OUTER HOUSE, COURT OF SESSION

[2017] CSOH 132

CA3/17

OPINION OF LORD BANNATYNE

In the cause

MUIR CONSTRUCTION LIMITED

Pursuer

against

KAPITAL RESIDENTIAL LIMITED

Defender

Pursuer: Manson; Brodies LLP
Defender: Duthie; Burness Paull LLP

18 October 2017

Introduction

[1] The pursuer trades as a commercial contractor in the construction sector. In or around 2014, the defender wished to procure the design and construction of a new-build housing scheme at Admiralty Road, Rosyth ("the project"). The pursuer was selected as the principal contractor for the project.

[2] The pursuer and defender entered into a Design and Build Contract in relation to the project on 12 and 14 August 2014 ("the Construction Contract").

[3] During the course of the project disputes arose between the parties on a range of matters. In particular, disputes arose in relation to (1) purported defects arising from the

pursuer's work on the project and (2) the valuation and payment of the pursuer's final account in terms of the Construction Contract.

[4] The parties referred questions arising from those disputes to adjudication. The parties also engaged in litigation in this court under reference CA221/15 relative to the disputes and the conduct of the adjudications.

[5] The pursuer and the defender elected to attempt to procure a global resolution of the various disputes which arose from the project. In the early part of 2016, the parties negotiated and then entered into a contract regulating the manner in which the disputes were to be resolved. This contract was dated 7 and 8 April 2016 ("the Settlement Contract"). The Settlement Contract inter alia sought to deal with the circumstances in terms of which the defender was entitled to retain money pending completion by the pursuer of its contractual obligations.

[6] On 21 December 2016 the defender issued to the pursuer what purported to be a pay less notice ("PLN").

[7] The defender has retained and continues to retain the sum of £102,208.59 ("the retention sum").

[8] The pursuer in the present action seeks payment from the defender of the retention sum. The defender denies liability to make payment of the retention sum to the pursuer. In addition the defender counterclaims for damages.

The Issues

[9] The action was set down for Debate, in order to discuss the following matters:

(a) The defender's right to exercise equitable retention.

(b) Express waiver in terms of the Settlement Contract.

(c) The validity of the PLN served by the defender.

(d) The relevancy and specification of the counter claim.

[10] The first issue was argued before me at some length. However, in the course of his submissions Mr Duthie advised that the defender was no longer insisting upon its argument based on the concept of equitable retention.

[11] In addition to the Debate I was also addressed with respect to the pursuer's motion for summary decree.

The Material Provisions of the Contracts

Retention

[12] The provisions regarding retention are contained in Clause 6 of the Settlement Contract which provides as follows:

> "6.1 Subject to Clause 6.2 the Retention shall be paid by Kapital to Muir upon the earlier of:
>
> 6.1.1 the issue of the Notice of Completion of Making Good Defects under the Contract; or
>
> 6.1.2 31 December 2016.
>
> 6.2 If Kapital is of the view that any defects remain as at the date for payment of the Retention, Kapital may only issue a Pay Less Notice and withhold payment of any retention in accordance with the Contract if the following additional/conditions are satisfied:
>
> 6.2.1 Kapital has notified Muir of any defects and given Muir the opportunity to rectify the same;
>
> 6.2.2. Kapital has an Expert Report confirming that any defects are Muir's responsibility; and
>
> 6.2.3 Kapital has undertaken the work to remedy the defects and has already incurred the cost sought to be withheld and can evidence this to Muir."

[13] For the purposes of the argument before me the relevant date in terms of Clause 6.1 was 31 December 2016.

[14] Clause 4.10.2 of the Construction Contract sets out the contractual requirements for a valid PLN and provides as follows:

> "A Pay Less Notice
>
> 1 (where it is to be given by the Employer) shall specify both the sum that he considers to be due to the Contractor at the date the notice is given and the basis on which that sum has been calculated.
>
> 2 (where it is to be given by the Contractor) shall specify both the sum that the Contractor considers to be due to the Employer at the date the notice is given and the basis on which that sum has been calculated."

