OPINION OF LORD EASSIE : OUTER HOUSE, COURT OF SESSION. 16th May 2005.

Introductory

[1] In 1998 a decision was taken by the owners of a cinema in Glasgow that the site should be redeveloped to provide a new multiplex cinema, together with some retail accommodation. For certain reasons the owners chose not to contract directly with designers and a building contractor. Instead a scheme involving a number of different parties and a number of different contractual relationships was put in place. In summary the basic arrangements were that the site would be sold to an insurance company - Pearl Assurance Plc - in order that it might later be leased back to the cinema operator. A property development company would carry out the redevelopment of the site to the extent of constructing the shell of the building, which would then be fitted out by the tenant. In order to construct the shell of the building the property development company would enter into a design and build contract with a building contractor. The pursuers in this action are the property development company and the defenders are the tenant under that basic arrangement.

[2] As part of the overall arrangements the pursuers and the defenders were parties, along with others, including Pearl, to a contract styled an "Agreement for Lease" - hereinafter "the AFL" - the last date of execution which was 10 November 1998. In the AFL the pursuers are referred to as "the Developer" and the defenders as "the Tenant". The AFL is No 6/1 of process. As envisaged and required by the AFL the pursuers subsequently entered into a building contract with Kier Regional Limited - "Kier" - on 3 March 1999 (No 6/3 of process) for the construction of the "shell" works, termed in the AFL "Developer's Works", which could then be fitted out by contractors engaged by the defenders.

[3] In this action the pursuers' primary claims are for payment of two sums of money. The first sum claimed is for the additional costs of giving effect to what the pursuers maintain were variations to the Developer's Works instructed by the defenders. The second sum is claimed as damages for breach of contract in respect of terms said by the pursuers to be implied in the AFL regarding the provision of information by the defenders to the pursuers, the absence of timeous provision of that information being said to have resulted in the pursuers having incurred a liability to Kier in terms of the building contract for what might shortly be described as prolongation costs. Both of the pursuers' claims are based upon the terms of, or terms said to the implied in, the AFL. The defenders contend that the pleadings advanced by the pursuers in support of both of these claims are irrelevant and they argued in debate that the action should accordingly be dismissed. The pursuer's secondary claims are contained in the third and fourth conclusions of the summons and are for certain declarators reflective of the primary claims. No independent issue respecting them was raised. The pursuers seek a proof before answer.

[4] By way of background to the AFL it is averred by the pursuers that sometime previously an associate of the pursuers had been involved with the defenders in the development of a multiplex cinema in Cardiff which involved stacking the auditoria vertically, rather than adjacent to each other on a horizontal plane as is the more customary arrangement for such cinemas. It is averred by the pursuers that the defenders were pleased with the design used in Cardiff and identified the Glasgow site, with its relatively small "footprint" as a possible further development. At that time the Glasgow site was advertised for sale on the open market. It was then withdrawn from the market and thereafter from the summer of 1998 the pursuers and their architects worked with the defenders and their design team, who were the same team as has been engaged in the Cardiff project, in order to develop the design for the Glasgow multiplex using the underlying design concept inherited from the Cardiff project.

The AFL

[5] The AFL is a multi-party agreement to which, in addition to the parties to this litigation ("the Developer" and "the Tenant" respectively) the landlord - Pearl - and a guarantor and a further company described as "the owner" are also party. However, so far as pertinent to the dispute in this litigation the material provisions of the AFL are as mentioned in the following paragraphs.

[6] It is convenient to start with Clause 3.1 of the AFL, which assumed an important place in the debate. It states:-

*"**3.1 Employer's Requirements:** The parties shall confer in order to develop the Specification (including the Drawings) into fully detailed design drawings incorporating all service runs to accommodate the Tenant's reasonable fit out requirements and to agree the Employers Requirements and in the event of the parties being unable to agree the same within thirty working days then either party shall be entitled to refer any dispute for determination by the expert under Clause 17.2"*

The term "Specification" is defined in Clause 1.1 of Clause 1 ("Definitions") as being:-

*"**'Specification'** means the specification which is comprised in Part I of the Schedule and the Drawings all of which are to be comprised the [sic] Employer's Requirements and the Contractor's Proposals (and/or any specifications and/or drawings which the parties may subsequently agree shall be substituted therefore or used in conjunction therewith)."*

The term "Drawings" is given the definition:-

*"**'Drawings'** means the drawings annexed to the Specification and part of Part I of the Schedule."*

Part I of the Schedule to the AFL contains a document entitled *"General Specification Shell and External Works"* to which is appended as "Appendix A" a number of drawings preceded by a frontispiece *"Atkins Walters and Webster Agreed layout drawings"*. (The firm of Atkins Walters and Webster were the architects who had been engaged in the Cardiff project and who apparently worked on the development over the summer and autumn months of 1998 of the design for Glasgow).

[7] The term "Employers Requirements" is also included in the many definitions in Clause 1.1 of the AFL. Its definition is in these terms:-

*"**'Employer's Requirements'** means the document issued by the Developer for the design and carrying out and completion of the Developer's Works (which shall incorporate the Specification) agreed or determined pursuant to Clause 3.1 with such Variations (if any) approved by the Tenant pursuant to Clause 3.3."*

The term "Developer's Works" is earlier defined in Clause 1.1 as being:-

*"**'Developer's Works'** means the construction of the Building with all mains services and loading bay as described in the Specification".*

And since "Building" has its own definition, for completeness it should be quoted:-

*"**'Building'** means the building comprising the Subjects and other areas to be constructed by the Developer on the Property in accordance with the Specification the Employers Requirements and the Measurement Plans."*

[8] The AFL provides for the Developer (the pursuers) entering into "the Building Contract" whereby the "Building" would be constructed. Clause 1.1 of the AFL gives a definition to "Building Contract":-

*"**'Building Contract'** means the design and build contract in respect of the Developer's Works in the form of The Scottish Building Contract with Contractor's Design (August 1998 Edition) (which incorporates the JCT Standard Form of Building Contract with Contractor's Design 1981 Edition incorporating Amendments 1 to 7 and 9 and 10 and T.C./94/WCD) ('UK Form')) as amended by the Schedule of Amendments (which shall incorporate the Specification and the Employers Requirements) and as may be amended pursuant to Clause 12.1 to be entered into between the Developer and the Building Contractor and executed in self-proving form (together with any contract or contracts from time to time entered into by the Developer and the Building Contractor supplemental thereto which shall be in a form consistent with the UK Form as amended) with any Variations previously approved by the Tenant pursuant to Clause 3.3."*

Clause 3.7 provides, *inter alia* that *"... the Developer shall before commencement of the Developer's Works enter into the Building Contract with the Building Contractor...".*

[9] Clause 5.1 of the AFL provides that:-

*"**5.1 Commencement:** The Developer shall as soon as reasonably practicable after the date of this Agreement commence and thereafter proceed diligently and expeditiously with the execution and completion of the Developer's Works".*

Clause 5.2 provides further that the Developer should execute and complete the Developer's Works *inter alia "...(d) in accordance with (i) the Building Contract...".*

[10] From the foregoing it may be seen that the contractual documentation envisages a process of "conferral" whereby the "Specification (including the Drawings)" would be developed to an agreement on "Employers Requirements" which would then be incorporated into the design and build contract between the Developer and the Building Contractor. However, the AFL also provides for completion dates unrelated to the process of conferral. Thus Clause 5.10 provides that the Developer shall "... procure that the Certificate of Completion shall be issued by the earlier of (i) the Estimated Date of Completion and (ii) Six (6) weeks after the date of issue of the Access Certificate". The first and last of the terms within that Clause have, under Clause 1.1, the following definition:-

*"**'Certificate of Completion'** means the written statement validly issued by the Developer's Project Managers under Clause 10 certifying that practical completion of the Developer's Works has taken place in accordance with the terms of this agreement and the expression **'Certificate Date'** shall mean the date of issue of such certificate.*

***'Access Certificate'** means the written statement validly issued under Clause 10 by the Developer's Project Managers certifying that the Developer's Works have reached the stage set out in Section 1 to Part A of the Schedule."*

But importantly the second term - "*Estimated Date of Completion*" - is defined thus:-

*"**'Estimated Date of Completion'** means the earliest of:-*

(a) the date which is 72 weeks after the last date of execution hereof and

(b) the date which is 60 weeks after the date of commencement of the Developer's Works."

It may thus be seen that the practical effect of that definition is that an interval of twelve weeks is available for the process of "conferral" under Clause 3.1 leading to agreement on "Employers Requirements"; the negotiation of the terms of the Building Contract; and the subsequent commencement of the Developer's works. The AFL further provides for the Developer's being liable to pay to the Tenant certain daily sums - described as contingency sums - in the event of the completion date not being achieved (see Clause 10.2).

[11] Clause 7 of the AFL is concerned with variations to the Developer's Works which may be requested by the Tenant. It is headed "Permitted Tenant's Variations". The phrase "Permitted Tenant's Variations" is defined in Clause 1.1. as follows:

"**'Permitted Tenant's Variation'** means any variation or amendment requested by the Tenant to the Employer's Requirements or the Contractor's Proposals after any Variations to the Employer's Requirements or the Contractor's Proposals have been approved by the Tenant pursuant to Clause 3.3."

Clause 3.3 is concerned with a "Variation" (written with an initial capital letter, as opposed to the third word of the definition last quoted, the first letter of which is lower case)which the Developer wishes to make and "Variation" (so written) is defined thus:

"**'Variation'** means any alteration to any item contained in or referred to in the Building Contract the Detailed Documents and/or Deeds of Warranty which would have the effect of materially varying or materially changing the words or terminology of a document or the effect of the relevant document would be so altered as to be disadvantageous to the Tenant or changing the Specification so that the Developer's Works would not be constructed in accordance with the Specification".

