JUDGMENT : Sheriff James A Taylor : Glasgow. October 2002

Introduction

[1] The previous debate in this case (2002 SLT (Sh Ct) 103) did not exhaust all the issues but I was invited to give my judgment on the interpretation of Section 111 of the Housing Grants, Construction and Regeneration Act 1996 as a preliminary issue before parties resumed to debate further issues in the case. Following my first judgment, the defenders made payment of the principal sum to the pursuers. In the second debate the pursuers attacked the defenders' pleadings in the counterclaim.

[2] The pursuers were engaged by the defenders as the main contractors in the re-development of eight flats at Cleveden Drive, Glasgow. The flats were subsequently sold to members of the public. The defenders averred that the pursuers were in breach of various contractual terms and sought to recover damages under three heads. In the first place, there was a claim for liquidate and ascertained damages. Secondly, there was a claim for the cost of making good the alleged defects in the work carried out by the pursuers. Thirdly, there were the hotel costs incurred by the eventual purchasers of the flats when they moved out of the flats to enable remedial work to be carried out to them.

[3] The twist in the scenario was that the defenders were not the heritable proprietors of the flats. The heritable proprietors were The Burrell Company (Developments) Ltd (hereinafter referred to as "Developments"), a company within the same group of companies as the defenders.

[4] Mr Wallace, solicitor, appeared for the pursuers and Mr McMillan, solicitor, represented the defenders.

Pursuers' Submissions

[5] Mr Wallace indicated that he had three broad submissions to make. The first submission was that since the defenders were not the heritable proprietors of the flats they had not sustained any loss. Therefore, nothing was recoverable from the pursuers. Secondly, he submitted that the defenders' averments were so lacking in specification that they were irrelevant and should not be admitted to probation. His third submission was that the defenders were not entitled to recover, liquidate and ascertained damages on the basis that it was not a genuine pre-estimate of the loss sustained by the defenders.

[6] Mr Wallace kept the first of his submissions within a very short compass. Since the defenders had not sold the flats they had incurred no liability to the eventual purchasers. Any losses had been incurred by Developments. The defenders therefore had no remedy against the pursuers. In response to Mr McMillan's submission that the broader ground as set out in ***McAlpine Construction v Panatown*** [2000] 3 WLR 946 should form part of the law of Scotland, Mr Wallace referred me to the history of the principles under discussion as they were developed in ***Dunlop v Lambert*** 1837 15 S 884 and ***St Martin's Property Corporation Limited v Sir Robert McAlpine Limited*** [1994] 1 AC 85. He submitted that the decision in *Dunlop v Lambert* should be narrowly applied and restricted to the issue of risk in contracts of carriage. He founded upon Lord Clyde at pages 952H to 953C. He referred to the passage in Gloag on Contract referred to by Lord Clyde to the effect that ***Dunlop v Lambert*** supported the proposition that *"an agreement whereby the seller undertakes the risk may be inferred from the terms of the contract, although the property and the goods may have passed to the buyer"*. He referred to Lord Jauncey's speech at page 988B where his Lordship records that Scottish text book writers have not embraced ***Dunlop v Lambert*** in the same way as the English courts have done. He pointed out that at pages 954 and 955 Lord Clyde considered the decision in the *Albazero* to be a fundamental building block in the decision making process in ***Panatown.*** He went on to point out that Lord Clyde offered the view that the decision in ***Dunlop v Lambert*** had to be rationalised in ***The Albazero*** to make it fit with English legal principles.

[7] The problem in England, said Mr Wallace, was that the English courts would not allow a person, not a party to a contract, to acquire rights under that contract. Even Lord Goff in his dissenting opinion at page 973G set out the English rule and the problems to which the concept of privity in English law had given rise. ***Panatown*** was an English decision designed to cure an English problem. It should not therefore be considered as part of the law of Scotland.

[8] The whole thrust of what the judges were seeking to achieve in **Panatown**, and the cases which preceded it, was to avoid damages falling into a legal black whole. There was no black hole in this case said Mr Wallace. It would have been perfectly open to Developments to have raised proceedings against the pursuers based on the *jus quaesitum tertio*. He would have had no difficulty with such. However, this had not been the course adopted as that would have entailed a separate action. Accordingly the defenders would have had no defence to this action as they would not have been able to use the losses allegedly sustained by Developments in an attempt to justify withholding payment of the sums claimed under the contract by the pursuers, the building contractors.