Waiver

[15] The provisions regarding waiver are contained in Clauses 8 and 9 of the Settlement Contract and these provide as follows:

> "**8 RELEASED CLAIMS**
>
> 8.1 Subject to the other provisions of this Settlement Agreement, upon the Parties executing this Settlement Agreement, on behalf of itself and its Related Parties each Party hereby irrevocably waives any and all past, present and future claims, rights, demands, and set-offs, whether in this jurisdiction or any other, whether presently known to the Parties or to the law, whether past, present or future, competent to it on any basis against the other Party or the other Party's Related Parties arising out of or in connection with the Contract, the Works, the Dispute and all other matters relating thereto (and said claims to include, without prejudice to the foregoing generality, any and all claims of whatever nature, whether arising in contract, breach of contract, delict, quasi-contract, at common law, pursuant to statute or otherwise) and each Party confirms that the entering into of this Settlement Agreement is in full and final settlement of any such claims (the **'Released Claims'**).
>
> **9 RESERVED CLAIMS**
>
> 9.1 This Settlement Agreement is made strictly under reservation of and without prejudice to:

9.1.1 Muir's obligation to correct any defects, shrinkages or other faults in the Works in accordance with Clause 2.35 of the Contract;

9.1.2 Kapital's right to claim against Muir in respect of latent defects which may become patent after the date of execution of this Settlement Agreement (irrespective of whether or not the cause of such latent defects occurred prior to or post the date of execution of this Settlement Agreement);

9.1.3 Kapital's right to claim under any Premier Guarantee warranties issued in respect of the Works; and

9.1.4 Muir's obligation to maintain insurance in terms of Section 6 of the Contract including but not limited to its remaining obligations under the Contract relative to professional indemnity insurance."

[16] Clause 2.35 of the Construction Contract referred to at Clause 9.1.1 of the Settlement Contract is in the following terms:

> "If any defects, shrinkages or other faults in the Works or a Section appear within the relevant Rectification Period due to any failure of the Contractor to comply with his obligations under this Contract:
>
> 1 such defects, shrinkages and other faults shall be specified by the Employer in a schedule of defects which he shall deliver to the Contractor as an instruction not later than 14 days after the expiry of that Rectification Period; and
>
> 2 notwithstanding clause 2.35.1, the Employer may whenever he considers it necessary issue instructions requiring any such defect, shrinkage or other fault to be made good, provided no instructions under this clause 2.35.2 shall be issued after delivery of a schedule of defects or more than 14 days after the expiry of the relevant Rectification Period."

Material Dates

[17] It is perhaps convenient at this stage to set out certain dates which were of materiality in respect to the discussion before the court. These dates are:

1. The Settlement Contract was executed on 7 and 8 April 2016.

2. The rectification period ran from 21 July 2015 to 20 July 2016.

3. The date of issue of the PLN was 21 December 2016.

4. The date on which the retention sum was to be paid by the defender to the pursuer in terms of Clause 6 was 31 December 2016.

5. These dates were not a matter of contention between the parties.

The Pursuer's Argument

[18] The first argument advanced by Mr Manson can be summarised as follows: the defender had not purified the contractual conditions required of it in order to withhold. This chapter of his submissions involved a number of detailed and separate attacks on the validity of the PLN.

[19] In expanding upon this contention Mr Manson first argued that the satisfaction of the conditions contained in Clause 6.2 of the Settlement Contract turned on the form and content of the PLN.

[20] Mr Manson submitted that the court should test the content of the PLN by reference to: (1) the demands made of a PLN by the Construction Contract and Settlement Contract and (2) the "reasonable recipient" test as summarised by Popplewell J in *QOGT Inc* v *International Oil and Gas Technology Limited* 2014 EWHC Civ 1628 paragraphs 109 to 113.

[21] Turning to the content of the PLN he referred in particular to the last paragraph on page 1 which stated this:

> "We consider that the sum that is due on the date this notice is given is: Zero (£0.00) (the 'Amount Due') …".

[22] It was his position that neither in the PLN itself or the documentation accompanying it, upon which the defender sought to rely, was any basis given for the zero sum figure

arrived at as being the amount due in terms of the PLN, as demanded by Clause 4.10.2 of the Construction Contract.

[23] The requirement for such a basis to be set forth is one of the two essential features of a valid PLN. This submission was made under reference to *Surrey and Sussex Healthcare NHS Trust* v *Logan Construction (SE) Limited* 2017 EWHC 17(TCC) at paragraph 53. Accordingly, the PLN issued was not valid. The necessary precondition for the issuing of a valid PLN had not been satisfied.

