meeting was held on 9 July 2003 between representatives of both parties. The pursuers were represented by Mr Jim Smith, a quantity surveyor, and the defenders by Turner & Townsend, the quantity surveyors who had acted for them in connection with the project. At the meeting the defects were discussed, and a list of the then known defects was prepared. The results of the meeting were summarized in a letter from Turner & Townsend to Mr John Boland, the defenders' managing director, dated 11 July 2003. The material parts of the latter are as follows:

"Spa

MDL [the pursuers] indicated that they would be willing to complete the outstanding works if instructed to do so. When the company went into receivership, their contract was automatically terminated. They have, however, retained a core of staff to complete and facilitate handovers of existing works and in order for them to be able to implement our completion works they would require to be instructed to proceed, by letter, either from yourself or from [Turner & Townsend] on your behalf.

It is also a requirement of the Insolvency Act that the Receivers approval is needed to authorize further works. He cannot do so, however, until sufficient monies are received from the affected parties to cover the costs. MDL requested, therefore, that we review each of the snagging items to assess the liability of MDL for any outstanding works and to assess the possibility for release of a portion of the retention fund to cover these works.

- *Hydropool cover -- It was accepted that the present installation was unsatisfactory and that replacement, based on a notional allowance of £10,000, should be considered.*
- *Heat exchanger works - Maximum cost allowance to rectify the problem agreed at approximately £2000.*
- *Floor lights -- Approximate cost allowance to rectify: approximately £2500.*
- *Round table fixings -- Isometrix 'foot' still to be tested. Further work may, however, be needed to reconfigure the spindle details: assessed at approximately £2000.*
- *Fixing glass partitions -- Cost allowance to rectify: approximately £1200.*
- *Gobo clocks -- Whilst liability for failure has still to be defined, provisional allowance for work assessed at £500.*
- *Wobbly sinks -- MDL to provide gaskets for Sheraton to action. Approximate cost allowance assessed at £500.*
- *Staining to limestone: MDL's position is to make a contribution boards cleaning of the net areas affected of £2000.*
- *Glass breakages -- MDL disclaimed responsibility.*

The total value of direct works needed to complete the Spa snagging list, based on the above, is approximately £20,700.

This excludes any allowances for consequential losses, such as additional heating costs associated with the pool cover, or for the costs associated with glass breakages (in the latter regard, MDL are firmly of the opinion that this is an insurance matter)".

It is apparent from this letter, and was confirmed by Mr McGowan's evidence, that the parties' representatives identified the known defects in the Spa and put approximate figures on the cost of rectifying each of them. The one exception to this related to the glass breakages. As the letter indicates, the pursuers continued to deny that

they were liable in any way for those breakages. The estimated cost of remedying glass breakages was somewhat less than £90,000.

[3] The parties' representatives reported on the meeting, and a further meeting was arranged between Mr McGowan and Mr Boland, to take place on 24 July 2003. Mr Graham Dunsmore, a partner in Turner & Townsend, also attended the meeting. Evidence about the meeting was given by all three men who were present; I discuss the significance of that evidence below at paragraphs [9]-[13]. It was agreed, however, that at the meeting Mr McGowan and Mr Boland, acting respectively on behalf of the pursuers and the defenders, reached an agreement on certain matters that were outstanding between the parties. This was recorded in an e-mail sent by Mr McGowan to Mr Boland on 25 July, in the following terms:

"Further to our meeting yesterday, my understanding of what was agreed and proposals for addressing some of the detail, are as follows:

...

b) Final Account for Spa agreed at £8,265,000. T&T to issue the necessary paperwork with retention adjusted to £20,700. Of the balance shown on the certificate as due and payable, £90,000 will be withheld by you pending resolution of glazing issue (see d) below).

c) MDL to complete the agreed list of defects (which specifically excludes the glazing issue), at which point COMDG [certificate of making good defects] will be issued and the retention paid to MDL.

d) MDL continue to refute any liability or responsibility for the glazing issue. We recognize your concerns on recoverability if you subsequently prove our liability and hence your proposal to withhold the £90,000. I confirm that we will not pursue recovery of the £90,000 held by you, provided that you pursue the matter diligently with your insurers, consultants and other contractors who may have a responsibility for recovery of your losses. On receipt of any sums from any of these sources, you will release the appropriate amounts to MDL. If you have not already released the whole amount by 31 July 2004, you will then do so, except to the extent that it has been established by our agreement or any court action that we are liable".

Four days later, on 29 July 2003, Mr Boland replied to Mr McGowan by an e-mail in the following terms:

"Thanks for this. On behalf of Hotel Corporation of Edinburgh I accept that what you have written below accurately reflects our meeting last Thursday. I shall write formally on HCE paper to confirm. By copy of this e-mail to Graham Dunsmore I ask that those actions which lie with T&T be progressed asap.

Re glazing, I am trying to move this forward".

A copy of Mr McGowan's e-mail was appended.

[4] The parties were in agreement that the essential terms of their contract were contained in Mr McGowan's e-mail of 25 July. A dispute arose as to the construction of that contract, however, in the following circumstances. Following the meeting Turner & Townsend issued an interim certificate to the effect that £237,693 was due for payment; this was based on the agreed valuation of £8,265,000 and the agreed retention of £20,700 specified in paragraph b) of the e-mail. Thereafter the pursuers made an application for payment to the defenders of that sum less £90,000, that being the sum specified in paragraph d) of the e-mail. The resulting balance was paid by the defenders. There was some correspondence leading to the issue of Turner & Townsend's interim certificate, but I do not think that that correspondence is relevant to the present dispute. After the payment to the pursuers, the defenders claimed that a number of further defects appeared in the Spa building; these are said to have been latent at the time of the meeting of 24 July 2003. The defenders contend that those defects are the responsibility of the pursuers, and in their defences they make averments specifying the defects and the estimated cost of rectification. It was agreed, however, that in the proof that gave rise to this opinion the merits of those averments should not be considered and that none of the evidence led at that proof should have any bearing on the question of liability for the latent defects. Consequently I express no opinion as to whether the defenders' contentions relating to the latent defects are well founded. The averments relating to the latent defects are relevant for present purposes, however, in two respects: first, in their defences the defenders assert that they are entitled to retain sums due to the pursuers against the cost of rectifying the latent defects; and secondly the defenders assert that they are entitled to invoke the principle of balancing accounts on insolvency to set off the cost of rectifying the latent defects against the sums due to the pursuers.