[9] If ***Panatown*** was part of the law of Scotland we could dispense with the *jus quaesitum tertio*. He urged me to proceed with caution to provide a solution to the English legal black hole when no such problem existed in Scot's Law. He considered that were I so to do this could give rise to all manner of problems with regard to remoteness in future cases.

[10] In response to Mr McMillan's submission that the existence in England of the Contracts (Rights of Third Parties) Act 1999 had not prevented the English Judiciary from developing the idea that parties who did not enjoy privity of contract could nevertheless recover damages from a party in breach of contract, Mr Wallace pointed out that the Act was not in force when all of the cases under consideration started their life and, further, that Lord Goff's speech at page 976 made it clear that the Act did not apply in the circumstances in ***Panatown.***

[11] Mr Wallace made submissions regarding his fallback position. If I was against him and considered that the broader ground as set out in ***Panatown*** was part of the Law of Scotland then consequential loss was not recoverable by this route. He referred me to Lord Clyde's speech at page 959D. Accordingly the liquidate and ascertained damages claim and the costs incurred in decanting the purchasers of the flats to hotels whilst remedial work was carried out were irrecoverable.

[12] Mr Wallace's submission regarding liquidate and ascertained damages was his next attack. He pointed out that the clause had been designed to compensate the employer in the building contract for lost credit interest and incurred debit interest in the event of there being a delay beyond the contractual date for completing the development (Statement 8 of the counterclaim on page 36 of the record). Under reference to ***Dunlop Pneumatic Tyre Company v New Garage & Motor Company Limited*** [1915] AC 79 and ***Clydebank Engineering & Shipbuilding Company v Don Jose Ramos Yzquierdo y Castaneda*** 1904 7 F (HL) 77, he submitted that any damages claimed under a liquidate and ascertained damages clause had to be a genuine pre-estimate of the loss which that party was likely to incur should the breach of contract, anticipated in the clause, occur. Any such loss must have been sustained by the defenders' related company, Developments. But there was no reference on record to the contractual arrangements between the defenders and Developments. He referred me to pages 19 and 20 of the record where it was pled by the defenders that it had been "agreed" that the defenders would supply the flats ready to be occupied by the purchasers from developments. Giving the defenders the benefit of the doubt he took this to be a reference to a contract but asked how was the contract constituted, when was it concluded, what were the contractual terms? It was particularly important in the context of a liquidate and ascertained damages clause to know when the contract was concluded since the genuineness of the pre-estimate had to be considered at the time the contract was entered into. I was then referred to pages 35 and 36 of the record where reference was made by the defenders to certain "understandings" which existed between Developments and the defenders. Mr Wallace could only interpret an "understanding" as being a statement of one party's state of mind. It was not a basis for inferring the existence of a contractual term. He concluded that the defenders, on their pleadings, were not under any contractual obligation to make payment of the liquidate and ascertained damages to Developments.

[13] He also submitted that the defenders' pleadings lacked specification in that they did not say how the sum claimed in name of liquidate and ascertained damages had been derived. All that was said on record was that the level of liquidate and ascertained damages inserted in the contract was an estimate of the lost credit interest and incurred debit interest which would result from a delay in the sale of the flats as a consequence of there being a delay in their completion. This he said did not enable the

pursuers to prepare for proof if they wanted to challenge the genuineness of the pre-estimate. Accordingly the liquidate and ascertained damages part of the counterclaim should not be admitted to probation. I was referred to McBryde: The Law of Contract in Scotland (2nd edition) at para 22-175.

[14] In his final submission Mr Wallace argued that the defenders' averments in the counterclaim in relation to the remedial works and how these could be said to flow from the contractual provisions were wholly lacking in specification and accordingly irrelevant. After Mr Wallace had taken us through a considerable section of the pleadings and cross referred to the schedules lodged as productions, Mr McMillan bowed to the inevitable and conceded that the averments did not give proper notice to the pursuers of the case which the pursuers had to meet and that the defenders would require to amend. That concession was very properly made. Mr McMillan nonetheless invited me to continue to hear the debate and to give my view on the two remaining submissions advanced by the pursuers. Mr Wallace concurred. I agreed to proceed as parties wished.

