Opinion of Lord MacKay of Drumadoon. Outer House, Court of Session. 11th November 2005.

Introduction

[1] The factual background to this action is summarised in Paras. [1]-[5] of my Opinion of 23 July 2004. The action arises out of a Sub-Contract between the parties. That Sub-Contract related to the carrying out by the pursuers of earthworks and site clearance, which were required during the construction of the M74 motorway. On 24 September 1998, Joint Receivers were appointed to the pursuers. Thereafter, on 30 September 1998, the Sub-Contract was determined by the defenders.

[2] In the principal action the pursuers seek to recover payment for works they carried out in terms of the Sub-Contract. They conclude for payment of two sums, £10,441,754 and £2,450,617. As I explained in Paras. [6]-[7] of my earlier Opinion, some time after the action was raised the parties agreed that the Court be invited to address a number of questions. I dealt with Questions A-D in my earlier Opinion. Those questions related to the claims being pursued by the pursuers. The parties are now agreed that Question E need not be answered and that the pursuers' claim for finance charges, as set out in Condescendence 10 of the principal action, should be allowed to proceed to proof.

[3] The parties still wish me to address Question F, which relates to the counterclaim. That question is in the following terms: "*Is the counterclaim relevant or pled (whether in the pleadings or in the discs or documents lodged in process) with sufficient specification, to allow it to proceed to probation*."

[4] In the run up to the debate in respect of Question F, a number of documents were lodged. One of these was a record, which incorporated the pleadings of the parties as at 15 March 2005. The pleadings in respect of the counterclaim have undergone fairly substantial amendment, since the previous debate on Questions A-D. The record discloses that the counterclaim contains a total of seven conclusions, two pairs of which, Conclusions 1A and 1B and Conclusions 5A and 5B, are pled in the alternative. Conclusions 1A, 1B, 2, 3 and 4 proceed on the footing that the defenders have suffered loss as a result breach of contract on the part of the pursuers. The defenders seek to recover the additional costs they incurred in carrying out those parts of the original sub-contract works, which the pursuers had failed to complete prior to the termination of the Sub-Contract. Two alternative formulations of those additional costs constitute the sums concluded for in Conclusions 1A and 1B.

[5] In terms of Conclusions 2, 3 and 4 of the counterclaim, the defenders seek to recover loss and expense incurred as a consequence of a period of 7 days delay, which they aver were occasioned by breach of contract on the part of the pursuers. The loss and expense suffered by the defenders is said to be attributable to the costs of site establishment, disruption of the defenders' labour and plant and the defenders' failure to earn bonus payments under the main contract to which the defenders were a party.

[6] Conclusions 5A and 5B proceed on the basis that the pursuers have already been overpaid by the defenders, that the pursuers have been enriched without any intention of donation on the part of the defenders, that such enrichment is unjust and that the defenders are entitled to such payment as will reverse that enrichment.

[7] In anticipation of the debate relating to the counterclaim, parties lodged written Notes of Arguments (No. 58 for the pursuers and No. 56 on behalf of the defenders). Shortly before the diet of debate was due to begin, the pursuers also lodged a document extending to some 187 pages, entitled *"PURSUERS' OBSERVATIONS ON THE COUNTERCLAIM: As at Minute of Amendment (consolidated 10 November 2004)"* (No 6/59 of Process). The document is dated 10 March 2005. An earlier version of the document had been lodged in process in November 2003.

[8] At the outset of the debate, there was some discussion as to whether the contents of No. 6/59 of Process, which discuss a number of the factual issues between the parties, rendered it inappropriate, if not impossible, for the debate to proceed. Indeed, senior counsel for the defenders made a motion that unless senior counsel for the pursuers could assure the Court that no questions of fact would arise during the debate, the debate should be adjourned. That motion was made against the background that the defenders maintain that the pursuers have not answered various calls made upon them in the defenders' pleadings. Those calls are referred in the Note of Arguments for the Defenders (No. 56 of Process).

