SHERIFF APPEAL COURT

2021 SAC (Civ) 5
GLW-CA118-19

Sheriff Principal M W Lewis
Sheriff Principal C D Turnbull
Appeal Sheriff F Tait

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in appeal by

D McLAUGHLIN AND SONS LIMITED

Pursuer and Respondent

against

LINTHOUSE HOUSING ASSOCIATION LIMITED

Defender and Appellant

Pursuer and Respondent: Howie QC; Levy & McRae LLP
Defender and Appellant: Manson, advocate; Harper Macleod LLP

23 December 2020

Introduction

[1] In April 2016 the parties entered into a building contract for the carrying out of certain works by the respondent (as Contractor) for the appellant (as Employer) at Kennedar Drive, Glasgow. The contract incorporated the terms of the Standard Building Contract with Quantities for use in Scotland 2011 Edition, with certain amendments. As is not uncommon in contracts of this nature, certain disputes and differences have arisen between the parties. The respondent commenced proceedings against the appellant, seeking

declarator that the true value of what is described in the crave as "the final certificate sum" in respect of the parties' contract is £839,295.68 (crave 1); and payment of (i) the sum of £33,600 (crave 2); and (ii) the sum of £111,708.42 (crave 3). The former sum represents what the respondent asserts is an improper deduction of liquidated damages; the latter sum represents the difference between the figure set out in the declarator and the "final certificate sum" that has, in fact, been certified as due for payment by the appellant to the respondent.

[2] The sheriff heard a debate, following which he *inter alia* granted decree against the appellant for payment to the respondent of the sum of £33,600 (in terms of crave 2); and *quoad ultra* allowed parties a proof before answer in the principal action. The appellant appeals against those parts of the sheriff's decision. No appeal is taken in relation to the sheriff's decision to dismiss the appellant's counterclaim.

The issues in the appeal

[3] The issues in the appeal can be addressed by answering three questions helpfully proposed by counsel for the appellant, namely:

1. Did the sheriff err in law by granting decree under crave 2 on the basis that the appellant had no contractual entitlement to withhold the sums retained in satisfaction of liquidated damages in terms of the pay less notice?
2. Did the sheriff err in law by refusing to dismiss the respondent's action because of an absence of a relevant and specific basis to establish the extent of the respondent's entitlement and the true value of the respondent's work?
3. Did the sheriff err in law by holding that the respondent has pled a relevant entitlement to loss and expense under the contract in circumstances where the

respondent has not offered to prove purification of the contractual conditions precedent in this connection or otherwise specify the basis for its entitlement?

The first question

[4] The first question relates to the sheriff's decision to grant decree in terms of crave 2 on the basis that the appellant had no contractual entitlement to withhold the sums retained by way of liquidated damages. The circumstances which gave rise to the deduction of liquidated damages are that the date for completion of the Works was 28 October 2016; completion was actually achieved on 15 June 2017. Where the Contractor (in this case, the respondent) fails to complete the Works by the agreed completion date, clause 2.31 is engaged. It is in the following terms:

> "**Non-Completion Certificates**
> 2.31 If the Contractor fails to complete the Works … by the relevant Completion Date, the Architect … shall issue a certificate to that effect (a "Non–Completion Certificate"). If a new Completion Date is fixed after the issue of such a certificate, such fixing shall cancel that certificate and the Architect … shall where necessary issue a further certificate."

[5] The Architect issued a Non-Completion Certificate which is dated 28 October 2016. On 1 September 2017 the Architect issued an interim payment certificate (no. 13), in terms of which he certified a net amount due for payment to the respondent of £35,382.21. As the respondent had failed to complete on time, the appellant was entitled to liquidated damages in accordance with the scheme set out in clause 2.32 of the parties' contract. The appellant timeously gave notice to the respondent of its intention to deduct liquidated damages at the agreed rate (i.e. £1,200 per week) from the sum certified as due to the respondent in terms of interim certificate no 13. Thereafter the appellant timeously issued a Pay Less Notice to the respondent, confirming that liquidated damages would be deducted from the sum

otherwise payable to the respondent. The sum deducted amounted to £39,600, that being based upon a delay of 33 weeks.