The full terms of Clause 7 of the AFL are as follows:-

*"**7. PERMITTED TENANT'S VARIATIONS***

***7.1 Tenant Requires a Permitted Tenant's Variation**:*

If the Tenant gives notice at any time to the Developer that it requires a Permitted Tenant's Variation to be incorporated in the Developer's Works then the Developer shall with all practicable speed:

(a) cause sufficient design to be prepared to enable an estimate of the cost of incorporating such Permitted Tenant's Variation to be prepared by the Building Contractor (and certified by the Quantity Surveyors) in accordance with Clause 7.5 and shall procure that the Quantity Surveyors promptly supply a copy of such estimate to the Tenant and the Tenant's Representative and

(b) procure that the Developer's Project Managers notify the Tenant and the Tenant's Representative in writing of any extension or reduction in the Building Contract period(s) which will arise from such Permitted Tenants Variation (if implemented) and

(c) enter into bona fide discussions with the Tenant and the Tenant's Representative with a view to agreeing the estimate and the extension or reduction of the period(s) referred to in this Clause 7.1 and failing agreement to be determined under Clause 17.2.

(d) use its best endeavours to obtain any consent necessary from the Landlord and consent shall only be necessary if it is required to be granted under the Lease and could have been withheld on reasonable grounds.

*7.2 **Definition of Permitted Tenant's Variation**:*

A Permitted Tenant's Variation is a variation of the Developer's Works which:

(a) does not diminish the GIA of the Subjects below 100,000 square feet and

(b) does not in the reasonable opinion of the Landlord and the Developer diminish the open market rental value of the Building and

(c) does not in the reasonable opinion of the Landlord and the Developer diminish the value of the Developer's interest in the Building and

(d) does not cause or is not in the reasonable opinion of the Developer likely to cause a delay in the anticipated construction period of the Building Contract and

(e) is otherwise reasonably acceptable to the Landlord and the Developer

(f) does not involve the making of a new planning application.

*7.3 **Developer to Procure Execution of Permitted Tenant's Variation:***

The Developer shall procure that any Permitted Tenant's Variation of which the Tenant gives notice to the Developer pursuant to Clause 7.1 shall be incorporated in the Developer's Works unless either:

(a) the Developer gives notice to the Tenant that it does not agree that the same is a Permitted Tenant's Variation in accordance with the terms of this Agreement and the ensuing dispute (if any) having been referred for determination under Clause 17.2 is resolved in favour of the Developer or

(b) the Tenant gives notice to the Developer within ten (10) Working Days (in respect of which time shall be of the essence) after receipt of any estimate supplied pursuant to Clause 7.1(a) and any notification of extension or reduction of time under Clause 7.1(b) (whichever shall be the later) that it does not approve such estimate and/or extension/reduction (as the case may be).

*7.4 **Disputes:***

Any dispute under Clause 7.1(c) or as to whether any proposed variation to the Developer's Works constitutes a Permitted Tenant's Variation shall be referred by the Developer and the Tenant to an expert for determination in accordance with Clause 17.2 but so that (for the avoidance of doubt) the Developer shall not be under any obligation to delay the progress of the Developer's Works and the Building Contract pending the resolution of any such dispute (and in the case of a dispute under Clause 7.3(a) if the Developer has previously served a notice under Clause 7.3(a)).

*7.5 **Basis of Costing Permitted Tenant's Variation:***

In causing the estimate referred to in Clause 7.1(a) to be prepared the Developer shall be entitled to take into account:

(a) all anticipated construction costs to the Developer in procuring that any such Permitted Tenant's Variation is incorporated in the Developer's Works and

(b) 10% of the anticipated construction costs to the Developer (exclusive of any element thereto attributable to design or other fees) relating to a Permitted Tenant's Variation which increases the amount of construction work to be carried out as a developers profit margin and to cover all fees whether those of the Developer or the Building Contractor or any sub-contractors.

*7.6 **Reimbursement of Costs:***

The Tenant shall reimburse to the Developer:

(a) the costs of the Permitted Tenant's Variations (in accordance with the estimate agreed under Clause 7.1(c) or determined under Clause 7.4) within one week of receipt by the Tenant from the Developer's Project Managers of a certificate that the whole or part of the Permitted Tenant's Variation has been completed and that payment for the relevant Permitted Tenant's Variation or part thereof is properly due from the Developer to the Building Contractor or other third party (it being agreed for the purposes of this sub-clause that the sums referred to in Clause 7.5(b) will be treated as a payment properly due from the Tenant simultaneously with the payment for the relevant Permitted Tenant's Variation or part thereof)

(b) costs incurred by the Developer if the Tenant withdraws or does not carry through with any proposed Permitted Tenant's Variation.

7.7 ***Co-operation to Avoid Delays:***

Without prejudice to the provisions of this Clause 7 the Landlord and the Developer and the Tenant shall and shall procure that their respective servants and agents shall cooperate fully with each other in relation to all matters arising under this Clause 7 so as to minimise any delays in the progress of the Developer's Works."

AFL to Building Contract

[12] As already mentioned, following the execution of the AFL the pursuers entered into a building contract with the building contractor mentioned in the definition of "Building Contractor" on 3 March 1999. However, it is averred by the pursuers that the Developer's Works commenced earlier, on 30 November 1998, following the granting of a letter of intent from the pursuers to the Building Contractor - Kier - dated 24 November 1998. The pursuers further aver that the issue of the letter of intent was preceded by discussions with the defenders and Pearl, both of whom were eager for the works to commence as soon as possible, and that the defenders and Pearl agreed to the commencement of the Developer's Works through the means of a letter of intent. Although not formally admitted, there does not appear to be any real dispute about the fact that the Developer's Works began at the end of November 1998 on the basis of the letter of intent. The reason wherefor the pursuers proceeded to begin the Developer's Works on the basis of the Letter of Intent rather than a Building Contract is ascribed to the presence of issues between the pursuers and Kier respecting particularly price, which had finally to be resolved as between them.

[13] It is however averred by the pursuers that those issues did not include any significant alteration to the design which, it is averred, was well advanced at the date of the AFL. The pursuers further aver that at the time of execution of the AFL a named representative of Virgin Cinemas Limited advised a named representative of the pursuers that the design for the cinema to be included in the AFL was what the defenders required and that the defenders were prepared "*to sign off the design*". By a letter of 20 November 1998 (No 6/4 of process) Virgin Cinemas Limited wrote to the pursuers saying:- *"We can confirm that the general arrangement and elevations for this scheme are fixed and approved by Virgin Cinemas Limited. However, we recognise that as the project progresses there will be minor variations put forward by both parties which will need to be agreed as the design develops. We do not anticipate that they will be problematic and are to be expected in the course of any design and build project."*

For completeness it may be noted that it is admitted by the defenders that Virgin Cinemas Limited had authority to act as their agent in these matters.

[14] Thereafter certain communications, the extent and significance of which is not the subject of mutual agreement on the pleadings ensued and, as already mentioned, the Building Contract between the pursuers and Kier was concluded on 3 March 1999. It is averred by the pursuers that the defenders agreed to the pursuers entering into the Building Contract on the terms of that contract at the time at which that contract was concluded.

The Variation Claims

[15] The alterations which the pursuers say constitute variations are described in the pleadings as having been made as respects four areas of the works:-
(i) Mechanical Services Scheme;
(ii) Louvres;
(iii) Foyer Layout; and
(iv) "Lafarge" Partitions.

The second of these areas was treated by both counsel for the pursuers and the solicitor advocates for the defenders as being essentially a matter ancillary to the first. It also became apparent during the debate that the last - Lafarge partitions - raised particular issues and was in effect *sui generis*. It is considered separately (see para. 58ff. *infra*). Accordingly one is concerned essentially with two claimed variations namely those flowing from changes in the proposed mechanical services systems and changes to the layout of the foyer. As respects the former it may be noted that, as averred by the pursuers, the design and installation of the mechanical services themselves was not part of the Developer's Works. But the design of the mechanical services had consequences for what would be required in the Developer's Works.

[16] Put in brief terms, the pursuers aver that the AFL proceeded upon a mechanical services scheme prepared by a firm of mechanical services engineers referred to in the pleadings as "Wilden". Thus, it is averred in Article 8.1.1 of the Condescendence that:- *"The Agreement for Lease contained a plant schedule and details of floor loadings developed specifically to incorporate the scheme prepared by Wilden. The plant schedule and floor loadings were based on, inter alia, the sizes and locations of the air handling plant required for the mechanical services scheme prepared by Wilden".*

Wilden had been employed on the Cardiff project. However, in November 1998, the defenders appointed a different firm of mechanical services engineers - Cudd Bentley - to prepare a revised mechanical services scheme which resulted in the preparation by Cudd Bentley of a series of drawings, the first drawings being issued to the pursuers on 21 January 1999, which had requirements, for the Developer's Works, inconsistent with the requirements of the Wilden Scheme. The essential difference is averred by the pursuers (Art. 8.1.1 of Condescendence) to be that -

"The Cudd Bentley Scheme involved air being heated or cooled by a large chiller and central plant area and then the air being pumped from this location to each of the auditoria. The Wilden Scheme involved individual mechanical and electrical installations to heat or cool water for each cinema. The plant required for the Cudd Bentley scheme was located externally whereas under the Wilden scheme the plant was located internally. The external location of the plant under the Cudd Bentley scheme meant that the slab on which it was placed had to allow for snow loading and weather impact on the strength of the slab. The slab on which it was placed required to protected from the weather. The floor loading therefore had to be increased by the weight of weather protection. The loads and locations of plant were changed under the Cudd Bentley scheme from the position under the Wilden scheme. The Cudd Bentley scheme did not require understage voids, unlike the Wilden scheme."

It is further averred by the pursuers that at the date of execution of the AFL:-

"The mechanical services scheme prepared by Wilden was sufficiently developed reasonably to allow the Developer's Works to commence. Under the Cudd Bentley scheme (as finally developed), the level 11 plant room was external as opposed to being internal under the Wilden scheme. The change from an internal to an external plantroom made a significant difference to the structural design of the level 11 floor slab. The level 11 floor slab required to be amended and strengthened."

