David Prentice (t/a Duns Slaters) v Portland Manufacturing Ltd [2004] ADR.L.R. 05/21

Before Lord President, Lord Penrose, Lord Clarke : 1st Division, Inner House, Court of Session **:** 21st May 2004

Opinion of Lord Penrose :

[1] The defenders employed the pursuer to carry out slating and associated works at buildings known as "The Stables", Swinton House, Swinton. The defenders made interim payments when requested by the pursuer, but delayed making payment when the pursuer sought the balance of the contract sum and payment for extra work. After protracted correspondence, during which the defenders' architect repeatedly asked for additional information from the pursuer to support the sums claimed, the pursuer raised the present action, for payment of sums of £5,523.12 and £12,937.57 for the original and extra work respectively. The defenders denied liability, contending that the pursuer had failed to carry out the works contracted for, and that the extra work had not been instructed in terms of the contract conditions, and was in any event over-priced. In addition they introduced a counterclaim for damages for delay, amounting to £24,640, and for remedial works and consequential losses amounting to £84,635.

[2] After a long and complicated procedural history, beginning at the end of 1999, the case came to proof in January 2002. Evidence was led over a period of eleven days, and there were three days of submissions. The sheriff granted decree for all but £150 of the sums sued for, and assoilzied the pursuer from the conclusions of the counterclaim. In this appeal, the defenders and appellants contended that the sheriff's decisions should be reversed, that the defenders should be assoilzied from the craves of the initial writ and that decree should be pronounced in terms of the counterclaim. The pursuer and respondent was content with the sheriff's disposal of the issues.

[3] The first issue between the parties related to the formation of the contract and the identification and terms of its primary components. The pursuer's position was that, after various discussions, he had, on 1 June 1998, tendered for the works described in his tender letter and associated plan, and that the defenders' architect, Mr Rhind, had accepted the offer orally, concluding the contract. The defenders contended that there had been a more complex tender process under reference to certain architect's drawings and a specification of works prepared by Mr Rhind, and that parts of these documents, in particular a drawing identified as Roof Plan, (4) 08, and a letter bearing to have been addressed by Mr Rhind to the pursuer dated 3 June 1998, had been incorporated into the contract.

[4] The credibility and reliability of the evidence of the pursuer and Mr Rhind were crucial issues at the proof. The sheriff comprehensively rejected Mr Rhind's evidence except to the extent that it was not contentious or supported by another witness. He has explained at some length why he arrived at that view. He says in his note: *"So far as Mr Rhind is concerned, while he gave his evidence in a polite way, I have to say that I found him to be a very poor witness. He was frequently muddled and on occasions contradicted himself. Certainly he was in the witness box for a long time but I think that the difficulties in his evidence demonstrate the inconsistencies and errors of the position which he has adopted as regards this contract. As his evidence is very important to the defenders' case, it is appropriate, I think, that I should record some particular reasons why I did not find him to be a credible or reliable witness. First, he admitted in evidence that at the time after completion of the work when he was repeatedly demanding extra documentation from the pursuer as to extra work carried out, he had in fact lost his file relating to the job. This was concealed from the pursuer in correspondence and accordingly the stated reasons for which this information was being sought are not entirely truthful. The witness was quite unable to explain to me why he had behaved in this way. It was my impression that had he been candid, then Mr Prentice would have understood why information and documents (needed for apparently no good reason) were required by Mr Rhind. Mr Rhind also was completely unconvincing in his explanation as to why, having written a letter commending the quality of the slating, he was now criticising it. His explanation appeared to be on the basis that in congratulating Mr Prentice on his firm's performance, he was really just going by the look of the roof from the ground, being impressed by the way the slates had been matched. This certainly is not the way that the letter reads because it is quite clear that he is talking about quality since he described qualitative defects which have to be remedied as snagging, that is to say, as comparatively trivial matters. I consider that Mr Rhind's explanation about this matter cannot be a truthful one and that of course is very bad for his credibility. The poor quality of Mr Rhind's evidence is, I think, symptomatic of his poor performance in supervising the making of the contract and its carrying out. Had he been more diligent, we would not now have had to have many days of evidence and legal submissions about what had actually happened, when and why. For example, even at the time he gave his evidence, Mr Rhind, alone, thought that the tender of 1 June ... which is the basic contractual document, was in fact a modification of a previously existing binding contract. He also claimed to have sent a letter of 3 June ... which I am not satisfied was*