[9] In responding to that motion, senior counsel for the pursuers submitted that the debate should proceed. He explained that No. 6/59 of Process had been lodged in response to the substantial amendments that the defenders had made to their counterclaim, which had included referring to alternative schedules at the end of the counterclaim, and additional productions that the defenders had lodged, on 28 February 2005, being a revised CD-ROM (No. 7/42 of Process), further drawings (Nos. 7/25 - 39 of Process) and further annotated spreadsheets (Nos. 7/41 of Process). The debate had been fixed in order to debate the relevancy of the counterclaim. For the purposes of the debate, the defenders' averments in the counterclaim would require to be taken as *pro veritate*. Any factual issues that were discussed in No. 59 of Process were not relevant to the issue of the relevancy of the counterclaim. Moreover, the debate was not dealing with the pleadings relating to the principal action.

[10] Having considered the motion of the defenders, I decided that the debate should proceed. In reaching that decision, I took account of what I had previously been told by the parties about their plans to seek to negotiate a settlement of the dispute between them. A procedure for mediation has been agreed, but I had been informed that it was a condition of the agreement to proceed to mediation that a debate as to the relevancy of the counterclaim should first take place. It is not entirely clear why that condition has been insisted upon. However, standing what had been explained to me, I decided it would be sensible to proceed with the debate on Question F, which took place over three court days.

[11] The pursuers seek dismissal of the counterclaim, on the basis that the counterclaim is irrelevant and lacking in specification. The defenders invite me to refuse the pursuers' motion, to ordain the pursuers to answer the calls made on them, towards the end of Statement of Fact 4.2, in relation to the payment of interim payments, and, having done so, to put the case out By Order, for a discussion as to further procedure. During the course of the debate, junior counsel for the defenders intimated that the defenders were willing to lodge more detailed schedules, in answer to certain of the criticisms as to the specification of their pleadings, which had been advanced by junior counsel for the pursuers. After the conclusion of the debate, additional schedules were lodged, being revised versions of the schedules referred to in Statements of Fact 5, 6, 7, 8, 9 and 10.

[12] Before I turn to deal with the detail of the submissions on behalf of the parties, I should deal briefly with two general issues, which were raised during the debate. The first relates to the legal basis on which a main contractor is entitled to recover damages in respect of the failure of a sub-contractor to complete sub-contract works. The second relates to the level of detail in which pleadings in a commercial action, such as the present, should be framed.

[13] As far as the first of these issues is concerned, junior counsel for the pursuers referred me to ***Hirt* v *Hahn*** (1876) 61 Missouri 496; U.S. Dig. (1876); ***Mertens* v *Home Freeholds Co.*** [1921] 2 KB 526; ***D.O. Ferguson & Associates* v *M Sohl*** (1992) 62 BLR 95; *Keating on Building Contracts* (7th Edition) at para. 8-45; *Hudson's Building and Engineering Contracts* (10th Edition) at para. 8.123 and *McBryde on The Law of Contract in Scotland* at para. 22.88. Those authorities were cited to vouch two propositions. The first was that when a contract is terminated, following upon a breach of contract, involving the non-completion of the contract works, the innocent party should be put in the same position as it would have been in, had the contract works been completed by the guilty party.

[14] The second proposition was that the assessment of the damages recoverable by the innocent party should *prima facie* be based upon a comparison between (a) the sub-contract price for the works, which the guilty party has failed to complete, and (b) the actual cost to the innocent party of completing those works that the guilty party had failed to complete. The actual loss incurred by the innocent party, in completing such works, fell to be calculated by reference to the costs the innocent party has incurred, less any amount that that would have had been due and payable to the guilty party had the guilty party carried out those works, in terms of its contract with the innocent party.

