The Sheriff Principal, having resumed consideration of the cause, refuses the appeal and adheres to the Sheriff's interlocutor dated 25 April 2005; continues the cause on the question of expenses to a date to be afterwards fixed.

JUDGMENT : Sheriff Principal Edward F Bowen QC. Edinburgh, 1st May 2006

1. This appeal arises in an action relating to a contract for the building of an extension to a cottage entered into between the pursuers, the builders, and the owner of the property, the defender. In the principal action the pursuers seek recovery of sums said to have been certified for payment prior to their contract with the defender being terminated. In a counter-claim the defender seeks a large sum of damages. He contends that the pursuers were in breach of express and implied terms of the contract between them. As a result, he contends that he was unable to use the cottage over a prolonged period. He further contends that the extension as constructed is so unsafe that it will require to be demolished, and that damage has been caused to the cottage itself which will require to be repaired. His claim for damages covers demolition and rebuilding costs, along with associated professional fees.

2. The pursuers deny that they were in breach of contract. In essence they maintain that they carried out the building works in accordance with the architect's design, and certain design instructions from a structural engineer. Both the architect and the structural engineer were convened by the pursuers as third parties under the provisions of Ordinary Cause Rule 20.1(2). The defender did not adopt the case stated by the pursuers against either of the third parties.

3. The action which was raised as a commercial action under the provisions of Chapter 40 of the Ordinary Cause Rules proceeded to a debate on preliminary pleas tabled by both parties. Following that debate the Sheriff, in an interlocutor dated 25 April 2005 sustained those pleas for a variety of reasons and dismissed the cause so far as directed against both third parties. The pursuers have appealed that interlocutor in so far as it relates to the first third party, the architects, who are hereinafter referred to as "the third party". No appeal is taken against the decision in so far as it relates to the structural engineers. Moreover the pursuers now accept that the Sheriff was correct in deciding that their averments as directed against the third party were irrelevant. They tendered and lodged an extensive minute of amendment in the course of the appeal procedure.

4. It is proper to record that, following the usual minute of amendment and answers procedure a motion to allow the record to be amended in terms called on 25 April 2006. At that calling Ms Olson on behalf of the third party, opposed allowance of the pursuers' amendment, arguing that it failed to cure the absence of specification which had proved fatal before the Sheriff. Due to the complexity of the issues I did not determine Ms Olson's submissions but allowed the amendment and continued the cause to the appeal diet. The situation is thus one in which allowance of the amendment is not to be taken as prejudicing the third party's argument as to whether it cures the defect in the original pleadings, and the pleadings as they now stand have not been the subject of scrutiny at first instance. In the interests of expedition it is however desirable that I should express my view as to whether the pursuers' case against the third party in the counter-claim is sufficient to proceed to enquiry.

5. Before turning to the submissions of parties it is appropriate to give attention to the manner in which the case is now pled. In statement in fact 3 the defender sets out seven respects in which the pursuers are said to have been in breach of express and implied terms of the parties' agreement. Certain of the specified breaches contain reference to more than one alleged defect in the building. The pursuers deal specifically with each of these allegations in answer 3 and in five instances make averments which might be said to be directed against the actings of the third party. They make the following averment which is of some importance: *"Explained and averred that there is no need to demolish the cottage and rebuild it. The type, extent and severity of the alleged defects are such that they can be rectified without demolition"*.

