JUDGMENT: Sheriff James A Taylor. Glasgow **:** 31st January 2002.

Introduction :

1. By contract dated 22 March and 5 May 1999 the pursuers were employed by the defenders as the main contractors in relation to a re-development of eight flats at Cleveden Drive, Glasgow. The conditions governing the contract were the SBCC Design Portion with Quantities (September 1997 Revision) Building Contract with Scottish Supplement 1980 (Revised, July 1997) to the Conditions of the Standard Form of Building Contract 1980 Edition with Quantities. There was no dispute that on or about 4 August 2000 the architects engaged by the defenders issued Interim Certificate No. 11 in the gross amount of £486,529.42 and that following the issue of previous Certificates the defenders had made payment to the pursuers of the sum of £451,529.42. Net of retention the sum certified by Interim Certificate No. 11 was £28,525 which together with VAT made the sum brought out in the Certificate to be £29,408. In their pleadings the pursuers relied upon the Interim Certificate as their entitlement to payment. They did not specify the works which they had performed and which underpinned their claim which had resulted in Interim Certificate 11 being issued. In the debate, which was heard by me on 12 January 2002, the essential issue was whether the pursuers had said enough to entitle them to a proof of their averments in support of their claim for payment of £29,408.

Defenders' Submissions :

2. Mr Cormack, solicitor, appeared for the defenders. The argument which he sought to advance was set out in the defenders' Note of Argument (No. 17 of process) from the bottom of p 4 to the top of p 6. As his starting point he referred me to Clause 30.1.1.1 of the Contract Conditions. This provision deals with Interim Certificates being issued by the architect. The architect's view, said Mr Cormack, was indicative only and not authoritative. Under reference to Condition 30.2 he submitted that the sum due under the contract was the gross valuation which was defined in 30.2.1.1 as including the total value of the work "properly executed by the contractor". In order to arrive at this figure the work carried out had to be assessed and valued in accordance with the Bill of Quantities. Thereafter the architect would issue an Interim Certificate. What was therefore due was not necessarily what the architect said was due. The quantity surveyor measured the works undertaken and the architect assessed whether the works had been executed in accordance with the contract document. However the architect might get it wrong and his view was not therefore binding. Mr Cormack referred me to the case of **Beaufort Developments (NI) Ltd v Gilbert Ash NI Ltd** [1998] 2 All ER 778. He relied particularly on the speech of Lord Hoffman where that is found at p 786 a - d. There Lord Hoffman opined that the architect's certificate was not conclusive evidence that the works had been carried out in accordance with the contractual standard. The reasoning was that the architect was the agent of the employer. He was therefore not independent. It was unreasonable therefore for the contractor to submit himself to be bound by a decision of the employer's agent. The Scottish Courts had adopted a similar approach as could be seen from the opinion of Lord Davidson in **W & J R Watson Ltd v Lothian Health Board** 1986 SLT 292.

3. Mr Cormack then referred to the terms of the Housing Grants, Construction and Regeneration Act 1996 ("the Act") and in particular to the provisions of section 111(1) which is in the following terms:-"A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective Notice of Intention to Withhold Payment."

4. He acknowledged that the defenders had not given a notice under this section. He maintained it was not necessary for them so to do since the pursuers were not suing for "a sum due under the contract". The amount brought out as due in the Interim Certificate and the sum due under the contract were not necessarily the same thing. In Mr Cormack's submission the Interim Certificate was not conclusive as could be seen from the opinion of Lord Hoffman in Beaufort. Accordingly, the pursuers had not given sufficient notice to the defenders of what works they said entitled them to payment of the sum sued for. The pursuers required to set out what work they had completed in accordance with the contract and for which they now sought payment.

5. I was then referred to the unreported opinion of Lord Macfadyen in the case **SL Timber Systems Ltd v Carillion Construction Ltd** (27 June 2001). In particular he referred me to para 20 where his Lordship stated:-
"Without the benefit of authority, I would have been inclined to say that a dispute about whether the work in respect of which the claim was made had been done or about whether it was properly measured or valued, or about whether some other event on which a contractual liability to make payment depended had occurred, went to the question of whether the sum claimed was due under the contract, therefore did not involve an attempt to "withhold...a sum due under the contract", and therefore did not require the giving of a Notice of Intention to Withhold Payment. On the other hand, where there was no dispute that the work had been done and was correctly measured and valued, or that the other relevant event had occurred, but the party from whom payment was claimed wished to advance some separate ground for withholding the payment, such as a right of retention in respect of a counterclaim, that would constitute an attempt to "withhold...a sum due under the contract", and would require a Notice of Intention to Withhold Payment."