[6] On 11 May 2018 the Architect granted an extension of time of five weeks. As a consequence, a new completion date of 2 December 2016 was fixed. That had the effect of cancelling the earlier Non-Completion Certificate. Notably, despite the respondent having failed to complete the Works by the revised completion date, and notwithstanding the mandatory terms of clause 2.31, no new Non-Completion Certificate was issued. The appellant subsequently repaid to the respondent the liquidated damages deducted by reference to the five week extension, namely, £6,000. The appellant continued to withhold £33,600 – the sum second craved. A Final Certificate was issued on 14 December 2018.

[7] To address the matters raised by the first question, in addition to clause 2.31 set out above, it is necessary to consider the terms of clause 2.32 of the parties' contract. That provides:

> **"Payment or allowance of liquidated damages**
>
> 2·32 ·1 Provided:
>
> .1 the Architect … has issued a Non-Completion Certificate for the Works … ; and
>
> .2 the Employer has notified the Contractor before the date of the Final Certificate that he may require payment of, or may withhold or deduct, liquidated damages,
>
> the Employer may, not later than 5 days before the final date for payment of the amount payable under clause 4·15, give notice to the Contractor in the terms set out in clause 2·32·2.
>
> ·2 A notice from the Employer under clause 2·32·1 shall state that for the period between the Completion Date and the date of practical completion of the Works … :

> .1 he requires the Contractor to pay liquidated damages at the rate stated in the Contract Particulars, or lesser rate stated in the notice, in which event the Employer may recover the same as a debt; and/or
>
> .2 that he will withhold or deduct liquidated damages at the rate stated in the Contract Particulars, or at such lesser stated rate, from sums due to the Contractor.
>
> ·3 If the Architect … fixes a later Completion Date for the Works or a Section or … such later Completion Date is stated in a Confirmed Acceptance, the Employer shall pay or repay to the Contractor any amounts recovered, allowed or paid under clause 2·32 for the period up to that later Completion Date.
>
> ·4 If the Employer in relation to the Works … has notified the Contractor in accordance with clause 2·32·1·2 that he may require payment of, or may withhold or deduct, liquidated damages, then, unless the Employer states otherwise in writing, clause 2·32·1·2 shall remain satisfied in relation to the Works … , notwithstanding the cancellation of the relevant Non-Completion Certificate and issue of any further Non-Completion Certificate."

The sheriff's decision

[8] The sheriff's reasoning for granting decree for payment of the sum withheld by way of liquidated damages is to be found at paragraphs [106] to [109] of his judgment, which are in the following terms:

> "[106] In summary, here the [appellant] was entitled to deduct liquidate damages at the rate of £1200 per week for each of the 33 weeks that the contract was delayed (from 28 October 2016 until 15 June 2017). However, the architect subsequently granted an extension of time of five weeks. This meant that the [respondent] was entitled to payment of £6,000 leaving the [appellant] with liquidate damages of £33,600 (33 weeks at £1200 totalling £39,600 under subsequent deduction of the 5 week extension of time, namely, £6,000).
>
> [107] What the [appellant] failed to do was to issue a further non-completion certificate in terms of clause 2.32.4. This is because, in terms of clause of 2.31, if a

> new completion date is fixed after the issue of a non-completion certificate, 'such fixing shall cancel that certificate'.
>
> [108] Accordingly, in my opinion, the [appellant] has no basis in contract for withholding the sum of £33,600.
>
> [109] The [appellant] claims that the fixing of a later completion date does not mean that the [appellant] loses its right to liquidate damages. If that had been the case, the contract would expressly provide for that. To imply such an obligation would give rise to draconian consequences on an employer and go against commercial common sense. However, I do not imply the contractual obligation to issue a fresh certificate because, in terms of clause 2.31, it is an express requirement on the architect/contract administrator. The words "where necessary" simply admit to the possibility that, depending on the length of extension, there may not be a requirement for a further certificate."

Submissions for the appellant

[9] Whilst accepting that the sheriff's analysis in paragraph [106] is correct, the appellant submits that it is where the sheriff proceeded next that saw him fall into error in his analysis as to why the respondent was entitled to payment of £33,600. The appellant submits that the conclusion arrived at by the sheriff was that the natural and ordinary meaning of "cancel" where it appears in clause 2.31 is that it has the effect of cancelling the whole idea of late completion on the part of the respondent.