[24] He argued that support for the position he was putting forward could be found in the approach of Lord Macfadyen in *Maxi Construction Management Limited* v *Mortons Rolls Limited* 2001 ScotCS 199 at paragraph 29.

[25] In conclusion, if there was no valid PLN due to a failure to provide the basis for the zero sum then there was no basis for the retention.

[26] The second detailed argument advanced as regards the validity of the PLN was that Clause 6.2.3 of the Settlement Contract had not been fulfilled.

[27] Mr Manson's position was that the defender's averments did not relevantly aver that the defender had "already incurred the cost" to remedy the defects as at the requisite date, 21 December 2016, the date on which the PLN was issued. Beyond the issue of relevancy it was his position that in terms of his summary decree motion it was clear from the various documentation relied upon by the defender that it was bound to lose with respect to the argument being advanced by the pursuer that Clause 6.2.3 had not been satisfied.

[28] He turned to look at the averments in answer 38 of the defences which set out the defender's position with respect to this particular issue. Answer 38 is in the following terms:

> "Explained and averred that the defender has undertaken work in relation to the defects at the substation. The cost of doing so has been approximately £33,084.80, including costs of £26,390 paid to A King Contracts Limited in or around December 2016. *Separatim*, the defender has undertaken work in relation to the cycle path. The

> pursuer was obligated to provide the cycle path in an adoptable state up to the underlayer of tarmacadam. The design of the cyclepath included a deliberate camber to assist with drainage. The pursuer's work on the cyclepath resulted in a cyclepath with a bulge in the centre. The cycle path was designed to drain water to one side of it. The pursuer did not dig deep enough for the substrate levels for the cyclepath. An inspection from Fife Council highlighted the defects with the cyclepath. The defects needed to be rectified before the cyclepath could have the top layer of tarmacadam added to it. The cost of carrying out the work to date is £25,177.60, including costs of £21,580 paid to A King Contracts Limited."

[29] With respect to the cyclepath Mr Manson's argument was this: there was no averment offering to prove that the costs of carrying out work were incurred prior to the requisite date in terms of Clause 6 of the Settlement Contract. The averments only offered to prove that the cost had been incurred prior to the date at which the averment was made, which was some significant time after the requisite date (the date of the averment was not a contentious issue).

[30] In advancing the above position Mr Manson contended that "cost incurred" on a proper construction meant that whereas here a subcontractor was used to carry out the work, the defender had paid the subcontractor for the work by 21 December 2016.

[31] Beyond this pure relevancy argument, Mr Manson in terms of his summary decree motion said this: looking to certain further documentation lodged on behalf of the defender, and in particular having regard to the terms of the affidavit of Keith Punler (the controlling mind of the defender) there is an acceptance that Kings (the subcontractor) were not paid by the defender with respect to said work until February 2017. In addition there is an acceptance that not all of the work to the cyclepath which is the subject of the invoice issued by Kings on 17 December 2016 was in fact carried out by the requisite date.

[32] Having regard to the above parts of this affidavit it was apparent that the defender was bound to lose with respect to this part of his case.

[33] Mr Manson advanced certain further arguments which went to the validity of the PLN. It was his position that the terms of the expert report produced in terms of Clause 6.2.2 of the Settlement Contract did not satisfy that part of the clause.

[34] Mr Manson analysed the expert report in this way: he did not dispute that it was an expert report. However, it did not confirm that there were defects which were the pursuer's responsibility.

[35] Section 2 of the report did no more than set out the terms of the Construction Contract and making certain comments upon it.

[36] Sections 3 and 4 referred to incomplete works not to defects. He submitted that there was a clear distinction to be made in terms of the contracts between defects and incomplete works.

[37] Section 5 was not prayed in aid in the PLN.

[38] Section 6 was heavily caveated by the use of words such as "if, but and maybe".

[39] The letter from the defender accompanying the PLN does nothing to improve the position. It is heavily caveated and introduces a range of contingencies which would inject uncertainty into the mind of the reasonable recipient. The reasonable recipient would not be able to assess the nature of the defects and the purported breach nor what was required of him to remedy the same.

[40] It was his position that the parties intended by Clause 6.1.2 that the defender could not baldly assert defects to avoid paying. The intention of the clause was that any report produced should clearly identify what the defects were and what response on the part of the pursuer was required. Applying Justice Popplewell's approach the pursuer as the reasonable recipient could not understand the report. He described the report as no more than a box ticking exercise.