[15] There was no dispute on the part of counsel for the defenders that the authorities cited illustrate the general propositions I have outlined or that those general propositions apply to the recovery of damages and the assessment of damages in respect of claims of the nature of those being advanced by the defenders in Conclusions 1- 4 of the counterclaim. However, there is a dispute between the parties to the present action, in relation to whether the defenders are entitled to restrict the assessment of the loss

suffered by them, so that it only takes into account those uncompleted works, which formed part of the original sub-contract works, or whether account should also be taken of the additional works and other changes to the original sub-contract works, which the defenders had authorised prior to the termination of the Sub-Contract.

[16] Turning to the second of the general issues, junior counsel for the defenders referred me to ***John Doyle Construction Limited* v *Laing Management (Scotland) Limited*** *(reported as* ***Laing Management (Scotland) Limited* v *John Doyle Construction Limited****) [2004] BLR 295)*. I was referred in particular to para. 20 of the Opinion of the Court, which is in the following terms:-

> *"20. The present case is concerned with the relevancy of the pursuers' pleadings, and the argument for the defenders in large measure consisted of a detailed and sustained attack on the overall structure of those pleadings. Nevertheless, it must be borne in mind that the present case involves a commercial action, and in the Commercial Court elaborate pleading is unnecessary. All that is required is that a party's averments should satisfy the fundamental requirements of any pleadings, namely that they should give fair notice to the other party of the facts that are relied on, together with the general structure of the legal consequences that are said to follow from those facts. In doing that, the pleadings of one party should disclose sufficient to enable the other party to prepare its own case and to enable the parties and the court to determine the issues that are actually in dispute. The relevancy of pleadings must always be tested against these fundamental requirements. In a case involving the casual links that may exist between events having contractual significance and losses suffered by the pursuer, it is obviously necessary that the events relied on should be set out comprehensively. It is also essential that the heads of loss should be set out comprehensively, although that can often best be achieved by a schedule that is separate from the pleadings themselves. So far as the casual links are concerned, however, there will usually be no need to do more than set out the general proposition that such links exist. Causation is largely a matter of inference, and each side in practice will put forward its own contentions as to what the appropriate inferences are. In commercial cases, at least, it is normal for those contentions to be based on expert reports, which should be lodged in process at a relatively early stage in the action. In these circumstances there is relatively little scope for one side to be taken by surprise at proof, and it will not normally be difficult for a defender to take a sufficiently definite view of causation to lodge a tender, if that is thought appropriate. What is not necessary is that averments of causation should be over-elaborate, covering every possible combination of contractual events that might exist and the loss or losses that might be said to follow such events".*

[17] Junior counsel for the defenders contended that in assessing the attack by the pursuers on the relevancy and specification of the counterclaim four points required to be borne in mind: (a) in commercial actions a particular approach to pleadings is encouraged and elaborate pleadings are unnecessary; (b) all that is required is that a party give fair notice of the facts they are relying upon, together with the legal consequences that are said to follow from those facts; (c) a party's pleadings should disclose sufficient to enable the other party to prepare its case and to enable the other party and the court to determine the points that are in dispute; and (d) fair notice can be given by relying on a production. It was contended that the terms of the counterclaim should be assessed against that background. Senior counsel for the pursuers did not dispute the validity of the guidance to be found in *John Doyle Construction Limited* v *Laing Management (Scotland) Limited*, nor the points that the defenders sought to take from that authority.

Submissions on behalf of the pursuers.

[18] Junior counsel for the pursuers contended that in relation to the sums claimed in Conclusions 1A and 1B, one would have expected the terms of the counterclaim to have stated which parts of the original sub-contract works, and which parts the additional works that had been authorised by the defenders, had remained uncompleted on the date when the sub-contract was terminated. It was argued that the defenders had failed to specify which works they had required to carry out and whether those works had formed part of the original sub-contract works or had constituted additional works, authorised by the defenders as Changes, in terms of Clause 9 of the Form of Sub-Contract Agreement, which I quoted in Para. 45 of my original Opinion. It was also argued that Statement of Fact 4, (which in turn refers to Appendix 5 of the Form of Sub-Contract Agreement, containing the schedule of milestone payments), and Statement of Fact 5, failed to provide adequate specification of the costs alleged to have been incurred by the defenders in carrying out such sub-contract works, as they had carried out, and as to what the defenders would have required to pay to the pursuers, had the pursuers carried out those

