

OPINION OF LORD DRUMMOND YOUNG OUTER HOUSE, COURT OF SESSION : 21 December 2006

- [1] The pursuers are a limited company incorporated under the Companies Acts. They aver that their business was formerly carried on by a partnership named Laurence McIntosh & Sons, and that the whole business, assets, rights and liabilities of the partnership were during the year 2000 transferred to the pursuers, who were incorporated to take over the business. In 1997 the first defenders entered into a Management Contract with the second defenders under which the first defenders were to carry out extensive fire protection and refurbishment works at the second defenders' premises in George IV Bridge in Edinburgh. On 29 January 1998 the first defenders and Laurence McIntosh & Sons entered into a Works Contract for the joinerwork specified in the Management Contract. The Management Contract was in the form of the Scottish Management Contract (March 1988), together with the Scottish Supplement to the Conditions of the JCT Standard Form of Management Contract, 1987 Edition, incorporating the amendments numbered SBCC Amendment Sheet Nr 1 and certain further *ad hoc* alterations and amendments. The joinerwork under that contract was referred to as Work Package No 23. The Works Contract was governed by the Standard Form of Scottish Works Contract/1/Scot (March 1988 Revision), together with a number of other documents, including an invitation to tender and tender. The pursuers were not originally parties to the Works Contract, having been incorporated after its date; nevertheless, they aver that by assignation dated 1 December 2005 the former partners of Laurence McIntosh & Sons assigned to the pursuers their whole right, title and interest in and to the Works Contract, the assignation bearing to be effective from 11 April 2000. That assignation was intimated to the first defenders' agents by letter dated 5 December 2005.
- [2] The pursuers have raised the present proceedings against the first and second defenders. The conclusions of the summons seek a number of remedies. The first conclusion is for declarator that a pretended final certificate dated 25 September 2003 issued by the contract administrator under the Management Contract is invalid and of no effect in so far as it purports to be conclusive evidence of the matters specified in (a) clause 4.32 of the Works Contract Conditions and (b) clause 1.14 of the Management Contract Conditions and in so far as it (i) relates to a sum attributable to the Works Contract and (ii) purports to have effect as conclusive evidence that all and only such extensions of time as are due under the Management Contract by reason of delay to the works carried out under the Works Contract had been given. The second conclusion seeks reduction of the final certificate. The third conclusion is for declarator that under the Works Contract the pursuers are entitled to an extension of time of 67 weeks or such other period as the court might determine. The fourth conclusion is for declarator that sums totalling £636,026.23 ought to be included in certain calculations performed and documents issued for the purposes of the Works Contract and Management Contract. The fifth and sixth conclusions are for declarator that the first and second defenders respectively are due to pay those sums to the pursuers, and the seventh and eighth conclusions are for payment of those sums by the first and second defenders respectively.
- [3] The second defenders are not of course an original party to the Works Contract, and neither the pursuers nor the partnership of Laurence McIntosh & Sons were parties to the Management Contract. The second defenders contend that, because neither the pursuers nor Laurence McIntosh & Sons was a party to the Management Contract, the pursuers have no title to sue the second defenders under that contract. They further contend that the pursuers were not and have not become a party to the Works Contract; the party which concluded that contract as works contractor was the partnership, Laurence McIntosh & Sons. Consequently, it is said, the pursuers have no title to sue under the Works Contract. The second defenders have tabled pleas in law (their first and second pleas) in support of the foregoing contentions. The first plea in law challenges the pursuers' title to sue in respect of the Management Contract; the second plea challenges the pursuers' title to sue the second defenders as works contractor under the Works Contract. The pursuers contend that they have, as a party to the Works Contract, title to challenge the validity of the final certificate issued under the Management Contract. Alternatively, they contend that the structure of the Management Contract is such as to give them title to pursue the remedies sought in the present action. In addition, they contend that the second defenders are personally barred from maintaining that the pursuers have no title to sue as works contractor, and they have tabled a plea in law (their fifth) to that effect. I appointed the action to a preliminary proof before answer on the first and second pleas in law for the second defenders and the fifth plea in law for the pursuers.
- [4] I propose first to summarize the evidence led at proof, which was relevant principally to the issue of the title to sue of the company in a situation where the partnership was the original contracting party. Thereafter I will deal with the company's title to sue and the question of personal bar. I then intend to consider whether the pursuers as works contractor have title to sue the second defenders directly. Finally, I will consider the question of whether a *jus quaesitum tertio* exists in favour of the pursuers. In view of my answers to the latter two questions, the issues of the company's title to sue and personal bar are not strictly relevant. Nevertheless, a full argument was presented on these matters, and I will deal with them accordingly.

Evidence

- [5] Evidence was led from two directors of the pursuers, Mr. Robert Findlay, who had been their managing director since December 2002, and Mr. Fraser Robertson, who was their commercial director. Mr. Robertson had been a partner in Laurence McIntosh & Sons. He gave evidence that the partnership had been the original contracting party for WP 23. The partnership had been advised, however, that a limited company should be formed to take over the business, and an off-the-shelf company was acquired in 2000. The partnership continued to run the business until the end of its current accounting period, in July 2000, and payments received until then were paid into the partnership bank account. The company took on all new contracts. The partnership had never been formally dissolved. Nor had there been any formal or documented transfer of the partnership's assets and

liabilities to the company. The partners had been advised that they did not need to do anything of that nature. The transfer had been managed by writing to the accounts departments of those with whom the partnership had contracts. In relation to the second defenders, this had been done by a fax dated 31 August 2000, sent to their accounts department. That fax was on partnership writing paper but was signed by Mr. Robertson as a "Director", obviously of the company. The fax read:

"Our Bank Account details have changed and we would be grateful if payments due for invoices dated from 01/08/00 could be paid to the account listed below.

*Laurence McIntosh Limited
Royal Bank of Scotland
Sort Code [sort code]
Account [account number]*

In relation to this fax, it should be noted that the request relates to the payment of invoices and a change of bank account. The reference to the company rather than the partnership in relation to the bank account can readily be explained through the principle of *ad hoc* agency, discussed below at paragraphs [16] and [17]. Mr. Robertson had not been directly involved with the contract for the National Library building, but he had investigated the matter and accepted that no formal assignation had been effected. It also appeared from his evidence that he was unable to say that the second defenders were made aware of any transfer of rights from the partnership to the company in respect of WP 23.