Defenders' Submissions

[15] In reply to the argument that the counter claiming defenders had sustained no loss as a result of any breach of contract by the pursuers, Mr McMillan referred to page 19 of the record where it was averred that the development was being undertaken by the defenders on behalf of Developments. Thus, he said, the nature of the relationship between the two parties was set out. He also referred to the averments on pages 35 and 36 of the record to which reference was made by Mr Wallace and which are referred to *supra*.

[16] He then referred to the case of ***Panatown*** and acknowledged that it was not binding upon me but that I should consider it to be persuasive. He also referred to Professor Thomson's article entitled Restitutionary & Performance Damages 2001 SLT News 71 in which Professor Thomson concluded that the decision in ***Panatown*** was consistent with Scots law. He accepted that the losses being claimed by the defenders in respect of the three heads referred to by Mr Wallace had been sustained by Developments and not by the defenders. There was, he said, a familial relationship here between the two companies. Although the laws of Scotland and England in relation to contract were different there was not so much difference that ***Panatown*** could not be applied in Scotland.

[17] Mr McMillan referred me to the speech of Lord Clyde in ***Panatown*** at page 954F. He also referred to the speech of Lord Jauncey at page 987 where his Lordship defined the narrow ground and also page 993 where the broader ground was explored by his Lordship. Mr McMillan stated that the defenders in this case were relying not on the narrow ground but on the broader ground as defined in ***Panatown.***

[18] In dealing with Mr Wallace's submission that consequential loss would not be recoverable under the broader ground, Mr McMillan pointed out that at page 959 Lord Clyde said ***"It (the broader ground) may not be able to embrace consequential losses..."*** (my emphasis). It was thus clear said Mr McMillan that all Lord Clyde was doing was reserving his position. He surmised that his Lordship was trying to put the brakes on the runaway train.

[19] Mr McMillan also referred me to the speech of Lord Goff at pages 976H to 977D, where Lord Goff expressed the view that the *Panatown* case was not concerned with privity of contract and there was no question of a third party seeking to enforce a *jus quaesitum tertio*. McAlpine Construction and Panatown had no intention when they contracted of conferring any benefit on UIPL, the third party who owned the property.

[20] He submitted that the Contracts (Rights of Third Parties) Act 1999 now provided a statutory form of the *jus quaesitum tertio* in England. This however had not in any way hampered the English courts in developing the common law rights of third parties who had sustained loss by virtue of a breach of contract. Thus the Scottish Courts should not feel inhibited just because Scots Law recognised a *jus quaesitum tertio*. The creation of such rights may well be artificial but that did not mean that it was not good law.

[21] In relation to the attack on the defenders' pleading of the liquidate and ascertained damages claim, Mr McMillan said that if he was required to provide any further specification it would defeat the whole

purpose of such a clause in a contract. He did not require to set out what was in the minds of the contracting parties.

[22] In summarising the submissions, I have sought to combine the various speeches which both solicitors made to me. It was clear that Mr McMillan was taken by surprise by the line adopted by Mr Wallace in arguing that *Panatown,* and the arguments advanced on behalf of the plaintiffs, was not good law in Scotland. I offered Mr McMillan the opportunity to adjourn the case to a future date in order that he might consider the arguments which had been submitted. After a very brief adjournment to enable Mr McMillan to consider his position the offer of an adjournment to a future date was declined.

The Status of the arguments in *Panatown* in Scots Law

[23] The principal issue in this debate, although perhaps not the most time consuming, was whether the submissions in ***McAlpine Construction v Panatown*** could assist the defenders. *Panatown* is the last reported decision in a series of cases starting with ***Dunlop v Lambert*** 1839 15 S 1232, and then progressing to ***The Albazero*** 1977 AC 774, ***St Martins Property Corporation Limited v Sir Robert McAlpine Limited*** 1994 1 AC 85 and ***Darlington Borough Council v Wiltshier Northern Lim****ited* 1995 1 WLR 68.