It is also averred by the pursuers that the Cudd Bentley scheme had different requirements respecting the positions for louvres in the external walls but for present purposes the technical details are not material. The extent to which the Wilden scheme had been developed for the Glasgow project and the extent to which Cudd Bentley differed from it is not a matter of agreement on the pleadings. But on the basis of the pleadings for the pursuer the position may be shortly summarised by saying that the Specification (including the drawings appended to it) annexed to the AFL was based on the requirements, consequential for the Developer, of the Wilden scheme; the Specification (including those drawings) so based was incorporated into the Building Contract as part of the Employer's Requirements; and that the subsequent averred instruction in December 1999 to alter the practical arrangements envisaged under the Building Contract to accommodate the needs of the Cudd Bentley scheme was a variation of the Specification (including those drawings) and hence of the parties' contract.

[17] The variation averred respecting the layout of the foyer may be shortly summarised as follows. The AFL is averred (Cond. 8.5.1) to have been based on layout drawings requiring a small foyer on two levels intended thereby to accommodate the downward gradient of the street to the east of the site. The intention was that cinema customers would proceed by escalator from that ground floor foyer (level 1) to the first floor (level 2) to purchase tickets. Level 1 contained a number of proposed retail units. On 21 December 1998 the defenders' architect issued revised drawings showing revised floor levels and a larger area (encroaching on the area proposed for the retail units) available for selling tickets at level 1, instead of ticket sales at level 2. In the event, the proposed encroachment on the retail unit area proved unacceptable to Pearl in its entirety. But, according to the averments for the pursuers, (Cond. 8.5.3) by a letter dated 6 May 1995 the defenders' architect issued a revised layout for level 1 which no longer required the encroachment on the area intended for the retail units but which nonetheless required a change to the floor level by increasing such areas as were lower than 27.3 metres to that figure, which would require the inclusion of a larger ramp for disabled access. So, in essence, the foyer claim relates to an instruction in May 1999 to alter the floor levels at level 1. The pursuers, it is averred, conveyed that instruction to Kier by EAI No. 1.

[18] The solicitor advocates appearing for the defenders submitted that the claim for payment of these averred variations was irrelevant on a number of grounds.

[19] The first of these grounds was a submission which it was accepted applied only to the mechanical services and louvre variations. It was a submission to the effect that the pursuers had not averred that the works had been sufficiently defined, prior to the giving of the instructions said to be a variation, for those instructions to constitute a variation and that the pursuers had thus confused "variation" with delay in the provision of final confirmation or information in the elaboration of the Employer's Requirements. They had not set out the "baseline" from which there was a later departure. As I understood this contention it was entwined with a particular construction of Clause 3.1 of the AFL. That clause (set out *supra*, para [6]) provided for a process of conferral to develop the design leading to the settling of the Employer's Requirements to be included in the Building Contract. As I understood the argument for the defenders, until that procedure was fully carried out to the extent that no details whatever were left to be fixed, the Employer's Requirements were not agreed. The making of the change from the Wilden scheme to the Cudd Bentley scheme was thus simply part of the process of developing the Employer's Requirements and so was not a variation of previously fixed, defined building works. In the first speech Mr Cormack for the defenders, in developing this submission, went so far as to submit that the Building Contract let on 3 March 1999 did not contain "Employer's Requirements" which met the terms of the AFL. The "Employer's Requirements", he said, were not to be found in the document included in the Building Contract as the "Employer's Requirements" or in any other specific document but were to be found in what resulted from the process of

instruction to the builder after the whole process of design development was completed. Accordingly, it was submitted on behalf of the defenders, the process of agreeing the Employer's Requirements was still ongoing when the change from Wilden requirements took place in December 1999. Accordingly, the claim for remuneration for variation respecting changes following from an alteration in the mechanical services scheme was irrelevant.

[20] I am not persuaded that on this ground the variations claim (insofar as relating to mechanical services) can be said to be irrelevant, at least in advance of inquiry. It is clear that following the execution of the AFL certain discussions took place, *prima facie* consistently with the procedure envisaged in Clause 3.1 of the AFL, which resulted in an agreement on the "Employer's Requirements" which were then duly incorporated into the Building Contract into which the pursuers were required to enter and did so with - it is averred - the knowledge and approval of the defenders. I have great difficulty with the contention or suggestion that after the conclusion of the Building Contract on 3 March 1999 the process of elaborating the "Employer's Requirements" could be said to be still ongoing and that changes could be made untrammelled by parameters settled by the Employer's Requirements which were included in the Building Contract. No doubt not every last detail could be or was settled by those Employer's Requirements. Even if the Employer's Requirements had left some detail of the Wilden scheme to be provided or confirmed, it does not follow, in my view, that there is not a "Wilden baseline". As junior counsel for the pursuers submitted, the fallacy in the argument advanced by the defenders is that, using the analogy of a painting, the argument assumes that until every last detail of the painting is present and in place the canvas is blank.

[21] Pursuing that artistic analogy I am satisfied that on averment the pursuers have adequately set out a case worthy of inquiry to the effect that at the time at which the Building Contract was concluded the Employer's Requirements - which included the Specification, and hence the Drawings- contained a sufficiently developed painting by Wilden to enable it to be said that the substitution of Cudd Bentley was not a process of mere filling in or adding detail to the Wilden sketch but was in itself a new sketch. It is *prima facie* apparent from the drawings and plant schedule within the AFL that the Developer's Works were conceived in terms of the Wilden scheme. That scheme, it is averred, was sufficiently developed to enable the works to begin and the Specification was carried over into the Employer's Requirements of the Building Contract without the relevant provisions having changed so as to depart from the Wilden basis.

[22] For these reasons I do not consider that on the "base-line" argument the pursuers' variation claim (in respect of the mechanical services) may be dismissed without inquiry.

[23] However, proceeding on the basis that the consequential alterations for the Developer's Works arising from the averred instruction in December 1999 to accommodate the Cudd Bentley mechanical ventilation system amounted to a variation of the Developer's Works the issue then arising is whether the pursuers are contractually entitled to recovery of the additional costs. Counsel for the pursuers made clear that they advanced only a contractual claim under Clause 7 of the AFL. It was not suggested on behalf of the pursuers that all the terms of Clause 7 of the AFL had been met. The contention for the pursuers is, however, that insofar as those terms may not have been fully met, the defenders waived full compliance with the terms of that clause.

[24] As respects the changes consequential upon departing from the Wilden scheme in favour of the Cudd Bentley scheme it is averred by the pursuers (Cond. 8.1.3):- *"At tenant liaison meeting number 2, held on 7th April 1999, Kier were instructed by Gleeds [the pursuers' project management agents] to forward the cost and programme implications of the roof plant requirements as detailed at that time of the Cudd Bentley Scheme to Gleeds. At tenant liaison meeting number 2, it was also stated that the pursuers' agent, Gleeds would issue a number of 'Tenant Change Orders' (hereinafter referred to as 'TCOs') to Perspective [the defenders' project management agents] in respect of the proposed variation to the works relating to the roof plant requirements in terms of the Cudd Bentley Scheme, It was envisaged that Perspective would sign the said TCOs prior to Gleeds issuing an Employer's Agent Instruction under the Building Contract ('EAI') to Kier in respect of incorporation of the Cudd Bentley Scheme into the works thereunder. Under cover of letter dated 17th May 1999 to Perspective, Gleeds submitted documents entitled 'Tenant Variation' (Nos 1 to 6) which were all dated 12 May 1999."*

The averments immediately following thereafter give particulars of the individual TCOs, indicating the items of work and costs involved.

[25] The pursuers' averments thereafter continue:- *"The concept of TCOs was not part of the procedures contained in clause 7 of the Agreement for Lease. However, notwithstanding this, TCOs were treated by the parties as equivalent to the concept of PTVs under clause 7 of the Agreement for Lease. Said clause 7 was the only mechanism in terms of which the defender was entitled to instruct variations to the Developer's Works. At a meeting on 17th June 1999, attended by inter alios Mr Bergmann of Gleeds and Mr Butler of Perspective, Perspective accepted that the defender had a liability to the pursuer in respect of the additional work referable to the said TCOs which had been issued, although the level of that liability remained in dispute with Mr Butler proposing alternative cost figures for the work. In these circumstances the parties were adhering to the basic agreement contained in clause 7.6 of the Agreement for Lease, namely, that the pursuer would be reimbursed by the defender in respect of the costs associated with a PTV or its equivalent. At the meeting on 17th June 1999, Mr Bergmann of Gleeds again advised on behalf of the pursuer that the pursuer required the said TCOs to be signed before a variation order was issued to Kier under the Building Contract".*

[26] After that passage in the pursuers' pleadings there follow averments regarding certain communings and meetings over the summer of 1999 and the issue of a further batch of TCOs relating to further changes to the roof plant requirements included in the Cudd Bentley scheme which it is not necessary to rehearse in detail. The averments then continue as follows:- *"At tenant liaison meeting number 7, Perspective also confirmed that if it received a letter by 4th October 1999 confirming that Kier would not levy prolongation costs in respect of the proposed TCOs.... it would sign and return said TCOs to Gleeds by 4th October 1999. Given the said discussions regarding prolongation, it was recognised that the TCOs relating to the proposed change to the mechanical plant requirements included in the Cudd Bentley Scheme were likely to cause delay in the anticipated construction period of the Building Contract. They could not therefore strictly be regarded as 'Permitted Tenant' Variations' given the definition contained in clause 7.2(d) of the Agreement for Lease. At the site meeting on 30th September 1999, Kier confirmed to Gleeds that prolongation costs would not be levied by it if the proposed change to the Cudd Bentley Scheme were instructed by the pursuer in terms of the Building Contract by 4th October 1999. By letter dated 30 September 1999, Gleeds advised Perspective of Kier's confirmation. Thereafter, however, Perspective failed to issue signed TCOs in respect of the proposed change to the mechanical plant requirements included within the Cudd Bentley Scheme."*

In December 1999 however matters appeared to have come to something of a head and this is treated by the pursuers in their averments in Condescendence 8.1.4:- *"On 2nd December 1999, at a site walk around, Mr Butler of Perspective indicated to Mr Jones of the pursuer that unless the Cudd Bentley Scheme was incorporated into the works, the defender would refuse to take occupation of the Cinema. At this point the pursuer considered itself to have been instructed to proceed with the incorporation of the Cudd Bentley Scheme into the works. There was an agreement between the parties that incorporation of the said variation would take place and the defender would reimburse the pursuer for the said incorporation. In addition, the pursuer consulted with Pearl, and it was confirmed, by Pearl's agent GVA Grimley, that the latter also wished the Cudd Bentley Scheme to be incorporated. Pearl thereby confirmed that the said variation was acceptable to it. In order to clarify exactly what the defender required, Gleeds consulted with Perspective. On 21st December 1999, Gleeds wrote to Perspective confirming the scope of the additional work instructed on 2nd December 1999. In particular, Gleeds confirmed which elements of additional work previously detailed in TCOs 1 to 11 together with further details contained in correspondence the defender required to be incorporated into the works."*

It is averred by the pursuers that following that confirmation the appropriate instructions were issued to the Building Contractor and changes were then effected to the Developer's Works. On the pursuers' averments those changes were not minor. They involved, among other things, the redesign of the roof, the dismantling of previously installed steel work and the redesign and re-erection of steel works (see Cond. 8.1.5).