- [6] Mr. Findlay gave evidence that he had investigated the National Library contract when he had taken over as managing director. The works on site had been completed by then, but the process of measurement had not been completed, and nothing had been done to push the pursuers' claim in respect of the contract; that claim had been intimated in May 2001. Mr. Findlay made reference to extensive correspondence that had passed in relation to the contract; in many of letters the works contractor was referred to as "Laurence McIntosh Limited". I deal with this correspondence in paragraph [9] below. Mr. Findlay also spoke to telephone conversations that he had had with representatives of both defenders to discuss outstanding monies; such meetings had taken place with Mr. Angus Pattison, the second defenders' construction consultant, and Armours, who acted as the second defenders' quantity surveyors for the project. Mr. Findlay stated that during those conversations Mr. Pattison and Armours knew that he was representing the company, Laurence McIntosh Limited. He thought that Armours, at least, treated the company as the works contractor for the purposes of WP 23. Until the present action was raised, in May or June 2005, it had never been suggested that any person other than Laurence McIntosh Limited was the works contractor. Expenses had been incurred in making the claim, in the form of legal expenses, fees due to Longworth Consulting, and internal expenses. The legal and consultancy fees incurred prior to raising the action amounted to £18-19,000. Mr. Findlay further stated that, if in the period between January 2001 and May 2005 it had transpired that Laurence McIntosh Limited was not the works contractor, the pursuers would have taken legal advice, and Laurence McIntosh Limited would not have incurred the expenses of preparing the claim. They pursuers would have acted on that advice in relation to any action.
- [7] Evidence was also led from Mr. Nicolas Longworth, who is the claims consultant who acts for the pursuers. He had been responsible for preparing the pursuers' claim in respect of WP 23, and spoke in particular to their claim document (number 6/5 of process). That document had been submitted to the second defenders and their advisers. The title page of the claim document referred to "Laurence McIntosh Limited", and in the introductory part of the statement of claim it was narrated that "Laurence McIntosh Limited (formerly Laurence McIntosh & Sons), have entered into a Works Contract Package arrangement for Joinerwork installation for the Fire Protection and Refurbishment Contract 2 at the National Library of Scotland, Edinburgh for Balfour Beatty Limited". That statement had never been queried by Armours. In cross-examination, Mr. Longworth was asked whether he had considered the nature of the company's right to present the claim, and he replied that he had not applied his mind to that matter in May 2001. He accepted that in replies from the first defenders the works contractor was often described as "Laurence McIntosh & Sons". He commented that he could not speak for what the first defenders had in their computer systems; that might explain the use of that wording.
- [8] For the second defenders, evidence was led from Mr. Angus Pattison. He referred at some length to the correspondence that had passed among the parties. He stated that there had been no protocol regarding correspondence, and he had always been careful to follow the correct contractual route; he only copied correspondence to those who were contractually connected with the Library. The second defenders had received some direct correspondence from Laurence McIntosh & Sons, despite the lack of a contractual link; he understood that that had happened because Laurence McIntosh had encountered difficulties in their negotiations with the first defenders. In cross-examination he accepted that the claim document (number 6/5 process) referred in a prominent manner to Laurence McIntosh Limited. He further accepted that, following receipt of the claim document, he had treated Laurence McIntosh Limited as a business that might have a claim under WP 23, and that Armours appeared to have treated the claim in a similar manner. In re-examination, however, he stated that he was unable to say whether Armours had treated the claim document as bringing about a change in the works contractor. As far as he was concerned, the works contractor for WP 23 was Laurence McIntosh & Sons. In this respect there was a distinction between those who might have a claim and the contracting parties. At no time had it been suggested that there was a change in the contracting parties.

- [9] Extensive correspondence among the parties and their professional advisers was produced. I do not think that it is necessary to go through this in detail. In a substantial number of documents reference was made to Laurence McIntosh Limited; in others the reference was to Laurence McIntosh & Sons. In general, the former category of documents emanated from the pursuers and Longworth Consulting and the latter from the first and second defenders and Armours; nevertheless, in correspondence emanating from the defenders and their advisers there were some references to Laurence McIntosh Limited.
- [10] Apart from the evidence, the pursuers aver that by assignation dated 1 December 2005 the former partners of the partnership of Laurence McIntosh & Sons, for the avoidance of doubt, assigned to the pursuers their whole rights, title and interest in and to the Works Contract, with effect from 11 April 2000. It is further averred that the assignation was intimated to the first defenders' agents, Pinsent Masons, by letter dated 5 December 2005, and that by letters dated 5 December 2005 and 12 January 2006 the first defenders acknowledged receipt and intimation of the assignation and consented in terms of clause 3.9 of the Works Contract conditions to that assignation. It is averred that the pursuers sue as such assignees. Those averments are not admitted in terms by the second defenders, but the assignation has been lodged in process and the second defenders did not dispute that such a formal assignation had taken place; their submissions proceeded in part on the hypothesis that such an assignation had taken place, and they challenged the relevancy of the averments relating to that assignation.

Company's title to sue

- [11] The pursuer's argument on this part of the case was based on the proposition that the rights and obligations of the former firm of Laurence McIntosh & Sons had been validly assigned to the pursuers. They pursued founded both on the events during 2000 when, according to Mr. Robertson's evidence, the company had taken over the partnership's business and on the assignation of 1 December 2005, which had been granted "for the avoidance of doubt". In this connection, the pursuers' counsel pointed out that the second defenders were not a party to the Works Contract, and thus had no interest to challenge the validity of the assignation. Clause 3.9 of the Works Contract conditions (as amended by clause 2.2 of the Further Amendments to the conditions) permitted the management contractor to consent to the assignation of the rights and obligations of the works contractor without having to obtain the consent of the employer under the Management Contract. Nothing in the Management Contract required the management contractor to obtain the employer's consent. Furthermore, the assignation in favour of the company could have been perfected by formal intimation in 2000 and 2001, and the second defenders as employer could not have objected at that stage.
- [12] In relation to the timing and mechanics of the assignation, the pursuers submitted that the general rule that a person who has no title to sue at the time of raising an action cannot acquire title to sue by subsequent assignation is subject to qualification, on the basis of equitable considerations. If title to sue is "basically" in the pursuer, he may complete the steps required to clear the title of qualifications as the action proceeds. The court is primarily concerned with substance rather than form, and thus imperfections in title may be dealt with after raising the action. In the present case, counsel submitted that the evidence of Mr. Robertson and Mr. Findlay was that the whole business, assets, rights and liabilities of the partnership, including their rights and liabilities under the Works Contract, were transferred to the pursuers during 2000. In the circumstances title to sue was "basically" in the pursuers, and all that was required was the formality of a written assignation followed by intimation to make that title absolute. In the present case, that was achieved by the assignation of 1 December 2005 and subsequent intimation.
- [13] Counsel for the defenders submitted that, on the evidence, it could not be held that any assignation of the pursuers' rights under the Works Contract had taken place prior to the raising of the action. The pursuers had accordingly failed to establish title to sue at the time when the action was raised. The defect in their title was not cured by the subsequent assignation, in accordance with the well established principle that an assignation after raising an action cannot cure lack of title to sue: *Symington v Campbell*, 1894, 21R 434; *Bentley v Macfarlane*, 1964 SC 76; *Slattadale Ltd. v Tilbury Homes (Scotland) Ltd.*, 1997 SLT 153. Certain types of assignation can be perfected by judicial intimation through the raising of an action, but that would not be possible under the Works Contract, where clause 3.9 of the conditions required the express prior written consent of the management contractor.
- [14] In my opinion the pursuers have failed to establish title to sue in respect of the Works Contract. In summary, my reasons for this conclusion are as follows. First, nothing was done at the time when the company was set up to effect any assignation of rights under the Works Contract, and there was no evidence that anyone with contract-making authority on the part of either defender was asked to consider a change of contracting party. Secondly, the normal rule is that title to sue must exist at the date of raising an action; consequently the assignation of 1 December 2005, which was only granted after the present action had been raised, will not cure the defect in title. Thirdly, while in certain limited cases the transfer of an already existing right may be perfected after an action is raised, the present case does not fall into that category. I will deal with each of these matters in turn.
- [15] So far as the first of these issues is concerned, the evidence of Mr. Robertson was that until 2005 there had been no formal or documented transfer of the partnership's assets or liabilities to the present pursuers; the partners had received advice that such a course was not necessary. The company had taken on new contracts, but it appears that existing contracts were left as they were except for the question of payment. No evidence was given, by Mr. Robertson or any other witness, that anything had been done by the partnership or the company to ask anyone with contract-making authority on the part of either the Management Contractor or the second defenders to