works. The defenders' pleadings were also criticised on the basis of a lack of detail about, and explanation for, the figures in the schedules referred to in the various Statements of Fact, in particular in Statements of Fact 4.2, 5.1 and 5.7. Similar criticisms were advanced as to the contents of certain of the productions lodged by the defenders on 28 February 2005, which are being relied on by the defenders as providing notice of the sums claimed in terms of the counterclaim.

[19] It was also contended that (a) the damages claimed in respect of the works carried out by the defenders in terms of Conclusions 1A and 1B had been based on assessed costs, rather than actual costs, (b) the defenders had failed to make clear whether the works that the defenders had carried out had included works additional to the original sub-contract works, which had been instructed by the defenders after the sub-contract had been terminated, (c) that the defenders' alternative approaches, in Statements of Facts 4.1 and 4.2, to the assessment of the sum due to the pursuers, as at the date of termination of the sub-contract, were irrelevant, (d) for the purposes of the counterclaim, the value of the works that had been carried out by the pursuers, prior to the date of termination of the Sub-Contract, could not be assessed, as the defenders sought to do, by reference to the provisions in the original Sub-Contract relating to interim payments (Appendix 5 containing the schedule of milestone payments), (e) the defenders' approach to the valuation of the works carried out by the pursuers had failed to take into account the provisions of Clause 16 of the Form of Sub-Contract Agreement, (f) the defenders' approach to the valuation of the works had also failed to take into account the provisions of Clause 20 in Appendix 1 to the Form of Sub-Contract Agreement, which I discussed in my original Opinion, in answering Question C, (g) the defenders' approach to valuation of the works carried out by the pursuers had failed to attribute any value to works that fell within milestones, which had not been fully completed by the date on which the Sub-Contract was terminated, (h) the work carried out by the pursuers had been valued as at the date of receivership, rather than on the date when the Sub-Contract was terminated and (i) the calculation of the damages claimed by the defenders in respect of the costs they had incurred in carrying out sub-contract works had failed to take account of the bonus that the defenders would have required to pay the pursuers, in light of the bonus the defenders had themselves earned under the main contract, as a direct result of the pursuers' contribution to achieving early "Permit to Use" dates under the Main Contract. In terms of the Sub-Contract, a bonus would have been payable to the pursuers, had they completed the whole of the sub-contract works.

[20] In relations to the sums claimed in Conclusions 2, 3 and 4, counsel for the pursuers attacked the relevancy and specification of the averments in Statements of Fact 6, 7, 8 and 9. Those conclusions seek to recover, by way of damages, loss and expense alleged to have been suffered, between 24 September 1998 and 7 October 1998, on account of the pursuers going into receivership. That loss and expense is alleged to have been incurred in respect of costs of site establishment (Statement of Fact 7), disruption to the defenders' attendant labour and plant (Statement of Fact 8) and the defenders' failure to earn bonus amounting to £182,700, under the provisions of the Main Contract (Statement of Fact 9). It was submitted on behalf of the pursuers that they had not been bound to complete the original sub-contract works in advance of the dates set out in Appendix 8 to the Sub-Contract. The defenders had not properly averred how any alleged delay on the part of the pursuers, or arising out of the termination of the sub-contract, could be linked to or had caused (i) any delay in performance, on the part of the defenders, under the Main Contract, (ii) any additional loss or expense to the defenders or (iii) any loss by the defenders of any right to bonus under the provisions of the Main Contract.

[21] Finally, certain criticisms were directed against the averments in Statement of Fact 10. Those criticisms focused on the lack of detail in, and the lack of explanation for, the figures included in the Schedules referred to in that particular Statement of Fact.

