OPINION LORD DRUMMOND YOUNG : Outer House Court of Session. 30th May 2002

1. On 8th December 1999 the pursuers and a company known as Miller Group Limited entered into an agreement known as the Construction Consortium Agreement. In terms of that agreement, the parties associated themselves as a construction consortium for the purpose of preparing an offer to design, procure and construct a sludge treatment centre at Daldowie and, if the offer were successful, to carry out the necessary works for the design, procurement and construction of the centre. The offer was successful, and the pursuers and Miller Group Limited entered into a further contract, known as the Construction Contract, with SMW Limited, a subsidiary of Scottish Power, whereby they agreed to carry out the necessary work of design, procurement and construction for SMW Limited. SMW Limited had been established by Scottish Power to tender for the provision of the sludge treatment centre for West of Scotland Water Authority under the private finance initiative. In September 2000 Miller Group Limited novated their part of the Construction Consortium Agreement and the Construction Contract to the defenders. Thus the parties' relationship is subject to two contracts, one governing their relations with each other and the other governing their relations with SMW Limited.

2. It is convenient at this stage to set out the material terms of the Construction Consortium Agreement. In that agreement, SMW Limited was referred to as "the Purchaser", and the Construction Contract for the sludge treatment centre was referred to as "the Contract". Article 1 of the Construction Consortium Agreement provides as follows:

" 1.2 The Parties have associated themselves as a Construction Consortium for the exclusive purpose of jointly together with Scottish Power preparing the Offer to [West of Scotland Water Authority], pursuing the award of the Contract and in the event that the Offer... is accepted by SMW Limited, in performing the Contract.

1.3 For this purpose, each Party agrees to co-operate to the best of its ability to undertake, contribute to and assist in the required activities, which shall include... the following: --

3.2 to calculate the price to be charged to the Purchaser for the works and services comprising its Project Part as hereinafter defined and to be performed in the completion of the Contract.

1.3.3 in the event of the Contract being awarded to the Construction Consortium, to actively and diligently prosecute the execution of its Project Part...".

Article 6 provides as follows:

"6.1 Notwithstanding that the Parties may be jointly and severally liable to the Purchaser for the whole of the performance of the Contract, as between the Parties it is agreed that fulfilment of the obligations and responsibilities imposed upon the Construction Consortium by the terms of the Contract shall be divided between the Parties, and that each Party's share shall be referred to as its Project Part.

6.2 Each Party is fully responsible for the satisfactory performance of all obligations relating to the Project Part undertaken by it as detailed in Appendix 1, and accordingly bears all commercial, technical and other risks arising therefrom or connected therewith and with any variations called for by the Project Manager which may affect that Project Part, and shall indemnify the other Party against the consequences of a failure to so perform such obligations in the manner and subject to the limits established in Article 8 hereof.

6.3 The Contract consists of a complete installation, ready for operation and accordingly the Construction Consortium may be responsible for the provision and performance of ancillary supplies and services which are necessary to complete the installation, but which may not be specifically mentioned in the Contract. It is therefore understood that as between the Parties each Party will be liable for the provision and performance of any such ancillary supplies and services necessary to complete its Project Part.

6.4 In the event that there is a difference of opinion between the Parties regarding the Party's Project Part to which any ancillary supplies and services must properly belong, the Party best qualified and able to do so (as determined by the Management Committee in the event of disagreement between the Parties) shall provide such ancillary supplies and services so that they may be effected without delay. The direct costs of providing such ancillary supplies and services shall provisionally be borne by the Parties pro rata their respective Participation Quotas (as hereafter defined).

6.5 The proportion of the Contract Price due to each Party in consideration of the proper performance of all obligations arising from or connected with the Contract and this Agreement is as shown in the break-down of the Contract Price set out in Appendix II of this Agreement (referred to in this Agreement as the

'Participation Quota'), subject to any adjustments in respect of variations to the Contract Price pursuant to the provisions of the Contract".

Appendix II of the Agreement divides the Contract Price between the parties. The total Contract Price was £55,572,898, of which £22,068,096, or 39.7%, was payable to the defenders and £33,504,802, or 60.3%, was payable to the pursuers. Those two percentages were accordingly the Participation Quotas referred to in article 6.5.

Article 8, referred to in article 6.2, provides for liability by one party to the other following the occurrence of various events that give rise to joint and several liability on the part of the Construction Consortium.