6. Thus, said Mr Cormack, if the employer in a contract wished to avail himself of, say, the principle of mutuality of contract and to put forward an argument that the work for which payment was sought had not been properly carried out and therefore the contractor was not entitled to payment, no notice under section 111 of the Act was required. Putting matters another way he said that if there was a positive element in what the payer sought to achieve, such as recovery of damages for faulty work from a party in breach of contract, then a notice under section 111 of the Act would be necessary.

7. Mr Cormack then took me to para 22 of Lord Macfadyen's opinion where his Lordship said that the absence of a section 111 notice did not relieve the pursuer from the ordinary burden of showing that he was entitled under the contract to receive payment of the sum concluded for. It followed said Mr Cormack that it was incumbent upon the pursuers to set out the work which they said they had carried out under the contract and which entitled them to payment. The pursuers had not done this and had relied only on the Interim Certificate and accordingly their averments should not be allowed probation.

Pursuers' Submissions :

8. In reply Mr Wallace, solicitor, submitted that both the **Beaufort Developments** case and that of **W & J R Watson** pre-dated the coming into force of the 1996 Act. Therefore the context in which the present case fell to be considered was different from the context in which the two reported cases had been decided. In any event Mr Wallace accepted that the architect's Interim Certificate was not conclusive. He accepted that in terms of Condition 30.10 of the Conditions there was specific provision to this effect.

9. Mr Wallace referred me to the terms of Condition 30.1.1 which he said gave to the pursuers an entitlement to payment under the contract upon 14 days elapsing from the date of issue of an Interim Certificate. All that the pursuers therefore needed to plead was that an Interim Certificate had been issued in accordance with the contractual provisions and that the net amount brought out in the certificate was unpaid. In the absence of an averment from the defenders of service of a notice in terms of section 111 of the Act, the pursuers would in such circumstances have established an entitlement to payment. It was not necessary to plead all of the contractual works. Since the amount brought out in the Interim Certificate had as its starting point a gross valuation, the pursuers would have to set out all of the works which they had performed in the course of the contract. This said Mr Wallace would be a farcical and would render the certification provisions in the contract as redundant.

10. Turning to Lord Macfadyen's opinion in **SL Timber Systems** Mr Wallace submitted that the facts of the two cases bore no resemblance and accordingly what was stated by Lord Macfadyen had little application to this case. In the **SL Timber Systems** case there had been no interim certificate issued by the architect, nor had there been any Certificate issued conform to section 110(2) of the Act. Accordingly, there were no circumstances which required Carillion Construction Ltd to issue a notice under section 111 of the Act. All that existed was an interim valuation from SL Timber Systems. If Mr Cormack was correct there was no point in having the provisions which one found at sections 110 and

111 of the Act nor most of Condition 30, if it was incumbent upon the claimant to have to prove every item making up the valuation.

Decision

11. I have come to the conclusion that the arguments advanced on behalf of the pursuers are to be preferred. The defenders relied very heavily upon Lord Macfadyen's opinion in **SL Timber Systems Ltd**. In that case a sub-contractor (pursuer) made a claim for payment of certain monies from the main contractor (defender). The contract between the parties did not comply with the terms of the Act and accordingly the adjudication provisions of the Scheme for Construction Contracts (Scotland) Regulations 1998 (the Scheme) applied. The dispute was referred to adjudication in terms of the Scheme. The defenders had not served a notice under section 111(1) of the Act. For reasons I need not go into, the adjudicator declined to examine whether the sum claimed was due under the contract. He therefore did not explore whether the circumstances which required the defenders to serve a section 111(1) notice, if they sought to withhold payment of the sum claimed, were met. From Lord Macfadyen's opinion it would appear that the adjudicator's position was that since the pursuers had claimed that there was a sum of money due to them by the defenders as a result of work undertaken by them in terms of the contract, the defenders required to serve a section 111(1) notice if they sought to dispute that payment was due. The pursuers then raised an action for payment of the sum brought out as due to them in the adjudicator's award. Lord Macfadyen was invited to examine the approach taken by the adjudicator. It was in this context that what is said by his Lordship in para 20 must be examined. It can be seen that, before the adjudicator, the only basis for saying that the pursuers were entitled to payment of the sum sought was an assertion by the pursuers. No contractual or statutory mechanism had been deployed to scrutinise the claim. It is clear from Lord Macfadyen's opinion that he considered that the adjudicator's decision was wrong and that the adjudicator should have come to the view that since there was only a claim for payment by the pursuers there was no sum due under the contract and accordingly there was no requirement to serve a section 111(1) notice if the defenders sought to dispute the pursuers entitlement. It is interesting to note that notwithstanding his view that the adjudicator had erred, Lord Macfadyen felt obliged to give effect to his decision since the adjudicator had not acted outwith the scope of his jurisdiction. At the conclusion of the contract the decision of the adjudicator could be reviewed by the Court. Thus it can be seen that Lord Macfadyen considered that when the case was before the adjudicator the sum claimed was not a sum due under the contract.