consider an assignation or other change of contracting party. This point is I think of considerable importance, because it means that the pursuers' case is dependent on inferences to be derived from correspondence or conversations that were not directly addressed to the issue of a change of contracting party. The change in a contracting party is important, however, for the reasons described below at paragraph [17]; consequently it is only clear references in letters or discussions that will suffice to infer consent to an assignation, or intimation of an assignation. The only relatively formal documents that were sent at the time when the company began to trade were letters relating to payment; the accounts departments of companies which were likely to owe money to the partnership were requested in writing to pay monies to a company bank account. Those arrangements all appear commercially sensible, but they do not involve the assignation of rights under any contract from the partnership to the company. In particular, the procedure followed in relation to payments did not involve any assignation but is readily explained on the principle of *ad hoc* agency.

- [16] Within groups of companies, it is relatively common to find one company performing tasks for another company within the group. This may take many different forms; for present purposes, an example that is relevant is that one company may perform debt collection functions on behalf of other companies within the group. In such a case, the debts do not become due to the debt-collecting company; they remain due to the original contracting party, but the debt-collecting company acts as agent for the contracting party in obtaining payment of the debts. That will commonly involve payment of debts into a bank account in the name of the debt-collecting company; the latter company's function is merely that of an agent, and the underlying contractual structures are not affected. Arrangements of this nature are found not only within groups of companies; they may also be useful when a business is transferred from one legal person to another, as when the business of a partnership is transferred to a company; in addition, at the level of natural persons, they are frequently encountered within a family. Nor are *ad hoc* agency relationships confined to routine tasks such as the collection of debts; they may also extend to more complex matters such as conducting negotiations over the performance of a contract.
- [17] In the present case I am of opinion that all of the tasks that the present pursuers, the company, appear to have performed on behalf of the partnership can most readily be explained through the concept of *ad hoc* agency. After the company was set up, it became the legal entity that carried on active operations. Nevertheless, without an assignation duly followed by intimation, the rights of the partnership could not be transferred to it. The need for assignation and intimation is important, if only to ensure that parties to contracts with the partnership are aware that in future any obligations will be owed to the partnership's assignee. For this reason I can see no reason for reducing the legal requirements of assignation and intimation, or for taking a liberal view of what might constitute assignation or intimation. In the present case, the requirements include obtaining the consent of the management contractor to any assignation, in accordance with clause 3.9 of the JCT conditions as modified by clause 2.2 of the special conditions to the Works Contract. Assignation may have an impact on rights of retention and set-off under the contract; consequently it cannot be assumed that such consent was a mere formality. Moreover, the partnership's contracts would normally be bilateral, and the obligations under those contracts could not be transferred to a third party without novation; novation requires the positive consent of the creditor. In view of the formal requirements of assignation, it is not surprising that the partners of Laurence McIntosh & Sons were advised that it was not necessary to go through with such a procedure. The simple and obvious course was to permit the company to represent the partnership in all its legal dealings in relation to contracts that remained with the partnership. In my opinion that is precisely what happened. The consequence of that, however, is that all rights and obligations in respect of the existing contracts remained vested in the partnership.
- [18] That is illustrated very clearly by the arrangements for payment of monies due to the partnership, as described in paragraph [5] above; the company simply collected the monies on the partnership's behalf. The letter of 31 August 2000 that was sent to the second defenders was in some respects ambiguous as to who was giving the instructions, but in all circumstances it must I think clearly be construed as an instruction from the partnership to make payment into a bank account of the company; such payment would obviously discharge the debtor's liability to the partnership. The company's acting as an *ad hoc* agent for the partnership also, I think, explains the manner in which the contractual claim was presented, ostensibly in the name of the company. Counsel for the pursuers founded heavily on the claim document (no 6/5 process), which is clearly headed "Laurence McIntosh Limited", and states in its introductory section that the contracting party is "Laurence McIntosh Limited (formerly Laurence McIntosh & Sons)". While that wording appears to assume that an assignation had taken place, the fact is that no assignation had been effected, and consequently neither the first defenders as Management Contractor nor the second defenders would have been aware of any assignation. In those circumstances, I am of opinion that a reasonable man in the position of either the first or the second defenders would construe the claim document as being presented through the company but acting as agent for the true contracting party, the partnership. As a matter of commercial reality, that would plainly be a sensible way to proceed, avoiding the need for a formal assignation but permitting the active trading entity, the company, to progress matters on behalf of the true contracting party. The claim document was prepared by Mr. Longworth; he accepted that he had not applied his mind to the company's right to present the claim at the time when the document was prepared, in May 2001. That if anything reinforces the inferences that no assignation was intended and that the claim document was presented by the company as an *ad hoc* agent for the partnership.
- [19] The other correspondence that was referred to in evidence can in my opinion readily be explained in the same manner as the payment instructions and the claim document. I do not think that it is necessary to go through the correspondence comprehensively; two examples, both of which were particularly relied upon by counsel for the

pursuers, will suffice. First, on 3 April 2001 Armours wrote to Balfour Beatty Limited in connection with the valuation submission which had been presented shortly before that date (correspondence file, no 18). In the first paragraph of the letter it is stated that "we have carried out a review of Laurence McIntosh Ltd's valuation submission which was included within the Management Contract Valuation 28". Other references followed to "Laurence McIntosh Ltd". What prompted those references, however, was clearly the fact that the valuation submission bore the name of Laurence McIntosh Limited, and it was natural for the writer of the letter to refer to it in those terms. The valuation submission bore the company's name simply because the company was acting as the partnership's *ad hoc* agent for the purpose of preparing and presenting claims; commercially, that is the obvious and rational interpretation of what happened. A further letter containing references to the company was written on 16 July 2003, by Mr. Pattison to Mr. David Muir of Balfour Beatty Limited (correspondence file, no 53). This begins "I refer to the recent meetings and protracted correspondence over the claim submitted by Laurence McIntosh Ltd"; later in the document is a reference to "the claim dated May 2001 from Laurence McIntosh Ltd". Once again, the context is clearly the wording of the claim document, which proceeded in the company's name, and earlier correspondence from the pursuers which used the name of the company. Moreover, as I have already mentioned, it was not suggested in evidence that a change in the contracting party had ever been intimated in terms to any person who had contract-making authority on behalf of either Balfour Beatty or the second defenders. If an assignation having legal force was truly intended that would have been a very obvious step to take, and if such a step is not taken I do not think that the court should be astute to draw an inference from correspondence that an assignation had in fact taken place. In the circumstances I do not think that any inference can be taken from the correspondence that either the second defenders or their representatives or the representatives of Balfour Beatty considered that the partnership had validly assigned its rights under the contract to the company. The formalities of an assignation and intimation had not occurred, and in those circumstances the natural inference is one of agency. In conclusion, I should indicate that most of the correspondence emanating from Balfour Beatty and the second defenders continued to refer to the works contractor as "Laurence McIntosh & Sons". That reinforces the point made above, that the pursuers did not intimate to any representative of Balfour Beatty or the second defenders that an assignation had taken place and that in future the works contractor's rights would be those of the company.