In Article 8.1.6 of the Condescendence the pursuers make averments to the effect that in the instruction of the variation neither defenders and their project manager nor the pursuers followed the precise procedures under Clause 7 of the AFL and reference is made to meetings at which the defenders' agents accepted that the defenders had a liability in respect of the additional work carried out in terms of the TCOs. Thereafter, in Article 8.2 of Condescendence the pursuers aver:- *"In all the circumstances, the defender, by its actings, abandoned its right to insist upon strict compliance with the requirements of clause 7 of the Agreement for Lease. Nonetheless, the defender accepted that the pursuer still required to be reimbursed by the defender as condescended upon above. In the circumstances condescended upon in Article 8.1, the defender's actings were not consistent with retention of its right to insist on strict compliance with the requirements of clause 7. In the circumstances condescended upon in Article 8.1, Pearl, by its actings, abandoned its right to insist on strict compliance with the requirements of clause 7. The pursuer conducted its affairs on the basis that the said right had been abandoned by the defender and by Pearl. In the foregoing circumstances, the pursuer is entitled to be paid in respect of the costs associated with the said TCOs (being equivalent to PTVs under clause 7.6 of the Agreement for Lease)...."*.

[27] As respects the foyer layout changes, it is averred by the pursuers that on 15 February 1999 (when the possibility of siting the ticket desks on the ground floor was being contemplated) Gleeds wrote to Watson, the defenders' architect, stating that the levels to the foyer could not be re-planned without programme and cost implications for the shell, lift and escalator works. After it became apparent that the additional area required for ground floor ticketing would not be available, on 6 May 1999 Watson provided a revised layout requiring the entire floor to be at a level of 27.3 metres with an additional step to the entrance and a longer ramp for access by disabled people. It is further averred (Cond. 8.5.3) that: *"Mr Butler of Perspective made it clear that the defender required the pursuer to incorporate all the requirements of the said revised layout prepared by Watson into the pursuer's works or the defender would refuse to take occupation of the Cinema. Accordingly, on 6th May 1999, Gleeds on behalf of the pursuer issued EAI number 1 to Kier under the Building Contract, and the said revised layout was in due course incorporated into the works...."*

The letter from Gleeds to Kier of 6 May 1999 enclosing the EAI number 1 (No. 6/39 of process) records that Perspective and Grimley as agents for the tenant and landlord, had consented to this variation in terms of Clauses 6 and 7 respectively of the AFL and the copy letter indicates, in its circulation note, that copies of that letter then had been sent to *inter alios* those agents. The pursuers go on to aver in Condescendence 8.6 that:- *"In all the circumstances, the defender, by its actings, abandoned its right to insist upon strict compliance with the requirements of clause 7 of the Agreement for Lease. In instructing the said revised layout for level 1, the defender, and its agent, Perspective, did not follow the detailed procedures under clause 7 of the Agreement for Lease. The said revised layout was not formally instructed as a Permitted Tenant's Variation under clause 7. Said clause 7 was the only mechanism in terms of which the defender was entitled to instruct variations to the Developer's Works. The pursuer proceeded to*

have the said revised layout incorporated into the works. In doing so the pursuer did not operate the precise procedures contained in said clause 7. Neither the defender, nor its agent Perspective, took any objection to this. The pursuer proceeded to have the works required for the revised layout, which was instructed by the defender, carried out. It incurred significant liabilities in so doing. In these circumstances, the parties were adhering to the basic agreement contained in clause 7.6 of the Agreement for Lease, namely, that the pursuer would be reimbursed by the defender in respect of the costs associated with a PTV or its equivalent. In the circumstances condescended upon in Article 8.5.3, Pearl, by its actings, abandoned its right to insist on strict compliance with the requirements of clause 7. The pursuer conducted its affairs on the basis that the said right had been abandoned by the defender, and by Pearl."

[28] It was submitted for the defenders that the pursuers' reliance on waiver was misconceived; that the averments intended to instruct waiver were irrelevant; and hence the variation claim was irrelevant. The requirements of Clause 7 of the AFL which, on the pursuers' approach, had to have been waived included (i) the definitional limitations in Clause 7.2(d) as to what might constitute a "PTV"; (ii) the achieving of agreement on the additional costs, or failing agreement an independent determination under Clause 17; and (iii) certification under Clause 7.6 of due completion of the PTV. A prior, technical problem for the pursuers was suggested in that a PTV was a variation of the Developer's Works, whereas the pursuers' pleadings refer generally to variation of the specification attached to the AFL. However, the central submission for the defenders was that waiver operated essentially as a defence on the basis that a right invoked by a pursuing party might be met with the defence that the right had been abandoned and hence extinguished. What the concept of waiver could not do, it was submitted, was to operate so as to cause something which does not come within the terms of a contractual provision to be treated as if it did, with the consequence that a right yet arose under that contractual provision even though the terms of the provision were not met. It was hard to see how "abandonment of strict compliance" could enable it to be said that a variation which was not a PTV within the terms of Clause 7 of the APL could come within the ambit of the clause. Agreement on or independent determination of, the cost of the PTV was also central to the operation of Clause 7.

[29] In the course of his submissions on waiver, Mr Cormack, for the defenders, referred to a number of authorities. At the forefront he placed ***Armia v Daejan Developments Ltd*** 1979 SC (HL) 56 referring in particular to the passage in the speech of Lord Keith of Kinkel (at page 66) in which waiver was described as being the abandonment of a right. In addition reference was made ***to Lousada & Co Ltd v J E Lesser (Properties) Ltd*** 1990 SC 178; ***James Howden & Co Ltd v Taylor Woodrow Property Co Ltd*** 1998 SC 853; ***Evans v Angus Healthcare (Glenesk) Ltd*** 2001 SCLR 117 and ***Oakmall Greenock Ltd v McDonalds Restaurants Ltd*** (unreported, Lord Drummond Young, 9 May 2003). Reliance was also placed on the decision in ***Amec Mining Ltd v The Scottish Coal Co Ltd*** (unreported, Lord Carloway, 6 August 2003) as recognising that the proper course for a contractor faced with a request for extra work was to refuse to do it until properly instructed in terms of the contract.

[30] It was further submitted on behalf of the defenders that there were insufficient averments of fact from which waiver might be established. Although the pursuers averred that TCOs were treated by the parties as equivalent to PTVs and that at two meetings Perspective accepted that the defenders had a liability to the pursuers in respect of the additional work, it was not averred that the Fund (Pearl) was included in that acceptance. Moreover, the TCOs were not, in fact, signed. The fact that Perspective did not sign the TCOs was consistent with a process of negotiation which was not concluded by agreement (cf ***Lousada***). The averment respecting the site walk around on 2 December 1999 could be consistent with Mr Butler's asserting some form of independent right to decline to take occupation unless the Cudd Bentley scheme were incorporated. There was no averment fixing either the defenders or the Fund with advance knowledge that EAI 9 and EAI 10 would be issued on 22 December 1999 and 14 January 2000 respectively. The same point arose respecting the foyer layout. There were thus no adequate averments of conduct by the defenders inconsistent with the terms of Clause 7 and indicating abandonment of due insistence on the observing of the terms of that clause, on which the pursuers had conducted their affairs. Reference was also made to *Moodiesburn House Hotel Ltd* v *Norwich Union Insurance Ltd* 2002 SLT 1069 in this connection.

[31] For their part, counsel for the pursuers disputed the contention that waiver could not operate so as to bring within a contractual provision a claim which did not meet all the contractually defined requirements. On the contrary, where a claim is advanced under contract, waiver might indeed involve the waiving of definitional requirements. Thus in ***Donnison v Employers Accident and Livestock Insurance Co Ltd*** (1897) 24 R 681 - referred to in the speeches in ***Armia*** - the time condition was one relevant to the definition of an admissible claim and hence the liability of the defender insurance company, but that condition could be waived. Similarly in ***Minevco Ltd v Barratt (Southern) Ltd*** (unreported, Second Division of the Court of Session, 16 March 2000) the obligation which it was sought to enforce was subject to a time limit but the Court was satisfied that the pursuers' case that the time limit had been departed from *rebus et factis* should be the subject of inquiry and that the same applied to the case also argued by the pursuers that the defenders had in any event waived their right to found on the time limit. As a matter of relevancy, submitted counsel, it was possible for a party to waive insistence on the presence of all the elements stipulated under the contract for the arising of a contractual claim. Conduct constituting waiver could include, or find its context in, some informal agreement or understanding (***James Howden & Co v Taylor Woodrow Property Co Ltd,*** p.Lord Marnoch, 872 F-I). The distinction between waiver and variation of contract might sometimes be narrow (cf. Lord Keith in ***Armia,*** p. 72), though it was indicated in *Minevco* that the task of establishing waiver might be easier than variation of contract. Only if the averments for the party contending for

waiver were clearly incapable of supporting waiver should the action be dismissed without inquiry. In that connection reference was made to ***Evans v Angus Healthcare (Glenesk) Ltd***, 131B-C.