ever done, which purported to import very important conditions about timeous performance and about the applicability of British Standards, without being able to explain why, the matter being so important, he did not make sure that Mr Prentice received and accepted it, since the letter amounted to a proposed variation of the contract and as such would have had to be accepted by Mr Prentice. He was also unable to explain why, if he had successfully incorporated the provisions as regards timeous performance and British Standards (as he considered he had) [he] did not insist upon there (sic) being observed, in the face of what he now considered to be Mr Prentice's defective performance of the contract. There were never any minuted site meetings, no written instructions were even given about modifications, no proper attention seemed to have been paid by Mr Rhind to the plan sent with Mr Prentice's letter of tender, (Mr Rhind did not appear to even remember whether or not he had seen such a plan before), and Mr Rhind gave the impression of not having considered it along with the tender but simply jumped to the conclusion that the letters in the minute of tender referred actually to a plan known as (4) 08 ... which is not part of the present contract but had been seen by Mr Prentice at an earlier stage. I should also record that the reference to the standard building contract in the letter which Mr Rhind claimed to have sent, is quite extraordinarily vague in the circumstances. On behalf of the defenders it was accepted that even if such a letter had been sent, the imprecision was such as to mean that the standard terms were not incorporated, and could not be, in any contract. The whole substance of Mr Rhind's evidence is, in my judgement, seriously undermined by three matters. In the first place he appeared to consider that we were dealing with a modification of the pre-existing contract; in the second place, he appeared to consider that his letter referred to did import additional conditions as regards time and standard contractual terms. Third, he appears to have been in considerable confusion throughout the performance of the contract as to whether or not he was acting as agent for the defenders, and thus in a partial role, or whether he was carrying out the role of architect as it would emerge from the incorporation of British standards and exercising something of an intermediary role between the tradesman and the client."

[5] The first ground of appeal was in these terms: *"The learned sheriff erred in fact and in law in holding that the plan (4) 08... and the conditions set out in the letter [dated 3 June] did not form part of the parties' contract. On the basis of the evidence led before him, the sheriff ought to have concluded (a) that the plan (4) 08 had been mutually discussed, subject to certain later alterations (principally in relation to the substitution of 'Cupiga' for Welsh slate) as the basis of the contract to be let and was objectively to be regarded as part of the invitation to tender, which the tender itself did not objectively disclaim; (b) that the letter [dated 3 June] had either been sent and received as a document importing contractual conditions on or near the date it bears, or at least that its terms had been discussed and agreed orally between the parties or their representatives as part of the contract; and (c) that the sketch was both too imprecise in its terms and too informally advanced by the pursuer so as to qualify objectively as a contractual document. As a result of these errors the Sheriff erred in fact and law in finding that the roof areas B1 and C1 were extra to the contract, that the standard of workmanship to be applied to the execution of the contract works was that commonly used by slaters in the locality for rural domestic work, and that the time limit for completion of the contract was simply to be a reasonable time. The Sheriff ought to have held that the said areas were to be priced provisionally as part of the contract (and that they were so priced); that the standard of workmanship and the selection of ancillary materials was, if not expressly set out in the contract documents, that reasonably to be expected from careful and competent slaters complying with British Standards and the relevant recommendations of slate producers and lead manufacturers and their trade associations; that the time limit for completion of the works was the end of September 1998, and that the pursuer was aware of (and objectively accepted) that time limit and knew that the reason for it was the intention to transfer the defenders' manufactory to Swinton shortly thereafter."*

[6] In opening his submissions for the appellants, Mr Sandison indicated that he would invite the court to make extensive alterations to the sheriff's findings in fact, substituting findings based largely on the evidence of Mr Rhind for those set out by the sheriff. He based his approach on the observation of Lord Thankerton in ***Thomas* v *Thomas*** 1947 S.C. (H.L.) 45 at page 54 that: *"The appellate Court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court."*

As the first ground of appeal stands, the appellants had to identify some "objective" basis on which the sheriff's disposal of the issues of fact and law before him could be so undermined that the whole issues of fact and law would be re-opened for this court to examine and assess, arriving at findings that were different, and in some cases radically different, from those set out in the sheriff's decision. However, as Mr Sandison sought to develop his argument it became increasingly clear that the fundamental contention was that the sheriff's

views on credibility and reliability were unsustainable, and that he had erred in particular in rejecting Mr Rhind's evidence as unreliable and incredible in respect of matters to which he alone spoke.

[7] Mr Sandison accepted that the grounds of appeal did not contain any relevant criticism of the sheriff's rejection of Mr Rhind's evidence. As the passage quoted from his note shows, the sheriff gave reasons for the view he formed that were based on the substance of Mr Rhind's evidence in the context of the evidence as a whole. Mr Di Emidio, who appeared for the pursuer and respondent, had not been shown Mr Sandison's proposed amended findings before the hearing. He had approached the appeal on the basis that the grounds had avoided any direct attack on the sheriff's conclusions in relation to Mr Rhind's evidence. He submitted that the court should not now entertain any argument that depended on Mr Rhind's unsupported evidence. The proposed amended findings tendered by Mr Sandison left few of the sheriff's findings unaffected. Most of the sheriff's findings were simply deleted. Others were re-written to the opposite effect. It was clear from the terms of the proposed amended findings that they could not be given effect without treating Mr Rhind's evidence as wholly credible and reliable, and, as a consequence, rejecting evidence which the sheriff had expressly found both credible and reliable.

[8] Having heard counsel on the issue, the court decided that the appellants should not be heard on a matter of such importance in the absence of notice in the grounds of appeal. Mr Sandison proceeded with his submissions on that basis. But he accepted that there was little that he could say in support of the first ground of appeal.