- [20] The second part of my reasons for concluding that the company lacks title to sue is the rule that title to sue must exist when an action is raised. That rule is subject to an exception in cases where an existing right is perfected after the action is raised; the third part of my reasons for concluding that the company has no title to sue is that that exception has no application to the present case. The rule and the exception may most conveniently be considered together. The pursuers founded on the assignation of 1 December 2005, but that happened some time after the raising of the present action. Counsel for the pursuers argued that the general rule is subject to an equitable qualification: provided that title is "basically" in the pursuer he may complete the necessary formalities after the raising of an action. In my opinion that argument is not well founded. The basic rule is quite clear, on the authority of *Symington v Campbell*, *supra*, and *Bentley v Macfarlane*, *supra*. In the former case, LP Robertson stated (at 21 R 436) "*This is not the case of a person having at the time of raising the action a substantial right, requiring only formal completion. The title of the pursuer here depends on an assignation, which he does not say had been gone into at all before the action was raised. The whole transaction took place after the summons had been served. This sweeps away, on the pursuer's own shewing, his title to nearly all that he is suing for.*"

That statement of the rule recognizes the exception, and restricts it to cases where there is a substantial right requiring only formal completion. In *Bentley*, the pursuer had originally had title to sue as the victim of an accident but had assigned his right to a third party prior to raising an action. The court considered an argument that the pursuer had purified his title when he obtained a retrocession from the assignee after the action was raised. That argument was rejected. LP Clyde cited with approval a statement in Maclaren on Court of Session Practice, at page 189: "*If at the date of raising an action the pursuer has no title to sue, the defect cannot be cured by a subsequent assignation.*" The Lord President continued (at 1964 SC 79-80) "*The proposition expresses a matter of substance, and not a mere matter of procedure, for, if the action when it starts is a nullity, because the pursuer has no title at all to initiate it, nothing that is subsequently done can cure the fundamental defect in it....*"

*There have, of course, been cases where a pursuer's title to sue has been affirmed although that title was not complete or was subject to some qualification. Provided that basically the title is in the pursuer, his title to sue will be vindicated, and he may complete the steps required to clear his title of defects or qualifications during the action. Executors, for instance, as Lord Adam observed in *Symington*, have a good title to sue although they have not completed confirmation when the action is raised. And in *Westville Shipping Co. v Abram Steamship Co.* [1923 SC (HL) 68] a party with a good title to reduce a contract on the ground of misrepresentation had a good title to sue, although at the time he raised his action he had assigned his interest in the subject of the contract to a third party. That assignation was subsequently reduced on the ground of misrepresentation. As Lord Dunedin put it, at p.72, 'the original title to set aside a contract induced by misrepresentation was quite good. It is true that for the moment there seemed a good answer, namely: 'You have parted with the subject of the contract and therefore you have lost your interest,' but the moment that the instrument by which they had so parted was swept away the original title was then in all its force. Lord Dunedin was careful to distinguish this case, where there was a title to sue throughout, although subject at the date of the raising of the action to a qualification, from a case such as *Symington*, where at the date of the raising of the action there was no title at all.'*"

- [21] The same distinction underlies the decision of Lord Coulsfield in *Slattadale Ltd. v Tilbury Homes (Scotland) Ltd*, *supra*. In that case a company known as Cityploy, which undoubtedly had title to sue, raised an action for breach of missives of sale of heritable property. Cityploy then assigned its whole right, title and interest in the action to the pursuers, Slattadale, but the assignment was not intimated. Cityploy was then struck off. Only then were the pursuers sisted to the action. Subsequently the Queen's and Lord Treasurer's Remembrancer assigned to the pursuers the whole right, title and interest of Cityploy in the missives. It was held that Cityploy and through Cityploy the pursuers had title to sue. Lord Coulsfield stated (at 1997 SLT 156J-L) "*Cityploy's claim against the defenders did not cease to exist when Cityploy was dissolved: it was transferred to the Remembrancer, and was subject to the rights of the pursuers against Cityploy. In these circumstances, in my opinion, this case can properly be seen as parallel to cases such as that of an unconfirmed executor, where there was a defect in title, rather than the absence of any right or claim. If that is so, there is, in my view, no reason why the defect in the pursuers' title should not be regarded as having been cured by the assignation which has been obtained from the Remembrancer*".

The distinction drawn in that passage is between a mere defect in title and the absence of any right or claim. In the present case, however, the problem confronting the pursuers is a lack of evidence that any actual right was transferred prior to the assignation of 1 December 2005. The actings of the partnership and company, as spoken to by Mr. Robertson, appear to me to yield a clear inference that legal rights were left with the partnership but that the company acted as the partnership's agent in recovering debts and presenting claims. In those circumstances the defect is not merely one of title; it is the absence of a right. Consequently the exception cannot apply.

- [22] Counsel for the pursuers founded on the equitable nature of the exception to the rule in *Symington v Campbell*. I am doubtful whether the main exception that has been recognized can be considered equitable; it is rather based, as Lord Coulsfield very clearly explains, on the distinction between a defect in title and the absence of a right. That appears to be a clear distinction in law. In any event, nothing in the authorities suggests that there is any exception to the general rule that is based on unfocused equitable considerations. In the interests of legal certainty, I am of opinion that any suggestion that there is a general equitable exception to the rule should be resisted.

- [23] In some cases an assignation may be completed by means of judicial intimation; serving on the defender a summons that relies on the assignation may itself be intimation to the defender of the assignation: *Carter v McIntosh*, 24 D. 925; Gloag and Irvine, *Rights in Security*, 484. In the present case, however, judicial intimation will not assist the pursuers, for two reasons. First, there was no evidence of any actual assignation prior to 2005, and the written assignation of 1 December 2005 postdates the raising of the action. Secondly, clause 3.9 of the conditions of the Works Contract (as inserted by clause 2.2 of the special conditions applicable to that contract) provides that the works contractor may not assign or transfer any rights or obligations under the Works Contract without "the express prior written consent" of the management contractor. In view of that provision, there is no room for any implied consent; if an assignation is to be effected the express consent of the management contractor must be obtained in advance. In the present case there was no evidence that the first defenders as management contractor ever consented to an assignation prior to the raising of the present action. In effect, clause 3.9 in its amended form precludes reliance on informal assignation in the manner approved in *Carter v McIntosh*, *supra*.