[32] As respects the submission that the averments were in any event insufficient to support waiver, it was to be noticed that *inter alia* the pursuers offered to prove an acceptance by the defenders' representatives that the defenders were liable to pay for the additional works; it was not the case that in departing from the PTV procedures of Clause 7 the parties set up an alternative agreed procedure which insisted on the signature of the TCO. Simply to point to the averment that the TCOs were not in fact signed ignored the significance of both what was said on the 2 December walk round and in subsequent communings and also the acceptance by the defenders and Pearl of the consequent EAIs which resulted in the changes to the Developer's Works being carried out and accepted by them in the knowledge that significant cost was involved. A proof before answer should be allowed as respects the variations claimed.

[33] Having considered these submissions and the authorities to which I was referred I have come to the conclusion that it would not be right to reach a decision on the soundness of the variation claim - and hence the waiver issues - without inquiry. In reaching that conclusion I have been mindful of Mr Connal's exhortation at the outset of his speech that the Court should be wary of what he described as the clarion call *"simply to fix a proof before answer"*. However, while it is of course the case that in his speech in *Armia* Lord Keith described the doctrine of waiver as connoting the abandonment of a right, I am not persuaded by the principal proposition for the defenders that waiver cannot be deployed so as to cause something which does not come within the terms of a contractual provision to be treated as if it did. In a contractual context, waiver of a contractual term may necessarily imply that something which does not satisfy all the contractual provisions is yet to be treated as being within those provisions because the party having an interest to insist on full satisfaction as either expressly, or by implication arising from the factual circumstances, waived his right to insist on one or more of the contractual conditions being duly fulfilled. In ordinary usage, waiving a contractual term is indeed to say that one is not insisting on one's right to require due observance of the term. In his speech in ***Armia,*** Lord Keith observed (72) - *"The topic of waiver may arise in a number of guises in a variety of contexts. The truth is that it is a creature difficult to describe but easy to recognise when one sees it, subject to the proviso that it is on occasion difficult to distinguish it from variation of a contract."*

As counsel pointed out, the authorities illustrate that a contractual term which is definitional of a contractual entitlement may be waived. Thus in ***Donnison*** the liability of the insurers was delineated by among others the contractual term that notice of the occurrence of the accident required to be given within 14 days. But the insurers were held to have waived observance of that term. Similarly in *Minevco* the liability of the defending party under the lease was qualified by stipulations regarding time which would have removed liability if not waived. In such cases the "right" said to have been waived is the right to insist on dual fulfilment of all the parameters contractually set for the arising of liability. I do not see any reason in principle why it should not be possible to waive two or more parameters where the contractual liability in question is defined by a plurality of contractual terms or requirements. Accordingly, and by way of example, while Clause 7(1)(c) of the AFL provides for prior agreement on price, I do not consider that the procedure thus envisaged cannot, in principle, be waived with the implication that the additional cost be left to settlement afterwards either by agreement or by adjudication through litigation or arbitration. I would add that, to my mind, the interpretation of Clause 7 of the AFL presents a number of apparent difficulties, among which is the possible inconsistency between Clause 7(2) and both the definition of "*Permitted Tenant's Variation*" in Clause 1.1 and the terms of Clause 7(1)(b) and (c) respecting extension of the Building Contract period. The assumption that each of the variations in question in the present case could not be a Permitted Tenant's Variation because they had prolongation effects is one which might be better considered in the light of the whole evidence. Further, it has also to be borne in mind that the building project was completed incorporating the variations in question in circumstances in which it is averred that the parties were following the basic scheme but not the detail of Clause 7. In paragraph [16] of the Opinion of the Court in ***Minevco*** one reads:-

> *"[16] It is not in question that a clause of written contract cannot be varied or altered by verbal agreement. However, the position may be different if there are facts and circumstances which are explicable only on the basis that there was an express or implied agreement. As Lord Robertson observed in* ***Baillie v. Fraser*** *(1853) 15 D. 747 at 750: 'It is a delicate thing to infringe on the terms of a written contact, but when the parties have been acting so as to alter it by their conduct, then we must give effect to the change'.*

In such a case parole evidence may be led in order to prove such a case. In ***Sutherland v. Montrose Shipbuilding Company*** (1860) 22 D. 665 the question was whether a ship-owner had extended the time for completion of the vessel by the ship builder. In that context the Lord Justice Clerk (**Inglis**) stated at page 673 that the rule of law, in the light of the decision in ***Wark v. Bargaddie Coal Company*** (1859) 3 Macq. 467, was that *'where there are averments of acquiescence in operations inconsistent with the terms of the written contract, they may be admitted to proof; and if it appear that the acquiescence was the consequence of a previous arrangement, that is then competent to prove that arrangement'*. Thus in ***Wark*** the landlord's acquiescence in the tenant's breach of a prohibition under the lease provided a relevant answer to the landlord's claim that the tenant had been in breach of contract. In *Baillie* v. *Fraser* the fact that the tenant had tendered, and the landlord had accepted, rent on a different basis from that stipulated under the lease effected a permanent conversion in the rent which was payable."

In the present case the pursuers aver essentially that the parties did not act in precise accordance with the contract and seek to ascribe this to waiver on the part of the defenders insofar as they might otherwise be entitled to insist on due observance of the contractual terms. As was suggested by counsel, it might be that the actings amounted to an agreement to vary the contract, the distinction between variation and waiver being difficult to discern, particularly in the case of an executed contractual relationship such as the present. However, variation was apparently a higher hurdle to overcome. I would add that I do not find ***Amec Mining Ltd v The Scottish Coal Co Ltd*** to be of assistance on this topic, since the case presented by the pursuers in that action was not one of waiver, but of an implied contractual obligation on the part of the employer's agent to issue a formal instruction.

[34] As respects the submission for the defenders that the facts averred were insufficient to allow waiver to be inferred I have to say firstly that I am not presently persuaded that the invocation of the compearing solicitors for the defenders of the involvement or non-involvement of the Fund - ie. Pearl - is wholly relevant. The liability which the pursuers assert is against the defenders. If they, the defenders, waive - expressly or by conduct - rights to dispute their liability to the pursuers that should be sufficient for the purposes of establishing their liability. It is in any event averred that Pearl, through its agents, confirmed that the variations were acceptable. From the rest I did not consider that it can be said that what is set forth is necessarily incapable of allowing waiver to be inferred. Among other things, it is averred that on two occasions the defenders agreed that they would be liable for the cost of the additional works. As counsel for the pursuers pointed out, subsequent to the possibly critical walk round on 2 December 1999 Gleeds wrote to the defenders' agents on 21 December 1999 (No 6/20 of process) referring to an earlier letter of 10 December 1999 and subsequent discussions. In the letter Gleeds confirms its understanding of *"the variation works to be instructed*" (referring to *inter alia* what are described as *"Permitted Tenant Variations"*). The instructions from the pursuers to Kier issued on 22 December 1999 (6/21) bear to have been copied to the defenders' agents and the agents for Pearl, and the same applies as respects the later instructions issued in substitution in January 2000.

[35] Accordingly, while there may yet be questions of law to be resolved, I consider that their resolution requires investigation of the facts and that the pursuers should thus be allowed a proof before answer on the variations claim.

Breach of Implied Terms

[36] The terms which the pursuers say should be implied into the AFL are set out principally in Article 6 of the Condescendence of the Summons as follows:- *"In the foregoing circumstances, there was implied into the Agreement for Lease a term to the effect that the defender would not act in such a way as to hinder or prevent the pursuer from complying with its obligations under the Agreement for Lease or from executing its works in a regular and orderly manner, and to take all steps reasonably necessary to enable the pursuer to discharge its obligations and to execute the works in a regular and orderly manner. In particular, it was an implied term that the defender would not act so as to hinder or prevent the pursuer from fulfilling its obligation to procure that the Certificate of Completion was validly issued by 20th January 2000. Further, it was an implied term that the defender was under an obligation to provided or arrange for the provision to the pursuer of such full and correct information concerning the Developer's Works as was, or ought reasonably to have been, known by the defender to be required by the pursuer, and that in such manner and at such times as was reasonably necessary to enable the pursuer to fulfil its obligations in terms of the Agreement for Lease. The said terms required to be implied as a matter of business efficacy. No reasonable man in the position of either of the parties would refuse to accede to them, and nor would any other party to the Agreement for Lease have done so. Without these implied terms, the Agreement for Lease would operate in a way which would not be the way in which practical businessmen, in the development and construction industry, on all sides of the transaction, would reasonably expect it to operate."*

Although the pleadings thus set out essentially three implied terms it became apparent during the debate that the crucial term contended for was the third, namely the obligation on the defenders *"to provide or arrange for the provision to the pursuer of such full and correct information concerning the Developer's Works as was, or ought reasonably to have been, known by the defender to be required by the pursuer and that in such manner and at such times as was reasonably necessary to enable the pursuer to fulfil its obligations in terms of the Agreement for Lease."*

That implied term, said counsel, flowed at least partially from the second implied term not to impede the pursuers in completing on time but also, and importantly, from certain provisions in the Specification.

[37] The provisions of the Specification in question are the following:-

(a) Clause 16-09 (Roof Plant)

"Provision is to be made within the structural frame to support all roof mounted condenser, air handling plant and associated plant to requirements to be confirmed by Virgin. All supports and fixings shall be properly flashed and finished by the Developer. The Developer shall provide secondary steelwork supports for all plant and equipment to be installed by Virgin, steelwork to have a galvanised finish, in locations to be confirmed by Virgin and such supports shall take the form of the cranked frames, adjustable cross supports and the stub columns. The Developer to be responsible for the design of structural steelwork in accordance with loadings to be confirmed by Virgin, which is to include the central chiller unit (only where this is to be located at roof level) approximate weight 5 tonnes."