[41] The next detailed branch of Mr Manson's argument turned on the issue of waiver.

[42] There were two broad chapters to this branch of the argument:

(a) the pursuer's position is that many of the claims founded on by the defenders were incomplete works and not defects. This was the same point he had made earlier when discussing the retention issue.

[43] Reserved claims in terms of Clause 9 related to defects and accordingly the issues founded upon not being defects for the reasons which he had earlier advanced meant that they had been waived.

[44] The second chapter of his argument was this: assuming the issues raised were defects he made the following submissions under reference to the defender's averments in the Scott Schedule which had been lodged in process. According to the defender's position in the Scott Schedule: first at item 5 the defender makes averments regarding the cycle track:

> "Factual position: Muir was notified by Hardies during 2015 that the cycle path remained an incomplete item (KRL document 21) and on 15 May 2015 was advised that there were issues with the pathway that required to be addressed before it could be made available to the public."

[45] Having regard to the above the claim was not latent as at the relevant date in terms of Clause 9 of the Settlement Contract nor did it appear in terms of Clause 2.35 of the Construction Contract during the rectification period.

[46] Equally with respect to the Scott Schedule at paragraph 6 the following averment was made by the defender regarding "Additional work to facilitate adoption of gas governor and electricity substation":

> "During the construction phase, Muir was advised of the requirement for additional builders work to satisfy Energetics Ltd... on 22 September 2014 (KRL document 31)."

[47] Accordingly this was not a latent defect at the requisite date and it did not appear during the rectification period.

[48] Accordingly it was his position that these were, if defects, claims which had been waived.

[49] Mr Manson's argument then turned to look at the other items set out in the Scott Schedule.

[50] With respect to items 1, 3 and 4 in the Scott Schedule Mr Manson on the basis of the defender's factual averments under each of these heads advanced waiver arguments on the same basis as with respect to items 5 and 6.

[51] Mr Manson then turned from the issue of waiver to advance a number of arguments with respect to the relevancy and specification of the defender's averments contained within his pleadings and in particular as set out in his averments in the Scott Schedule. Mr Manson first submitted that the claim as set out in paragraph 1 of the Scott Schedule which related to snagging defects: contained no specification whatsoever of the remedial work required or how the sum claimed against each item has been calculated.

[52] Beyond the above the claim in terms of paragraph 1 of the Scott Schedule also in part sought to recover the cost of the employment of a clerk of works. It was his position that this claim was not envisaged by the terms of the contract and was not a reasonably foreseeable, natural and ordinary incident arising from the asserted breach *(Johnston* v *W H Brown Construction (Dundee) Ltd* 2000 SLT 791).

[53] Turning to item 2 on the Scott Schedule the argument advanced was this: the claim was one which had not crystallised in any meaningful way. The claim was contingent. It related to the adoption of roads by Fife Council. His argument, as I understood it, was to

the effect that the claim had not crystallised as there was no decision by the roads authority that they were definitely rejecting the roads. Until that happened no claim could crystallise.

[54] As regards items 3 and 4 on the Scott Schedule Mr Manson submitted that the claim for £28,650.67 as set out in item 3 was contingent and the claim for £54,691.13 as set out at item 4 was contingent.

[55] In the course of his reply Mr Duthie said that these two particular matters though referred to in the Scott Schedule did not form part of the defender's claim. As I understand it he accepted that these "claims" were contingent. I accordingly do not require to further deal with this issue.

[56] Also with respect to items 3 and 4 the pursuer submitted that these had been waived given the factual averments which were to the effect that they had arisen prior to the commencement of the rectification period.

[57] The final argument advanced by Mr Manson on behalf of the pursuer with respect to the Scott Schedule related to the ninth item.

[58] The pursuer's claim was to recover the costs of carrying out intrusive examinations of all properties on the site and make good defects in all of the properties on the site in relation to plumbing works. The areas said to be affected by these defects were said to be joints in pipes which were situated behind walls. The total claim was £71,300.

[59] The justification for this work was set out by the pursuer as follows: in one property following upon an intrusive examination silver tape was found to have been used in order to connect two pipes. The joint had failed causing the pipe to leak due to the use of silver tape. There had been a separate problem where silver tape had been found connecting pipes in a different area in 15 properties.