[5] In due course the date specified in paragraph d) of the e-mail of 25 July, 31 July 2004, arrived. Prior to that date the defenders had not taken any action against the pursuers to assert that they were liable to make good the glazing defects. Nor had any claim been accepted by the defenders' insurers, consultants or any other contractors. No part of the sum of £90,000 referred to in paragraph d) had been released by the defenders to the pursuers. Consequently the sum of £90,000 was due and payable in terms of the agreement of 24 July 2003. These facts were a matter of agreement between the parties. It was also agreed that that sum of £90,000 represented monies that had been certified under the relevant contractual procedures as due by the defenders to the pursuers.

[6] In the foregoing circumstances the pursuers raised the present action against the defenders for payment of the sum of £90,000 specified in paragraph d) of the e-mail of 25 July 2003. That sum was subsequently increased to £105,000 to take account of value added tax. The pursuers' claim is based on the agreement concluded between the parties on 24 July 2003. The defenders contend that the pursuers are not entitled to payment of that sum for

three reasons. First, the defenders seek to operate a right of retention, based on the principle of mutuality of contractual obligations. The defenders contend that the pursuers did not rectify certain of the known defects in the works on the Spa building, and were thereby in breach of contract; in particular, they aver that the pursuers failed to rectify the problems with the hydropool cover and the wobbly sinks and failed to clean areas of stained limestone. In addition, they found on the pursuers' failure to rectify the latent defects referred to in paragraph [4] above. Consequently it is said that the pursuers cannot insist on implement of the defenders' obligation to pay the £90,000 while failing to implement their own obligation to rectify defects. Secondly, the defenders seek to set off their own costs in rectifying the defects that were agreed on 24 July 2003 against the sum of £90,000 under the principle of balancing of accounts on insolvency. The cost of rectifying those defects is averred to be £30,956. In addition to that, the defenders have made a claim for consequential loss amounting to £47,848 in respect of one of those defects; this relates to loss of heat that is said to have resulted from the defect in the pool cover. The total of those two sums is £78,804, which exceeds the agreed retention of £20,700 specified in paragraph b) of the agreement by £58,104; consequently the defenders contend that the latter sum can be set off against the £90,000 due to the pursuers. Thirdly, the defenders seek to set off their own costs in rectifying the latent defects referred to in paragraph [4] above against the debt of £90,000, once again under the principle of balancing of accounts on insolvency. In the defences the cost of rectifying the latent defects is quantified at £120,000, and in addition the defenders aver that they have a consequential loss claim arising from those defects that amounts to £107,000. The defenders claim that they are entitled to set those sums of against the £90,000 due to the pursuers. It was a matter of agreement that the pursuers were insolvent, and had been since the appointment of the receivers.

[7] The pursuers' primary response to the foregoing arguments for the defenders is that rights of retention and balancing accounts on insolvency can be excluded by agreement. They contend that the agreement of 24 July 2003 excluded any right of retention against the sum of £90,000 specified in paragraph d), and also had the effect of excluding any balancing of accounts on insolvency in respect of that sum. In addition, the pursuers make two further contentions. First, they assert that the present dispute related to a construction contract, and in such a contract a party who seeks to withhold payment after its due date must issue a notice of withholding, in terms of section 111(1) of the Housing Grants, Construction and Regeneration Act 1996. No such notice had been issued in the present case. Secondly, the pursuers assert that the sum of £90,000 referred to in paragraph d) of the e-mail of 25 July 2003 was money held for a specific purpose. If money is held for a specific purpose, that excludes any right of balancing of accounts on insolvency.

[8] As will be apparent from the foregoing discussion, the critical question that arises in the present case is whether the defenders have a right of retention or balancing of accounts on insolvency in respect of the sum of £90,000 referred to in paragraph d) of the e-mail; it is admitted that otherwise that sum is due to the pursuers. A proof before answer was fixed on that question; the merits of any claims that the defenders might have against the pursuers were expressly excluded from the scope of the proof. I propose first to consider the evidence led at the proof and its significance in determining the issues in dispute. Secondly, I will consider the construction of the contract, and in particular whether it has the effect of excluding rights of retention and balancing accounts on insolvency. Thirdly, I will consider whether the contractual arrangements involved the holding of money for a specific purpose in such a way as to exclude the right of balancing of accounts on insolvency. Fourthly, I will consider the application of section 111(1) of the Housing Grants, Construction and Regeneration Act 1996.

Evidence

[9] The parties were agreed on the general principles applicable to the construction of commercial contracts. In relation to the admissibility of oral evidence, these may be stated as follows. First, it is permissible in construing a contract to have regard to the circumstances in which the contract was concluded in order to discover the facts to which the contract refers and its commercial purposes, objectively considered: ***Prenn* v *Simmonds***, [1971] 1 WLR 1381; ***Reardon Smith Line Ltd* v *Hansen Tangen***, [1976] 1 WLR 989. Nevertheless, regard may only be had to matters that were known, or ought reasonably to have been known, to both parties: ***Howgate Shopping Centre Ltd* v *Catercraft Services Ltd***, 7 January 2004, unreported, per Lord Macfadyen at paragraph [36]. Secondly, the last rule is subject to a number of important limitations and qualifications. In the first place, evidence of parties' discussions while a contract is being concluded is permissible *"not to put a gloss on the terms of the contract, but rather to establish the parties' knowledge of the circumstances with reference to which they used the words in the contract"*: ***Bank of Scotland* v *Dunedin Property Investment Co Ltd***, *supra*, at 665F-G per LP Rodger; see also ***Bovis Construction (Scotland) Ltd* v *Whatlings Construction Ltd***, 1994 SC 351, per LP Hope at 357C-G. In the second place, it is not usually helpful to have regard to evidence about what was said in the course of the negotiations over the terms of the contract; at the stage of negotiations the parties' positions are changing and until they finally reach agreement are still divergent; only the final version of the contract records a consensus: ***Prenn* v *Simmonds***, per Lord Wilberforce at [1971] 1 WLR 1384G-1385A.