Article 14.1 is in the following terms:

"14.1 All monies held by the Construction Consortium, whether received as payments under the Contract, or from the insurers or otherwise shall be treated as, and are hereby declared to be, funds held in trust for the benefit of the Parties. Monies received as payments under the Contract, and monies received from insurers shall be promptly distributed to the Parties, subject only to such adjustments as are provided for in this Agreement".

3. Following the conclusion of the Construction Contract, the parties carried out works for SMW Limited, and the Construction Consortium received the payments that were due under that contract. The parties have maintained a joint bank account known as the Miller VA Tech Wabag Construction Money Market Account, the account in question being an account no. 10437418 at the branch of the Royal Bank of Scotland at St. Andrew Square, Edinburgh. SMW Limited paid and continue to pay sums due under the contract into another account, but by agreement the sums are transferred into the account no. 10437418. In order to transact with monies paid into that account, consent is required from each of the parties. The monies paid by SMW Limited are paid in accordance with payment certificates identifying the work by each party in respect of which the monies are paid.

4. Payment certificate no. 24 was issued by SMW Limited on 30th November 2001. That certificate disclosed that the sum of £1,414,587.08 plus value added tax of £247,552.74 was due to the Construction Consortium. That sum was paid by SMW Limited, and was lodged in the account no. 10437418. As with its predecessors, the certificate identified the work by each party in respect of which payment was made; £1,361,296.76 plus VAT was identified as due to the pursuers and £53,290.14 plus VAT was identified as due to the defenders. On 19th December 2001 Morgan Est PLC, acting on behalf of the defenders, wrote to the pursuers proposing certain adjustments to the payment due under payment certificate no 24. In summary, these were as follows. First, the defenders submitted claims against the pursuers which, after certain deductions, totalled £2,396,783. I was informed that these claims related to certain ancillary services that the defenders had provided in connection with the works. The defenders claimed that these services formed part of the pursuers' Project Part, and that their cost was accordingly payable by the pursuers in terms of article 6.3 of the Construction Consortium Agreement. The pursuers, however, had disputed the defenders' claims; consequently the defenders asserted that the cost of the services in question was initially payable pro rata by the parties according to their Participation Quotas; that was said to follow from article 6.4 of the Construction Consortium Agreement. On that basis, the defenders said, 60.3% of the sum of £2,396,783 was payable by the pursuers. That came to £1,445,260.15. The defenders accordingly claimed that the latter amount fell to be deducted from the sum of £1,361,296.76 due to the pursuers under payment certificate no. 24, leaving a balance of £83,963.39 due by the pursuers. Similarly, the defenders claimed, the same sum of £1,445,260.15 fell to the added to the sum of £53,290.14 due to the defenders under payment certificate no. 24, leaving a balance of £1,498,550.29 due to the defenders. All of those sums were exclusive of VAT.

5. The pursuers aver that the defenders have, since 19th December 2001, refused to consent to or to assist in the distribution of monies to the pursuers from the bank account number 10437418, and that the pursuers are therefore unable to obtain the payment due to them under payment certificate no. 24. The defenders deny those averments in their defences, but I did not understand this position to be maintained in the submissions made before me; in any event the denial is manifestly wrong.

6. Payment certificate no. 25 was issued by SMW Limited on 21st December 2001. That certificate disclosed that the sum of £1,415,934.25 plus value added tax of £247,788.49 was due to the Construction Consortium. Once again, that sum was paid by SMW Limited and was subsequently lodged in the bank account no. 10437418. Once again, the certificate identified the work by each party in respect of which payment was made; in this case £1,282,250.45 plus VAT was identified as due to the pursuers and £133,683.80 plus VAT was identified as due to the defenders. On 25th February 2002 Morgan Est PLC, acting on behalf of the defenders, wrote to the pursuers proposing adjustments to the sums due under payment certificate no. 25. These were similar to the adjustments proposed in the letter of 19th December 2001, and made on the same basis. Once again, it was claimed by the defenders that the sum of £1,445,260.15 fell to be deducted from the sums due to the pursuers and added to the sums due to the defenders. In this case, it was said that there was a balance due by the pursuers of £1,198,287.06. It was clear, however, that that was an error, and that on the defenders' calculations that sum was due to and not by the pursuers. It was further claimed that the sum of £1,632,234.09 was due to the defenders. Those sums were exclusive of VAT.