[9] On the basis of the evidence that the sheriff did find credible and reliable, the facts relating to the formation of the contract are clear. The stables buildings at Swinton House had originally been a stone-built, slated farm steading on three sides of an open court-yard. At some time in the past, part of the roofing on the south side of the original steading had been replaced by asbestos sheeting. The court-yard had been roofed over with a slated pitched roof at a higher level than the original buildings. And the whole buildings had been extended along the north side by the addition of a *"lean-to"* structure roofed with corrugated sheeting. In January 1998 Mr Rhind's firm prepared plans, including the plan (4) 08, for an extensive refurbishment programme including some masonry work, extensive joinery work and re-roofing. Plan (4) 08 contained a limited description of some of the work, with a lettered key to the areas where certain operations were to be carried out. Other descriptions of works and of materials were contained in elevations and sections, also prepared by the architect.

[10] At that stage the drawing (4) 08 indicated one area of builder-work, in the north-east of the original steading, where the existing roof was to be removed, the walls increased in height, and a new roof constructed. The intention that appears from the plan was that the existing Welsh slates were to be re-used, with a provisional allowance for twenty-five per cent replacement. Replacement slates were to be second-hand Welsh slates. Welsh slates were also to be used on all newly-slated roofs. Copper nails were specified, *"all in accordance with current Codes of Practice". "Code 5"* lead was specified throughout and it was provided that all lead-work was to be carried out in accordance with the recommendations of the Lead Sheet Association. At that stage the defenders had not formed a final view whether plant situated in the buildings at the north-west of the original steading should be removed. The slating would be disturbed in that event, but otherwise it was hoped that it might not require re-slating. The plan indicated that for the work in this area a provisional allowance was required for new sarking and re-slating with Welsh slates. The boundary of the area in question on the west side of the roof was well-defined. But on the east side it ran on into an area of roof that was to be re-slated on existing sarking in any event. The plan did not contain a full specification of the works required. As I have already mentioned it had more of the character of a description of works, supplemented by other drawings and narrative descriptions of works and materials. There were some dimensions, as in the case of lead sheeting and sarking. But generally that was not the position. There was no specification of the slates other than that they were to be Welsh. The architect proceeded to invite tenders. The pursuer was not among the contractors invited to tender for the works. No acceptable tenders were received.

[11] In March 1998, after the failure of the formal tender process, Mr Rhind approached Mr Prentice and invited him to visit Swinton, to inspect the roofs and to provide an estimate of the cost of the roofing work then required. Mr Prentice visited Swinton on 16 March. He was shown the architect's plans, and in particular plan (4) 08. He was given a copy of that plan on which he noted the dimensions of the areas where slater-work was

to be carried out. The sheriff has found that Mr Prentice's tender of 1 June 1998 was based on a plan he prepared and provided to the architect. On the evidence of the pursuer he was clearly entitled so to do. The scope of the slater-work had been reduced from that originally reflected on the architect's plans. The high roof over the original court-yard was no longer to be re-slated as a whole. The bottom rows of slates were to be removed to allow the fitting of a rubber gutter below them, and re-slated. Re-slating of the provisional areas in the north east of the original steading was not required. The raising of the roof in the north-east of the original buildings was not to proceed. And the description of the slater-work had changed. The process by which the changes came about appears to have been discussion. No revised architect's plan was produced.

[12] After the meeting on 16 March, the pursuer provided, on 1 April 1998, an estimate of the price of the work he understood he was asked to carry out. He quoted for new slating on areas identified as "A" to "G" using "new cupiga slates", and re-slating in one area, "H", which comprised parts of the high central roof, without reference to the provision of new slates. The sheriff narrates in his note that in discussion on site Mr Prentice proposed that Spanish slates should be used instead of Welsh slates and that Mr Rhind agreed to that proposal. He narrates that it was for that reason that the word "cupiga", a Spanish slate, appeared in the letter of tender. The pursuer's evidence warranted that view. The effect of his evidence, in chief and in cross-examination, was that "cupiga" was an example of a Spanish slate, as was "del carmen", the brand he used, and that "one good Spanish slate is the same as another good Spanish slate". The quotation did not lead to a contract, however. The price was thought to be too high.

[13] On 26 May 1998 Mr Rhind wrote to Mr Prentice by fax asking for a revised tender for the work. The letter states, *inter alia*, *"This should take account of the reduced area of building and any work done by others, such as Keith Renton, that is covered by your first Tender. Reduction of cost is important to keep control of the original budget."*

The reference to the pursuer's "first tender" was consistent with the defenders' case on record that the pursuer was one of the contractors who had been asked in February 1998 to tender for the work originally described, and that the offer of 1 April 1998 was in response to that invitation. But on the sheriff's findings that was without substance in fact. Mr Prentice was never party to the formal tender process.

[14] On 1 June 1998 the pursuer responded to the invitation of 26 May with a reduced price as compared with his offer of 1 April. He wrote: *"In reply to your fax dated 28th May 98, please find below revised tender for work allowing for reduced slating area which includes all lead soakers and valleys in code 5."*

There followed a "brief description" of work in each of the areas identified on the attached drawing. With the exception of area "H", which was described as already set out, each area was described either as *"To slating roof with new cupiga slates"* or *"To stripping slates off roof and slating with new cupiga slates"*. Five areas involved only slating and two involved both operations. The descriptions of work in each of the areas identified was the same as the description in the offer of 1 April 1998 for the same letter designation. The parties did not produce in court a drawing for the offer dated 1 April, however. The sheriff held that Mr Rhind accepted the offer of 1 June by telephone, and that the bargain was concluded. There was ample evidence to entitle him to reach that conclusion on the view he took of credibility and reliability.