[10] On the basis of the following principles, evidence is admissible in order to explain two matters, the factual background to the parties' agreement, so far as known to the parties at the time, and the commercial purposes of the agreement. Evidence is not admissible, however, to explore what was said in the course of negotiations. In considering evidence of the factual background and commercial purposes, a further general rule relating to the construction of the contract is important, namely the rule that contracts must be construed objectively. For this reason it is only facts that were or ought reasonably to have been known to both parties that are relevant. Likewise, in considering the commercial purposes of the parties' agreement, it is their common purpose, objectively

considered, that must be discovered; commercial objectives held by one party are only relevant if they are communicated to and accepted by the other, or if the other party ought reasonably to have understood those commercial objectives and acceded to them.

[11] Evidence about the meeting of 24 July 2003 was led from the three men who were present at it, Mr McGowan, Mr Boland and Mr Dunsmore. Evidence was also led from Mr Peter Robinson, who had worked as project architect on the Spa building. His evidence related to the defects in the building. For the purposes of the proof both sides ultimately agreed that it was not of importance, since the merits of any claims that the defenders might have against the pursuers were expressly excluded. So far as the other three witnesses are concerned, I found that Mr McGowan and Mr Dunsmore gave a broadly similar account of the matters discussed at the meeting and, with one exception, the parties' commercial objectives. Mr Boland's account of matters, especially in relation to the commercial objectives of the parties, differed substantially from the other two witnesses. I have no hesitation in preferring the account given by Mr McGowan and Mr Dunsmore. Both of these men gave their evidence in a manner that was straightforward, measured and considered. I thought that both had an excellent grasp of the details of what was being discussed, and understood fully the objectives of the discussion. Mr Boland, by contrast, did not appear to be interested in the details of the discussion; his attitude was that he employed other people to go into matters of detail. He stated that he was just there to talk about money. He refused in cross-examination to accept that a distinction might be drawn in the agreement between the general contractual retention found in nearly all construction contracts and a specific contractual right of withholding. While the existence of such a distinction is of course part of the critical question in the present case, I thought that Mr Boland's refusal to countenance the possibility of such a distinction was unimpressive. In general, the tone of Mr Boland's evidence could be described as combative; he had a definite, if simplistic, view about the agreement, and he was not prepared to countenance any contrary views. At times he failed to give straightforward answers to questions put to him. Mr Boland did, however, accept certain matters about the agreement of 24 July 2003. He accepted that three particular questions had been discussed, namely the final account, the contractual retention and the glazing issue. He accepted that the e-mail of 25 July contained the terms of what had been agreed. He further accepted that the sum of £90,000 had been withheld for a specific purpose, namely to deal with the glazing issue.

[12] Mr McGowan and Mr Dunsmore both gave very clear evidence as to the subject matter of the meeting of 24 July 2003 and the parties' commercial objectives at that meeting. So far as the subject matter of the meeting is concerned, I have set out the substance of the matter at paragraphs [1]-[3] above; that account is based on the evidence of Mr McGowan and Mr Dunsmore, as well as the relevant documents. In relation to the parties' commercial objectives, both agreed on the following. At a general level, the parties aimed at settling their disputes on a commercial basis. At a more specific level, they had the following objectives. First, they were to agree the final account for the contract; this was to take account of such matters as claims and extensions of time. Secondly, the defects identified at the earlier meeting held on 9 July 2003 were to be rectified; these are the defects other than the glazing specified in Turner & Townsend's letter of 11 July 2003. That did not, however, extend to the problems with the glazing. Thirdly, in relation to those defects, the parties were to agree a retention figure that represented the estimated cost of rectification; figures for the individual items had been agreed at the meeting of 9 July. In this way the contractual retention would the reduced, so releasing monies to allow the receivers to carry out the outstanding works. Fourthly, in relation to the glazing, the defenders maintained that the pursuers were responsible for the defects but the pursuers had denied liability; the defenders had asked the Building Research Establishment to report on the matter. In these circumstances the defenders wanted to retain a sum sufficient to cover the cost of rectifying the defects, estimated at £90,000; the pursuers, on the other hand, wanted the full amount to be certified and paid, and at least wanted to obtain payment should the report commissioned from the BRE come down in their favour. The parties' objective was accordingly to deal with the glazing issue separately, in such a way that part of the certified sum due under the final account would be retained while the defenders pursued matters with the BRE but would be paid to the pursuers if the defenders failed to obtain a favourable opinion from the BRE within a specified time; a closing date (an expression used by Mr Dunsmore in cross-examination) was to be set for that purpose.

[13] Mr McGowan gave certain further evidence about his intentions in concluding an agreement on 24 July 2003. He stated that he was concerned with the position of the receivership; in particular, he wanted to ensure that monies due to the pursuers were collected in as quickly as possible; and at the same time he wanted to ensure that the receivers were not committed to any open-ended liabilities. These are perhaps fairly obvious objectives for a party who represents a company in receivership; nevertheless, I do not think that they are objectives that would necessarily be shared or accepted by the defenders, and for that reason they do not seem relevant to the construction of the present agreement. Mr McGowan also gave evidence that he intended to agree a definitive list of defects, and that the agreement should effect a full and final settlement of all claims that might arise between the parties; his view was that it had achieved that objective. Mr Dunsmore, by contrast, thought that the agreement had effected a full and final settlement of the scope of the works that the contractor had been appointed to carry out, including the final account, but that did not apply in relation to latent defects. It is not necessary for present purposes to reach a view as to whether the agreement did effect a final settlement of all claims between the parties; the solicitor for the pursuers accepted this, and submitted that the question of full and final settlement had no effect on the questions of retention and balancing accounts on insolvency. In my opinion that is correct. If a full settlement were reached that would involve a discharge of the parties' claims, but retention has nothing to do with any discharge; it merely involves a right to withhold payment or other performance until the other party performs its obligations. Balancing accounts on insolvency does involve the discharge of claims, but

in a manner that is quite different from a contractual agreement to discharge claims. Consequently it is not necessary for me to reach a definite view on whether Mr McGowan was correct in thinking that a full and final settlement had been effected. That question could be relevant in subsequent proceedings, and consequently I express no further view on the matter.