7. The pursuers aver that the defenders have also refused to consent to the payment of the sum shown as due to the pursuers in terms of payment certificate no. 25. Once again, the averment is denied in the defences, but once again I did not understand its accuracy to be disputed.

8. The pursuers have now raised the present action in which they conclude first for declarator that, pursuant to article 14 of the Construction Consortium Agreement, the defenders are not entitled to withhold agreement, refuse consent, prevent or otherwise hinder the prompt distribution of monies held by the Construction Consortium received as payments under the Construction Contract save in respect of any contractually provided adjustments. The pursuers' second conclusion is for interdict and interim interdict of the defenders and persons acting on their behalf from preventing or otherwise hindering the release to the pursuers of monies paid to the Construction Consortium at the Royal Bank of Scotland account no. 10437418 and which are due to the pursuers. On 27th February 2002 a motion for interim interdict in terms of that conclusion was made on an ex parte basis, and I granted the motion. The pursuers' third conclusion is for an order pursuant to section 46 or alternatively section 47 of the Court of Session Act 1988 ordaining the defenders to consent to and assist the transfer of monies due to the pursuers held by the Construction Consortium in the account no. 10437418 to the pursuers forthwith or within such other period as the court ordains, the monies in the said account due to the pursuers being (i) £1,361,296.76 and (ii) £1,506,644.28. Those amounts are the sums, the former exclusive of VAT and the latter inclusive of VAT, specified as due to the pursuers in payment certificates nos. 24 and 25. Counsel for the pursuers made clear, however, that at present he relied on section 47(2) of the 1988 Act, and not on section 46.

9. The defenders now move for recall of the interim interdict pronounced by me on 27th March 2002. At the same time, the pursuers move for an order pursuant to section 47(2) of the 1988 Act.

10. Counsel for the pursuers submitted that the pursuers were entitled to prompt payment of all monies originating from SMW Limited and paid into the account no. 10437418. That result was said to follow from article 14.1 of the Construction Consortium Agreement, which, according to its terms, directs prompt distribution of monies received as payments under the Construction Contract, subject only to "such adjustments as are provided for in this Agreement". The only place in the Construction Consortium Agreement where any reference is made to "adjustments" to monies received as payments under the Construction Contract is article 6.5; this refers to payment of the Contract Price subject to the Participation Quotas but "subject to any adjustments in respect of variations to the Contract Price pursuant to the provisions of the [Construction] Contract". It was accordingly necessary to go to the Construction Contract to discover what such adjustments might be. Clauses 22-25 of the Construction Contract provided for variations in the works to the constructed under that contract. Clause 25 referred specifically to the "adjustment" of the Contract Price in consequence of such variations. That was the only place in the Construction Contract where any reference was made to such adjustments. Consequently, counsel submitted, the "adjustments" referred to in article 14.1 of the Construction Consortium Agreement could only be adjustments to the Contract Price in consequence of variations made under clauses 22-25 of the Construction Contract. The adjustments proposed by the defenders,

however, did not relate to variations of the works; they are rather related to "ancillary supplies", which had nothing to do with any variation of the works. In these circumstances, it was submitted, the defenders were not entitled to withhold any amounts from the sums due to the pursuers under payment certificates nos. 24 and 25.

11. Counsel for the pursuers further submitted that in the foregoing circumstances a motion under section 47(2) of the Court of Session Act 1988 was competent; he referred to **Stirling Shipping Company Limited v. National Union of Seamen**, 1988 SLT 832, at 835 J-K, and **Black Arrow Group PLC v. Park**, 1990 SLT 254. He accepted that the balance of convenience was relevant to both motions. In that respect, he submitted that, in the commercial context of a large-scale construction contract, cash flow was critical. The defenders were attempting to achieve an illegitimate negotiating position by interrupting the pursuers' cash flow.

12. For the defenders it was submitted that the term "adjustments" in article 14 of the Construction Consortium Agreement should be construed more widely than the pursuers contended; in particular, "adjustments" in article 14 should not be given the same meaning as "adjustments" in article 6.5. The expression "adjustments" in article 14 was sufficiently wide to cover any alteration to the monies due to the parties under the Construction Contract. Consequently it was wide enough to cover division of the cost of ancillary services in terms of article 6.4 of the Construction Consortium Agreement. It was submitted that the latter clause was designed to bring about a provisional allocation of the cost of ancillary services where the final allocation was in dispute; it therefore affected the division of money between the parties. The solicitor for the defenders further submitted that article 6.5, on which the pursuers relied, was concerned with the definition of the Participation Quotas, and was thus not relevant to the present case.