[22] Having adopted the submissions of junior counsel as to the lack of specification in the counterclaim, senior counsel for the pursuers developed the pursuers' attack on the relevancy of the counterclaim. It was submitted that the manner in which loss falls to be assessed, following upon a breach of contract before completion, involved a number of questions of law, in particular remoteness of loss. Concentrating on the averments in support of Conclusions 1A, 1B, 5A and 5B, senior counsel stressed that the contract between the parties had not been a fixed price contract to carry out a fixed amount of works. Alterations to the sub-contract works had been possible, in terms of Clause 9, and the pursuers

were entitled to be paid for having carried out works that were additional to the original sub-contract works. The pursuers were also entitled to be paid for works they had carried out that formed part of the works covered by specific milestone payments. By the time the sub-contract between the parties had been terminated, both the scope of the sub-contract works and the contract price had substantially altered. The defenders had erred in both of their alternative approaches to calculating the sum accrued as being due to the pursuers, as at the date of termination (see Statements of Fact 4, 4.1, and 4.2). The defenders had failed to take account of the changes to the sub-contract works, by way of additions, deletions and substitutions, which the defenders had instructed, and the consequential alterations that had been made to the contract price. The pursuers were entitled to be paid for all those works they had carried out. In framing the counterclaim the defenders had failed to take those facts into account. They appeared to be valuing the works carried out by the pursuers on the basis of the milestone payments, set out in Appendix 5, and to be calculating their losses for completing the sub-contract works, including additions, deletions and substitutions, which the pursuers had agreed and been authorised to carry out, on the basis that the contract price that the pursuers would have received for those sub-contract works would have been £9 million. Had the pursuers completed the sub-contract works, they would have been entitled to payment for all of the sub-contract works they had carried out, including additions, deletions and substitutions. The full sum they would have been entitled to receive required to be taken in account in the formulation of sums claimed in the counterclaim. The pursuers were entitled to notice of the particular sub-contract works, which they had failed to complete and which the defenders had completed. Any claim against the pursuers should be restricted to the costs of completing those particular works, under deduction of what the pursuers would have received from the defenders had the pursuers completed those works. In these circumstances, the claims being pursued in Conclusions 1A, 1B, 5A and 5B were irrelevant. Even if the defenders proved what they offered to prove, they would not be entitled to decree in terms of any of these conclusions.

Submissions for defenders

[23] In responding to the submissions of junior counsel for the pursuers, junior counsel for the defenders argued that the defenders had given the pursuers fair notice of the various claims included in the counterclaim. The pursuers could be expected to be aware of the original sub-contract works, which were incomplete at the date of termination. Similarly the pursuers could be expected to be aware of the changes in the original sub-contract works that had been authorised by the date of termination, but had not been completed by that date. What the defenders were seeking by way of damages from the pursuers were the losses they had suffered for having to complete those parts of the original sub-contract works, which the pursuers had failed to complete by the date of termination. Adequate notice of those works had been given in the Schedules referred to in the counterclaim and the various productions the defenders had lodged, including the video (No. 6/34 of Process), appendices to be found in the revised CD-ROM (No.7/42 of Process), the additional marked up drawings (Nos. 7/25 - 39 of Process) and the annotated spreadsheets (Nos. 7/41 of Process).

[24] "*Assessed costs*" in the annotated spreadsheets were the costs that had actually been incurred by the defenders, in completing the original sub-contract works. The pursuers had also been given access to the contracts that the pursuers had entered into with new sub-contractors. One practical test as to whether the pursuers had been given fair notice was to ask whether the pursuers had been able to respond to the counterclaim. It was clear that they had been, initially in the Observations on the Counterclaim, dated 4 November 2003 (No. 32 of Process), and then in the revised Observations on the Counterclaim, dated 10 March 2005, which had been lodged on the eve of the debate. If the pursuers maintained that the defenders were seeking to recover the costs of carrying out works, which should not have been included, the pursuers could identify such works and take the point at proof.