[24] In ***Dunlop v Lambert*** the court was concerned with the loss of a cargo of whisky. William Dunlop & Company had consigned the whisky to a shipper. In terms of the bill of lading it was to be delivered to the consignee, Robson, or his assignees, in Newcastle. The cargo was lost in carriage. Dunlop sent a replacement cargo to Robson. Dunlop then sought to recover their loss from the shipper. The difficulty for the pursuers was that when the loss arose the pursuers were not the owners. They ceased to be the owners of the whisky at the time of shipment. The various opinions and speeches of their Lordships in the House of Lords are analysed in their Lordships speeches in *McAlpine v Panatown* and I could do no better than to refer to them. As Lord Clyde pointed out at page 952, the issue in the case was whether the general rule regarding an entitlement to sue in the event of the loss of goods during a sea voyage could be affected by some particular agreement between the interested parties. *"The case did not decide that a consignor can sue for damages for loss of a cargo even although he has suffered no loss, nor is it authority for the view that a consignor may recover on behalf of the consignee damages for a loss which has fallen upon a consignee"*, Lord Clyde at page 952D to E. It is thus of limited assistance in the present case.

[25] ***The Albazero***, another shipping case, gave rise to what has become known in English law as ***The Albazero*** exception. Lord Diplock at page 844 defined the exception in the following manner:-
"That the consignor may recover substantial damages against the ship owner if there is privity of contract between him and the carrier for the carriage of goods; although, if the goods are not his property or at his risk he will be accountable to the true owner for the proceeds of his judgement."

One can thus see that this *dictum* goes further than the judges went when deciding *Dunlop v Lambert* if one accepts, as I do, the issue in *Dunlop* being what was said by Lord Clyde in his speech in *Panatown* as I have set it out *supra*.

[26] The justification given by Lord Diplock for the second part of the passage quoted was to prevent a loss being irrecoverable "when any rational legal system" (page 847) would recognise that a person who sustained loss as a result of a breach of contract, but who was not a party to the contract, should be compensated by the person in breach. In other words, the loss should not disappear into a legal *"black hole"*.

[27] In the ***St Martins*** case it was a building contract as opposed to a shipping contract which the Court had to deal with. *St Martins Property Corporation Limited* ("Corporation") were developers of a site. They entered into an agreement with a local authority, which owned the ground, that on completion of the development, Corporation would be entitled to a 150 year lease. Corporation then entered into a building contract with *McAlpine* for the construction of buildings on the site. Subsequently all of Corporations' property interests were assigned to *St Martins Property Investments Limited* ("Investments"). Corporation also purported to assign to Investments the benefit of the contract and engagements entered into by it for the construction of the development. The building contract, however, contained a prohibition against assignment. As a consequence, Investments were precluded

from making any claim against *McAlpine* under the building contract. The issue in the case was whether Corporation could recover damages from *McAlpine* for breach of the building contract even although Corporation's interest had been transferred to Investments. In *St Martins* Lord Browne-Wilkinson at page 115 stated:-

"If, pursuant to the terms of the original building contract, the contractors have undertaken liability to the ultimate purchasers to remedy defects appearing after they acquired the property, it is manifest the case will not fall within the rationale of Dunlop v Lambert. If the ultimate purchaser is given a direct cause of action against the contractor (as is the consignee or endorsee under a bill of lading) the case falls outside the rationale of the rule. The original building owner will not be entitled to recover damages for loss suffered by others who can themselves sue for such loss."

It is significant that the rationale in ***The Albazero*** and also ***St Martins*** was to avoid a legal black hole. I attach considerable importance to the passage from Lord Browne-Wilkinson's speech in *St Martins* where he states that if the ultimate purchaser had *a "direct cause of action"* against the contractor than the rule which was said to have been formulated in *Dunlop v Lambert* did not apply.

[28] In ***Panatown,*** *McAlpine Construction*, building contractors, contracted with *Panatown* for the construction of an office block on land owned by UIPL. It was alleged that *McAlpine* breached the contract and the building was defective. UIPL and *Panatown* were companies in the same group. In addition to contracting with *Panatown*, *McAlpine* also signed a duty of care letter in favour of UIPL. UIPL were left owning a defective building. *Panatown* suffered no loss. *Panatown* raised proceedings against *McAlpine*. The case explored the circumstances "in which the employer in a contract of services may claim from the contractor on the ground of breach of contract damages in respect of a loss which has been suffered by a third party." (Lord Clyde page 948). This is the issue which is presented in the instant case.

After analysing the earlier decisions on this issue Lord Clyde at page 956F to G said:-

"In the context of a building contract one does not require to look for a second building contract to exclude the (Albazero) exception. It would be sufficient to find the provision of a right to sue."