Construction of the contract: exclusion of rights of retention and balancing accounts on insolvency

Exclusion by contract of rights of retention and balancing accounts on insolvency

[14] It is clear that it is competent in a contract to exclude the common law right of retention, and also the right of balancing accounts on insolvency. There was some disagreement between the parties' solicitors as to the conditions of such exclusion, however, and accordingly it is necessary to examine the two main authorities on the point, ***Redpath Dorman Long Ltd v Cummins Engine Company Ltd***, 1981 SC 370, and ***Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd***, [1974] AC 689. The former case is the only Scottish authority. It involved a clause in a building contract, clause 43, which was in the following terms:

"Whenever under the contract any sum of money shall be recoverable from or payable by the contractor, such sum may be deducted from or reduced by the amount of any sum or sums then due or which at any time thereafter may become due to the contractor under or in respect of the contract".

The pursuers contended that that clause excluded the common law right of retention. That argument was rejected. Lord Justice-Clerk Wheatley stated the parties' arguments as follows (at 373):

""Counsel for the defenders, while accepting that it was for them to establish that there existed a right of retention of money which was otherwise payable by them under the contract, maintained... that a right of retention existed at common law apart from any such right under the contract itself provided the terms of the contract did not expressly or by necessary implication exclude that common law right. Counsel for the pursuers accepted this as a general proposition, but maintained that the terms of this contract excluded that common law right by necessary implication in that the contract itself provided exhaustively for the whole rights of the parties in relation to retention by clause 43".

The Lord Justice-Clerk continued (at page 374):

"[The sheriff] proceeded on the basis that any provision in a contract relating to set off supersedes and is substituted for the common law right. That is not the correct approach. What was said in the Gilbert-Ash case is that you consider the terms of the particular contract as a whole to see whether there are any provisions therein which, either expressly or by necessary implication, write out the common law right. Pursuers' counsel did not quarrel with this approach, but they maintained that Clause 43 of the contract had that effect.... We do not agree. We do not consider that, looking to the contract as a whole, the terms of clause 43 clearly have that effect. Clause 43 provides for certain remedies under the contract but these are not exclusive or exhaustive of the manner in which legal rights arising from the contract may be prosecuted".

It is clear from that statement of the law that it is competent to exclude common law rights, including the right of retention, provided that the matter is sufficiently clear from the terms of the parties' contract. It is, moreover, clear that common law rights may be excluded either expressly or by "necessary" implication; that point is important in view of differences of judicial opinion in *Gilbert-Ash*.

[15] ***Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd,*** *supra*, deals with the right in English law that corresponds, broadly speaking, to the Scottish right of retention; that is the right of set off in respect of unliquidated cross claims. In relation to that right, Lord Salmon stated at pages 722-723):

"The parties to building contracts or sub-contracts, like the parties to any other type of contract are, of course, entitled to incorporate in a contract any clause they please. There is nothing to prevent them from extinguishing, curtailing or enlarging the ordinary rights of set off, provided they do so expressly or by clear implication".

Viscount Dilhorne appeared to adopt a similar approach at page 707, although he did not state the principle that is relied on. Lord Diplock, however, at pages 716-718 appeared to adopt a different approach. He stated at pages 717-718:

"It is, of course, open to parties to a contract for sale of goods or for work and labour or for both to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law or such remedy may be excluded by usage binding upon the parties... But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption. In the case of building contracts no question of usage arises to rebut the presumption.... So when one is concerned with a building contract one starts with the presumption that each party is to be entitled to all those remedies for its breach as would arise by operation of law, including the remedy of setting up a breach of warranty in diminution or extinction of the price of material supplied or work executed under the contract. To rebut the presumption one must be able to find in the contract clear unequivocal words in which the parties have expressed their agreement that is remedy shall not be available in respect of breaches of that particular contract".

In these passages Lord Diplock, differing from Lord Salmon, appears to require express words rather than mere implication to exclude the principle of retention. The solicitor for the defenders attached great weight to Lord Diplock's speech, and submitted that I should follow it. In my opinion Lord Diplock's view on this matter does not represent Scots law. In the first place, in *Redpath Dorman Long* the Lord Justice-Clerk makes it clear that necessary implication will suffice; express words are not required. That view is of course binding in the Outer House. In the

second place, provided that the import of the parties' contract is sufficiently clear, it is difficult to see why express words should be necessary. To insist on express words involves a purely formal requirement, with no effect on substance. That type of formalism seems quite at odds with the approach of Scots law to questions of construction, at least in modern times. What is required is not express words but a clear intention contained within the parties' contract. In this connection, I respectfully agree with the test put forward by Lord Salmon, that the exclusion of common law rights must be effected either expressly or by clear implication. "Clear" implication may well be the same as "necessary" implication, but the latter word carries a philosophical weight that is inappropriate in this context; consequently I prefer the expression "clear" implication.

[16] The two foregoing cases were concerned with the common law right of retention and its English equivalent. I am nevertheless of opinion that similar principles apply to the right of balancing accounts on insolvency, at least in any agreement that is concluded after the insolvency of one of the parties. While this right, unlike retention, is a true form of set off, resulting in the extinction of a debt, I am of opinion that following insolvency it must be possible to exclude it by contract provided that that is done either expressly or by clear implication. In an agreement concluded prior to insolvency, it is possible that public policy considerations might prevent the exclusion of the right by contract. That could occur in particular if the effect of the agreement were to confer a preference over general creditors; thus if the agreement involved the solvent party's ranking in full for its debt, without any reduction for debts that it owed the insolvent party, that could be regarded as creating a preference. That consideration does not apply in the present case, however, and accordingly it is unnecessary to express any concluded view on the matter. In the present case it seems clear that the agreement between the parties could not, on any construction, create any preference in favour of the defenders. I am accordingly of opinion that the right of balancing accounts on insolvency may be excluded either expressly or by clear implication.