- [24] Before leaving this part of the case I should comment briefly on certain practical matters that were touched upon in the pursuers' submissions. Counsel for the pursuers pointed out that the second defenders are not a party to the Works Contract, and thus had no interest to challenge the validity of any assignation of rights under that contract. Moreover, an assignation of the works contractor's rights under the Works Contract did not require the consent of the employer but only the consent of the management contractor. Obviously the second defenders are not a party to the Works Contract; nevertheless, the works performed under that contract were in their premises, and they are entitled to take any defence that is open to them in a claim by the works contractor. For that reason the second defenders may rely on the fact that the management contractor did not consent to any assignation in favour of the Company prior to the raising of the present action.

Personal bar

- [25] The pursuers' alternative submission was that, if the assignation were ineffective for the purposes of the present action, the second defenders were personally barred from asserting that the pursuers were not the works contractor and had no rights under the Works Contract. Counsel submitted that the pursuers had made claims under the Works Contract as a limited liability company, and those claims had been recognized in correspondence by Mr. Pattison and others who represented the second defenders. On the evidence, therefore, the essential ingredients of a case of personal bar were made out. Those ingredients were a representation, express or implied, on the part of the second defenders and reliance thereon by the pursuers, to their prejudice. So far as a representation was concerned, counsel relied on sixteen of the letters that had passed between the parties' representatives, and also on the claim document presented on behalf of the company. Particular reliance was placed on Armours' letter to Balfour Beatty of 3 April 2001 and Mr. Pattison's letter to Balfour Beatty of 16 July 2003; these are the two letters that I have discussed in some detail at paragraph [19] above. Reference was also made to the meetings that had taken place between the parties' representatives. Counsel submitted that, on the basis of correspondence and meetings, the second defenders through their professional team acknowledged the existence of the pursuers and accepted that they were the works contractor and conducted negotiations on that basis; at least, the evidence established that the pursuers were reasonably entitled to assume and proceed

upon the basis that they had been accepted as works contractor. From April 2001 onwards the pursuers had relied on the representations made on the second defenders' behalf; they had incurred fees to Longworth Consulting and to their solicitors in respect of the preparation and presentation of their claims. That was sufficient to amount to prejudice. Counsel further emphasized the equitable nature of a plea of personal bar, and submitted that the equities favoured the pursuers. It should be a relatively straightforward process to transfer partnership business to a limited liability company, and that is all that happened in this case.

- [26] In my opinion the principle of personal bar does not assist the pursuers' claim to have title to sue. The classic statement of the doctrine of personal bar is found in the speech of Lord Birkenhead in *Gatty v Maclaine*, 1921 SC (HL) 1, at 7, in a passage that was expressly founded on by counsel for the pursuers: "*Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time*".

It is clear from that formulation that, for personal bar to operate, there must be a representation of fact, whether express or implied from conduct, and the person to whom the representation is made must act upon it to his prejudice.

- [27] I have concluded that the pursuers do not satisfy the foregoing requirements, for a number of distinct reasons. Before I state these, however, I should make a preliminary observation. The pursuers contend that the second defenders are personally barred from asserting that the pursuers are not the works contractor and had no rights under the Works Contract. If the pursuers are treated as the works contractor, however, that appears to be equivalent to novation of the Works Contract, in such a way that the company takes over the whole of the partnership's rights and obligations. That contention goes beyond the claim that the works contractor's rights had been assigned to the company. From the management contractor's point of view, it involves a change of debtor. Counsel for the pursuers submitted that all work under the Works Contract had been carried out by 2000, before the company became involved. He further submitted that there was no suggestion that any of the work was defective; the remaining matters outstanding under the Works Contract were administrative. Consequently any possible element of *delectus personae* was no longer significant. I have no doubt that he was correct in stating that all work had been carried out and that there was no suggestion that work was defective. Nevertheless, the possibility of latent defects remains, and I do not think that it can be ignored. Moreover, construction contracts almost invariably contain an express provision prohibiting assignation or subcontracting without consent; in the present case such a provision is found in clause 3.9 of the Works Contract conditions as amended by clause 2.2 of the special conditions applicable to the contract. That is a clear indication that *delectus personae* is important in such contracts, and it is very easy to understand why that is so. Against that background, I am of opinion that the law should be slow to infer that novation has taken place without a clear indication of consent from the other party to the contract. While the element of *delectus personae* in the Works Contract is directly relevant to the first defenders as management contractor, it also has implications for the second defenders, in two respects. First, the work performed under the Works Contract was ultimately for their benefit, and they had an interest in ensuring that it was properly carried out and that all defects, latent or otherwise, were properly remedied. Secondly, the second defenders are likely to have the benefit of collateral warranties from the works contractor. Counsel for the pursuers did not address the question of whether the obligations under such warranties should pass from the partnership to the company. On his submissions on personal bar, however, this appears to me to raise a significant difficulty, especially as the question of collateral warranties does not appear to have arisen in the correspondence that has been produced.

- [28] Against the foregoing background, my reasons for rejecting the pursuers' case on personal bar are as follows. In the first place, I am of opinion that the evidence does not establish that any clear representations were made by representatives of either the first or the second defenders to the effect that the pursuers, the company, would be treated as the works contractor; the need for a clear representation is affirmed in *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741. at 775F-G per Lord Hailsham of St Marylebone LC. In large part the pursuers' submissions on this area were founded on the correspondence that passed between the parties, in which there were a substantial number of references to "Laurence McIntosh Ltd". These included letters from representatives of the first and second defenders. When the correspondence is examined carefully, however, it is clear in my opinion that those references can readily be explained by the two matters discussed at paragraph [19] above: the company appeared to be acting as *ad hoc* agent for the partnership in the presentation of the claim, and in many cases the references to the company were prompted by similar references in letters or other documents that emanated from the pursuers. Once again I do not think it necessary to go through the correspondence in detail; clear examples of the foregoing features are found in the two letters discussed at paragraph [19]. The pursuers' argument went further than the correspondence emanating from the defenders' representatives, however. It also founded on the references to the company in documents prepared on behalf of the pursuers, notably the claim document, and the failure of the defenders' representatives to take issue with references to the company; that was said to amount to an implied representation. The answer to this argument is once again in my opinion the company's apparent position as *ad hoc* agent for the partnership. Against that background, I do not think that the silence of the defenders and their representatives can be taken as anything near a clear representation that the company would be treated as the works contractor. In this connection the fact that the pursuers' argument amounts to novation by personal bar is important; novation involves a radical innovation on the parties' rights and obligations, and it is in the interests of all concerned that clear procedures should be followed. If a party to a contract wants novation to take place, the simple and

obvious course is to raise the matter directly with the other party. For these reasons it is only in a clear case that I would be willing to infer that novation had been effected through personal bar. The present case is anything but clear.