(b) Clause 19-02 (Louvres)

"The Developer will be responsible for the installation of all external doors, louvres, windows, entrance and exit screens. Louvres shall be to the specification to be confirmed by Virgin (free air area and attenuation requirement to

be confirmed) and cavities closed around the perimeter of the opening so formed in hard boarded material. The Developer will also be responsible for the construction of all openings for vents, fans, flues, ducts, service passageways, etc, to sizes and locations to be advised by Virgin."

(c) Clause 28-01

"The Developer shall make provision for all builder's work items to be incorporated within the Building, the extent, location and size of which are to be confirmed by Virgin. All external apertures not to be completed by the Developer are to be made temporarily watertight and secure, and all roof openings properly trimmed, complete with upstands with roof coverings dressed around. The precise requirements shall be confirmed to the Developer within 2 weeks of receipt by Virgin of his general arrangement drawings, meaning dimensioned layout, section, elevation and roof drawings fully co-ordinated with the structural frame designs. The elevations will need to be punctured with many louvre positions and these will need to be integrated into the elevational designs for the building.

The Developer will provide horizontal and vertical duct risers to facilitate the distribution of mechanical and electrical services throughout the building, risers to be provided with removal panels and fire protection. Service risers to be for sole use of Virgin, wherever possible."

Counsel for the pursuers stated that this obligation was in fact fulfilled by the letter (6/4 of process) of 20 November 1998 which confirmed that the general arrangement and elevations were fixed and approved by Virgin Cinemas Limited. However, this provision had relevance to the date for providing information on lifts and escalators which linked to -

(d) Clause 24-04; 24-01

"The passenger lifts, goods lift, fire fighting lifts and the escalators, including standby generators to power up the lifts in the event of any emergency will be supplied and installed by Virgin. The Developer will reimburse Virgin the cost of lifts required solely for the use of class 3 users." (Cl. 24-04) and

"The Developer shall provide, together with the lift motor rooms, substructures, lift shafts and builders work complete:" (Cl. 24-01).

(e) Clause 25.01

"Location, size and layout of plantrooms and any special structural requirements shall be confirmed to the Developer, by Virgin, following confirmation by the Developer of any noise restrictions to be imposed by the Local Authority."

Reference is made to all but (d) of these provisions of the Specification in the averments in Condescendence 5 of the summons. Hence the introductory words of Article 6 of Condescendence.

[38] Put shortly, the contention for the pursuers is that although the Specification thus places obligations on the defenders to provide, for example, details of the lifts or escalators which the defenders are to provide; or of the size and weight of the air conditioning plant to be provided by the Tenant but installed in a plant room built by the Developer; the text is silent as to the time of provision of such information, or its fullness or accuracy. Accordingly, particularly in light of the obligation on the Developer to complete within a fixed period and to proceed in a *"regular, diligent and expeditious way"* (AFL Clause 5.1), it was necessary, in order to give business efficacy, to imply an obligation to provide the full and correct information in question at times when the Tenant knew - or ought to have known - that it was reasonably necessary for the Developer to have that full and complete information in order for the Developer to perform its obligations under the AFL.

[39] There was little, if any, dispute between the parties respecting the general law relating to the implication of contractual terms. Both counsel and the compearing solicitor advocates referred to the opinion of the Lord Ordinary (Macfadyen) in ***Scottish Power Plc v Kvaerner Construction (Regions) Ltd*** 1999 SLT 721 and I understood it not to be disputed that the passage at 725F-I contained a convenient resumé of the topic. In that passage the Lord Ordinary said:-

*"Normally if the term in question is not already established as an ordinary incident of the type of contract in question, the test which will require to be satisfied before it can be held to be implied will be what I have been calling the business efficacy test, in other words it would be necessary for the party arguing for its implication to demonstrate that that is necessary in order to give the contract such business efficacy as the parties must both have intended that it should have (**McWhirter v Longmuir; The Moorcock; Crawford v Bruce; Rockcliffe Estates**). In seeking to judge whether that test is satisfied, it will ordinarily be helpful to ask the question posed in **Morton v Muir Bros,** namely whether the term is one which in the circumstances every reasonable man would seek for his own protection and no reasonable man would refuse to accede to.*

*It is, in my opinion, quite clear that there can be no question of implying a term which is contradictory of an express term to which the parties to the contract have agreed (**Rockcliffe Estates**). I do not consider, however, that is correct that there can be no implied term touching upon a subject matter on which the contract contains express terms. If the implied term is that to which the parties would have agreed so unhesitatingly that they saw no need to express it, I see no reason to exclude the possibility that they chose to express only so much as was necessary to modify to the extent desired the provision which would have been taken to apply if they had remained wholly silent."*

In addition to this passage reference was made in particular by Mr Cormack to the sentence in the Lord Ordinary's Opinion at 725C in which he observed that it was, in his opinion, *"necessary to guard against too ready a resort to holding that terms are implied into a contract which parties have set out in express detail".*

In addition, as indicated by the Lord Ordinary in ***Scottish Power***, it was not in dispute that one could readily imply in all contracts an implied term not to hinder or impede the ability of the other party to perform his obligations. This proposition was well established in the case of ***Barque Quilpué Ltd v Brown*** [1904] 2 KB 264. In addition, reference was made to the following judicial decisions, (not referred to in *Scottish Power) viz,*- ***Mona Oil Equipment and Supply Co v Rhodesia Railways Ltd*** [1949] 2 All ER 1014; *Martin Grant & Co v Sir Lindsay Parkinson & Co Ltd* (1984) 29 BLR 31; ***London Borough of Merton v Stanley Hugh Leach Ltd*** (1985) 32 BLR 51 and ***F Brown Plc v Tarmac Construction*** *(Contracts) Ltd* [unreported, Lord Macfadyen, 11 February 2000].

[40] The primary objection taken on behalf of the defenders to the implication of the terms contended for by the pursuers - by which is meant essentially the third term relating to the timeous provision of correct information - was that such an implication was not necessary. It was an attempt to impose a vaguely formulated implied term upon the express terms of the AFL which, it was said, fully regulated matters (cf ***F Brown Plc v Tarmac***). The particular express term was Clause 3.1 of the AFL which, it was submitted, provided for a specific process or procedure leading to the final settling of the Employer's Requirements. Clause 3.1 had its own timescale, *viz*, that if after 30 days of conferring about a particular matter agreement could not be reached the question would then be referred to independent adjudication in terms of Clause 17(2). Accordingly, it was argued for the defenders, the terms of Clause 3.1 AFL were exhaustive of the need for the Tenant to provide information. The contract (the AFL) envisaged a comprehensive procedure for the elaboration of the *"Employer's Requirements*" upon the finalisation of which any obligation on the Tenant to furnish information came to an end. That interpretation of Clause 3.1 was supported by the fact that the definition in Clause 1.1 AFL of "Relevant Event" for the purposes of Clause 10(2)(b) of the AFL did not encompass the late provision of such information since the definition omitted Clause 25.4.6 of the Building Contract conditions.

[41] The secondary contention for the defenders was that - at least as respects the mechanical ventilation systems - the pursuers were attempting to present as a breach of an implied term what was in essence a failure properly to instruct a variation. But there could be no implied term requiring the instruction of a variation.

[42] Taking first the latter submission for the defenders it is in my view clear that the pleadings for the pursuers do not contend for the implication of an implied term to instruct a variation. As was explained by counsel, under reference to the pleadings for the pursuer, the complaint is essentially two-fold. First, it is contended that the defenders did not timeously provide the information required for the pursuers to proceed on the assumption - underlying the original terms of the Building Contract - that the Wilden scheme applied. And secondly, even after the defenders had decided to proceed with the Cudd Bentley arrangement in December 1999, they delayed thereafter in the provision of the necessary information pertinent to the Cudd Bentley scheme until March 2000.

[43] Assuming, for the moment, an obligation on the defenders to provide such full and accurate information as they knew, or should have known, to be necessary for the pursuers to complete the Developer's Works at the times when that information was known, or should have been known, to be required by the pursuers (for them to instruct the building contractor) and assuming that there was a breach of that obligation prior to 2 December 1999 it appears to me not to matter that the reason for the non-provision of the information may have been some delay or vacillation in the defenders taking a final decision whether to change from the Wilden to the Cudd Bentley ventilation system. Likewise, the eventual taking of the decision to change systems does not preclude the same obligation being breached thereafter. Accordingly, while it is, I suppose, possible that delay in providing Wilden information avoided, in practical terms, the completion of work which would be redundant or inconsistent with Cudd Bentley on the change, I do not in principle see merit in this secondary submission for the defenders and I therefore turn to their primary submission on this branch of the case.

[44] As already indicated, the essence of the defenders' primary submission - which also has its reflection in their submissions on the variation claim - was to the effect that the terms of Clause 3.1 of the AFL represented the limit of their obligation to provide information. As I understood the submission, the contention came to be that the process of "conferral" was intended to arrive at the elaboration of the *"Employer's Requirements"* which would be settled in every last detail and accordingly there could be no room for any continuing obligation to provide any information thereafter. To imply an obligation to give further full and complete information after the ending of that process would thus be in conflict with the express terms of the contract.

[45] Counsel for the pursuers submitted in their response that the assumption - inherent in the defenders' argument - that the operation of Clause 3.1 must produce agreed Employer's Requirements which would be a definitive document whose terms must necessarily preclude any need for the Tenants to provide any further information was fallacious. Firstly, in its terms Clause 3.1 did not state that there must be a definitive document eliding any possible need for the supply of any additional information. Had it been the intention there should be such a document that might have been expressly stated. Further, the definition of Employer's Requirements stated that the requirements should incorporate the Schedule - which contained provisions requiring the Tenant to provide information - but the definition of Employer's Requirements did not indicate that those obligations contained within the Specification must be conclusively satisfied prior to its incorporation into the Employer's Requirements and that on incorporation no obligation, express or implied, could survive the identification of the Employer's Requirements and the entering into the Building Contract. The defenders' position was an extreme one which did not sit with the complexity of a major building project in which it was wholly foreseeable - at the time of the AFL - that many detailed decisions would require to be taken even after the Building Contract had been entered into, the fact that some information might yet be required not being one which would prevent starting on the works. That

commonsense view was reflected by, *inter alia*, the fact that the Building Contract included various provisional sums.