Legal principles applicable to contractual interpretation

[17] The parties were agreed on the general principles applicable to the construction of commercial contracts. These may be stated as follows. First, a contractual provision must be construed in the context of the contract in which it is found; and the contract must be construed as a whole: Gloag, *Contract*, 399; ***Capital Land Holdings Ltd* v *Secretary of State for the Environment***, 1997 SC 109, at 114 per Lord Sutherland. Secondly, a contract must be construed objectively, according to the standards of a reasonable third party who is aware of the commercial context in which the contract occurs. Thirdly, a commercial contract should be given a commercially sensible construction; this is essentially an example of the more general rule that a construction that produces a reasonable result should be preferred over one that does not: ***Bank of Scotland* v *Dunedin Property Investment Co. Ltd.***, 1998 SC 657; ***Mannai Investment Co. Ltd.* v *Eagle Star Life Assurance Co. Ltd.***, [1997] AC 749. Consequently, when a court is faced with competing constructions, it should consider which meaning is more likely to have been intended by reasonable businessman: *Commercial Union Assurance Co. Ltd.* v *Hayden*, [1977] QB 804. Fourthly, the court must give effect the parties' bargain; it must not substitute a different bargain from that made by the parties.

Construction of contract

[18] The parties were agreed that the terms of the contract were found in Mr McGowan's e-mail of 25 July 2003; those terms were accepted in Mr Boland's e-mail of 29 July. The essential question is accordingly the construction of that e-mail according to the principles set out in the last paragraph. That exercise must be carried out against the evidential background of the circumstances in which the agreement came to be concluded and the commercial objectives that the parties had at the time of the agreement. On that basis, I am of opinion that intention of the parties in respect of the sum of £90,000 withheld pending resolution of the glazing issue was to withhold that sum for a specific purpose. In that way the parties excluded both the common law right of retention and the right of balancing accounts on insolvency.

[19] As indicated at paragraph [12] above, I find that the parties' first specific objective was to agree the final account for the contract. Their second specific objective was to agree upon the rectification of the defects identified at the meeting of 9 July 2003, and their third objective was to agree a retention figure that represented the estimated cost of such rectification. All those matters are dealt with in the agreement as recorded in the e-mail of 25 July 2003. At paragraph b) the final account is agreed at £8,265,000. In the same paragraph the retention is agreed at £20,700; this sum represents the total estimated cost of rectifying the defects that had been identified at the meeting of 9 July (see paragraph [2] above). That figure obviously replaces the amount that had previously been withheld by way of contractual retention as the contract was performed; in paragraph b) the word "adjusted" is used, which reflects that exercise. In paragraph c) it is stated that the pursuers were to complete the agreed list of defects. Those provisions give rise to all of the first three specific objectives. Paragraph c) goes on to state that, once the agreed list of defects has been completed, a certificate of making good defects is to be issued and the retention is to be paid to the pursuers. That represents the operation of the normal contractual procedures that would apply to a contractual retention fund. All those provisions appear quite clear, and indeed were not seriously in dispute.

[20] Paragraph b), after agreeing the amount of the final account and the adjusted retention, goes on to deal with a further matter. The third sentence of the paragraph refers to the balance shown on the certificate as due and payable. This reflects the fact that the balance of the final account, under deduction of the contractual retention, is a debt payable by the employer to the contractor. The same sentence then provides that of that balance £90,000 will be withheld pending resolution of the glazing issue. There is a reference to paragraph d). That provision is important in my opinion, because it indicates clearly that the withholding of the £90,000 is distinct from the contractual retention. The contractual retention is agreed at one figure, £20,700, and the £90,000 is

withheld from the balance that is payable after deduction of the contractual retention. Moreover, it is clear from the last sentence of paragraph b) that the £90,000 is to be withheld pending resolution of the glazing issue. The glazing issue had been identified as an area of dispute between the parties. It was an area of dispute that was quite different from the other defects that had emerged, in that there was no agreement as to responsibility for it, or as to the appropriate way of obtaining redress. The pursuers continued to deny any liability; the defenders were in the process of obtaining a report from the BRE; and the pursuers had suggested that the defenders should in any event make a claim against their own works insurance for the defects. These features all put the glazing dispute into a different category from the other defects, where liability was agreed and the pursuers accepted an obligation to rectify. In addition, in relation to the other defects, matters were dealt with under ordinary contractual procedures, namely the standard contractual retention fund, rectification works, a certificate of making good defects and, at that point, payment of the contractual retention fund.

[21] In the case of the glazing defect, however, a different procedure was used. In this case, a specific withholding of £90,000 was agreed. It is noteworthy that the e-mail uses the expression "withheld" rather than "retained" or a construction based on the word "retention"; that of itself tends to indicate a distinction from the ordinary contractual retention. The treatment of this sum is specified in paragraph d). Paragraph d) begins by reciting that the pursuers continued to refute any liability or responsibility for the glazing problem. That simply represents the factual position at that time. The paragraph continues by referring to the defenders' concerns as to the recoverability of their costs if they should succeed in proving that the pursuers were liable for the glazing defects. That sentence continues "hence your proposal to withhold the £90,000". That makes very clear sense; the pursuers were insolvent, and the defenders' concern is entirely understandable. The paragraph then states "I confirm that we will not pursue recovery of the £90,000 held by you" provided that a condition is satisfied. That reflects the fact that the £90,000 is distinct from the contractual retention, and is a sum withheld from the balance certified as due and payable. The condition is that the defenders should pursue the matter diligently with their insurers, consultants and other contractors who might have a responsibility for the defects. That is wholly intelligible in view of the fact that the parties were in dispute as to responsibility for the defects, and about their recoverability under the defenders' works insurance. If left by itself, this sentence would be inspecific about the remedy for three further possibilities; these are success in recovering monies from other parties, a failure to pursue the matter diligently with those parties, and the defenders' succeeding in fixing liability for the defect on the pursuers. These matters are dealt with, however, in the last two sentences of paragraph d). The first of these contemplates that the defenders may be successful in recovering sums from another party. In that event a corresponding amount is to be released to the pursuers from the £90,000 withholding. The two other possibilities are dealt with in the final sentence of the paragraph. Chronologically, the two parts of that paragraph should be considered in reverse order. First, it is contemplated that the defenders might succeed in establishing liability on the part of the pursuers, either by agreement or by court action. In that event, although it is not stated in terms, it is clearly contemplated that the defenders may continue to withhold the £90,000 and reimburse themselves for the cost of rectification out of that sum. Secondly, it is contemplated that such liability may not be established within a specified time. The time selected is the period of slightly more than one year expiring on 31 July 2004. The clause provides that, if the defenders have not already released the whole amount by that date, they will then do so except to the extent that the pursuers' liability had been established by agreement or court action. That provision is expressed as a positive obligation to release the monies.