- [29] In the second place, the pursuers' case on personal bar is essentially founded on the silence of the defenders' representatives: presented with documents that referred to the company as the claimant, they did nothing to suggest that the partnership was the contracting party. In general, however, silence will only give rise to personal bar when there is in all the circumstances a duty to speak or object: *William Grant & Sons Ltd v Glen Catrine Bonded Warehouse Ltd*, 2001 SC 901, at paragraph [49] per LP Rodger; the case deals specifically with acquiescence, but the point is in my opinion a more general one, applying to other forms of personal bar. In the present case I am of opinion that there was in the circumstances of the case no duty on the defenders' representatives to object to references to the company in the claim document or the correspondence. That is particularly so because those references readily yielded the inference that the company was acting as *ad hoc* agent for the partnership.
- [30] In the third place, I am of opinion that, at least so far as the second defenders are concerned, no representation of any sort was made by any person who had power to bind them to a novation of the contractual arrangements. The pursuers relied on letters written by Mr. Pattison and on meetings at which Mr. Pattison was present, and on his failure to object to the references that were made to the company as the party pursuing the claim. Mr. Pattison gave evidence about his involvement in the contract; he had started as the representative of the second defenders in the administration of the contract, and had ultimately become the certifying authority under the contract. He did not, however, have any contract-making authority on behalf of the second defenders, and there was no evidence to suggest that the second defenders might have led him to think that he had such authority. Novation, as I have remarked, involves a radical innovation on the parties contractual arrangements, and in my opinion contract-making authority would be essential before any person could bind another to such a course. The other representatives of the second defenders who were involved in the correspondence were Armours. They were the quantity surveyors acting under the contract; as such they would not have had authority to conclude contracts on behalf of either the employer or the management contractor, and no contrary submission was made by the pursuers.
- [31] In the fourth place, there was in my opinion no clear evidence that the pursuers relied on any representations by the defenders' representatives, whether express or implied, in presenting their claim and in due course raising this action in the name of the company rather than the partnership. The evidence of Mr. Robertson was essentially that the business had been transferred to the company in July 2000 and that at that time advice had been received that nothing further was required to transfer contracts from one entity to the other. Mr. Longworth stated that he had not given any consideration to whether or why the claim should be presented in the name of the company. The presentation of claims in the company's name appears to emanate from the claim document prepared by Mr. Longworth. In the circumstances the use of the company as claimant and pursuer appears to result from the pursuers' own understanding of the legal position rather than anything that the defenders' representatives said or failed to say to them. I am accordingly of opinion that the analysis used by the court in *Cantors Properties (Scotland) Ltd. v Swears & Wells Ltd.*, 1978 SC 310, is applicable. In that case, following the destruction of premises leased by the pursuers to the defenders, the pursuers suggested that rent charges should be suspended, but the defenders replied that the rental commitment stood. The pursuers agreed with that proposal. The pursuers subsequently sought a declarator that the lease had terminated, and the defenders pleaded personal bar as a defence; they averred that they had acted on the pursuers' affirmation that rent payments should continue to their prejudice. It was held that the defenders' belief that the lease continued did not arise out of any representation of a state of facts by the pursuers but rather from an error as to the legal position of the parties. In the present case it seems to me that the pursuers' decision to proceed in their own name arose essentially out of their own understanding of the position, rather than out of any of the rather oblique references made by the defenders' representatives in the course of correspondence and meetings. Further support for this result is found in *William Grant & Sons Ltd v Glen Catrine Bonded Warehouse Ltd*, *supra*, where Lord Nimmo Smith stated at paragraph [4] of his opinion "*It appears to me to be entirely clear... that in order for a defender to succeed in a plea of acquiescence he must be able to establish a causal relationship between the pursuer's failure to act and his own actings; that he would not have acted as he did if the pursuer had not induced a reasonable belief that he consented to his doing so*".

In the present case I am of opinion that such proof is lacking. The pursuers chose to present their claims in the name of the company from an early stage, and there was simply no evidence that the decision was induced to any material extent by anything that the defenders did. No doubt if the defenders had expressly queried the matter the pursuers might have taken further legal advice. That happened, however, when the action was raised and a plea of no title to sue was tabled, and at that stage the pursuers decided to continue with the action. On the evidence I am unable to hold that the result would have been any different if the point had been made earlier.

- [32] For the foregoing reasons I hold the pursuers' case based on personal bar to be irrelevant.

Pursuers' challenge to final certificate in Management Contract

- [33] The pursuers challenge the final certificate issued under the Management Contract; they seek declarator that it is invalid and of no effect in certain specific respects and reduction of the certificate; they also seek a number of ancillary remedies that are dependent on reduction of the final certificate. The second defenders have

challenged the pursuers' title to challenge the final certificate. The final certificate is of course issued under the Management Contract, to which the pursuers are not a party. The contention for the second defenders is, in essence, that that precludes the pursuers from challenging the certificate; that is based on ordinary principles of privity of contract. If the pursuers want to challenge the final certificate, a contractual route is available to them, but this involves acting through the first defenders as management contractor; to achieve that result certain name-borrowing and similar provisions are available in the Works Contract.

- [34] Counsel for the pursuers submitted that the final certificate was an important document for the purposes of the Works Contract. The pursuers averred that certain aspects of the administrative machinery under the interlocking arrangements in the Management Contract and the Works Contract had broken down; that resulted from the failure of the employer's agent to issue a proper final certificate. The pursuers nevertheless had a financial interest in the certification process, and had to set aside the final certificate to obtain redress. Reference was made to *D & J. Nicol v Dundee Harbour Trustees*, 1915 SC (HL) 12, and to *Rape Crisis Centre v SSHD*, 2001 SLT 389. A legal relationship existed between interim and final certificates and the pursuers' entitlement to be paid. The employer through its agent, the contract administrator, by maintaining the validity of the final certificate was denying the pursuers their right to proper payment for the work that they had carried out. Counsel made detailed reference to provisions of the Management Contract and the Works Contract, notably clauses 4 and 8 of the Management Contract and clause 4.17 of the Works Contract. The final certificate, even though it had its origin in clauses 4 and 8 of the Management Contract, had contractual effect under the Works Contract. As a result the works contractor had a right to challenge the validity of that certificate by virtue of being a party to the Works Contract. Counsel submitted that it is not essential that a person seeking to set aside a document should be a party to that document; that was exemplified by actions by beneficiaries to reduce the deeds of trustees, or to reduce a testamentary writing. Counsel further referred to *Co-operative Wholesale Society v Birse Construction Ltd.*, 1997, 84 BLR 58, where a main contractor and subcontractor took part in an arbitration against the employer, and the arbitrator made an award in favour of the main contractor. The Court of Appeal held that the award should be treated as a sum duly certified for the purposes of the subcontract. That indicated the interlocking nature of the two contracts. This was particularly important where the contractual machinery had broken down, as averred in the pleadings; in such a case the appropriate remedy was declarator and reduction. Counsel further relied on clause 9.1 of the Works Contract conditions, as amended, which gave the court express power to open up and revise any certificate; that must cover any certificate mentioned in the Works Contract, which would include all interim certificates and the final certificate. Furthermore, if the pursuers had not convened the employer as second defenders the management contractor would have brought the employer in as a third party. The power of the court to revise any certificate plainly affected the second defenders as employer in view of the interlocking structure of the two sets of contract conditions. Moreover, clause 4.32.2 of the Works Contract Conditions contemplated a tripartite court action raised by the employer before the issue of the final certificate.
- [35] In my opinion the pursuers lack title to challenge the final certificate. The critical point is that two contracts are involved, the Management Contract and the Works Contract. The pursuers are a party to the Works Contract; they are not a party to the Management Contract. The final certificate, however, is issued under clause 4.12 of the Management Contract. Consequently any challenge to the certificate must proceed under the Management Contract. On ordinary principles of privity of contract, in the absence of a *jus quaesitum tertio*, a person who is not a party to a contract cannot sue on that contract. That is the simple answer to the pursuers' claim.
- [36] The pursuers found strongly on the structure of the two contracts that are involved, and especially on their interlocking nature. When these are examined in detail, however, I am of opinion that they clearly assume the ordinary rules of privity of contract, and assume in particular that any proceedings brought against an employer will be raised, at least nominally, by the management contractor. In the event that the party who is truly making the claim is the works contractor, name-borrowing provisions are available to enable the action to proceed in the name of the management contractor. If the pursuers wish to maintain a claim against the second defenders, they must make use of those provisions.
- [37] The contractual arrangements used for the works at the National Library are based on the JCT Standard Forms of Scottish Management Contract and Scottish Works Contract. Those forms of contract are promulgated by bodies representative of the construction industry, in Scotland by the Scottish Building Contract Committee. The contractual structures that are used have been in use in their present form since 1988, and there can be little doubt that they represent the considered view of the construction industry as to the appropriate form of contractual organization for projects where a management contractor is to be appointed. The industry has, through the JCT and SBCC, chosen to use this structure, involving separate management and works contracts. That is so despite the fact that rights and obligations arising as between employer and management contractor are clearly closely linked with rights and obligations arising as between management contractor and works contractor. The choice of two separate contracts has been endorsed by the present parties through their choice of the JCT Standard Forms. That choice must be respected by the courts. The argument for the pursuers would in my opinion seriously subvert that choice and the underlying contractual structures. This can be seen in dicta in *Northern Regional Health Authority v Derek Crouch Construction Co Ltd*, [1984] 1 QB 644. In that case Sir John Donaldson MR stated (at 674C-D) "*There is no way in which [the subcontractors] can litigate any claims under the main contract in their own name. Their only right is either to make claims against [the main contractors] under the sub-contract, leaving it to [the main contractors] to pass their claims on under the main contract, or to seek to use [the main contractors'] name to claim under the main contract*".