6. The pursuers then proceed to make the following general averments: *"Explained and averred that the pursuers acted in accordance with the terms of the contract. The third party inspected the pursuers' work and in issuing interim certificates under clause 62(1) indicated that he (sic) was satisfied that the work covered by these certificates had been properly executed. Reference is made to letters from the third party dated 26 June 2002, 16 September 2002 and 28 February 2003 enclosing interim certificates 1, 2 and 3 respectively which are referred to for their terms and incorporated herein brevitatis causa. Further explained and averred that the third party was in breach of its obligations to the defender under its contract with him. It was an implied term of his contract with the defender that it would exercise the knowledge, skill and care reasonably to be expected of an architect of ordinary skill and competence. An ordinary competent architect would not have undertaken design and contract administration work unless the terms of the contract regarding inter alia the scope of work, allocation of responsibilities and limitation of responsibilities were clearly agreed in writing. Reference is made to standard 4.1 of the Architects Registration Board "Code of Professional Conduct and Practice"*. An ordinary competent architect who had a duty under a contract to certify payments for work properly carried out would have regularly visited the site. Reference is made to the *"Architect's Job Book"* published by RIBA and in particular to work stage K. He would have issued interim payment certificates only if he was satisfied having inspected the works, that the contractor had carried out the works "properly", that is to say in accordance with the terms of the contract, and in accordance with his design. An ordinary competent architect would have provided adequate drawn and written information to a contractor to enable him to properly construct an extension. He would have incorporated the structural engineer's design into his drawings. He would have co-ordinated the structural engineer's design with his own and the existing building. In particular he would have incorporated the structural engineer's design for the new timber-framed wall construction, the double header plate, the birdsmouth and both the holding down and lateral restraint straps. He

would have ensured that the structural engineer's design was relevant to the existing structure, so that the new extension floor and walls were adequately supported off existing walls. In particular, he would have taken reasonable care to ensure that his design for the extension would have provided an adequately insulated, draft-free, waterproof envelope. He would have taken reasonable care to ensure that the contractor erected a waterproof enclosure over the building during the works rather than advise the contractor that there was no need to do so. He would have provided sufficient design information to allow the contractor to construct an effective joint between the existing flat roof and the new extension wall. He would have prepared contract documents referring to him as "the architect" only if he was to administer the building contract. He would have issued instructions to the contractor when it became apparent to him or ought to have become apparent to him that the information (including design information) given to the contractor was inadequate. He would have drawn to the employers and to the contractors' attention any defects in workmanship he observed or ought to have observed on inspecting the works. In each and all of these respects the third party failed to act with the knowledge, skill and care to be expected of an ordinary architect of ordinary skill and competence. As a consequence of these failures the defender has suffered loss and damage. Had the third party adequately fulfilled its duties under its contract with the defender, the extension to the cottage would have been adequately designed and the works adequately supervised". Averring that the third party owed a duty of reasonable care to the defender, the pursuer then goes on to aver a case of negligence in broadly similar terms.

7. The defender's averments of loss are set out in statement of fact 4. Following a general denial, and certain averments that the defender has failed to mitigate his loss the pursuer responds with the following: *"Esto the defender has sustained any loss, explained and averred that any loss was caused by the third party's breach of contract et separatim fault. Reference is made to answer 3. Separatim esto the defender's losses were to any extent caused by breach of contract on the part of the pursuer, the same losses also having been caused and materially contributed to by the third party's breach of contract et separatim fault as condescended upon, the pursuer entitled to a right of relief or contribution from the third party".*

8. The pursuer has a plea in law that any loss and damage sustained by the defender resulted from breach of contract *et separatim* fault and negligence on the part of the third party. Thereafter the pursuer states two pleas in law in the following terms:

   "6. Esto the defender has suffered loss and damage as a consequence of the pursuers' breach of contract (which is denied) said loss and damage also having been caused or contributed to by the third party's breach of contract as condescended upon, the pursuer is entitled to relief or contribution therefrom.

   7. Esto the defender has suffered loss and damage as a consequence of the pursuer's breach of contract (which is denied), it also having been materially contributed to by breach of contract et separatim fault and negligence on the part of the third party any damages awarded should be apportioned inter se in terms of section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940".