[46] As already mentioned, the solicitor advocates for the defenders sought support for their construction of Clause 3.1 also by reference to the definition of "Relevant Event" for the purposes of Clause 10(2) (b) of the AFL. The provisions of Clause 10(2) relate to the payment of "contingency sums" in the event that the Developer's Works are not timeously completed. Put shortly, a "Relevant Event" may postpone or delay the completion date from which the contingency sum might otherwise become payable. It is defined in the AFL as including some, but not all, of the events catalogued in Clause 25.4 of the Building Contract conditions. Among the provisions of Clause 25.4 of the Building Contract conditions omitted from the provisions referred to in the definition of "*Relevant Event*" in Clause 1.1 of the AFL is Clause 25.4.6, which refers to *"the Contractor not having received in due time necessary instructions, decisions, information or consents which the Employer is obliged to provide or give under the Conditions..."*. Since the omission of Clause 25.4.6 of the Building Contract conditions from the provisions of those conditions included in the list in the AFL definition of *"Relevant Event"* was presumably intentional and not an oversight, the omission was consistent with, and supported, the view that when the AFL was executed it was contemplated that by the time the Building Contract was concluded every requirement on the Tenant to provide information or instructions would have been satisfied.

[47] In their response to this sub-head of the defenders' argument counsel for the pursuers submitted that the omission of Clause 25.4.6 of the Building Contract conditions from the canon in the AFL definition was of no real significance to the issue under consideration. Apart from the facts that under the AFL time began running on its execution; that the Specification included clear obligations to provide information; that the Specification would form part of the Employer's Requirements; and that there was nothing to say that the Employer's Requirements must be exhaustively definitive; regard had to be paid to the true function of a provision such as Clause 25.4.6 in a building contract regarding *"extension of time*". Contrary to what was sometimes believed, that function was to benefit not the contractor but the employer, which it did by preserving the employer's right to liquidate damages, failing which time would be at large if the employer had caused delays. Reference was made to ***Peak Construction v McKinney*** [1970] 1 BLR 111. I did not understand this view of the true function of the provision to be disputed on behalf of the defenders.

[48] On this branch of the case I find the argument for the pursuers the more persuasive. Leaving aside for the moment the *"Relevant Event"* point, I agree in particular with counsel that textually Clause 3.1 does not fall to be interpreted as requiring a conferral process which must result in a definitive document which will so tightly and exhaustively define the Employer's Requirements as to exclude the need for the Tenant to provide any further information. The fact that the Employer's Requirements are to include the Specification which in turn includes obligations to provide information seems to me to point to the parties having indeed in contemplation a continuing obligation on the Tenant to further the project's completion by providing requisite information. And given a need for the Tenant to provide that information I did not understand it to be in dispute that it would be implied that the information should be provided accurately, completely and timeously, as indicated in the implied term for which the pursuers contend. The pursuers' approach is the one which on the face of matters makes the more practical sense. As pointed out by counsel, given the timescale under the AFL and the complexity of the project, it could never seriously be suggested in practical terms that, at the time of concluding the AFL, it could not be foreseen that there was any possible need for continuing instruction once the Building Contract had been let. I would also add that it appears from the minutes of the what are termed *"Tenant Liaison Meetings"* (and other correspondence) that information on a wide variety of matters was being requested from and supplied by the defenders' architects and other agents or consultants as the building works progressed. As respects the defenders' "Relevant Event" submission, while the point has some initial attraction I am ultimately persuaded that, for the reasons put forward by counsel, it does not really advance matters. The omission of Clause 25.4.6 of the Building Contract conditions from the AFL definition of Relevant Event is not, in my view, necessarily inconsistent with the implication of the term for which the pursuers contend.

[49] In these circumstances I consider that the pursuers' claim for damages for alleged breach of contract should also proceed to a proof before answer. I would add that Mr Connal also advanced a subsidiary point to the effect that prior to the change to the Cudd Bentley scheme it was unclear, on the pursuers' pleadings, what information was allegedly lacking since, while it was averred that information on floor loadings for the Wilden plant was lacking, it was also averred that details of the *"plant location"* were contained within the AFL. For my part, I am not confident that information on the plant location is necessarily sufficient to provide the information on floor loadings but in any event it appears to me that this is a matter which can best be addressed as part of a proof before answer and the preparations therefor.

Loss - Fiddes Report

[50] As indicated in the introductory section of this Opinion, the sums sought by the pursuers for the variation claim and the damages for breach of contract claim involve the recovery of liability said to be owed by the pursuers, as employers in the Building Contract, to Kier. The sums sought are based upon an assessment of Kier's claims against the pursuers by a Mr Fiddes, who is averred by the pursuers to be an independent expert. The appointment of Mr Fiddes is averred to have proceeded upon the joint instruction of the pursuers and Kier, who agreed that Fiddes' determination should be binding upon them *inter se*. The sums in respect of the claim for variation and damages are extracted from the report and determination by Mr Fiddes [No 6/71 of process].

[51] The solicitor advocates appearing for the defenders submitted that the Fiddes report and determination could not provide a relevant basis for recovery as against their clients. As I understood matters, it was accepted them that it was reasonably foreseeable to the defenders that, if the pursuers' claims were well founded, a liability to Kier would arise. It was also reasonably foreseeable that the pursuers might enter into a compromise with Kier and, if reasonable, such a settlement with Kier might quantify their claim against the defenders. The admissibility of recovery of such a reasonable settlement was vouched by ***Biggin & Co Ltd v Permanite Ltd*** [1951] 2 KB 314 and subsequent cases discussing that principle. A convenient summary of the ***Biggin*** principles was to be found in ***Bovis Lend Lease Ltd v R D Fire Protection Ltd*** (2003) 89 Con L R 169, 197. It was however submitted that it was clear that the pursuers' claim did not meet the ***Biggin*** concept or principles since it was neither an agreed settlement nor averred to have been a reasonable agreed settlement. While it was foreseeable that the pursuers might compromise their liability with Kier, it was not foreseeable that they would enter into the peculiar arrangement of the Fiddes' reference. Accordingly the pursuers' averments of loss were irrelevant and consequently the action was irrelevant.

[52] In response counsel for the pursuers adverted to the policy of the law expressed in ***Skanska Construction UK Ltd v Egger (Barony) Ltd*** [2004] EWHC 1748 (TCC) at para 409, namely that the law "*encourages commercial settlements both as a matter of policy and commonsense*". The ***Biggin*** principles, particularly principle 2 as described in ***Bovis Land Lease*** did not restrict matters to negotiated compromise. The pursuers and Kier - following, I was told, two adjudications - had referred the issue to an independent assessor. Nothing which they thereby did offended against the policy described in *Skanska*. In their pleadings the pursuers said (i) that it was reasonable to settle Kier's claim (a matter not in dispute); (ii) that the pursuers acted reasonably in seeking an independent binding assessment; and (iii) that the assessment was in itself reasonable. These were matters of fact, for which proof would be required, it being open to the defenders to attack on the basis of want of reasonableness at any stage.

[53] The exposition of the ***Biggin*** principles given by the judge (His Hon. Judge Anthony Thornton, QC), in ***Bovis Lend Lease*** (p 147), to which I understood counsel to take no issue, is in these terms:-

"*1. The Biggin principles may be relied on where the claim over arises as a claim under an indemnity or is a claim for damages for breach of contract. Equally they are applicable both when liability to the third party had been admitted by the claimant and when it remained in issue and had been included as part of the issues being settled.*

2. The principles are applicable because, ordinarily, a defendant is to be taken to have foreseen that a consequence of its breach of contract would be both that the claimant would be liable to the third party and that that liability might give rise to litigation and a compromise under which the claimant incurred financial loss.

3. The principles are not merely an aspect of a claimant's duty to mitigate its loss but also involve the law concerned with the measure of recoverable damages following a breach of contract. Thus, the settlement figure, that is the sum being paid by the claimant to settle the third party's claim, is to be taken to be the upper limit of what may be recovered from the defendant in relation to the loss caused to the claimant as reflected in the claimant's liability to the third party.

4. As a starting point, a claimant may recover the sum paid in settlement if it can establish that that settlement was reasonable and that it was reasonable to settle the third party's claim. It is only necessary for the claimant to prove, in general terms, that the settlement was reasonable. It is not necessary for it to establish in great detail the extent and quantum of the third party's claim.

5. The evidence that may be adduced to establish reasonableness will vary but it may include, if the claimant so elects, evidence of advice given by relevant professionals to the claimant which was relied on in deciding to settle. The material that is discloseable when a settlement is relied on may, on occasion, include documents recording such advice but any consequent waiver or overriding of privilege involved in such disclosure will depend on how the claimant expects to establish reasonableness and on what material it proposes to rely for that purpose.

.....

7. To the extent that the settlement was unreasonable or unreasonably entered into, it is irrecoverable since that element of the settlement was not caused by the defendant's breach and, equally, it resulted from the failure by the defendant to mitigate its loss."

[54] It may thus be seen that the starting point is foreseeability by the defending party that his breach of contract might render the pursuing party liable to a third party and consequently that the third party claim might be pursued to settlement or to litigation. In the circumstances of the present case it is, I think, impossible to say that if the defenders were in breach of contract in the way alleged by the pursuers, it was not foreseeable that the pursuers might incur liability to Kier and that Kier's insistence on its claim would result in litigation or compromise. Indeed, I did not understand the solicitor advocates appearing for the defenders to contend otherwise. In essence their position appeared to me to come to the contention that the ***Biggin*** principle enabling recovery of the amount of a reasonable compromise with the third party applied only to a commercially negotiated compromise and could not embrace a settlement of the third party claim arrived at through a mechanism other than such a commercial negotiation or I suppose, ultimately, judicial decision. As it was put by Mr Connal, the ***Biggin*** principle conferred a "privilege" for a plaintiff and to achieve that privilege the pursuing party had "*to stay within the* ***Biggin*** *lines*".