That was so despite the fact that, if the main contractor and subcontractor should disagree over a claim presented using a name-borrowing provision, numerous complications might arise. In the same case Dunn LJ pointed out (at 662E-G) that the contractual provisions arose out of the unique contractual relationships developed over many years by the JCT and its predecessors in the standard forms of building contracts and subcontracts. He pointed out that the scheme enables the building owner to deal with one main contractor instead of making separate contracts with specialists. The actual decision in *Crouch* has been overruled by the House of Lords in *Beaufort Developments Ltd. v Gilbert-Ash (NI) Ltd.*, [1999] 1 AC 266, but nothing in the latter case casts any doubt on the analysis of the contractual structures in the earlier case. The possible difficulties that can arise under the JCT contractual structures were also mentioned by the Court of Appeal in *Co-operative Wholesale Society v Birse Construction Ltd*, *supra*. In that case the court had to consider the effect of an award in an arbitration under the main contract on the rights and liabilities of parties to a subcontract. It was held that the arbitrator's award replaced the architect's certificate, and thus had direct effect so far as the subcontract was concerned. Counsel for the main contractor had complained that that put the main contractor in the invidious position of having to urge the merits of a claim in the main contract arbitration which would, if the employer became insolvent, be in conflict with his own interests, in that he would have to pay the subcontractor without any recourse against the employer. Phillips LJ indicated (at 84 BLR 78) that the risk of such a conflict of interest was inherent in the contractual scheme. It seems to me that this case, while recognizing the interlocking nature of the two contracts, firmly supports the proposition that the two contracts are conceptually independent of each other, and that rights or obligations arising under one contract can only have effect in relation to the other contract by virtue of specific provisions in the latter contract. In *Birse* the arbitrator's award was substituted for the architect's certificate, and the architect's certificate had effect in the subcontract by virtue of the provisions of that contract.

- [38] Moreover, if the pursuers are correct in their contention that they can challenge the final certificate directly under the main contract, the implication appears to be that every works contractor could raise an action directly against the employer at any time, provided that the subject matter of the action had a bearing on the works contractor's position. The repercussions of that would be very considerable; it certainly flies in the face of what I understand to be normal practice. If, by contrast, the contractual structure is respected, it provides a framework for dealing with claims by and against subcontractors and works contractors in a systematic and principled fashion.
- [39] The matter is even clearer when the detailed provisions of the Management Contract and Works Contract are considered. In the Works Contract conditions, clause 1.9 provides as follows: *"Nothing contained in the Works Contract shall ... create any privity of contract between the Works Contractor and the Employer (except by way of and in terms of the Employer/Works Contractor Agreement)..."*.

That clause negates any inference that the employer is a party to the Works Contract. That clearly respects the underlying contractual structure. In the Management Contract, clause 8.1 provides that the following clauses, 8.2-8.5, are to apply in respect of items of work that are identified as work to be carried out by works contractors. Clause 8.2.1 provides that the works contractors to carry out those items are to be selected by an agreement in writing between the management contractor and the architect or contract administrator, that selection being confirmed by an instruction; nevertheless no one is to be employed as a works contractor unless he will enter into a contract using the current unamended JCT standard form of Works Contract. That indicates that any works contractor is like to be bound by clause 1.9, and the Management Contract accordingly contemplates that no privity is to arise between the employer and the works contractor. Clauses 8.3-8.5 of the Management Contract make further provision dealing with the position of a works contractor, including payments due under a Works Contract and the certification of loss and expense caused by matters materially affecting the regular progress of a Works Contract. All of these provisions, however, seem to me to respect the contractual structures. To the extent that there is any exception to those structures, express provision is made.

- [40] Claims by a works contractor will normally lie against the management contractor who can, in appropriate cases, make a parallel claim against the employer. In cases where this procedure is not available, a remedy is in my opinion provided by clause 1.11 of the Works Contract. That clause provides as follows: *"The Management Contractor will so far as he lawfully can at the request of the Works Contractor obtain for him any rights or benefits of the provisions of the Management Contract so far as the same are applicable to the Works and not inconsistent with the express terms of the Works Contract but not further or otherwise. Any action taken by the Management Contractor in compliance with any aforesaid request shall be at the cost of the Works Contractor and may include the provision by the Works Contractor of such indemnity and security as the Management Contractor may reasonably require"*.