9. At the outset of her submissions on behalf of the third party Ms Olson pointed out that there was no suggestion of a contractual right of relief and as the common law as to contribution had been superseded by the provisions of the 1940 Act it was difficult to see the purpose of plea in law 6. Mr Walls for the pursuers accepted that position and deleted this plea in law. In respect of plea 7 Ms Olsen argued at the conclusion of her submissions that the pursuer's pleadings did not set out on a basis on which this plea could be sustained. For there to be contribution between joint wrongdoers there required to be contribution to a single wrong: ***Grunvald v Hughes*** 1965 SLT 209 per Lord Justice Clerk Grant at page 211. There were no averments as to how the pursuers and third party could be jointly and severally liable in respect of a single wrong. To the contrary the pursuers' pleadings identified as the wrong committed by the third party that *"the extension to the cottage would have been adequately designed and the works adequately supervised"* that is to say, the problem was caused by the third party alone. That averment was made both in relation to the contractual and delictual cases. It provided no basis for a contribution between both the pursuer and third party. The defender had not adopted the pursuers' averments against the third party. If the pursuers were successful in establishing their averments, that is to say were to prove that the third party was solely responsible for the deficiencies in the cottage there would be no question of a decree passing against them and consequently no question of contribution. Whilst there was a formal averment in the pursuers' averments in answer 4 that *"the same losses also having been caused or materially contributed to by the third party's breach of contract et separatim fault"* in fact those averments were not supported by the earlier factual averments. The pursuers specifically averred that there was no need to demolish the cottage and rebuild it and said that *"the type extent and severity of the alleged defects are such that they can be rectified without demolition"*. On that basis there was no single wrong and as certain of the allegations made by the defender about defective work did not involve the architect at all there was simply no basis upon which the plea of contribution could be sustained. Reference was made to ***Connor v Andrew Main & Sons*** 1967 SLT (Notes) 71, a case in which it was held that although the third party had been competently convened as the pursuer had not adopted the case against him and could not do so there was nothing to be served by keeping him in the action.

10. In response to these submissions Mr Walls accepted that it was the principle position of the pursuers that sole responsibility for the defect rested with the third party. The pursuers were however entitled to adopt the alternative position as set out in their *esto* case. ***R & W Watson Ltd v David Traill & Sons Ltd*** 1972 SLT (Notes) 38 supported the view that the pursuers would be entitled to recover a contribution from the third party if they might also have been held liable in respect of the loss or damage on which the action was founded without waiting for

decree to be pronounced against him. The wrong which the defender had suffered was the loss arising from the defects to the cottage, whatever those were. The pursuers' principle position was that the extension to the cottage did not require to be demolished but if it did both parties contributed to the cause. There might be lesser defects to which both the pursuers and the third party had contributed. This was a matter which might only be resolved at proof and so long as it remained the position that there was a possibility of the court holding that damage had been caused by the fault of both the pursuers were entitled to retain the third party in the action. The case of ***Engdiv Ltd v G Percy Trentham*** 1990 SLT 617 supported the view that the purpose the 1940 Act was to provide for a more equitable sharing of ultimate liability.

11. In the course of his opening submissions Mr Walls made reference to the fact that this was a commercial action and contended that the court should take a "*pragmatic view*" of the pleadings. No one is more concerned than I to encourage the use of succinct pleadings in commercial cases but two particular considerations remain. The first is that any succinct statement of a party's case must nevertheless give fair notice to the opposition and be fundamentally relevant. The second consideration is that where, as in this case the parties have resorted to pleadings which are extensive if not voluminous it becomes difficult to approach them on anything other than what might be regarded as a *"traditional"* basis. The one thing which is contrary to the ethos of proceedings in the commercial court is to set out voluminous pleadings, some of which might be relevant and some of which are plainly not. It is not in keeping with the objective of rapid identification of the issues to invite the court in that situation to take a broad view and remit everything to probation in the hope that something will be proved.