[15] The appellants' contention that the plan (4) 08 was the basis of the contract to be let is without substance on the evidence. It was not referred to in the pursuer's tender. Nor was it mentioned in Mr Rhind's oral acceptance. The sheriff was entitled to take the view that that was enough. However, in a number of respects the plan is incompatible with the letter of 1 June. It envisaged a wider scope of works, over roof areas that were more extensive than the areas covered in the offer. It covered a variety of trades that were beyond the scope of the pursuer's business as a slater and are not within the scope of his offer. It required the re-use of the Welsh slates removed from the existing slated roofs and the supply of second-hand slates to make good deficiencies rather than new slates. In that respect the pursuer's offer reduced the slater work considerably, since it removed the need for re-dressing of slates that would have been necessary in the case of second-hand materials. But viewing the matter objectively, as the ground of appeal invites one to do, the works envisaged in the plan (4) 08 are different from the works envisaged in the tender letter, and it cannot be construed as the basis of a contract concluded on the pursuer's offer by oral acceptance.

[16] The second aspect of this ground of appeal fares no better on an objective view of the document relied on. The first material stipulation which the letter dated 3 June 1998 sought to incorporate into the contract was that

"the latest date for completion of all of the work to comply with the requirements of Scottish Borders Enterprise is 30 September 1998". On the defenders' approach this required to be read with the architect's plan (4) 08. Superficially it would have amounted to an obligation on the pursuer to procure the timeous completion of works for which he had not contracted as well as those he had undertaken to perform. The final stipulation in the letter was that: "In general I would like to confirm that in the interests of both parties the Contract will be operated in the terms of the Standard Form of Building Contract". Which among the several standard forms of contract the writer of the document had in mind it is impossible to say. It was accepted by the defenders that there was no agreement between the parties that any standard form of contract had been incorporated effectively into the contract between them. As the sheriff has found, if this document had indeed been delivered to the pursuer it would have amounted to an attempt to innovate on the concluded contract between the parties. However, the sheriff was not prepared to find that it had ever been sent, much less received, on the evidence he accepted as credible and reliable.

[17] The third line of attack on the sheriff's findings was that the pursuer's sketch was too imprecise in its terms and too informally advanced by the pursuer to qualify objectively as a contractual document. The sketch provided the locations of the several areas mentioned in the tender letter. It does not lack clarity in relation to those areas except possibly at the boundary between area "C" and the areas originally identified as requiring provisional pricing in plan (4) 08, where the sketch shows an irregular line. As has already been observed, the plan (4) 08 similarly left this boundary ill-defined so far as the east-facing side of the roof was concerned. The sheriff was entitled to accept the evidence of the pursuer as to the extent of the work in this area for which he had priced and the extent of the area excluded. In all other respects the sketch is clear and provides the specification of the areas listed in the letter. Positively, the ground of appeal sets out the decisions that it is contended the sheriff ought to have arrived at on an objective view of the evidence. Without reference to Mr Rhind's evidence there is no basis on which these proposed findings could be supported. Taken as a whole, the first ground of appeal is without substance on the facts found by the sheriff, and his findings have not been challenged effectively.

[18] The second ground of appeal was in these terms: *"The Sheriff erred in fact and in law in finding that the standard of work carried out by the pursuer met the requisite contractual standard, on either view of what that standard was. The sheriff erred in rejecting the evidence of the architect Mr Rhind and the defenders' expert Mr Mason that the work failed in numerous respects in relation to selection, placing and nailing of slates, selection, formation and fixing of leadwork, and making drainage arrangements (which failures are fully set out on Record...) to meet the standard of a competent slater (local or otherwise) or the published standards of slate and lead manufacturers and relevant British standards. The Sheriff ought to have accepted that evidence as more coherent and objectively-based than, and thus preferable to, any evidence to the contrary. The Sheriff erred in finding that the pursuer was instructed to slate a part of the roof which could not properly be slated, and ought to have found on the basis of the preponderance of the evidence before him that the roof in question was capable of being properly slated, that the pursuer raised no objection and made no disclaimer about the work or its efficacy, and that the pursuer simply failed to slate it using an appropriate size and spacing of slate. The Sheriff erred in finding that the pursuer was entitled under the contract to use 'Del Carmen' or any other similar Spanish slate other than 'Cupiga' slates, or that the former is a better slate. His Lordship ought to have found on the evidence that the contract had stipulated for 'Cupiga' slates on the basis of a particular building used by the pursuer as an example to the defenders of the slate he was to use, that the particular kind of 'Del Carmen' slate substituted by the pursuer was cheaper, inferior in quality, and of a different colour to the stipulated slate, and that it was substituted by the pursuer without the knowledge or permission of the defenders or their architect. On the basis of any or all of the material breaches of contract which the Sheriff ought to have found were committed by the pursuer in relation to standard of work and choice of materials, the sheriff ought to have found that the pursuer was in material breach of the parties' contract in relation to terms which had as their counterparts the obligation on the defenders to pay the contract price. The Sheriff ought thus to have found the pursuer not entitled to any part of the outstanding price of the contract works."*