Thus Lord Clyde concluded that the rule developed in *Dunlop v Lambert* and which, after considerable development, came to be known in English Law as *The Albazero* exception could not apply in *Panatown* since the duty of care letter provided a direct route for UIPL to sue *McAlpine*. This approach appears to be entirely consistent with what was said by Lord Browne-Wilkinson in *St Martin's.*

[30] Having reviewed the authorities cited in argument it seems to me that the circumstances in this case are such that the rule in ***Dunlop v Lambert*** and ***The Albazero*** exception do not come to the assistance of the counterclaiming defenders. The issue in ***Dunlop v Lambert*** as interpreted by Lord Clyde who in turn is interpreting Lord Cottenham L. C., was concerned with the carriage of goods. The special feature was the identification of contractual relationships between consignor and carrier and between consignor and consignee. Thus it is difficult to see how the decision is of relevance to the facts in this case.

[31] Similarly ***The Albazero***, and its eponymous exception, does not assist the defenders. The starting point for this view is that there was an unchallenged assertion from Mr Wallace that the *jus quaesitum tertio* applied in this case. Lord Diplock's justification for developing the exception was to ensure that English Law was not thought to be irrational in not providing a remedy when the circumstances cried out for a remedy. Scots Law would have provided Lord Diplock with an existing right to sue in the shape of the *jus quaesitum tertio*. If his lordship had been required to apply Scots Law he would not have had to develop English Law as he did. In *St Martins,* if Lord Browne-Wilkinson had been applying Scots Law, he would have found a *"direct cause of action"* (page 115 quoted *supra*) in the form of a *jus quaesitum tertio* and thus the case he was dealing with would have fallen "outside the rationale of the rule". The *jus quaesitum tertio* provides a "right to sue" and as Lord Clyde pointed out in *Panatown* (page 956 quoted *supra*), *The Albazero* exception does not apply if such exists. Perhaps it was because of the foregoing that Mr McMillan did not seek to advance his argument based on either *Dunlop v Lambert* or *The Albazero* exception

[32] I have so far been dealing with what was referred to in ***Panatown*** as the narrow ground or ***The Albazero*** exception. This is that the party which contracts with the building contractor can recover from the contractor in the event of the building contractor's breach even although the defective building is owned by a third party providing the contracting party intends to account to the third party for the damages recovered. However the argument before the House of Lords in ***Panatown*** was further developed by counsel for ***Panatown*** into what was referred to as the broader ground. This ground, it was said, entitled the contracting party to recover damages from the building contractor without any such duty to account. As Lord Clyde pointed out at page 959 A to B, on this formula it does not matter whether the repairs or remedial work are or are not carried out. The argument proceeds on the basis that a loss is constituted when the innocent party fails to receive the bargain for which he contracted.

[33] In the instant case Mr McMillan submitted that it was the broader ground upon which the defenders relied. In my opinion this does not assist their position. There must be doubts if the broader ground even forms part of the law of England, never mind Scotland, if one has regard for the speech of Lord Jauncey. But leaving that aside, the broader ground has as its genesis the speech of Lord Griffiths in *St Martins*. Lord Jauncey at page 995 B to F, points out that on a proper understanding of what was said by Lord Griffiths, the party raising the proceedings must have sustained some financial loss. However financial loss is irrelevant in the broader ground as it was formulated by *Panatown*'s counsel.

[34] Lord Clyde (page 958 E-F) considered that the broader ground has been developed into two formulations:-

"In the first formulation this approach can be seen as identifying a loss upon the innocent party who requires to instruct the remedial works. That loss is or may be measured by the cost of the repair. The essential for this formulation appears to be that the repair work is to be, or at least is likely to be, carried out. This consideration does not appear to be simply relevant to the reasonableness of allowing the damages to be measured by the cost of repair. It is an essential condition for the application of the approach so as to establish a loss on the part of the plaintiff."

Since Mr McMillan accepted that the defenders had not sustained a loss, presumably because they had no requirement to instruct remedial works, pay the liquidate and ascertained damages to Developments or pay for the cost of rehousing the purchasers of the flats, this formulation is of little value to the defenders.