[10] The appellant contends that the conclusion which should have been arrived at by the sheriff was that the appellant did have a valid contractual basis upon which to withhold liquidated damages under the contract. As such, the respondent had and has no entitlement to decree in the sum of the liquidated damages retained. The liquidated damages were validly deducted by the appellant. To hold otherwise would be to unjustly reward the respondent in relieving it of the consequences of a 28 week period of delay. The decree, and

interlocutor granting it, should be recalled as both were the products of material errors on the part of the sheriff.

[11] In support of its analysis, the appellant relies upon the decision of the House of Lords in *Reinwood Ltd* v *L Brown & Sons Ltd* [2008] 1 WLR 696 and, in particular, the speeches of Lord Hope of Craighead at paragraphs [7] to [12]; and Lord Neuberger of Abbotsbury at paragraphs [38] to [48].

Submissions for the respondent

[12] The respondent submits that the sheriff had been correct to determine that the respondent was entitled to payment of £33,600. The respondent advances two separate arguments in support of that contention.

[13] Firstly, the ability of a party to impose liquidated damages is subject to the suspensive conditions laid out in clause 2.32.1. The suspensive conditions are that there must be a valid Non-Completion Certificate for the Works issued; and that a warning of the raising of liquidated damages has been given to the Contractor. To fulfil the first suspensive condition would require any Non-Completion Certificate to be valid. The respondent contends that, in this case, it was not. The ability to issue a valid Non-Completion Certificate did not arise until 29 October 2016. The purported Non-Completion Certificate was issued the day before, rendering it invalid and void. On this basis, it is submitted that, at no point, has a valid Non-Completion Certificate been issued. The suspensive conditions in clause 2.32.1 were never satisfied, and accordingly, liquidated and ascertained damages could not be levied against the respondent.

[14] Secondly, the respondent argues that the appellant's case misreads clause 2.32 of the contract, in that it overlooks the context of the surrounding contractual wording and the

obligation which clause 2.31 places upon the Architect. This obligation is to issue a new Non-Completion Certificate after granting an extension of time, where such a certificate is necessary. This necessity arises if the Contractor is still late in completing the Works, notwithstanding the grant of any extension of time – see *Octoesse LLP* v *Trak Special Projects Ltd* [2017] BLR 82 at paragraph 14. Notwithstanding the extension of time granted, the Works were not practically complete on time. A further Non-Completion Certificate ought to have been issued by the Architect. It was not. The issuing of a new Non-Completion Certificate was essential to the appellant's ability to continue to hold or levy liquidated damages. Due to the Architect's failure, the absence of a current, and new, Non-Completion Certificate, has the effect that the appellant is not entitled to withhold sums in respect of liquidated and ascertained damages.

[15] The appellant's reliance upon the decision of the House of Lords in *Reinwood Ltd* is misplaced. It does not assist the appellant and the sheriff did not construe it incorrectly. The respondent relies upon *Balfour Beatty Construction Northern Ltd* v *Modus Corovest (Blackpool) Ltd* [2008] EWHC 3029 (TCC) which, together with *Octoesse LLP*, *supra*, are more directly relevant. In *Balfour Beatty Construction Northern Ltd* at paragraph 114, Coulson J (as he then was) commented, in similar circumstances where a Non-Completion Certificate was required, that *"the absence of such new certificates is fatal to these claims"*.

Decision

[16] Standing the conclusion we have reached on the appellant's entitlement to withhold sums in respect of liquidated and ascertained damages, it is unnecessary for us to address the first issue raised by the respondent, namely, the validity of the Non-Completion Certificate which bears the date 28 October 2016 (see paragraph [5] above). That certificate

was cancelled, by virtue of clause 2.31, on 11 May 2018, when the Architect granted an extension of time of five weeks. A consideration of its validity prior to 11 May 2018 is not necessary for a determination of this appeal.

[17] The original date for completion of the Works was 28 October 2016; completion was actually achieved on 15 June 2017. Subsequently, a new completion date of 2 December 2016 was fixed. As a consequence, the respondent was still 28 weeks late completing the Works. The appellant's right to retain liquidated damages for that period was, however, dependent upon a new Non-Completion Certificate being issued. As explained above, the grant of an extension of time in May 2018 had the effect of cancelling the earlier Non-Completion Certificate (see clause 2.31). Despite the respondent having failed to complete by the revised completion date, and notwithstanding the mandatory terms of clause 2.31, no new Non-Completion Certificate was issued by the Architect in circumstances in which it was necessary to do so (i.e. practical completion had not been achieved on or before the revised completion date). That omission was fatal to the appellant's right to continue to withhold liquidated damages.