[19] The second ground of appeal suffers from deficiencies similar to the first in so far as it was predicated on the substitution of a finding of credibility and reliability in relation to Mr Rhind's evidence, with an implicit rejection of the evidence on which the pursuer relied successfully before the sheriff. The appellant faced similar difficulties in attempting to substitute a preference for the evidence of Mr Mason over the evidence of Mr Cheeseman, who provided much of the "evidence to the contrary" referred to in the ground of appeal. The sheriff dealt with the evidence of both witnesses, and explained the reasons for his preference of the evidence

of Mr Cheeseman led by the pursuer. The sheriff concluded that Mr Cheeseman was the more impartial and reliable witness. The ground of appeal also relied to a considerable extent on the assumption that the plan (4) 08 would be held to have been a contractual document. Mr Sandison accepted that the decision restricting his submissions to contentions specified in the grounds of appeal affected the scope for developing this ground. He focused his criticism of the sheriff on five matters: the use of "*del carmen*" slates; the use of code 4 and code 3 lead sheeting in parts of the works; and three criticisms of the pursuer's work found in the evidence of Mr Cheeseman, namely the slating of the low-pitched roof; the execution of work of installing cement/sand fillets at the junctions between slated areas and masonry; and the execution of lead-works at chimneys.

[20] On the sheriff's findings, "*cupiga*" slates were descriptive of the Spanish slates the pursuer had discussed with Mr Rhind and were not definitive of the pursuer's obligation in the selection and provision of slates. I have already noted that there was evidence to that effect that the sheriff was entitled to accept. Looking at the matter more broadly, it is difficult to see what alternative conclusion could have been reached. It might have been possible to infer from the general terms of plan (4) 08 that, at least in areas where there was existing Welsh slating, replacement second-hand slates should have characteristics of thickness, size and colour compatible with adjacent re-used slates. It is by no means certain: roofs may be slated with slates of uniform size or there may be slates of graduated sizes over the roof. The better view might have been that slate thickness and size were simply omitted from the description of works notwithstanding the clear intention that second-hand slates, necessarily requiring re-dressing, were to be used. When one comes to the pursuer's tender and Mr Rhind's acceptance, what emerges is complete indifference on the part of the architect to any specification of the slates to be provided. On the evidence, "*cupiga*" slates, when available at all, were among a range of slates produced by a particular manufacturer. Identification of the supplier could not imply the slate thickness, sizes or other qualities. "*Del carmen*" slates were slates produced by another manufacturer, apparently from the same trade group, and, on the evidence the defenders led, they were available in a range of qualities and sizes. The evidence disclosed little intelligent interest on the part of the defenders in the characteristics of the materials to be used. Superficial inspection of a building previously slated by the pursuer appears to have been the high point in their consideration of this issue. The ground of appeal refers to "the particular kind" of slates used as "cheaper, inferior in quality, and of a different colour to the stipulated slate". The price range, quality and colour of the reference "*cupiga*" slates, were never specified. If the pursuer was entitled to use Spanish slates other than "*cupiga*" slates the duty of the pursuer in the selection of slates that were of an appropriate quality, size, thickness and colour was to do what was necessary to enable him to provide a slated roof that was reasonably fit for the purpose implicit in the contract. There was ample evidence that he fulfilled that obligation.

[21] The defenders' complaint is of the most opportunistic kind. The sheriff has found that following completion of the work it was inspected by the defenders and their architect and that the pursuer was complimented on the quality of the new slating, subject to minor snagging complaints. It was only in the course of the protracted process of examining the quantification of the pursuer's claim for payment for extra works that it was noticed that the trade name of the slates used was "del carmen" and not "cupiga" and the defence began to be elaborated. Finally there was clear evidence that "cupiga" slates could not be procured. In his report, the defenders' witness Alan Mason explained that he had not been able to find any information about "cupiga" blue/grey slates. In his description of the remedial works he said were required he relied on a document described as "del carmen guide 7", apparently produced by the Spanish Slate Quarries Group. As Mr Di Emidio submitted, it was apparent that the remedial works Mr Mason recommended involved not the replacement of the slates used with slates meeting a "cupiga" contract specification, but with Spanish slates such as "Del Carmen", selected and fitted in accordance with a specification that was never incorporated into the parties' contract. The sheriff had before him evidence that he accepted as credible and reliable that the slating work carried out by the pursuer was of an appropriate standard. He was entitled to accept Mr Cheeseman's evidence in preference to what he clearly regarded as the partial and unreliable evidence of Mr Mason. Mr Cheeseman considered that the low-pitched roof along the northern side of the buildings should not have been slated at all, or, if it had to be slated, that larger slates with deeper lapping should have been used. The tender letter of 1 June 1998 followed on discussions of the areas to be slated. They had been cut down from the defenders' original intentions, but the lean-to structure remained in the project. The pursuer was invited to re-submit for the reduced area, which by then had been identified in discussions and