13. On the balance of convenience, it was submitted for the defenders that the pursuers could have referred the dispute over liability for ancillary services to adjudication, and in that way they could have obtained a rapid decision on the matter. He further submitted that the Court should be slow to grant the pursuers' motion under section 47(2), as that could foreclose the merits of the present action.

Recall of interim interdict

14. The usual two issues arise: whether the pursuers have made out a prima facie case and whether the balance of convenience favours the continuation or the recall of the interdict. The main legal dispute between the parties relates to the construction of article 14.1 of the Construction Consortium Agreement. It is convenient to start with this matter, as it is relevant to both of the above issues.

15. In my opinion the proper construction of article 14.1 is that contended for by the pursuers. The monies received from SMW Limited as payments under the Construction Contract must be distributed as quickly as possible to the parties in accordance with the certificates issued by SMW Limited, and the parties have a right to enforce payment of such monies out of the account in which they are held. The only exception to this right occurs if variations are made to the Contract Price pursuant to the Construction Contract; in that event adjustments in terms of article 6.5 of the Construction Consortium Agreement would require to be made to the proportions of the Contract Price due to each party. That assumes that such variations had not been taken into account by SMW Limited in certifying the amounts due to each party. It is accepted, however, that no such adjustments are relevant to the present case. Consequently the monies received from SMW Limited must be distributed to the parties in accordance with the certificates that have been issued by that company.

16. I reach this conclusion for two reasons. In the first place, article 14 uses the word "adjustments". That word is used in article 6.5 of the Construction Consortium Agreement, but nowhere else. The defenders claim that they are entitled to payments from the pursuers made under article 6.4, and ultimately article 6.3, but these clauses do not refer to "adjustments"; they refer rather to the parties' being liable for certain costs, or bearing certain costs in specified proportions. The difference in wording is in my opinion of some significance by itself.

17. Of greater importance, however, is the second reason for the foregoing conclusion. Article 14.1 relates to *"monies received as payments under the [Construction] Contract"*. Payments made under the Construction Contract will be instalments of the price payable under that contract, after making

appropriate allowance for any relevant variations or adjustments. Article 6.5 deals in terms with *"adjustments in respect of variations to the [Construction] Contract Price pursuant to the provisions of the [Construction] Contract"*. Thus it relates specifically to the monies payable to the parties with which article 14.1 is concerned.

18. Articles 6.3 and 6.4, by contrast, are not concerned in any way with the Contract Price. They are concerned rather with the manner in which the parties are to bear, as between themselves, the cost of ancillary supplies and services that are necessary to complete the installation but are not mentioned in the Construction Consortium Agreement. The definitive rule as to how the cost of such supplies and services is to be borne is found in article 6.3: each party is to bear the cost of the ancillary supplies and services that relate to its Project Part. That rule applies as between the parties. It is not an allocation of the Contract Price. Any debt that arises under article 6.3 is wholly independent of the Contract Price, and indeed of any payments made by SMW Limited as employer. Obviously disagreements may arise as to the Project Part to which particular supplies and services relate. In that event article 6.4 comes into operation. It lays down a provisional rule for the allocation of the cost of such supplies and services: if the parties disagree, the cost will be provisionally borne pro rata to their Participation Quotas. The Participation Quotas are set out in Appendix II; the pursuers' Quota is 60.3% and the defenders' quota is 39.7%. Once again, that rule applies as between the parties, and is not an allocation of the Contract Price. Once again, any debt that arises under article 6.4 is wholly independent of the Contract Price and of any payments made by SMW Limited. There is accordingly no reason for treating the debts that arise under articles 6.3 and 6.4 as "adjustments" to payments made by SMW Limited or to the Contract Price. Those debts are rather independent obligations arising between the present parties. As such, they give rise to claims that are independent of the provisions for payment of the Contract Price by SMW Limited. Claims of that nature do not in my opinion fit the exception to article 14.

19. On the foregoing construction of article 14.1, I am of opinion that the pursuers have a clear prima facie case for interdict in the terms sought. The parties are each entitled to immediate distribution of all sums received from SMW Limited, in accordance with that company's certificates, and the defenders have no right to insist that sums so certified should be modified to reflect claims made under articles 6.3 and 6.4. The interim interdict sought by the pursuers is merely designed to secure the immediate payment of all sums received from SMW Limited.