[18] The terms of clause 2.32 are set out above (see paragraph [7]). Whilst the Employer's (in this case, the appellant's) obligation in terms of clause 2.32.1.2, to notify the Contractor (in this case, the respondent) that he may require payment of, or may withhold or deduct, liquidated damages, remains satisfied in relation to the Works notwithstanding the cancellation of the relevant Non-Completion Certificate and issue of any further Non-Completion Certificate (unless the Employer states otherwise in writing), the contract proceeds on the understanding that "where necessary" a new Non-Completion Certificate shall be issued. The clear and ordinary meaning of clause 2.32 is that, in the absence of a Non-Completion Certificate, the Employer has no right to liquidated damages. The

conclusion reached by the sheriff at paragraph [108] of his judgment was the correct one. Contrary to the appellant's submission, the sheriff's interpretation does not have the effect of cancelling "the whole idea of late completion on the part of the respondent". The respondent was late completing, however, the appellant has no entitlement to liquidated damages for the period of delay in the absence of a Non-Completion Certificate.

[19] Significant reliance was placed by the appellant upon the decision of the House of Lords in *Reinwood Ltd supra*. In our view, it does not assist the appellant in the circumstances of the present case. It must be borne in mind that the central issue in *Reinwood Ltd* was the validity of a purported determination by the Contractor. The underlying facts were that the completion date was 18 October 2004, and liquidated and ascertained damages ("LADs") were agreed. On 7 December 2005 the Contractor applied for an extension of time. On 14 December 2005 the Architect issued a Certificate of Non-Completion. On 11 January 2006 the Architect issued an interim certificate in terms of which the net amount payable was £187,988. The final date for payment of that interim certificate was 25 January 2006. On 17 January 2006 the employer served a notice on the Contractor stating that it intended to deduct LADs from moneys due to it under interim certificates. It also issued a withholding notice stating that it proposed to withhold £61,629 in LADs from the sum due under the 11 January 2006 interim certificate and that it proposed to pay £126,359, the difference between the certified amount (£187,988) and the claimed LADs (£61,629). On 20 January 2006 the employer paid that amount.

[20] The payment made by the employer was made on time and in accordance with the employer's then rights in accordance with the parties' contract. On 23 January 2006, the Architect granted an extension of time until 10 January 2006. That grant negated the earlier

Non-Completion Certificate and was made prior to the final date for payment of the 11 January 2006 interim certificate, albeit it was made after payment had been made.

[21] The Contractor wrote to the employer stating that the effect of that extension was to reduce the LADs to which it was entitled to £12,326 and that the amount due under the January interim certificate was therefore £175,662. The employer made no further payment, and on 26 January 2006 the Contractor served notice of default. The Contractor thereafter claimed to be entitled to determine the contract on grounds including the alleged failure of the employer to pay the sum due under the interim certificate in full by the final date for payment. The judge held that the Contractor's notice of default had been valid and that, accordingly, it had been entitled to determine the contract. The Court of Appeal allowed an appeal by the employer.

[22] In dismissing the appeal, the House of Lords held that the employer had then been entitled to make the deduction from the sum due under the interim certificate that it had made in respect of the LADs based on the December Non-Completion Certificate; that, although the effect of the January extension had been to "cancel" the December Non-Completion Certificate, such cancellation had not, on the true construction of the contract, and in particular the provisions under which the payment had been made, been retrospective in effect; payment under an interim certificate was due as at the date of its issue and 25 January 2006 had been the "final date for payment", not the date on which payment had become due. Accordingly, the grant of the January extension of time after the employer had served the withholding notice and paid on the assumption that it had the right to rely on the December Non-Completion Certificate had not deprived it of the right to rely on that certificate. The Contractor had not been entitled to determine the contract.

[23] The position in relation to the deduction of liquidated damages in the absence of a valid Non-Completion Certificate has been clear for a considerable period of time, see for example *A. Bell & Son (Paddington) Ltd* v *CBF Residential Care and Housing Association* [1989] 46 BLR 102. Nothing said by the House of Lords in *Reinwood Ltd* changed that longstanding and well understood position.