included the lean-to. He did so and his tender was then accepted. The sheriff was entitled to find that he had been specifically instructed to slate the lean-to. The defenders' case on record was based on the contention that the Spanish Slate Quarries Group document "*Del Carmen guide 7*" was a proper measure of the pursuer's obligations in relation to the selection and fixing of slates in this area. The slate dimensions, lapping and hole gauge details complained of were said to fail to meet design criteria derived from that document, all as set out in the evidence of Mr Mason. It is apparent from the defenders' evidence that the defenders and Mr Rhind had not had this document in contemplation when the contract was entered into or when it was executed: this was another factor to emerge from investigations carried out to construct a counterclaim against the pursuer. The evidence of Mr Cheeseman that, if the roof were to be slated, slates of larger dimensions, with deeper lapping, should have been selected was based on his view that the low-pitched roof should not have been slated at all, and that, if it were to be slated, in any event such measures were necessary. That was not the defenders' case. Indeed the predicate, that the roof was of too shallow a pitch to slate, is challenged in the ground of appeal. So far as concerns the selection and use of "del carmen" slates the pursuer was not in breach of contract. The defenders might have approached the case differently, in particular in relation to the roof of the lean-to, had they accepted Mr Cheeseman's evidence as the basis of their case, but they did not do so.

[22] In relation to the high level central roof the sheriff has found that the pursuer was instructed to replace the lower courses of slates only. I have already referred to the description of works in item "H" of the tender letter. Findings in fact 34 and 35 refer to this area. In my opinion the sheriff was entitled to make these findings on the evidence he accepted as credible and reliable. If lapping were to be achieved in the replacing of slates in the lower courses only, after carrying out lead work at the edges of the roof, it was possible only by inserting slates under higher rows of slates already fixed to the roof. There is nothing objectively wrong in concluding that that could be achieved only by centre nailing of the replacement slates.

[23] The sheriff's findings in relation to tiling fillets and hidden gutters depend on the definition of the contract works. Secret parapet gutters in code 5 lead were indicated in various parts of the drawing (4) 08. The full details of the work described at the initial tender stage were not, however, set out on that drawing. It was necessary to refer to the elevations and sections on other drawings in the tender series to ascertain where, for example, existing gables required to be raised in association with the construction of secret parapet gutters behind. In such areas builder-work was required to achieve the original objective. Not only would it be difficult to fault the sheriff for arriving at the conclusions found in finding 36 in this respect, it is difficult to see how any other result could have been arrived at unless the whole original tender drawings had been incorporated into the parties' contract. That was not the defenders' case on record, nor did it feature in the grounds of appeal or the proposed amended findings.

[24] In relation to lead-works more generally, there is no dispute that the pursuer undertook to use code 5 lead throughout the works, or that he substituted code 4 or code 3 lead in certain parts of the works. Mr Mason's statement indicated that he had found code 4 or code 3 lead in "numerous areas". That was implicitly rejected in the sheriff's findings. He found in fact that:

> *"25. Code 5 lead was used throughout the works set out in the pursuer's tender with the exception of some covered areas and one apron where code 3 or code 4 lead was used.*
>
> *26. The use of said lead was not materially significant in contributing to an inferior job but there was a saving to the pursuer in material costs of £150 or thereabout in that respect.*
>
> *39. Insofar as code 3 or 4 lead was used in place of code 5 it was not so used in a place where it would make a material difference."*

On the sheriff's approach there was no material breach of contract in the supply and fitting of lead sheeting that did not conform to specification. Code 5 lead sheeting was of a thicker gauge than the other two grades.

[25] The remaining complaints of the defenders that can be supported on the evidence the sheriff found credible and reliable are the further two criticisms of the pursuer's work found in the evidence of Mr Cheeseman. Those related to the forming of cement skews, in particular at parapets, where too rich a cement/sand mixture was used and cracking resulted, and the construction and fitting of chimney flashings. In respect of these works, the sheriff found:

"38. Any defects in the pursuer's work fall to be categorised as such as would be dealt with by snagging procedure and had the pursuer been given the opportunity to do this, he would have been able to do so in the course of approximately one day's work."

In his note the sheriff observes that the pursuer had always offered to return to remedy snagging defects and that there was no reason to assume that the pursuer would not have done so timeously and properly had he been permitted to do so by Mr Rhind. However, Mr Rhind took the view that it was not appropriate and accordingly, in so far as snagging work was not done, that was really the defenders' own responsibility.

[26] Mr Sandison's submissions were, of necessity, constrained by the court's ruling on the scope of argument that was legitimate on the grounds of appeal, and, in particular, the implication that the sheriff's findings on credibility and reliability were not open to criticism. In relation to the selection and fitting of "del carmen" slates and lead sheeting other than code 5, Mr Sandison argued that the pursuer had failed to perform the contract and was disqualified, on principles of mutuality, from claiming the balance of the contract price or payment for extra work in areas B1 and C1, assuming that the defenders were held to be in error in contending that those areas were covered by the pursuer's tender of 1 June 1998. The argument was based on ***Ramsay* v *Brand*** (1898) 25 R. 1212 (reference was made to the report in 35 S.L.R. 927 for a more ample narrative of the facts); *Steele* v *Young* 1907 SC 360, and ***Elphinstone Forrest* v *The Scottish County Investment Company Ltd*** 1916 S.C. (H.L.) 28. Mr Sandison submitted that the principles of mutuality derived from those cases, and the scope of permissible remedies that followed from them, had stood the test of time, unaffected by later observations in cases such as ***Ruxley Electronics Ltd* v *Forsyth*** [1996] 1 A.C. 344 and ***Bank of East Asia* v *Scottish Enterprise*** 1997 S.L.T. 1213. Mr Di Emidio argued that ***Ruxley*** and ***Bank of East Asia*** showed trends in the modern law of remedies, reflected in the report of the Scottish Law Commission on Remedies for Breach of Contract SE1999/59, chapter 7.