[55] For my part I do not consider that the ***Biggin*** principles or "lines" have the narrow ambit for which I understood Mr Connal to contend. In my view, there are plainly a variety of methods whereby a settlement of a third party claim

may come about, these ranging through a spectrum extending from a direct negotiation or discussion between principals in meetings of greater or less formality to negotiation through lawyers or other agents to ultimate judicial determination at final appellate level. Mr Cormack, for the defenders, whose submissions were unreservedly adopted by Mr Connal, recognised arbitration as one such method within the spectrum. In the event of litigation, judicial reference to a "man of skill" ie an expert, might be appropriate. There is, of course, increasing recognition of the role of alternative dispute resolution procedures in the settlement of commercial affairs. Accordingly I do not consider that - at least at this stage - I can accept the proposition that it was not foreseeable that in advance of the raising of this litigation the pursuers and Kier might confide the settlement of the claims arising between them to a binding expert determination.

[56] As a subsidiary point, it was submitted on behalf of the defenders that it was not sufficient simply to aver that it was reasonable for the pursuers to have compromised by means of the Fiddes remit or that the Fiddes determination was reasonable. Further particularisation was required.

[57] In my view it is difficult to see what further useful specification of factual matters could be provided as respects this first complaint of lack of specification. The relationship between the parties is well spelled out; there is prior correspondence; and the terms of the Fiddes report itself. As to whether the Fiddes determination itself was unreasonable, the report is a production [No 6/71 of process] which apparently records a process of adjudication and evaluation by an expert, or man of skill. It is of course open to the defenders to articulate substantial objections both to the decision to remit to Mr Fiddes or to the reasonableness of the conclusions or methodology of Mr Fiddes' report and determination, but in the context of an action on the commercial roll the complaint of lack of specification within the pleadings of the pursuers advanced by the solicitor advocates for the defenders is not one with which I am able to find favour.

Lafarge

[58] This branch of the parties' dispute relates to certain internal walls, particularly the internal walls separating the auditoria from each other and from the surrounding corridors. The original concept (which I assume derived from the Cardiff project) was to use blockwork to which the Tenant would later fit plasterboard as part of the Tenant's fit-out work. The pursuers aver that in the summer of 1998 at "*inter alia* shell/fit-out co-ordination meetings" the pursuers suggested the use of a jumbo stud partitioning system - "Lafarge" - in place of blockwork. (I assume, perhaps wrongly, but also immaterially, that the reference to "Lafarge" is a shorthand reference to a proprietary system supplied by the French group of companies under that name, specialising in building materials). According to the pursuers' averments use of Lafarge would result in savings in terms of expense and time for the defenders since the plasterboard finishings which would otherwise form part of the Tenant's fit-out works could be completed as part of the installation of the Lafarge system during the building contract. The Specification which formed part of the AFL contained, in para.19-07, provisions envisaging either blockwork or studwork internal partitioning walls (i.e. the Lafarge system). The pursuers aver in Article 8.9.2 of Condescendence that by the time of execution of the AFL the defenders had confirmed that Lafarge was acceptable. The averments in that Article continue:-

"Furthermore the parties had agreed that the defender would make a contribution to the pursuer in respect of the use of Lafarge. In terms of the said agreement, the defender's contribution to the pursuer was to be the cost to the pursuer of the plasterboard material to be used in the construction of the Lafarge system".

[59] The succeeding Article of Condescendence (8.9.3) begins as follows:- *"On 1 February 1999, Gleeds wrote to Perspective confirming that the defender's contribution to the use of Lafarge in terms of the parties' agreement was to be in the sum of £286,488.00 plus VAT. At a meeting on 15th February 1999 attended by Messrs Jones and Edwards of the pursuer, Messrs Swain and Pullinger of the defender, and Mr Butler of Perspective, the parties' agreement in respect of the use of Lafarge was re-confirmed. At the said meeting, the pursuer once again advised the defender that the cost to it of the plasterboard material to be used in the construction of the Lafarge system was £286,488.00 plus VAT. Accordingly, the pursuer requested the contribution required from the defender in terms of the parties' agreement. At the said meeting, Mr Butler of Perspective stated that he considered that the Lafarge system could be purchased at a price below that quoted by the pursuer. Mr Butler undertook (on behalf of the defender) to revert to the pursuer with an alternative price representing the contribution that the defender would make in terms of the parties' agreement (being the cheaper price at which he considered Lafarge could be purchased). On 17th February 1999, Perspective wrote to Gleed's confirming what had been agreed at the meeting on 15th February 1999 that the costs of the plasterboard material to be used in the construction of the Lafarge system (being the defender's contribution to the pursuer in terms of the parties' agreement) were to be agreed. Neither Perspective nor the defender provided an alternative price to the pursuer for the costs of the plasterboard material to be used in the construction of the Lafarge system. The level of the contribution to be made by the defender to the pursuer in terms of the parties' agreement was never agreed. By letter dated 18th May 1999 to Virgin Cinemas, the pursuer advised that in order to avoid delay to the construction of the Cinema it required to order the plasterboard material. In the said letter, the pursuer advised that, in the absence of any alternative price provided by the defender, the plasterboard material would be procured in accordance with the price advised to the defender by Gleeds' letter dated 1st February 1999 and at the meeting on 15 February 1999. The pursuer proceeded to procure the plasterboard material, to carry out the construction of the Lafarge system and incurred significant liabilities in so doing".*

The pursuers go on to aver in the first two sentences of Article 8.10 of Condescendence that:- *"In all the circumstances, the agreement between the parties that the defender would make a contribution to the pursuer in respect of the use of Lafarge, was collateral to the Agreement for Lease. Further, it was implied into said collateral*

agreement that the pursuer would be paid a reasonable contribution by the defender for having the use of Lafarge, as further condescended upon below".

There then follow averments to the effect that *esto* there was no collateral agreement respecting the use of the Lafarge system, the employment of the Lafarge system was a variation in terms of Clause 7 of the AFL, compliance with whose terms the defenders were held to have waived. The averments relating to this alternative case contain no material additional averments of fact.

[60] In relation to the collateral agreement case, it was pointed out by Mr Cormack, for the defenders, that while the pursuers founded on the course of correspondence leading up to the letter of 18 May 1999 there was, in the productions, the responding letter of 27 May 1999 whereby the defenders' project managers wrote saying that while content with the Lafarge system the defenders were not willing to pay the extra cost. I do not think that, as a point of relevancy at this stage, that letter must necessarily demonstrate the absence of previous consensus. It may well be only a change of heart and disputing the existence of an agreement averred to have been reached previously, while of possible evidential significance, does not, as a matter of relevancy, require the dismissal of the claim founded on averment of that prior agreement.

[61] The second submission advanced by the defenders respecting the collateral agreement case was a complaint of lack of specification of the averment in Condescendence 8.9.2 of the initial agreement on the making by the defenders of a contribution. As I understood matters, Mr Connal, for the defenders, ultimately took the position that, subject to his criticism of the averments in Article 8.9.2 of Condescendence, the collateral agreement argument could not be disposed of without inquiry. The alternative variation claim suggested by the pursuers was however wholly irrelevant. In colloquial terminology it did not even start to run. It was impossible to see how there could be any question of a variation, unless possibly (which is not the case) the pursuers had elected to use and had commenced to build in blockwork and then had been instructed to proceed with the studwork version of the Lafarge system.

[62] As respects the complaint of want of specification of the agreement said to have been reached between the parties which is treated by the pursuers in Article 8.9.2 of the Condescendence to the Summons, counsel for the pursuers submitted that what was averred in that Article should be read with what followed in the succeeding Article, which, it was suggested, supplied the necessary detail. In my view, while the two Articles have, of course, to be read together, I do not consider that reading them together satisfactorily answers the complaint. Article 8.9.2 avers in terms that by the date of execution of the AFL in November 1998 - "the parties had agreed that the defender would make a contribution to the pursuer in respect of the use of Lafarge. In terms of the said agreement, the defender's contribution to the pursuer was to be the cost to the pursuer of the plasterboard material to be used in the construction of the Lafarge system". In my view this appears to be the starting point of the pursuers' case of a collateral agreement and, as a simple matter of fair notice, the defenders are entitled to further detail as to the time and means of achieving this consensus and, if other than by written communing, the identities of the individuals concerned. Given the terms of the letter of 27 May 1999, purportedly disputing the existence of any agreement on contribution, it seems to me to be important to identify the principal agreement. However I consider that the use of the power under the Rules of Court regarding commercial actions to order further specification is an appropriate means of addressing this issue.

[63] The alternative presentation of the Lafarge claim as a "variation" is one which was not earnestly defended by counsel for the pursuers and, for my part, I have great difficulty in understanding its basis. The Specification was drafted to envisage the use of the Lafarge system in its giving the option for the studwork construction as an alternative to blockwork. As Mr Connal pointed out, it is not suggested that the pursuers elected to proceed down the blockwork option only to be instructed later to reverse matters and proceed with the stud partitioning system. The claim that there was a collateral agreement that if the Lafarge option were selected, the consequent saving to the defenders in their fit-out work might be reflected in a contribution to the pursuers is understandable but, in my opinion, it is incompatible with the notion of the instruction of the variation under Clause 7 of the AFL. I agree with Mr Connal's description of this alternative branch as being a "non-starter" and I accordingly regard the alternative presentation of the Lafarge claim as irrelevant.

[64] Accordingly, the outcome as respects the Lafarge claim is that I regard a proof before answer of the collateral agreement to be appropriate, subject to the pursuers giving further specification of the agreement which the claim in Article 8.9.2 of the Condescendence to the Summons, but the alternative formulation has a variation under Clause 7 AFL I regard as irrelevant.

[65] In the circumstances I shall put this case out By Order for consideration and discussion of arrangements for further procedure.

Pursuers: Borland, Richardson; Masons
Defenders: Connal, QC, Solicitor Advocate; Cormack, Solicitor Advocate;
McGrigor Donald