The second question

[24] The second question in the appeal is did the sheriff err in law by refusing to dismiss the respondent's action because of an absence of a relevant and specific basis to establish the extent of the respondent's entitlement and the true value of their work?

[25] Whilst the matters relevant to this issue are touched upon in the sheriff's judgment, the issue itself is not addressed by him. It appears that this court had the benefit of a fuller argument on this.

Submissions for the appellant

[26] The appellant argues that the sheriff failed to recognise the inherent irrelevancy of the proposed declarator in a context where the Final Certificate will remain standing and unaffected by any operative order of the court. Further, the sheriff failed to recognise that no operative order is sought in connection with the extension of time to which the respondent claims it is entitled.

[27] Whilst recognising the contractual effect of the Final Certificate, the sheriff failed to follow through his conclusion in that regard as it will fall to be affected by the orders sought by the respondent. The respondent has not sought reduction of the Final Certificate. The declarator the respondent seeks is inherently flawed because the contract deems the sum

recorded on the Final Certificate to be binding and conclusive. No substantive challenge has been mounted against the Final Certificate. Accordingly, the proposed declarator cannot co-exist alongside the Final Certificate. This renders the proposed order ineffectual and, therefore, irrelevant.

[28] The approach which a party such as the respondent is required to take in a case such as this is set out by Lord Drummond Young in *Karl Construction Limited* v *Palisade Properties plc* 2002 SC 270 at paragraph [20]. In order for the court to give effect to a review of the Final Certificate, as proposed by the respondent, it must set it aside. The respondent has not asked the court to do so. Even were the respondent to be successful, the result of the action as framed would be a contradictory set of instruments purporting to regulate the parties' rights: the declarator and the Final Certificate. In this state of affairs, the respondent's averment that the "Final Certificate fails to acknowledge the full entitlement of the [respondent] to loss and expense, variations, extension of time and relief from liquidated and ascertained damages" is irrelevant. The Final Certificate takes proper account of the position and that will remain the case unless and until the court is asked to interfere with that certificate. The court will be unable to effect any substantive interference with the certificate here because of the manner in which the action has been framed.

[29] No operative order is sought by the respondent in connection with the extension of time to which it claims it is entitled. Again, the position as between the parties rests with the extension of time of five weeks awarded on 11 May 2018 (see paragraph [6] above). The respondent has not sought any declarator in relation to that award. It has not asked the court to find and declare that a longer extension ought to have been awarded. No effective mechanism has been brought into play by the respondent which would operate to alter the legal position which currently rests between the parties in terms of the contract. The sheriff

failed to recognise this. The scheme of the contract and the effect of the various certificates and awards do not recognise any entitlement to an extension of time and, therefore, the additional sums sought by the respondent. The respondent has to establish that entitlement and obtain orders which will serve to alter the position presently recognised by the contract. The respondent has not sought effective orders in this connection. The court has not been furnished with the necessary machinery to give effect to the outcome desired by the respondent. The action should have been dismissed as irrelevant.

Submissions for the respondent

[30] A crave can only be competent or incompetent – not irrelevant. Reduction of the Final Certificate is unnecessary. It is only required where some bar or the other stands in the way of payment. That is not the case here. As it has been timeously challenged, the Final Certificate is not conclusive in relation to payment. A decree for payment in favour of the respondent would act as an amendment to the Final Certificate.

[31] The appellant's challenge to the Final Certificate is concerned with securing payment of the Contract Sum (as adjusted) in terms of the contract. The length of the extension of time to which the respondent considers it is entitled is of absolutely no relevance. It does not affect the adjusted Contract Sum, save for acting as a multiplier for completion of any prolongation claim. The length of any extension of time will have to be proved in the process of determining a monetary award, but it does not require its own unique declaratory award by a sheriff.