[35] The second formulation was seen by Lord Clyde as relying on the concept that "the loss is not just constituted by the failure in performance but indeed consists in that failure". After a careful analysis of this formulation his Lordship opined that a breach of contract was not in itself a loss in any meaningful sense. "A failure in performance of a contractual obligation does not entail a loss of the bargain for contractual rights" since these rights remained in existence and could be enforced by the court. His Lordship thus rejected the second formulation of the broader ground.

[36] However even if I am wrong in doubting whether the broader ground in Lord Clyde's second formulation was accepted as part of the law of England, Lord Clyde went on to say at page 960 B to C *"both of these two formulations seek to remedy the problem of the legal black hole. At the heart of the problem is a doctrine of privity of contract, which excludes the ready development of a solution along the lines of jus quaesitum tertio. It might well be thought that such a solution would be more direct and simple".*

[37] Lord Clyde said that it would be inappropriate to introduce the *jus quaesitum tertio* to English law by the route of "judicial innovation". He then said "the alternative has to be the adoption of what Lord Diplock in ***Swain v The Law Society*** [1983] 1AC 598, 611, described as a juristic subterfuge "to mitigate the effect of the lacuna resulting from the non-recognition of a *jus quaesitum tertio*"". Set in the context of requiring to circumvent the problem created by the law of England's approach to the doctrine of privity of contract, Lord Clyde stated at page 960 G-H:-

"It seems to me that a more realistic and practical solution is to permit the contracting party to recover damages for the loss which he and a third party has suffered, being duly accountable to them in respect of their actual loss, than to construct a theoretical loss in law on the part of the contracting party, for which he may be under no duty to account to anyone since it is to be seen as his own loss. The solution is required where the law will not

tolerate a loss caused by a breach of contract to go uncompensated through an absence of privity between the party suffering loss and the party causing it. In such a case, to avoid the legal black hole, the law will deem the innocent party to be claiming on behalf of himself and any others who have suffered loss."

[38] I do not have to rely on any subterfuge to avoid the legal black hole since the *jus quaesitum tertio* is a remedy recognised by Scots law. Its application was accepted as infilling the black hole. There is thus no black hole. Accordingly, the *"realistic and practical solution"* devised by Lord Clyde is peculiar to the law of England. The law of Scotland does not require a solution to be devised since, as his Lordship made clear in his speech, the problem would not exist if the law of England recognised the *jus quaesitum tertio*.

[39] Both Lords Clyde and Jauncey went to some length to emphasise that ***St Martins*** and ***Darlington Borough Council v Wiltsher Northern Limited*** (upon which the parties did not address me) were black hole cases. From a consideration of what was said in these cases it is clear that the judges were concerned that English law was not seen to allow a legitimate and reasonable loss caused by a breach of contract to go uncompensated in circumstances where equity demanded compensation to be recoverable. However in ***Panatown*** the majority were of the view that they were not dealing with a black hole case. The party sustaining loss had the benefit of the duty of care letter which could found an action against ***McAlpine.*** As Lord Jauncey said at page 988:-
"What is the justification for allowing A to recover from B as his own a loss which is truly that of C when C has his own remedy against B? I would submit none".

[40] I am therefore of the opinion that in this case, given the accepted availability of the *jus quaesitum tertio*, there is similarly no "justification" for allowing the counterclaiming defenders to recover from the pursuers as their own a loss which is truly that of Developments, when Developments, by use of the *jus quaesitum tertio* have their own remedy against the pursuers. Thus in my opinion the defenders are not entitled to the damages which they seek.

[41] As I have recorded, Mr McMillan did not challenge the availability to Developments of the *jus quaesitum tertio.* He did not accept the offer of an adjournment which might have afforded an opportunity to explore this further. Accordingly this judgment has proceeded on the basis that the *jus quaesitum tertio* was and is available to Developments. If that basis is incorrect, I consider that the defenders still have a difficulty. Given my interpretation of ***Panatown,*** it would be a minimum requirement on the defenders if they are seeking to take advantage of the arguments set out in ***Panatown*** and the prior cases therein cited, to offer to prove by way of averment that Developments have sustained loss by virtue of the actings of the pursuers and that Developments have no contractual route to obtaining redress. The counterclaim does not pass this test. Accordingly it is irrelevant.

[42] It was common ground between the parties that the defenders would be entitled to nominal damages.