[25] In relation to the matters dealt with in Statements in Fact 5.2, 5.3, and 5.4 the defenders had taken matters as far as they could. There had been no calls upon them in the pleadings that had gone unanswered. At a debate, the Court could not be expected to trawl through the voluminous productions that parties had lodged. The allegation that the defenders were over-claiming was a matter to be dealt with at proof. The assessment of damages involved questions of fact, which fall to be determined after proof (see ***Haberstich* v *M'Cormick & Nicholson*** 1975 SC 1).

[26] Following a breach of contract, it was also relevant, when assessing the loss suffered by the innocent party, to employ more that one measure in doing so and to check one result against another (see ***Prudential Assurance Co. Ltd* v *James Grant & Co. (West) Limited*** 1982 SLT 423 and *McBryde on The Law of Contract in Scotland* at para. 22.90). In these circumstances it was necessary to hear evidence before determining what damages were due to the defenders. There were critical issues of fact between the parties as to the basis on which the pursuers had been paid prior to the date of termination. Linked to these questions of fact were issues as to the correct construction of the terms of the Sub-Contract, including Clause 16 of the Form of Sub-Contract Agreement, that bore on the entitlement of the pursuers to payment. That was clear from the respective pleadings of parties in the Counterclaim and Answers and from what was to be found on pages 24-25 of the revised Observations on the Counterclaim, dated 10 March 2005 (No. 59 of Process). As far as the question of bonus was concerned, the pursuers had sought payment of a bonus in the principal action. If they now maintained that any bonus, which would have been due to them had they completed the original sub-contract works, should now be credited against any sums due to the defenders, they could plead that point. The parties were in dispute as to the bonus to which the defenders were entitled under the Main Contract and the bonus to which the pursuers would have been entitled, had they completed the sub-contract works. Those disputes could only be resolved after proof. Fuller versions of the schedules referred to in Statement in Fact 10, including one dealing the application of the provisions of Clause 20 of Appendix 1, would be produced.

[27] After adopting the submissions of junior counsel, senior counsel for the defenders stressed that the counterclaim had been deliberately confined to recovering the losses involved in the defenders completing the original sub-contract works. All the variations of those sub-contract works had been left out of account in the counterclaim. Those variations were the subject of claims in the principal action. Reference to pages 5 and 10 of No. 32 of Process and pages 24 - 25 of No. 59 of Process indicated that the parties had been adopting a common approach to the valuation of the original sub-contract works that had not been carried out by the pursuers. The costs involved in completing the original sub-contract works would be dealt with in the counterclaim. What the pursuers were entitled to be paid in respect of Changes, whether they had been additions to or alterations to the original sub-contract works, would be dealt with in the principal action. As far as the losses that were claimed by the defenders were concerned, when the works that had not been completed fell within the scope of a milestone payment that had not been 100% completed, the whole of the milestone payment would be deducted from the costs the defenders had incurred.

Discussion

[28] I have reached the view that Question F should be answered in the affirmative. It my opinion it would not be appropriate to dismiss the counterclaim, or any part or parts of it, after debate. On the contrary, I take the view that the written pleadings and the extensive productions that have been lodged in process by the defenders provide sufficient notice to the pursuers and to the Court of the legal and factual bases for the claims that are being pursued in the counterclaim.

[29] Whilst the principal action and the counterclaim encompass a number of difficult legal issues and numerous complicated factual issues, it is possible to identify certain basic facts in the background to the action. The parties entered into a sub-contract, in terms of which the pursuers undertook to carry out earthworks. It remains to be determined precisely when the Sub-Contract between the parties was concluded. However, by 4 February 1998, at the latest, the original sub-contract works were defined by reference to the Second Schedule to the Form of Sub-Contract Agreement. Those works were subject to Changes, involving additions, variations and deletions, authorised and instructed by the defenders in terms of Clause 9 of the Form of Sub-Contract. On 24 September 1998, Joint Receivers were appointed to the pursuers. The defenders held the pursuers to be in repudiatory breach of contract and terminated the Sub-Contract on 30 September 1998. As at the date of termination, certain of the original sub-contract works had not been completed by the pursuers. Likewise, by that date, the pursuers had not carried out certain of the additional works instructed and authorised in terms of Clause 9.