20. I am also of opinion that the balance of convenience favours the grant, and at this stage the continuation, of interim interdict. Two main considerations are relevant. The first is the relative strength of the parties' cases: **N.W.L. Limited v Woods**, [1979] 1 W. L. R. 1294, at 1310 per Lord Fraser. On this issue, for the reasons discussed above I am of opinion that the pursuers' case is clearly to be preferred. The point in dispute is one of interpretation of the parties' contract. While evidence may obviously be relevant to such an issue of interpretation, in particular to establish the genesis or aim of the contract, in the present case I consider that the interpretation of the relevant parts of the Construction Consortium Agreement, and in particular of article 14.1, is very clear. The aim of a provision such as article 14.1 is also quite clear, namely to ensure that all sums received from the employer are promptly made over to the parties. In the circumstances, I doubt whether evidence would add anything of importance to the interpretation of the contract.

21. The second consideration relevant to the balance of convenience is the maintenance of the status quo. In some contexts, for example a dispute between neighbouring landowners, it may be appropriate to treat the status quo as a simple freezing of the situation when proceedings are brought. In a commercial context, however, I am of opinion that it is not always appropriate to approach the status quo in that way. Particularly in a case where the proceedings relate to payments due under a commercial contract, it will usually be more accurate to regard the status quo as dynamic in nature. In such a case, the parties' contractual machinery envisages that payments will be made at particular times, usually on a regular basis. In doing so, that machinery recognises the critical importance of cash flow in the commercial world; without a stream of income most commercial enterprises would have difficulty in paying their debts as they fall due. "Maintaining positive cash flow is essential in any well managed business. Interruption of cash flow will necessarily affect the business's budgetary strategy

and may well affect short term liquidity and the efficiency of financial management": **Interconnection Systems Limited v Holland**, 1994 SLT 777, at 780F per Lord Penrose. The context of the present case is the construction industry, where cash flow has been described as its "life blood". That is very plainly recognised in the payment provisions contained in sections 109-113 of the Housing Grants, Construction and Regeneration Act 1996, and also in the adjudication provisions of the same Act. Consequently, in a case involving payments due under a commercial contract, especially a construction contract, I am of opinion that the status quo must be understood as the making of payments under the contract as they fall due according to its terms. If a liquid debt is prima facie due under the contract but the parties are in dispute as to whether it should be subject to adjustments arising out of illiquid claims or an alleged right of retention or set off or counterclaim arising out of an illiquid claim, I am of opinion that the status quo should be understood as the making of the payment that is prima facie due. In the present case, that conception of the status quo plainly favours the grant of interim interdict in favour of the pursuers.

22. In some cases other countervailing factors may be sufficiently strong to negate the importance of the status quo, understood in the foregoing sense. If, for example, there are serious doubts about the solvency of the party to whom the payments will be made, that may be enough to persuade the court that it should not compel such payment to be made. This is not such a case, however; the pursuers are a subsidiary of a large Austrian public company, and the defenders accepted that, with the backing of their parent, there was no doubt about the pursuers' ability to pay any sum that might be due by them to the defenders. The defenders did argue that the dispute over liability for ancillary services could be referred to adjudication, which would resolve it quickly. While in some circumstances that might be relevant to the balance of convenience, in the present case I consider that it is not sufficient to negate the arguments based on the strength of the parties' respective cases and the maintenance of the status quo. Indeed, on my construction of article 14, the existence or otherwise of a claim relating to ancillary services is not relevant to the parties' right to payment of monies subject to that clause.

23. For the foregoing reasons I am of opinion that the balance of convenience favours the maintenance of the existing interim interdict. I will accordingly refuse the motion for its recall.

Court of Session Act, section 47(2)

24. Section 47(2) of the Court of Session Act 1988 is in the following terms:
"In any cause in dependence before the court, the court may, on the motion of any party to the cause, make such order regarding the interim possession of any property to which the cause relates, or regarding the subject matter of the cause, as the court may think fit".

Three principal questions arise in a motion under this subsection. Firstly, does the order sought relate to the subject matter of the cause? Secondly, has the pursuer made out a prima facie case for such an order? Thirdly, does the balance of convenience favour the making of such an order? The first question is one that arises out of the wording of the subsection. The latter two questions are identical to those that the court must consider in an application for interim interdict, and in my opinion the approach of the court to these questions should be similar in each case. Both interim interdict and an order under section 47(2) are provisional remedies, granted without any definitive hearing on the merits of the case; and both are designed to preserve matters pending the final outcome of litigation. These features call in my view for a broadly similar approach to the two remedies.