Decision

[32] There is, in our opinion, no contradiction in the approach adopted by the respondent in this case. No question of relevancy arises in relation to the first crave. In effect, the respondent seeks declarator in relation to the sum that ought to have been certified as due for payment under the contract and for payment of the difference between that sum and the sum which has been paid. Reduction of the Final Certificate is unnecessary as, standing the challenges mounted by the respondent, the Final Certificate is not conclusive in relation to those matters. The Final Certificate is not a bar to payment of the further sums claimed by the respondent, should it succeed in establishing its entitlement to them. The appellant's argument in this regard is misconceived. The sheriff was correct not to dismiss the action on this ground. There seems to us to be nothing within what was said by Lord Drummond Young at paragraph [20] of his opinion in *Karl Construction Limited* that prescribes the approach which a party, such as the respondent, is required to take in a case such as this. Indeed, the position seems clear from the passages quoted therein from the decision of the House of Lords in *Beaufort Developments (NI) Ltd* v *Gilbert-Ash (NI) Ltd* [1999] 1 AC 266 that, in a case such as the present one where a Final Certificate has been timeously challenged by way of court proceedings, the ordinary powers of the court in regard to the examination of the facts and the awarding of sums found due to or by either party is all that is required. Whilst the power of reduction is available to the court, it does not require to be deployed in the present case.

The third question

[33] The third question is whether the sheriff erred by holding that the respondent has pled a relevant entitlement to loss and expense under the contract in circumstances where

the respondent has not offered to prove purification of the contractual conditions precedent in this connection or otherwise specify the basis for its entitlement?

The sheriff's decision

[34] The sheriff's judgment addresses the loss and expense issue at paragraphs [115] to [117], which are in the following terms:

> "[115] Finally I turn to deal with the issue of the [respondent's] averments anent the Scott Schedule. This case has been raised within the commercial procedure at Glasgow Sheriff Court. The purpose of the procedure and the resources devoted to it, is to resolve disputes expeditiously. This can only happen when parties embrace the procedure. Here the [appellant] takes exception to the Scott Schedule produced by the [respondent]. The Scott Schedule is a substantial lever arch file of some detail. I am unable to determine the extent of its significance to the matter in dispute without proof. However, for the purposes of the debate, it was evident that the [appellant] had refused to cooperate in the production of the Scott Schedule. The submission was to the effect that the Scott Schedule had not been incorporated within the [respondent's] pleadings; that it did not fit the requirements for a Scott Schedule (with merely one example of what that meant) namely that the [appellant] could not follow the Scott Schedule summary at tab one. The solicitor for the [respondent] had little difficulty explaining that the sub-total £751,805.33 was the valuation as per the Final Certificate; that the payment notice totalling £839,295.69 represented crave one and that the balance including VAT of £145,308.43 was the total of craves two and three.
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> [116] In short, if the [appellant] had been in any doubt as to the significance of the summary, a discussion, email or letter to the [respondent's] solicitor would have resolved the issue. Again, had the [appellant] been unsatisfied as to the terms of the Scott Schedule or the [respondent's] response to its enquiries, an email to me would have resulted in an appropriate hearing and, if necessary, the appropriate order. Instead the [appellant] chose to ignore the terms of the Scott Schedule until the debate. It does so at its peril. I was unimpressed.
>
> [117] This is a commercial action arising out of a construction contract. I do not consider that there is merit in the [appellant's] submission in relation to the specification by the [respondent]. The [respondent] perils its case on the Final

> Certificate. The Scott Schedule details the basis for its claim to additional payment. The [appellant] has chosen to ignore the Scott Schedule. In *ICI plc* v *Bovis Construction Ltd* the court considered that the Scott Schedule was inadequate, but that did nor debar the plaintiffs from pursuing their claim. I cannot say that the [respondent's] pleadings here are irrelevant or lack specification to such an extent that it will be unable to prove its entitlement to crave three. Accordingly, I propose to allow a proof before answer in relation to craves one and three of the principal action, with preliminary pleas No 1 for the [respondent] and No 1 for the [appellant] being left outstanding. Preliminary plea No 3 for the [appellant] (that the [respondent's] averments should not be admitted to probation) will be repelled."

Submissions for the appellant

[35] The appellant argues that the sheriff erred in failing to hold that the respondent had not pled a relevant entitlement to (i) an extension of time; and (ii) payment in respect of claims for loss and expense.

[36] Extension of time claims are regulated by clause 2.27. That clause sets out a number of conditions precedent which require purification before an entitlement to an extension arises. The sheriff erred in failing to hold that the respondent has not pled purification of these conditions precedent. Without doing so, the respondent will be unable to establish an entitlement to an extension of time. The Scott Schedule relied upon does not set out an adequate basis for establishing the purification of the conditions precedent.