Liquidate and Ascertained Damages

[43] Although the foregoing effectively deals with the case, save for the question of nominal damages, I will, in deference to the arguments advanced, deal with the issue of liquidate and ascertained damages.

[44] It was not in dispute that in order to be recoverable, liquidate and ascertained damages required to be a reasonable pre-estimate of the loss which the party for whose benefit the contractual provision was concerned might sustain. The pleadings disclosed that in this case the liquidate and ascertained damages were intended to cover "the lost credit interest and incurred debit interest which would result from a delay in the sale of the flats as a consequence to a delay in their completion" (page 36 of the record). However the contract which contained the liquidate and ascertained damages clause was a contract between the pursuers, the building contractors, and the defenders. The defenders did not own the flats. The defenders did not therefore incur lost credit interest nor did they incur debit interest. There are no adequate averments to set up a contractual relationship whereby the defenders were obliged to make payment of any such losses to Developments. All that the defenders say is that there was an "understanding" between the defenders and Developments that the defenders "would

seek recovery from the building contractors (the pursuers) of those losses and the sums recovered would be payable to Developments as a debt by the defenders". There was no averment that there was a binding contract between the defenders and Developments which the latter could enforce. Accordingly, the defenders have sustained no loss, and could have sustained no loss, by virtue of any failure to complete the works by the revised completion date. The provision in the contract is thus not a reasonable pre-estimate of the damages which the defenders, as opposed to Developments, might incur in the event of their being a delay in the completion of the building contract works. It thus follows that what is sought from the pursuers in the counterclaim by way of liquidate and ascertained damages is a penalty and not recoverable.

[45] Even if I am wrong in the foregoing, it is my view that the defenders still have a difficulty. They must still rely on the submissions in ***Panatown*** if they are to succeed. Thus if we further assume that the views which I have expressed in relation to ***Panatown*** are also wrong and apply ***Panatown*** to this head of claim, where do we go? Lord Clyde at page 959 pointed out that the broader ground, which is the ground the defenders sought to fight upon, may not enable all losses sustained by the building owner to be recovered when the loss sustained by the breach is said to be the failure in performance itself. Under reference to Lord Griffithss example in *St Martins* of the husband who instructs repairs to a house owned by his wife being able to recover damages if the repairs were defectively undertaken by the tradesman, Lord Clyde said *"The inability of the wife to let one of the rooms in the house caused by the inadequacy of the repair, does not seem readily to be something for which the husband could claim as his loss"*. Lord Jauncey expressed similar views. When examining the broader ground he said at page 998 *"Furthermore consequential loss resulting to the third party due to delay and resultant loss of profits would appear to be irrecoverable"*. With these comments I respectfully agree and for the reasons advanced by their Lordships.

[46] Thus even if I am wrong in the views to which I have come a) that the submissions in ***Panatown*** should not be followed in Scotland when the *jus quaesitum tertio* can apply and b) that the liquidate and ascertained damages clause in the contract between the parties is unenforceable, it is my opinion that consequential loss such as lost credit interest and incurred debit interest is not recoverable.

Hotel Expenses

[47] The foregoing comments apply equally to the expenses incurred by Developments in arranging for some of the purchasers of the flats to stay in hotels when remedial work was being carried out to their flats. These damages are not recoverable at the instance of the defenders by praying in aid the decision in ***Panatown.***

Finally

[48] Finally I should record that if I had found that liquidate and ascertained damages was a recoverable head of loss I would have allowed the defenders a proof of their averments. I do not think that they require to specify any more than they have done as to how the pre-estimate of the loss was built up. The pursuers would have been able to find out from the land register, if not by other means, the value of the flats. They could easily ascertain the likely level of interest rates which the defenders might incur if in debit and receive if in credit with their bank. Accordingly they should be able to have a broad idea of the defenders' lost credit and incurred debit interest to enable them to come to a view as to whether the liquidate and ascertained damages claimed is a genuine estimate of the loss sustained.

[49] I will put the case out for a hearing on Wednesday 13 November at 9.30am to discuss the question of nominal damages, expenses and anything else which the parties choose to raise. This can be by conference call if the parties so wish. If that date is unsuitable to the parties the e-mail facility should be used and an alternative date arranged. If the parties are able to agree how the outstanding issues should be dealt with then they should let me know and I will pronounce the appropriate interlocutor.