25. The subject matter of the cause must be determined from the terms of the conclusions of the summons and the parties' averments: **Black Arrow Group PLC v. Park**, supra; **Stirling Shipping Company v. National Union of Seamen**, supra. In the present case the first conclusion is for declarator that, under article 14 of the Construction Consortium Agreement, the defenders are not entitled to withhold agreement, refuse consent, prevent or otherwise hinder the prompt distribution of monies held by the Construction Consortium received as payments under the Construction Contract. The second conclusion is for interdict in broadly similar terms. The third conclusion is for an order under section 46 or alternatively section 47(2) ordaining the defenders to consent to and assist in the transfer of monies held by the Construction Consortium in the Royal Bank account number 10437418; an order under section 46 will be appropriate when the parties' rights are finally determined, but the present

order is sought under section 47(2). It is clear from the pursuers' averments that the monies in question were derived from payments received under the Construction Contract, and that part of the pursuers' averments is not disputed by the defenders. Moreover, it is clear from the pursuer's averments that the grounds on which declarator is sought, the grounds on which interdict is sought and the grounds on which an order under section 47(2) is sought are identical, namely a particular construction of article 14, in the context of the totality of the parties' contractual arrangements. The defenders obviously dispute that construction of the contract, but their averments make clear that the subject matter of the cause is whether, on a proper construction of the parties' contractual arrangements, the pursuers are entitled to payment of the whole of their share of the monies in the account in question. It follows that the order sought under section 47(2), for co-operation in making payment to the pursuers of the monies in the relevant Royal Bank account, does relate to the subject matter of the cause.

26. On the question of whether the pursuers have made out a prima facie case, exactly the same considerations are relevant as with the application for interim interdict and motion for recall of that interdict, as the second and third conclusions seek to achieve essentially the same result, namely the transfer of monies in the Royal Bank account no 10437418 to the pursuers, so far as those monies were certified by SMW Limited as due to the pursuers. The substantive grounds on which the two remedies are sought are, as I have stated in the last paragraph, identical. I am accordingly of opinion, for the reasons stated in relation to the motion for recall of interim interdict, that the pursuers have made out a prima facie case.

27. On the question of balance of convenience, I am of opinion that similar considerations are relevant to those that are relevant to the motion for recall of the interim interdict. Because the grounds of action are the same for both the interdict and the order sought under sections 46 and 47(2), and the defenders' counter-arguments are the same, my conclusion on the relevant strengths of the parties' cases is the same. As in the case of interim interdict, maintenance of the status quo is an important consideration, so that at the interim stage the court interferes as little as possible with the underlying rights and obligations of the parties. Indeed, because an order under section 47(2) need not be merely prohibitory in nature, this consideration is likely to be of particular importance. In a case where an order under section 47(2) is sought in relation to rights and obligations under a contract, the court should so far as possible respect the parties' contractual scheme. In such a case however, I am of opinion that the same dynamic conception of the status quo applies as with interim interdict. Consequently any order under section 47(2) should generally enforce the payment of liquid debts that have fallen due under the parties' contract, without regard to any illiquid claims or rights of retention or set-off or counterclaim based on the illiquid claims that may be asserted to resist such payment. In the present case the payments that the pursuers seek from the Royal Bank account no 10437418 arise from liquid debts. The defenders seek to set off against those payments claims under article 6.4. Those claims, however, are not liquid. They are dependent on assertions that the defenders have incurred expenditure on ancillary supplies and services necessary to complete one or other Project Part, and the amount of such expenditure must still be definitively ascertained. For these reasons I consider that the status quo favours an order in the terms sought by the pursuers.

28. For the foregoing reasons I am of opinion that the balance of convenience favours an order under section 47(2) of the Court of Session Act 1988. I will accordingly make such an order in the terms sought by the pursuers. I should add that this does not, as the defenders argued, foreclose the issue in dispute between the parties. If the pursuers' conclusion for an order under section 46 of the 1988 Act is ultimately unsuccessful, the sums received by them in consequence of the present order will require to be repaid.

Pursuers: Davidson, Q.C.; MacRoberts
Defenders: Connal, Q.C.; McGrigor Donald