[37] Claims for loss and expense are regulated by clause 4.23. Again, this sets out a series of conditions precedent which the respondent must purify before it can create an entitlement. Again, the sheriff erred in failing to hold that the respondent has not pled purification of these conditions precedent or the necessary information and details which would allow the claim to be assessed and sums due ascertained.

Submissions for the respondent

[38] The respondent contends that the alleged pleading inadequacies raised by the appellant are unfounded. The Scott Schedule incorporated within the action clearly describes the areas in contention, clearly outlines the relevant difference in respect of the sum certified against the sum sought and is not a unique format that is not or rarely used by construction professionals. The respondent is required to prove the differences between the Contract Sum as it should stand and the sum that it has in fact been paid. The Scott Schedule clearly outlines these differences in a commercial manner. Adequate pleading in respect of specification requires the appellant to be able to understand the case that it is required to meet in order that it will not be taken by surprise at proof, see *MacDonald* v *Glasgow Western Hospitals* 1954 SC 453 at 465. The appellant has ample pleadings upon which to prepare and to not be surprised at proof.

Decision

[39] The first issue for determination by the Court is whether the sheriff erred by holding that the respondent has pled a relevant entitlement to an extension of time. The sheriff's judgment is silent on this matter. Standing the fact that the respondent does not, in fact, seek an extension of time that is unsurprising. The Final Certificate has not been challenged in relation to the extensions of time granted. It is, therefore, by virtue of clause 1.9.1.3, conclusive evidence that all and only such extensions of time, if any, as are due under clause 2.28 have been given. The sheriff did not err in this regard.

[40] The second issue for determination by the Court is whether the sheriff erred by holding that the respondent has pled a relevant entitlement to loss and expense under the

contract. The starting point in a consideration of this issue is the respondent's pleadings. These are to be found within article 3 of condescendence:

> "… A number of specific Architect Instructions were issued leading up to and after the Completion Date of 28 October 2016 for which the Pursuer would be entitled to an extension of time together with loss and expense thereof per clause 4.23 of the parties Contract. These included revisions of drawings, change of specification of fittings and additional structural works. The individual items are specified together with their date of instruction and description in Tables of Variations and Architect Instructions, copies of which are produced and terms thereof held incorporated *brevitatis causa*. The difference in valuation between the Pursuers and the Defenders is the sum sued for. … The Pursuers have an entitlement to Loss and Expense, this dispute concerns the value. A Scott Schedule which details the Architect Instructions which led to any resultant prolongation, loss and expense breakdown incurred thereof and a schedule of payments is produced and the terms of which are held incorporated *brevitatis causa* …"

[41] The action is a commercial one proceeding under Chapter 40 of the Ordinary Cause Rules. It is fair to say that the sheriff was not impressed with the approach taken by the appellant at the debate before him. That is clear from the terms of paragraph [116] of his judgment (see paragraph [34] above). The rules which govern commercial procedure make specific provision in relation to points of specification – see rule 40.12.(2). Whilst presented as a matter of relevancy, the nature of the appellant's complaint is, in truth, one directed to specification – the alleged failure to aver compliance with clause 4.23. Whether, and to what extent, further specification of the respondent's claim was required should have been addressed by the appellant at a Case Management Conference. The sheriff, who has responsibility for the expeditious resolution of the action, was unable to say that the respondent's pleadings are irrelevant or lack specification to such an extent that it will be unable to prove its entitlement to crave three. In commercial proceedings, it is appropriate that we have proper regard to the views of the sheriff in relation to what is, in effect, a point

of fair notice. The appellant must be able to understand the case that it is required to meet in order that it will not be taken by surprise at proof, see *MacDonald supra*.

[42] In our view, the respondent's pleadings, taken with the documents incorporated therein, provide adequate notice. The sheriff was entitled to allow a proof before answer. He did not err in doing so. That conclusion does not in any way detract from the fact that the requirements of clause 4.23 will require to be met by the respondent to establish an entitlement to the reimbursement of direct loss and / or expense.

Disposal

[43] We shall refuse the appeal and adhere to the interlocutor of the sheriff. The appellant shall be found liable to the respondent in the expenses of the appeal. We shall certify the appeal as suitable for the employment of junior counsel. Whilst the Court was greatly assisted by the submissions of senior counsel for the respondent, we have reached the view that the nature of the issues argued in the appeal were not of such complexity as to justify sanction for the employment of senior counsel.