[22] These provisions make it clear in my opinion that the intention of the parties, objectively considered, was to deal with the sum of £90,000 quite independently of the contractual retention and quite independently of any other debts that might be due as between the parties. That sum was taken from the certified balance that would otherwise have been due by the defenders to the pursuers and held pending resolution of a specific issue, namely identifying the party liable for the cost of making good the glazing defects. That was clearly an important issue as between the parties; the sum involved was fairly substantial, and the evidence established that the parties were in sharp dispute as to liability. Paragraph d) then deals with the disposal of the sum so withheld in all the eventualities that are likely to occur as between the pursuers and the defenders; if the defenders succeed in establishing liability on the part of a third party, the sum will be released to the pursuers; if the defenders succeed in establishing liability on the pursuers' part, by court action or by agreement, the sum may be withheld and if necessary used to pay for the cost of rectification; and if neither of those events occurs by 31 July 2004, the sum is to be released to the pursuers. Paragraph d) thus provides comprehensive and self-contained instructions as to what is to happen to the £90,000 withheld. The end point of those instructions is a positive obligation to release the monies if liability has not been established by 31 July 2004. The provisions of paragraph d) appear to be independent of the other provisions of the contract, and they involve the withholding of money for a specific purpose. For these reasons I am of opinion that the principle of common law retention does not apply. That appears a commercially sensible result; the defenders are given an opportunity to prove their claim against the pursuers but, if they fail to do so, the pursuers obtain payment of a sum that has otherwise been certified as due.

[23] The same is true of balancing accounts on insolvency. It was known that the pursuers were in receivership, and it was obviously know that rights of set off might arise. Against that background, the comprehensive and self-contained nature of paragraph d) is in my opinion a strong and clear indication that the £90,000 was to be dealt with according to the provisions of the paragraph and without reference to any other debts that might be due as between the parties or any set off in respect of those debts. Once again I consider that to be a commercially sensible result. Moreover, in the case both of retention and balancing accounts on insolvency, the result is one that

gives effect to the whole of the provisions of the parties' contract. It reflects the contrast found in paragraph b) between the contractual retention of £20,700 and the special withholding of £90,000. It further reflects the relatively elaborate provisions found in paragraph d) to deal with the disposal of the £90,000; these must be contrasted with the way that the contractual retention is dealt with, which accords with the ordinary provisions of the parties' building contract.

[24] The foregoing construction of paragraph d) is in my opinion supported by the evidence, summarized at paragraph [12] above, as to the parties' commercial objectives. According to the evidence of Mr McGowan and Mr Dunsmore, which I have accepted, the parties' objective was to allow retention of part of the certified sum while the defenders attempted to establish liability on the part of the pursuers through the BRE report but to provide for payment of that sum to the pursuers by a specified closing date. That indicates that the provisions dealing with the £90,000 were designed as a self-contained code. It is clear, moreover, that the structures of that code were based on a compromise deal agreed between the parties; the compromise was between the pursuers' desire to obtain payment of the certified sum and the defenders' desire to have security for payment should they succeed in establishing liability on the part of the pursuers. One further consideration is also highly significant. The £90,000 was a sum certified for payment. If it had been intended that the defenders could retain that sum against any contractual payments due by the pursuers, including liability for making good other defects, the straightforward way of achieving that result would have been to make it part of the agreed contractual retention. In other words, instead of being dealt with separately, it would simply have been added to the sum of £20,700 which was agreed as the contractual retention in paragraph b). That was not done, however. That is in my opinion a strong indication that the £90,000 was intended to be dealt with in a manner quite independently of all other debts arising as between the parties.

[25] For the foregoing reasons I am of opinion that the wording of the parties' agreement, as contained in the e-mail of 25 July 2003, is sufficiently clear to indicate an intention to exclude the principles of retention and balancing accounts on insolvency in respect of the sum of £90,000. The solicitor for the defender submitted that the wording used was not clear and unequivocal. He pointed out that Mr McGowan had taken considerable care in the drafting of the e-mail. I agree that Mr McGowan had taken care about the wording of the e-mail; I think that appeared clearly from his evidence. The solicitor for the defender went on to submit that, if Mr McGowan had intended that the effect of the agreement should be to exclude any further deductions or cross-claims, it is likely that he would have said so in terms. In my opinion that is not an inference that should be drawn in this case. It is very common, indeed perhaps normal, for the draftsman of a contract of this nature to say what is to happen rather than what is not to happen, because that is the primary matter dealt with by the contract. In such a case what is not to happen is left to inference; that applies to matters such as the exclusion of rights of retention or set off or other cross-claims. In my opinion that is what happened here; in the e-mail of 25 July 2003 Mr McGowan stated what was to happen to the £90,000 rather than what was not to happen, and in my opinion he did so in such a way as to make it clear that rights of retention and balancing accounts on insolvency were to be excluded.

[26] The solicitor for the defender further submitted that other forms of wording could have been used if the intention had been to exclude rights of retention and set off. Examples given included the following: "*The £90,000 is to be paid without any deductions"; "Any further rights of set off and retention are excluded";* and "*All common law rights are excluded"*. If such wording had been used the position would have been put beyond doubt. Because it was not used, however, the defenders' solicitor submitted that no clear inference could be drawn that rights of retention and set off were excluded. In my opinion it is rarely helpful in construing a contract to consider other forms of wording that might have been used. It is usually possible to suggest a wide range of alternative formulations, some indicating the meaning contended for by one party, others indicating the meaning contended for by the other party. The existence of such alternatives does not help in choosing between those meanings. The fact is that the parties have not used those alternatives; they have chosen a particular form of words, and it is those words and no others that must be construed by the court. In the present case I do not think that the existence of alternative forms of wording is of assistance.