[27] On the findings in fact that the sheriff made, and was entitled to make, on the evidence before him in this case, it would be inappropriate to express any view on fundamental issues relating to the law of remedies. In relation to the major issue between parties, the use of "del carmen" slates, there was no breach of contract, and the defenders had no right to withhold payment of any part of the contract sum, or the amounts otherwise due as extras, on the basis of the use of those materials. The reference to "cupiga" slates was illustrative only of the Spanish slates the parties had agreed should be used. There was a failure to comply with specification in certain of the lead-works. But that did not amount to a material breach of contract on the sheriff's findings, and, taking the authorities at their highest for the defenders, would have entitled them to withhold payment only of the part of the contract price required to carry out the contract works with an appropriate grade of lead. Similarly, the standards of workmanship employed by the pursuer were held to involve non-material breaches of contract, capable of correction within the scope of ordinary snagging works in a construction context. In a suitable case it might be appropriate to consider whether one should adopt the approach illustrated in *Ruxley* and follow their Lordships' lead in seeking to demonstrate that the Scottish law of contractual remedies can go hand in hand with common sense (see Lord Bridge of Harwich at page 354). But the factual sub-stratum for such an exercise does not exist in this case. On any view, on the facts found, the pursuer was entitled to payment of the balance of the contract sum, and, if appropriately priced, the extra work, subject to such deduction as was properly referable to the breach of contract in the supply and use of code 4 or code 3 lead. The second ground of appeal is without substance.

[28] It is of some importance, however, to note what the defenders sought, before the sheriff and on appeal, in regard to the remedy, if any, available to them in respect of the breach of contract relating to the lead works. The defenders' contention was that the sheriff ought to have found that the pursuer was in breach of material terms of the parties' contract that had as their counterparts the defenders' obligation to pay the contract price, and that he ought therefore to have found that the pursuer was not entitled to payment of any part of the balance of the contract price or of the sum claimed for extra work. So long as the defenders could maintain such an argument in relation to the whole slate-works, and a material proportion of the lead-works, they could, with a degree of logical consistency, contend that the pursuer was not entitled to payment. However, when the claim has of necessity to be related only to the lead-works component of the total works comprised in the lump sum elements of the tender, and the corresponding claims for payment of the extras, there is the immediate problem that the defenders' case was not structured so as to enable these elements to be isolated

and dealt with separately. There was no basis on which the sheriff could find the cost of making good the defective lead-works, and there are no relevant findings in fact. There was evidence that the sheriff used in order to find that the saving to the pursuer of using thinner lead sheeting was about £150. But that was not on any view a proper measure of the amount that the defenders would have been entitled to withhold if one applied the decisions in ***Ramsay*** and ***Steele***. Mr Mason's estimate was based on re-doing the whole works, consistent with the defender's written case which was dependent on establishing material breach in each of the principal areas relating to the supply and use of materials and standards of workmanship.

[29] Nor was this court asked to make appropriate findings. The defenders' first proposals for amendment of the sheriff's findings in fact reflected the contention that the whole works should be taken down and executed afresh as proposed by Mr Mason. The revised note of proposed alterations to the findings, submitted after the court's decision that the sheriff's findings on credibility and reliability could not competently be criticised, was to amend finding 38 to read as follows: *"The pursuer's work fails to meet the contractual specification in that 'Cupiga' brand tiles were not used by him; Code 3 and 4 lead was used in various places across the roof; the 16% pitch roof was slated with slates which were too small appropriately to be used there; the lead flashings around the chimneys were not properly formed; and the cement skews were badly formed and have cracked. The cost of putting the works into the state contracted for is at least £30,000. Any other defects in the pursuer's work fall to be categorised as such as would be dealt with by snagging procedure and had the pursuer been given the opportunity to do this, he would have been able to do so in the course of approximately one day's work."*

[30] It is unnecessary to discuss the terms of this proposed finding critically. It is sufficient to note that the position remains that the defenders sought no order from this court based on the identification of the lead-work that required to be re-done, at best for the defenders, on the sheriff's findings 25 and 26, and the cost to the defenders of instructing and carrying out that work at the material time. It is far from clear that either party invited the sheriff to approach the assessment of any deduction from the payment to which the pursuer was entitled, or of his liability for damages for the breach, on the basis of his decisions on credibility and the findings in fact that followed. The sheriff estimated the saving in material cost to the pursuer of using code 3 or 4 lead in place of code 5 in the limited areas affected at £150. As Mr Sandison observed, that approach was specifically rejected in *Ramsay*. The sheriff was not entitled to make a deduction on that basis. But he was not provided with the materials required to enable him to made a deduction from the price on any other basis, viewing the lead-works in isolation. The approach in *Ramsay* was that, as an exception to the mutuality rule, the court might order payment of the contract price for the works, subject to a deduction for the cost to the building owner of repeating the disconform operations to the contractual standards using specified materials. The defenders might, on this approach, have sought to withhold a sum based on re-doing lead-works in the specific areas where it was found that code 4 or code 3 lead sheeting had been used. They did not do so.