12. In para 20 of his opinion Lord Macfadyen said:- *"In my opinion the words "sum due under the contract" cannot be equiparated with the words "sum claimed". The section is not, in my opinion, concerned with every refusal on the part of one party to pay a sum claimed by the other. It is concerned, rather with the situation where a sum is due under the contract, and the party by whom that sum is due seeks to withhold payment on some separate ground. Much of the discussion of the section in the cases has been concerned with what circumstances involve "withholding" payment and therefore require a notice."*

13. But in the instant case the position is otherwise. It was accepted that the contract between the parties complied with the provisions of the Act. Resort to the Scheme was therefore not required. Clause 30.1.1.1 is in the following terms:- "The architect shall from time to time as provided in Clause 30 issue Interim Certificates stating the amount due to the Contractor from the Employer and the Contractor shall be entitled to payment therefor within 14 days from the date of issue of each Interim Certificate."

14. There was no dispute that the architect had issued an Interim Certificate. It therefore seems to me that the defenders became entitled to payment of the sum brought out in the Interim Certificate within 14 days of it being issued. In my opinion that is an entitlement to payment of a sum due under the contract. In order to reach the figure in the Interim Certificate one has made use of the contractual mechanism. To use the words deployed by Lord Macfadyen in para 20 the issue of an interim certificate was the occurrence of "some other event on which a contractual liability to make payment depended." This situation falls to be contrasted with the position in **S L Timber Systems** where, before the adjudicator, there had been no calculation of the sum sued for by reference to a contractual mechanism and which gave rise to an obligation under the contract to make payment. There had been

no more than a claim by the pursuers which claim had not been scrutinised by any third party. Thus in my opinion if The Burrell Co (Construction Management) Ltd wished to avoid a liability to make such payment because the works did not conform to the contractual standard they would be withholding payment of a sum due under the contract. In order to withhold payment they would require to give a notice in terms of section 111(1) of the Act. No such notice was given.

15. The interim certificate is not conclusive evidence that the works in respect of which the pursuers seek payment were in accordance with the contract (see Clause 30.10). That however does not preclude the sum brought out in an Interim Certificate being a sum due under the contract. The structure and intent of the Act, as I understand it, and accepted by Mr Cormack, is to pay now and litigate later. Accordingly the defenders would not be precluded from suing the pursuers should the works carried out by the pursuers and for which the pursuers have been paid turn out to be faulty. Indeed as I understand matters that is what the defenders seek to do in the counterclaim. However, in my opinion the pursuers have pled all that is required of them given the omission on the part of the defenders to serve a notice under section 111.

16. I should also record that, following discussion, the defenders conceded that under reference to the case of **Millers Specialist Joiner Co Ltd v Nobles Construction Ltd** (unreported, Technology and Construction Court, HH Judge Gilliand QC, 3 August 2001) the effect of the defenders not having served a notice under s111(1) of the Act was to prevent them from retaining from sums due in terms of Interim Certificate 11, any over-payments which had already been made under the contract on previous certificates. This concession was made on the assumption that I came to the view that the sum brought out as due in terms of Interim Certificate No. 11 was a sum due under the contract. It was also conceded by the defenders that their defence to the action as pled was irrelevant if I came to the view that to withhold payment they required to serve notice under section 111 of the Act.

17. As agreed at the debate I will put the case out for a further case management conference on 1st February 2002 at 9.30am. I am content that this should be by conference call. Hopefully the parties will have had an opportunity to discuss further procedure before then. I should record that I am a little concerned that we have made so little substantive progress in the case. Whilst the issues were very well canvassed before me by both Mr Cormack and Mr Wallace essentially what we were arguing about was who should be in funds whilst the litigation to determine the substantive issues in the case proceeded. I confess to not being privy to all of the background facts and I can conceive of certain situations where such considerations might be important, but it does seem that a great deal of time and effort has been expended and it may be that we have yet to address the real issue in the case.