[60] Mr Manson made two detailed submissions relative to this claim.

[61] First the pursuer in their averments believe and aver that in all 61 properties on the site silver tape had been used and that therefore there would be a requirement to carryout intrusive inquiries in all of these properties and thereafter to carryout repairs in all of these properties. His position was that there was no proper factual averment for this position. The factual averments founded on were (a) the discovery of silver tape as a connecting material in one house behind a wall and (b) the discovery of silver tape on the pipe work of 15 houses (a separate problem, which had been dealt with at an earlier stage and did not form part of the claim in the current action).

[62] It was not known that silver tape had been used in any of the other 61 properties, but the defender wished to inspect each of these, and claimed a sum for repair in relation to each of these although the defender did not know if any other silver tape would be found.

[63] It was his position that these averments were irrelevant.

The Reply on behalf of the Defender

[64] As regards the validity of the PLN Mr Duthie's position was that it was valid.

[65] The approach to the construction of such a document he submitted was this: it falls to be construed in the manner of a reasonable commercial person adopting a contextual, purposive and common sense construction. An overly formal approach to construction of a contractual notice should be avoided: see *Hoe International Limited* v *Andersen* 2017 CSIH 9 *per* Lord Drummond Young at paragraphs 22 to 24.

[66] A common sense, practical view of the contents of a pay less notice should be taken by the court: an unnecessarily restrictive interpretation of such a notice is not appropriate. Provided that the notice makes tolerably clear what is being held and why, the courts will generally not strive to intervene or endeavour to find reasons that would render such a

notice invalid or ineffective: see *Surrey and Sussex Healthcare NHS Trust* v *Logan Construction (SE) Limited* 2017 EWHC 17(TCC) *per* Mr Alexander Nissen QC at paragraphs 56 to 66.

[67] He submitted that the PLN should properly be considered as comprising: (1) the formal letter from the defender to the pursuer of 21 December 2016; (2) the formal pay less notice; (3) the note of outstanding snagging; and (4) an opinion from Mr Williamson of Hurd Rolland Partnership, Chartered Architects. Collectively those four documents allow the defender to satisfy the requirements of Clause 6.2 of the Settlement Contract.

[68] The defender had on numerous occasions notified the pursuer of the defects in the works in the vicinity of the substation and gas governor house and the cycleway footpath along the burn side. The defects and incomplete works in respect of the cycleway footpath along the burn side are detailed at section three of the report. The defects and incomplete works in the vicinity of the substation and gas governor house are detailed at section four of the opinion of Mr Williamson. Properly construed, it is tolerably clear from the report that the defects are the pursuer's responsibility. The requirements of Clause 6.2.2 of the Settlement Contract are therefore satisfied.

[69] He submitted that the extent of detail necessary for the notice to be valid depended on the circumstances of each case. Whereas here the retention amount is small and a very large amount of work is necessary for defects to be remedied it is enough for the defender to say the remedying of the defects will require a sum well in excess of the retention sum. Thus the basis upon which in this case there is a zero sum in the notice is sufficiently stated.

[70] With respect to the distinction which the pursuer sought to draw between "a defect" and "incomplete works" he baldly asserted there was no distinction between the two.

[71] Turning lastly to Clause 6.2.3 Mr Duthie argued this: the invoice relative to the work was issued on 17 December and was due for payment by 31 December. Accordingly the cost had been incurred by 31 December. This submission was made under reference to paragraph 17 of the affidavit of Mr Punler. Though the affidavit made it clear that payment was not made until some time in February this was not relevant when considering whether Clause 6.2.3 had been fulfilled. For costs to have been incurred in terms of the clause it was sufficient for the defender to have incurred the liability to pay the cost and for that liability to have crystallised by the requisite date. Here invoices had been rendered on 17 December 2016 and were due for payment on 31 December 2016. Accordingly on the 31 December 2016 the debt was ascertainable and immediately payable. In support of this proposition he directed my attention to: *Charter Reinsurance Co Ltd (In Liquidation)* v *Fagan* 1997 AC 313 and *Burr* v *OM Property Management Ltd* 2013 1 WLR 3071.

[72] So far as when the work was actually carried out by the defender's contractor it was his position that having regard to the terms of the affidavit and the other documents it was clearly a matter of dispute as to when work was carried out and in these circumstances this matter required to be dealt with at Proof and could not be dealt with in terms of either a relevancy plea or a summary decree motion.