[30] There is no dispute between the parties that, following 30 September 1998, the defenders were entitled to carry out, or have carried out, any of the original sub-contract works, which the pursuers had not completed. There is no dispute that the defenders are entitled to seek to recover any losses they have

incurred in having those sub-contract works carried out. Likewise, there it does not appear to be in dispute that the defenders could, if they wish, seek to recover from the pursuers any losses they have incurred in carrying out any works additional to the original sub-contract works, which the pursuers had agreed to carry out, but had failed to carry out by 30 September 1998.

[31] However, following upon the termination of the Sub-Contract, it is for the defenders to decide which works they wished to have carried out. That was so, whether the works had formed part of the original sub-contract works or had been instructed as additional to the original sub-contract works, in terms of Clause 9 of the Form of Sub-Contract. Similarly it is for the defenders to decide which sums they wish to recover (or at least offset against any sums that may be due to the pursuers), if they have suffered loss in carrying out such works. Likewise if the defenders take the view that prior to 30 September 1998 they had overpaid the pursuers, it is for them to decide whether, and if so, on what basis and in which amounts, they wish to seek repayment from the pursuers. The defenders are under no obligations to pursue all claims they may have against the pursuers. It is for them to determine which claims they wish to pursue and to identify and give notice of the legal basis upon which they intend to pursue their claims.

[32] In my opinion, the passage quoted from the Opinion of the Court in ***John Doyle Construction Limited*** **v** ***Laing Management (Scotland) Limited*** is of considerable relevance to a dispute of the nature that exists between the parties to this action. Both the contemporaneous records dating back to 1997-1998 and the documents that have been created in the course of this action are voluminous. By way of example, I was advised that the revised CD-ROM (No.7/42 of Process) contains over 18,000 images. There are also numerous appendices, drawings and spreadsheets lodged as productions. Many of these are complex and technical documents. Certain of the contents of those documents are difficult for the lay reader to understand and absorb. Having said that, it is clear from the terms of the Pursuers' Observations on the Counterclaim (No.59 of Process) that the authors of that particular document appear to have been able to do so. That reinforces the view that in a commercial action elaborate pleading is to be discouraged.

[33] In my opinion, the terms of the counterclaim, backed up, as they are, by various schedules, appendices, and other productions provide fair notice to the pursuers of the facts upon which the defenders intend to rely and of the legal framework, within which it is contended, those facts entitle the defenders to the various sums they seek. In my opinion the terms of No. 59 of Process illustrate that there is every reason to believe the pursuers will be able to prepare their case, in the event that it proves necessary for the counterclaim to go to proof. In the event that a proof on the counterclaim is required, that would, in all probability, take place at the same time as any proof in the principal action.

[34] During the course of the debate, the defenders responded to criticisms as to lack of specification by undertaking to provide more detailed versions of the schedules referred to in their pleadings. Following the debate they did so. Those revised schedules appear to provide considerable details as to the make-up of certain of the figures found in the Statements of Fact in the counterclaim.