12. In addition to her submissions on contribution Ms Olson subjected the pursuers' pleadings to a wide ranging attack based on lack of specification. Before turning to that it is, I consider, appropriate to give consideration to the issue of whether there is any basis in the pleadings on which the pursuer and third party could be held jointly liable to the defender. Standing the defender's refusal or failure to adopt the case against the third party there would, in the absence of any such basis, be no purpose to be served by keeping the third party in the action. It is clear that on any view the question of contribution could only arise in the event of the court taking a view after proof which is contrary to each of the pursuers' two main defences. These are (a) that the cottage does not need to be demolished and (b) if it does, this is ***entirely*** due to failures on the part of the architect. I mention the first of these because it does not seem to me that there is any answer to Ms Olson's submission that, if the cottage does not need to be demolished yet it is proved that there are a number of deficiencies calling for rectification, that would involve a series of distinct wrongs for each of which ***either*** (but not both) the builder and architect might be said to be responsible. The justification for maintaining the third party in the action accordingly only exists solely on the footing that the court may arrive at a conclusion that the extension will need to be knocked down and that both the builder and architect contributed to that situation. I am quite prepared to accept Mr Walls' submission that, in principle, the third party can be kept in the action so that the issue of joint liability can be resolved in this process even if this is an eventuality arrived at only on the pursuer's fallback position. The question, however, remains whether there are relevant and specific averments upon which any such finding of joint responsibility could be made.

13. In my view there are no such averments and to allow this case to proceed to a proof in which joint contribution was a potential issue would be a recipe for confusion and unnecessary expense as well as possible unfairness to the third party. Ms Olson submitted that the passage which commences with the sentence *"Had the third party adequately fulfilled its duties...the extension to the cottage would have been adequately designed and the works adequately supervised"* sets out a case of sole responsibility. There can be little doubt about that; the whole thrust of the pursuer's case is that the architects were to blame and this passages encapsulates the essence of their case. It proceeds: "*Appropriate instructions would have been issued to the pursuer. The extension would not have been designed and built with defects. The defender would not have suffered loss and damage*". There is no room for reading those averments as including a case of joint fault or contribution. Such a case is only to be found in the purely formal averments of an *esto* case in answer 4, and I can identify no factual averments which support it.

14. Resolution of that issue in favour of the third party is sufficient to support the view that there is nothing to be gained by retaining that party in this process. But the matter does not end there. On any view, and particularly if I am wrong in holding that there are no relevant averments which might establish joint liability, there are various aspects of the pursuer's case which are irrelevant or essentially lacking in specification. The averments about an architect not undertaking design and contract administration work without responsibilities being ***"clearly agreed in writing"*** are plainly irrelevant in establishing the cause of the defender's loss, as are those about preparing contract documents referring to himself as ***"the architect"***. The averments about duty to visit the site are not accompanied by any averments as to what constitutes ***"regularity"*** and in what respect there was any failure. There is a general averment that the architect should only have issued interim payment certificates if he was satisfied that the work had been carried out ***"properly"***, but there is no specification as to what was improper, which certificates should not have been issued, or why. There is a reference to providing adequate ***"drawn and written information"*** but no indication as to where the inadequacy lay. Terms such as ***"adequately"***, ***"sufficient"*** and ***"effective"*** are unaccompanied by any relevant averments as to the inadequacy, insufficiency, or ineffectiveness of the items which are the subject of the complaint. There is a reference to drawing to the employers and contractors attention ***"any defect in workmanship"*** that had been observed, again without specifying what these defects were. The very distinct impression which one is left with is that at any proof the court would embark on a voyage of discovery, the pursuers' hope being that some of these averments directed against the third party would be established. It would not in my judgment be fair to allow this to happen.

15. It will often be the situation in cases involving house owner, builder and architect, that a dispute involving all three parties should be resolved in one process. That is not the position in the present case. The owner has not sought to blame the architect, and the builder's case against him is unclear. In my view the appropriate and most expeditious manner for this case to proceed is by way of a proof involving only the builders and the owner. I make this observation because it was Mr Walls' submission that if there was a basis in principle for the third party remaining in the action but there were concerns over the adequacy of specification of the averments against that party the matter should be remitted to the Sheriff with the observation that questions of specification are still to be resolved. In my view such a course would do little other than hinder progress. The issues between the pursuers and the defender ought to be resolved at a proof in sufficient time for questions of liability on the part of any other party to be addressed before they are time barred.

16. In the circumstances I shall adhere to the Sheriff's interlocutor and continue the cause to determine all questions of expenses prior to remitting it to the Sheriff to proceed as accords.

Act: Walls, Solicitor, Pinsett Masons (for Pursuers)
Alt: Ms K Olson, Solicitor Maclay Murray & Spens) for the First Third Party