[27] A further argument for the defenders was that all that the parties had agreed in the e-mail of 25 July 2003 is that the sum of £90,000, which was part of the final account sum, was to be held by the defenders for a further 12 months or thereby. The result was that until 31 July 2004 that sum was an agreed retention; thereafter it became a disputed withholding. In my opinion this construction of the e-mail fails to give effect to its full terms. In particular, it fails to give effect to the statement in paragraph d) that, if the full amount had not been released by 31 July 2004, it would then be released up except to the extent that it had been established by agreement or court action that the pursuers were liable to the defenders for the glazing defects. In addition, the suggested construction fails to explain why the sum of £90,000 is isolated in the manner that is found in paragraphs b) and in particular d) of the e-mail. What was involved was clearly something more than a mere retention; otherwise the elaborate provisions found in paragraph d) would not have been necessary.

Balancing accounts on insolvency: funds held for specific purpose

[28] In relation to the principle of balancing accounts on insolvency, a further line of authority supports the conclusion that a general right of set off is not available. It is established that the principle of balancing accounts on insolvency does not apply to any money that is held for a specific purpose. That principle is explained by Lord Ross in ***Mycroft, Petitioner***, 1983 SLT 342. In that case a firm of accountants had collected monies on behalf of a company. After the company went into liquidation the accountants claimed that they could set those monies off against their claim for fees due to them for work performed. It was held that they were not permitted to do so.

Lord Ross referred to a range of cases where compensation and, it would seem, balancing accounts on insolvency cannot be pleaded. The first of these is deposit; where monies are the subject of either proper or improper deposit balancing of accounts on insolvency is excluded. The second is where an agent has received money from or on behalf of his principal; the agent's obligation to pay or account for such funds to his principal cannot be set off against debts due to the agent by the principal. The third is where money is held for a special purpose. This rule applies to funds held on trust and, it would seem, to funds that have been dedicated to a special purpose. Indeed, the two earlier cases, deposit and funds held by an agent for a principal, can probably be regarded as examples of this rather wider principle. Lord Ross considered what a special or specific purpose is in this context, and held that the funds held by the accountants were held for such a purpose, namely to provide a fund upon which the company could draw to make payments. He then stated (at 344):

"The reason why specific appropriation precludes a plea of compensation is that compensation cannot be pleaded if to do so would be inconsistent with the terms of the contract express or implied".

That in my opinion represents the general principle that underlies all of the special cases where set off has not been permitted.

[29] In my opinion the foregoing principle is applicable to the present case. The sum of £90,000 was withheld for a special purpose, namely to provide a fund that was available for a limited period to satisfy the cost of rectifying the glazing defects, should it be proved that the pursuers were liable, and was otherwise payable to the pursuers. If the £90,000 had been paid to a third party to satisfy the purposes specified in paragraph d) of the e-mail of 25 July 2003, that would have created an improper deposit, where there is very well established authority that balancing of accounts on insolvency is excluded. In my opinion the result should be the same even though the monies in question were retained by the defenders; the monies were still a fund held for a special purpose. That conclusion is strengthened by the fact that the £90,000 was an amount certified for payment, and should have been paid immediately but for the parties' agreement; that fact strengthens the analogy with improper deposit.

Housing Grants, Construction and Regeneration Act 1996, section 111

[30] The solicitor for the pursuers presented a further argument under section 111 of the Housing Grants, Construction and Regeneration Act 1996. This was to the effect that, if the defenders wished to withhold payment of a sum certified as due to the pursuers, they required to give an effective notice of intention to withhold payment in terms of that section. Section 111(1) provides as follows:

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

Section 111 was considered in ***SL Timber Systems Ltd v Carillion Construction Ltd***, 2002 SLT 997, where Lord Macfadyen pointed out (at paragraph [20]) that the provision is concerned with the situation where a sum is shown to the due under the contract but the party by whom it is due seeks to withhold payment on some separate ground. In the present case, the solicitor for the pursuers submitted, the sum of £90,000 was clearly due, and the defenders sought to withhold payment on the basis that other defects existed in the contract works. That was precisely the situation covered by section 111. It was not suggested that the defenders that any notice of intention to withhold payment had been issued. Consequently the defenders' attempt to invoke the principles of retention and balancing of accounts on insolvency was misconceived.

[31] The solicitor for the defenders submitted that the present contract was not a construction contract; it was rather to be regarded as a settlement or compromise agreement, standing by itself, independently of the underlying construction contract. Section 111 only applies to construction contracts; consequently it could not apply to the present agreement. The decisions of Judge Humphrey Lloyd in ***Shepherd Construction Ltd v Mecright Ltd***, [2000] BLR 489, and Sheriff Principal Bowen in ***Quality Street Properties (Trading) Ltd v Elmwood (Glasgow) Ltd***, 2002 SCLR 1118, were cited in support of this contention.

[32] I agree with the defenders' contention that section 111 only applies to construction contracts; and that anything that is properly to be regarded as an independent settlement agreement will not fall under the section. The wording of the section makes clear that it only applies to construction contracts. These are defined in section 104(1) as meaning, in essence, any agreement for the carrying out of construction operations, arranging the carrying out of construction operations or providing labour for the carrying out of construction operations. If parties conclude an independent settlement agreement, that contract does not fall within the definition in section 104(1), and for that reason I respectfully agree with the views of Judge Humphrey Lloyd and Sheriff Principal Bowen in the two cases cited in the last paragraph. Nevertheless, it is important in my opinion to draw a distinction between settlement agreements that are independent of the underlying construction contract and agreements, which might in some circumstances be described as settlement agreements, which merely determine sums that are due under the construction contract. An example of the former category is an agreement to accept payment of a specified sum in full and final settlement of all claims arising out of a construction contract. An example of the latter category is an agreement that the amount of the contractual retention under a construction contract should be fixed at a specified sum. In the latter type of case all that the parties have done is to agree a particular sum that is relevant for the purposes of their construction contract; that agreement will be given effect through the mechanisms available under the construction contract. An agreement of that nature must in my opinion be considered part of the underlying construction contract, because it has no existence independent of that contract. It is only settlement or compromise agreements that can properly be regarded as independent of the

construction contract that escape the provisions of section 111. This is recognized by Judge Humphrey Lloyd in ***Shepherd Construction Ltd v Mecright Ltd***, at paragraph 14, where he points out that the effect of a settlement agreement is to replace the original agreement to the extent to which the settlement agreement applies.