This provision is framed in very general terms. It may obviously apply to the works contractor's obtaining the use of such facilities as scaffolding or a water supply or site huts. Nevertheless, the statement that compliance with any request is to be at the cost of the works contractor, together with the related provisions for indemnity or security, suggests that the scope of the clause is wider; indeed, the generality of the wording used itself suggests that. In my opinion the clause is intended to cover the presentation of claims, of any relevant sort, by the works contractor; it obliges the main contractor to take up those claims under the provisions of the Management Contract. In this connection, of course, it is material that all of the work carried out by the works contractor is work that is provided for in the Management Contract; consequently there is no conceptual problem with the management contractor's presenting the relevant claim. Conflicts of interest may arise between the management contractor and the works contractor, as pointed out in *Crouch* and *Birse*, but that possibility is inherent in the contractual scheme. Clause 1.11 was considered in *Belgravia Property Company Ltd v S & R (London) Ltd*, 2001,

93 Con LR 59. Judge Humphrey Lloyd QC indicated (at paragraph [19]) that was some difficulty in envisaging situations where clause 1.11 would be of practical use. Nevertheless, he concluded (at paragraph [21]) "The wide terms of cl 1.11 would... permit it to be used to enable a works contractor to use the management contractor's right to commence an arbitration against the employer, e.g. about the amounts to be included in certificates or to make a claim for damages for breach of the management contract where the sole damages were suffered by the works contractor".

I respectfully agree with that statement, which seems to me to be entirely in point in the present case.

- [41] Clause 4.27 of the Works Contract Conditions is also relevant to the present case; it permits the works contractor to borrow the management contractor's name in respect of certain categories of claim. The clause provides as follows: "If the Works Contractor shall feel aggrieved in regard to any amount certified by the Architect under clause 4.2 of the Management Contract Conditions..., or by his failure so to certify or direct, then, subject to clause 1.11, the Management Contractor shall allow the Works Contractor to use the Management Contractor's name and if necessary will join with the Works Contractor in litigation at the instigation of the Works Contractor in respect of the said matters complained of by the Works Contractor".

That clause was considered by Judge Humphrey Lloyd QC in *Belgravia* at paragraph [29]; he held that resort can be had to clause 4.27 even in cases where clause 1.11 had been used previously. In my opinion clause 4.27 is yet another provision that is entirely consistent with the view that I have taken of the contractual scheme. It assumes that any claim by the works contractor must, on ordinary principles of privity of contract, be made against the management contractor under the Works Contract; if, however, the management contractor has a corresponding claim against the employer, clause 4.27 permits the works contractor to use the management contractor's name to present the corresponding claim against the employer under the Management Contract.

- [42] Counsel for the pursuers suggested that, in their original versions, the forms of Management Contract Conditions and Works Contract Conditions envisaged the possibility of tripartite arbitration, involving employer, management contractor and works contractor. The references to arbitration are normally deleted, however, and that occurred in the present case. Nevertheless, counsel submitted that clause 9.1 of the Works Contract conditions, as amended by clause 2.7 of the special conditions of the Works Contract, gave the court equivalent powers. In my opinion the reliance on clause 9.1 is misplaced. That clause gives the court power to open up, review or revise any certificate, opinion, decision, requirement or notice. It is a type of clause that has been in common use since the decision in *Crouch*; such clauses are designed to avoid the decision in that case that the court had no power to open up and revise certificates. Since *Crouch* was reversed by the House of Lords in *Beaufort Developments Ltd, supra*, such clauses have fulfilled no useful function, but they are nevertheless commonly inserted. In my opinion clause 9.1 is no more than an anti-*Crouch* provision, and does not have the effects contended for by the pursuers. So far as tripartite proceedings are concerned, while clause 4.32.2 of the Works Contract Conditions does appear to envisage that possibility, it cannot prevail over what is otherwise a very clear contractual structure.
- [43] Counsel for the pursuers placed some reliance on two cases on title to sue, *D & J. Nicol v Dundee Harbour Trustees, supra*, and *Rape Crisis Centre v SSHD, supra*. In my opinion neither of these cases assists the pursuers. They are concerned with the general question of title to sue; the present case, however, is dependent on the particular contractual structures that the parties have chosen to use, and on the detailed terms of those contracts.

Jus quaesitum tertio

- [44] The final argument for the pursuers was that they had a *jus quaesitum tertio* under the Management Contract which entitled them both to seek reduction of the final certificate and to seek payment in the form concluded for. Counsel submitted that the final certificate was the culmination of the contractual machinery relating to payment in both the Management Contract and the Works Contract; under the Management Contract the relevant clauses were clauses 1.14 and 4.12 of the contract conditions. So far as the Works Contract was concerned, it was significant that the final certificate indicated the sum ultimately payable to the Works Contractor. The Works Contract provided no mechanism for challenging the validity of the final certificate at the stage when the present action was raised. It did not, however, exclude an action for reduction and payment consequential upon that reduction.
- [45] In my opinion the pursuers do not have a *jus quaesitum tertio* under the Management Contract. The critical question is whether such a right should be implied into the Management Contract in view of its relationship with the Works Contract. The relevant test is in my opinion that formulated by Lord Eassie in *Sears Properties BV v Coal Pension Properties Ltd.,* 2001 SLT 761, at 766E-F: "In considering whether a particular provision of a contract is *jus quaesitum tertio* the test is not simply whether the provision confers some benefit on the tertius but whether it is evidence that the contracting parties intended to give that tertius a title to sue upon the contractual provision in question".

Consequently the fact that a third party has an interest in the performance of a contract is not enough for the implication of a *jus quaesitum tertio*; what is required is an intention on the part of the contracting parties to benefit the third party. A similar point is made by Lord Clyde in *Scott Lithgow Ltd. v GEC Electrical Projects Ltd.,* 1989 SC 412, at 440. The cases on this area of law are considered in McBryde, *The Law of Contract in Scotland,* 2nd ed, at paragraphs 10-10 to 10-15, and in volume 15 of the *Stair Memorial Encyclopaedia,* at paragraphs 835 and 836, a passage written by Professor Hector MacQueen. In the latter paragraph it is pointed out that,

unless there is a clear indication to the contrary in the relevant contracts, there will not generally be a *jus quaesitum tertio* in situations where there is a contract and a dependent subcontract. The reason suggested is that in such a case, while a subcontractor who is not a party to the main contract has a clear interest in that contract, it is unlikely that the parties to the main contract would intend to confer a directly enforceable benefit on him. The purpose of using subcontracting arrangements is usually to distance parties from each other rather than to bring them into a direct legal relationship.

[46] In my opinion that observation is correct. In the field of building contracts, the reason for the extensive use of subcontracting is in large measure to ensure that the employer is not faced with a series of different contracts with each of the specialist contractors involved in the project. That, as Professor MacQueen points out, seems inconsistent with the implication of a *jus quaesitum tertio*. The forms of contract used in the present case go further, however; clauses 1.11 and 4.27 of the Works Contract are specifically designed to provide routes whereby a claim by the works contractor can be brought against the employer, but in a manner that respects the underlying contractual structure of Management Contract and Works Contract. If a *jus quaesitum tertio* had been intended, provisions of that nature would have been quite unnecessary. The existence of these provisions, therefore, provides a strong indication against the implication of any such right.

Conclusion

[47] I accordingly conclude that all four of the pursuers' arguments have failed. In these circumstances I will sustain the second defenders' first and second pleas-in-law and dismiss the action so far as directed against them. In doing so, I will repel the pursuers' fifth plea-in-law, that being the plea in support of the case based on personal bar.

Pursuers: Reid, QC; Biggart Baillie
Second Defenders: McNeill, QC; Dundas & Wilson CS