[73] In conclusion he submitted that for the foregoing reasons the PLN was validly issued.

[74] With respect to the issue of waiver his general position was this: the pursuer seeks to place a far broader scope on the waiver provision than it could properly bear.

[75] He accepted that Clause 8 was in the widest possible terms and that to avoid its effect the defender had to bring matters within the ambit of Clause 9.

[76] His substantive argument with respect to this in summary was: it did not matter in terms of Clause 9.1.1 that defects had existed and been drawn to the pursuer's attention by the defender prior to the commencement of the rectification period. That was of no relevance on a proper construction of the clause. The only issue of any relevance so far as purification of the clause was concerned was this: during the rectification period were defects intimated by the defender to the pursuer? There was no dispute that such intimation had occurred during that period and accordingly there was no question that these matters fell outwith the ambit of Clause 9.

[77] It could be seen that nothing which happened prior to practical completion was relevant as prescription could only run after practical completion.

[78] So far as the issues of relevancy and specification regarding the various matters averred within the Scott Schedule he commented as follows:

[79] With respect to item one in the schedule proper specification was given. The specification given had to be placed in context. The pursuer is the contractor who carried out the original works; all of the matters in the snagging list had been matters which were the subject of multiple items of correspondence. The pursuer was not coming cold to the matter. Thus item 1 as set out in the Scott Schedule and all other items in the schedule together with what was stated within the PLN had to be construed in that context. There are a very large number of snagging items on the list. Common sense had to be applied when considering what was required by way of specification. Although he accepted the snagging list was in abbreviated form it was his position that it was sufficient to tell the pursuer what the snagging items were and thus proper specification had been given to it.

[80] So far as the issue of the clerk of works was concerned it was a matter for Proof whether given the number and nature of the snagging items the clerk of works was necessary.

[81] With respect to item 2 he accepted that not a particularly detailed assessment had been given. However, this item was relatively minor and accordingly adequate specification was given.

[82] Turning to items 3 and 4 these were on any sensible view defects. Fair notice regarding the defender's position regarding these items had been given.

[83] Finally with respect to item 9 his position was that the factual averments when taken together were sufficient to draw the inference that all 62 properties which formed the project required to have intrusive inspections carried out and thereafter each would require to have remedial work carried out.

[84] It was his position that the claim was not contingent, it had crystallised.

[85] The opening up of the plumbing in each house was a reasonable course of action, given what had happened to date: namely the finding of a plumbing problem behind a wall in 1 property and the earlier finding of problems of a similar nature in other areas of houses in no less than 15 properties.

[86] The point raised by the pursuer he submitted was not a relevancy point, properly understood, it was rather a *quantum* argument. It should properly be dealt with at Proof.

Discussion

[87] It was not a contentious matter that the defender can only relevantly withhold payment by availing itself of the protection of a valid PLN in circumstances prescribed by

paragraph 6.2 of the Settlement Contract. In order to issue a valid PLN the conditions precedent contained in Clause 6.2 must be purified.

[88] The pursuer's first argument relating to validity of the PLN is that it does not properly specify the basis of the "zero sum". In terms of Clause 4.10.2 it is a term of the Construction Contract that the PLN will contain the basis for the sum in the PLN, namely: the "zero sum". In my view there is substantial force in the argument that no basis for the zero sum figure in the PLN is put forward in the PLN or the supporting documentation which is relied upon by the defender.

[89] From none of the information provided could the reasonable recipient work out the basis on which the zero sum figure was calculated. There is no calculation put forward which would allow the reasonable recipient to understand how that figure is arrived at. There is no specification which would allow the reasonable recipient to make any sense of the figure arrived at. The defender sets forth no figures and thus no basis substantiating the zero sum figure in the PLN or in any of the other documentation upon which it relies.

[90] With no difficulty I reject the defender's response with respect to this point. It amounted to no more than saying the sum retained is not a large one and given the number and nature of problems founded upon in the PLN the cost of remedying these would clearly amount to a figure well in excess of the retained sum and thus a basis for the zero sum figure was provided. That is not providing a basis for the figure. I am persuaded that the PLN in order to properly provide a basis needs at least to set out the grounds for withholding and the sum applied to each of these grounds with at least an indication of how each of these sums were arrived at.