[35] The sums claimed in Conclusions 1A and 1 B are explained in Statements of Fact 4 and 5 and the Schedules referred to in Statement of Fact 5.7. During the debate, counsel for the defenders clarified that in terms of these conclusions the defenders are seeking to recover costs involved in carrying out works forming part of the original sub-contract works, which the pursuers had not completed by 30 September 1998. They offer to prove what it cost them to carry out those works. They are prepared to deduct a value for those works, which they aver should be calculated on one of two alternative basis, which they set out in Statement of Facts 4.1 and 4.2. The pursuers, of course, dispute that either alternative is the proper method of determining what the defenders would have required to pay to the pursuers, had the pursuers carried out all of the original sub-contract works before termination of the contract. However, that particular dispute, involving as it does, consideration as to how the provisions of Clause 16, Condition 13 in Appendix 1 and Appendix 5 of the Form of Sub-Contract Agreement fall to be construed and reconciled with each other, can, if necessary, be resolved at proof. It should also be noted that particular dispute may be raised by the pleadings in the principal action in Condescendence 3. In my opinion, in respect of the sums concluded for in Conclusions 1A and 1B, the pursuers have been given fair and appropriate notice of the case they require to meet.

[36] As far as the sums concluded for in Conclusions 2, 3 and 4 are concerned the supporting averments in Statements of Fact 6, 7, 8 and 9 have been amplified by certain of the revised schedules that have been lodged since the debate took place. In my opinion, in relation to all three of these claims, the pursuers have been provided with fair notice of the case they require to meet. It is a question of fact whether the termination of the Sub-Contract, with the consequent requirement for the defenders to make alternative arrangements to carry out earthworks, caused 7 days of delay in the issue of a Permit to Use the North Section of the Works, under the provisions of the Main Contract to which the defenders were a party. If it did, further questions of fact arise in relation to the losses alleged to have been suffered by the defenders in respect of site establishment, labour and plant and loss of bonus. In my opinion, the defenders have given the pursuers ample notice of the facts they offer to prove in advancing these three heads of loss. The legal basis on which they seek to recover those losses is also clear. In my opinion, the defenders have relevantly pled these particular claims and provided adequate specification as to how these claims are quantified.

[37] The claims covered by Conclusions 5A and 5B involve returning to the dispute as to how the pursuers are entitled to be remunerated for all of the sub-contract works they carried out prior to termination of the Sub-Contract. In my opinion, the defenders have given the pursuers adequate notice as to their legal contentions on that issue. They are to be found in their defences to the principal action and are, in any event, set out in Statements of Fact 4, 4.1, 4.2 and 10. The quantification of the sums claimed in these alternative conclusions is also clear, from the terms of Statement of Fact 10 and the various schedules referred to in that Statement of Fact. In my opinion, the pursuers have been given fair notice of the case against them in respect of both of these alternative claims.

[38] In the whole circumstances, I see no basis for holding that the Counterclaim is irrelevant, in whole or in part. As far as specification of the claims included in the Counterclaim is concerned, there appears to me to be an abundance of specification available, indeed arguably too much. If, in preparing for a proof the pursuers seek further documents bearing upon the costs alleged to have incurred by the defenders, or about any other aspect of the losses alleged to have been suffered by them, then procedures exist by which the defenders could be ordained to produce additional documents that might clarify any uncertainty or ambiguity that may remain, as to precisely how the defenders quantify the claims they have included in the Counterclaim.

[39] The defenders invited me to ordain the pursuers to answer the calls made upon them in Statement 4.2. I am not minded to do so. These calls relate to questions of fact relating to events that took place seven years ago. In my view, if the parties are agreed that efforts should be made to mediate a settlement to the long-standing dispute between them, I cannot see such mediation would be assisted by allowing, or indeed ordaining, that further adjustment of the pleading should take place. If the pursuers were to amend their pleadings, in response to such calls, it would almost inevitably lead to further amendment on the part of the defenders. If, in the fullness of time, a proof requires to take place, I have little doubt that counsel acting for the defenders would be perfectly able to explore the factual issues raised by these calls, irrespective of whether the pursuers have chosen to answer them in advance of the date of the proof.

[40] As agreed with counsel, I shall put the case out By Order for a discussion of further procedure.

Pursuer: Keen, Q.C., Mure; Maclay Murray and Spens
Defenders: Moynihan, Q.C., Borland; Pinsent Masons