[31] Mr Sandison accepted that the third ground of appeal failed, given the decision on Mr Rhind's evidence. It was fundamentally dependent on the acceptance of what Mr Rhind had said, and had no other basis.

[32] The fourth ground of appeal related to the pricing of the pursuer's claim for extra work in the circumstances, and, in particular, having regard to the view that areas B1 and C1 were not priced within the tender of 1 June 1998. Despite Mr Sandison's extensive discussion of passages from the evidence of the pursuer and Mr Cuthbertson, it is impossible to support the substantial differences he sought to establish. The tender offered to carry out the slating and associated works for lump sum prices for each of the areas identified. The pursuer's evidence, as I understand it, was that in pricing the original works and the additional works he followed the same approach. The works involved operations that would typically be measured lineally and operations that would typically be measured on an area basis in a fully measured bill of quantities. Slating is typically an area item. Cement skews, guttering and lead aprons adjacent to masonry might be measured on a lineal basis or as items. The pursuer described his approach to measuring the extra work: he went back to the source information for labour and materials relating to adjacent areas of roof and priced the extra work pro-rata. Mr Cuthbertson explained that as a professional surveyor following ordinary professional practice he would have adopted a different approach and measured the areas and valued the works on the basis of his measurements of the areas involved at appropriate prices based on jobs of a similar nature for which he knew of competitive tenders. But there was nothing to suggest that material differences emerged from the two approaches. Mr Cuthbertson explained the pursuer's approach to pricing the extra work, based on the

pursuer's extensive experience, and was supportive of it. His own valuation provided an independent check. The sheriff had ample evidence on which to arrive at finding in fact 44. He explains his basis for accepting the pursuer's valuation, and he cannot be criticised for the approach he took.

[33] Mr Sandison was critical of the pursuer's documentation, of the consistency with which he applied mark-ups to materials prices for profit, of the quality of time records, and of similar details. These were matters within the scope of the sheriff's discretion on the evidence. Some of the criticisms had more superficial attraction than others. Mr Sandison discussed the practice of having time-sheets authenticated by the employer or an agent for the employer, for example. In a well-run construction contract, particularly a contract adopting one of the standard forms that stipulate for the submission and signature of time sheets intended for the support of claims for extras, that would have been understandable. But as the sheriff made clear it was his view that Mr Rhind had not supervised this contract in a competent and appropriate way, and it is difficult to have sympathy with a complaint that in an informal contract, such as this was, the methods and practices of a well-structured and administered construction contract were not followed. On the other hand, there was a criticism of the quality of the records maintained of materials used on the contract. There could have been more substance in that, depending on the view the sheriff took of the evidence. But he was entitled to take the view that the records available did vouch the unit prices applied and that the works themselves were the best evidence of what was used. The pursuer was not obliged to purchase all of the materials he used specifically for this contract. He was entitled to use materials from stock if they were appropriate for the works. There was no reason why he should produce a specific invoice for every unit of every material he used. But it is not for this court on appeal to indulge in a detailed re-assessment of the minutiae of the pricing of individual elements of extra work. The issue was for the sheriff as judge of fact. Unless he can be said to have erred in the factual assessment required of him, his decision cannot be criticised. There is no substance in the fourth ground of appeal.

[34] The fifth ground of appeal related to the sheriff's disposal of the counterclaim. The pursuer was not in breach of contract in relation to timeous performance. There was no breach of contract in relation to the selection and use of "del carmen" slates. There was non-material breach of contract in relation to lead-works. The remaining criticisms of the pursuer's work found by the sheriff were held to be snagging works that the pursuer had been prevented from performing when he sought an opportunity to do so. Apart from the element of timeous performance, which must fail given the rejection of Mr Rhind's evidence, the counterclaim is simply a reflection of the bases on which the pursuer's claims for payment were advanced, and stands or falls with the defences. In the circumstances the fifth ground of appeal is also without substance and must be rejected.

[35] The final ground of appeal relates to expenses. It proceeds, in the first place, on the basis that the defenders were willing to remit all issues to a man of skill and that the sheriff should have had regard to that factor in disposing of the expenses of the cause. As the case was developed there were potentially very significant issues of law in this case that were never likely to be addressed independently of the investigation of the facts. Even if there were any ground in principle or practice for modifying the liability of a party where a reference to arbitration or mediation had been refused, this would not have been an appropriate case in which to modify the defenders' liability. However, there is no basis for the application in our law or practice. The second basis of criticism is proportionality. This is quite unarguable in the circumstances. The pursuer presented a claim for payment for work done. He was confronted by a counterclaim which, to a sole trader, must have seemed potentially disastrous in financial terms. On the sheriff's findings any lack of proportionality lay at the feet of the defenders.

[36] In the result the appeal as a whole fails and should be refused.

Act: Di Emidio; Drummond Miller, W.S. (for Melrose & Porteous, Duns)
Alt: Sandison; Balfour & Manson (for Turnbull Simson & Sturrock, Jedburgh)