[91] I believe that the conclusion which I have reached is supported by the approach of Lord Macfadyen in *Maxi Construction Management Limited* v *Mortons Rolls Limited* at

paragraph 29. There Lord Macfadyen was considering whether an interim valuation could be regarded as constituting a claim by the payee in terms of paragraph 12 of the contract. It was argued before him that:

> "Interim Valuation No. 10 was, in effect, lacking in specification. It did not "specify … the basis on which [the payment claimed] is … calculated."

[92] The court held that the submission was well founded.

[93] Paragraphs 12 provides

> "a written notice given by the party carrying out work under a construction contract to the other party specifying the amount of any payment or payments which he considers to be due, specifying to what the payments relates (or payments relate) and the basis on which it is, or they are, calculated".

[94] Accordingly the clause Lord McFadyen was considering with respect to its material parts was on all fours with that before the court in the present action.

[95] In holding the submission well founded Lord Macfadyen observed:

> "But paragraph 12 does, in my view, require specification of the basis of calculation of the new matter included in the application in question."

[96] Applying that reasoning to the matter before me the PLN did not provide a proper basis for the zero sum.

[97] For the foregoing reasons I am satisfied that the PLN is not valid and effective.

[98] The pursuer's next argument regarding validity was directed to the non-fulfilment of the provisions of Clause 6.2.3 of the Settlement Contract.

[99] He in particular argued that the defender had not: "incurred the cost sought to be withheld" by the relevant date.

[100] The pursuer's position was a short one: the words "costs incurred" meant what they said and accordingly the defender must aver that it had paid for the relevant works prior to

the issuing of the PLN in order to satisfy the condition. The defender's position was equally short: it was sufficient to satisfy this part of the clause that the defender had a liability to pay for the works in question in terms of an invoice issued on 17 December 2016 and due to be paid by 31 December 2016.

[101] The first issue which falls for determination is this: by what date, in terms of Clause 6.2 had the defender's to have "incurred the cost". On a sound construction of the clause it is by the date on which the PLN was issued, which was 21 December 2016. The preamble to Clause 6.2 expressly provides "Kapital may only issue a Pay Less Notice… if the following conditions are satisfied". Thus in order to issue a valid PLN the cost must be incurred prior to its issue (Clause 6.2.3). Mr Duthie in the course of his submissions under this head appeared to attach importance to the date: 31 December 2016 which was the date for the payment of the retention in terms of Clause 6. However, that does not affect the date at which the validity of the PLN is tested in accordance with the clause. The relevant date for this purpose is 21 December 2016 the date of issue of the PLN.

[102] The words used in the Settlement Contract are "incurred the cost". The words chosen are not "incurred a liability to pay". Cost incurred and a liability to pay are two separate things.

[103] A cost is incurred, I believe, when payment is made. I am not persuaded that a cost is incurred in the context of this clause when an invoice is rendered with respect to the work. The defender in the course of his written submissions referred to *Burr* v *OM Property Management Ltd* 2013 1 WLR 3071. In this case the court of Appeal held that there was a clear difference between a liability to pay and a cost being incurred. I recognise that the discussion is in the context of a different provision. However, it seems reasonably clear from a consideration of the reasons for the decision that as a matter of principle the court

recognised a difference between where money is expended and thus a cost being incurred and a mere liability to pay.

[104] Moreover, support for the pursuer's construction can be found in the purpose of the provision of which Clause 6.2.3 forms a part. Clause 6 would have been understood by the reasonable man who was aware of the facts reasonably available to the parties at the time they contracted as placing further conditions on the issuing of a PLN founding retention. This I believe points to the words cost incurred meaning more than the incurring of a liability to pay and means that the money has been paid. If that is not the sound construction it is difficult to see what the clause adds to the issuing of a valid PLN.

[105] Even if I am wrong in holding that 21 December 2016 is the relevant date and rather 31 December 2016 is the relevant date I do not believe that assists the defender. In the context of the Settlement Contract and in particular having regard to the purpose of Clause 6, as I have above set out, the mere crystallising of the liability by the sums in terms of the invoices becoming due and payable is not sufficient to satisfy the condition of costs having been incurred. It would again mean that it is difficult to see what Clause 6.2.3 adds to the issuing of a valid PLN. Furthermore it would allow an invoice which does not, in part at least, represent work actually done and where payment was not made timeously but made some material time later (mid-February) to form a basis for a valid PLN. Again I do not believe the reasonable man would have understood that that was the intention of parties.