[33] In some cases, of course, parties may conclude an agreement part of which are to be considered an independent settlement agreement and other parts of which are to be considered as giving effect to the construction contract. In my opinion this is such an agreement. The provisions of paragraph b) that agree the final account and the contractual retention, together with the consequential certification, merely give effect to the construction contract, and must be operated through that contract. That must be contrasted with the provisions of paragraphs b) and d) that agree that £90,000 should be withheld pending resolution of the glazing issue and the manner in which that sum is to be dealt with and the glazing issue resolved. Those provisions are in my opinion an independent settlement of a discrete element in the parties' disputes. That settlement is not referable to the construction contract, but rather stands by itself. I am accordingly of opinion that section 111 does not apply to that part of the agreement. The parties' present dispute is, of course, concerned with the ability of the defenders to continue to withhold the sum of £90,000 specified in that part of the agreement. It follows that section 111 does not apply to the present case. For this reason the pursuers' argument based on that provision must be rejected.

Additional arguments

[34] Certain additional arguments were presented by the parties' solicitors. In the first place, the solicitor for the pursuers suggested that, if the provisions of the parties' contract relating to the withholding of £90,000 and the resolution of the glazing issue were regarded as an independent settlement agreement for the purposes of section 111, that would have certain further consequences. In the first place, he submitted that the normal consequence in Scots law would be that the common law right of retention could not operate as between that contract and the parties' construction contract. The right of retention is based on the principle of mutuality of contractual obligations, and that principle can only apply within a single contract. In the second place, he submitted that the right of balancing accounts in insolvency was also excluded as between the settlement agreement and the contractual contract. The construction contract was a pre-insolvency contract; the settlement agreement was an independent post-insolvency contract. In these circumstances, in accordance with the well-known principle laid down in *Asphaltic Limestone Concrete Co v Glasgow Corporation*, 1907 SC 463, pre-insolvency and post-insolvency debts cannot be set off against each other. Consequently the £90,000 due by the defenders under the settlement agreement could not be set off against any liability that the pursuers might have under the construction contract. It followed that either the provisions of the contract of July 2003 were to be regarded as part of the construction contract, in which case a notice of withholding should have been issued under section 111, or they formed an independent contract, in which case rights of retention and balancing of accounts on insolvency could not apply.

[35] Initially I found these arguments attractive. On further consideration, however, I have come to the conclusion that they present a significant difficulty. In addition, the arguments were only raised in the second speech for the pursuers, and I do not think that they were sufficiently canvassed for me to use them as a basis for my decision. The particular problem that seems to me to arise on these arguments is as follows. The arguments are only relevant as a ground of decision if I am wrong in holding that, in respect of the glazing agreement, all rights of retention and set off are excluded. In that event, these arguments involve splitting the agreement of July 2003 into two distinct parts and treating only one of those parts as independent of the construction contract. That agreement, however, was plainly negotiated as a package, and if it cannot be held that rights of retention and set off are excluded as between its two main parts (final account and contractual retention on one hand; the glazing issue on the other hand) the normal rule would be that rights of retention were available as between those two parts. The first part of the agreement, however, was clearly closely integrated with the construction contract, to the extent that it can probably be described as a mere modification of that contract. If that is so, rights of retention would normally be available in respect of any claims arising under the construction contract or the first part of the agreement of July 2003. In that event, it is difficult to see how rights of retention would not be available generally as between the construction contract and the agreement of July 2003. The problem is essentially that of determining what is a part of the construction contract and what is an independent contract; I do not think that it admits of an easy answer. In relation to balancing accounts on insolvency, parallel problems arise. If a pre-insolvency contract is modified after insolvency, that may still count as a pre-insolvency contract. Once again, the problem is that of determining the identity of the contracts involved. As I have indicated, these matters came towards the end of submissions, and I do not think that they were fully argued. For that reason I prefer to rest my decision on the basis set out above, namely that on a proper construction of the agreement of 24 July 2003 rights of retention and set off are excluded as between the glazing agreement and the parties' other contractual relationships.

[36] The solicitor for the defenders drew my attention to the decision of the House of Lords in ***Bank of Credit and Commerce International SA v Ali***, [2002] 1 AC 251, and in particular to certain observations of Lord Bingham of Cornhill at paragraphs 8-10 of his speech. In that passage, which represents the views of the whole of their Lordships, Lord Bingham states that a party may, in a compromise agreement, agreed to release claims or rights of which he is unaware and of which he could not be aware, if appropriate language is used to make plain that that is his intention. In the absence of clear language, however, the court would be slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware. On the basis of that passage, it was submitted that I should reject the proposition advanced by Mr McGowan in his evidence

that the parties' agreement of 24 July 2003 involved the full settlement of all of their liabilities. As I have indicated, it is not necessary for me to reach a decision on that matter for present purposes, although the point could be relevant in future. For this reason I do not think that it is necessary for me to say anything more about ***BCCI v Ali***.

Conclusion

[37] For the reasons stated previously, I conclude that the agreement of 24 July 2003 excluded any right of retention against the sum of £90,000 that was withheld pending resolution of the glazing issue, and also excluded any right of balancing of accounts on insolvency in respect of that sum. I further conclude that the sum of £90,000 withheld pending resolution of the glazing issue was a sum of money held for a specific purpose, with the result that the right of balancing of accounts on insolvency was excluded in respect of that sum. For these reasons I will sustain the first and second pleas in law for the pursuers, repel the pleas in law for the defenders, and pronounce decree in terms of the first conclusion of the summons as amended.

Pursuers: Mackenzie, Solicitor; Pinsent Masons
Defenders: Drummond, Solicitor; Shepherd & Wedderburn, W.S.