[106] In summary I am of the view that having regard to the purpose of the clause, and the terms of the clause that a proper construction of costs incurred is that the sums in any invoices for work done had to have been paid by 21 December in order to found a valid PLN.

[107] Applying the above construction to the defender's pleadings at answer 38 I observe that in relation to the cyclepath the defender does not offer to prove that any cost incurred was incurred prior to 21 December. It only offers to prove that the "cost of carrying out the work to date" – that is the date when the defender adjusted, which as I understand it was on 14 March 2017. Accordingly these averments are irrelevant.

[108] Turning to the substation the defender again fails to aver that the sums were paid by 21 December. It is not sufficient to aver that costs of £26,396 were paid "in or around December 2016". That does not support the costs being paid prior to 21 December 2016. It could equally on that averment be the position that they were paid in January 2017 which would not fulfil the condition.

[109] The discussion before the court with respect to this particular matter was not confined to looking purely at the relevancy of the specific pleadings made on behalf of the defender. The argument was also put forward that having regard to a number of other documents that in terms of the summary decree motion there was no proper defence put forward in relation to this issue.

[110] In particular reference was made to the affidavit of Keith Punler. This affidavit sought specifically to deal with the issue of when costs had been incurred in relation to the matters averred in answer 38.

[111] In the affidavit it was accepted:

[112] First at paragraph 14 as regards the cyclepath:

> "It was only the blacktop tarmacadam works, which represented 60-65% of the remaining cost of the work, that were carried out in January 2017. John Proudfoot, the Fife Council roads inspector, was unavailable in the last week of December 2016 (we had asked for him to attend the site), which resulted in a delay to those works."

[113] It is clear from the terms of the above paragraph that not all of the works which featured in the invoice had in fact been carried out until January 2017 and thus that part of Clause 6.2.3 which provided for work having been carried out prior to the relevant date was also not fulfilled.

[114] The affidavit continues at paragraph 16 where the following is said:

> "I do not dispute that the works to both areas had not been completed when Mr King's invoices had been produced by Mr King's surveyor." (emphasis added).

[115] Once more there is an admission, this time with reference to the invoices rendered in relation to both areas they did not reflect work which had in fact been carried out by the relevant date. Paragraph 16 continues:

> "I am in no doubt, however, that a firm commitment was made to A King by KRL to incur the costs stated on these invoices. Mr King's surveyor prepared the invoice, on the basis of the intended programme." (emphasis added).

[116] The above makes it absolutely clear the invoices did not reflect work which had been carried out in whole by the relevant date. These invoices on no basis could be said to properly reflect works carried out by the relevant date.

[117] It is stated at paragraph 17:

> "Having checked my records, however, I note that the sums stated on those invoices were not cleared until early to mid-February 2017. This was because there were earlier invoices outstanding at the time that required to be cleared first."

[118] The above makes it absolutely clear that costs were not incurred until early to mid-February 2017 in relation to both areas of work. This paragraph concludes with the following:

> "A King has been prepared to accommodate the delay in payment by KRL to date. Whilst we are occasionally late, we always clear our accounts."

[119] This also makes it clear that although the invoices said that they were due and payable on 31 December, this was not in fact the case.

[120] Having regard to the above parts of the said affidavit it appears to me clear that these invoices do not fulfil the terms of Clause 6 in that they do not represent work carried out or sums paid by the relevant date.

[121] A number of other documents were referred to with respect to the issue of when work was carried out including the defender's initial position in its defences which stated that the defender had neither undertaken this work or incurred the cost by the relevant date; the evidence given on commission of Mr King the contractor who had carried out this work; various other documents lodged by the defender and the terms of an explanatory note lodged on behalf of the defender. These raised disputed issues of fact and I did not believe it appropriate when considering a summary decree motion that I should consider these documents, see *Henderson* v *3052775 Nova Scotia Ltd* 2006 SC(HL) 85 *per* Lord Rodger of Earlsferry of paragraphs 18 and 19.

[122] However, on looking to the affidavit of Mr Punler on its own I am satisfied that the terms of Clause 6.2.3 were not fulfilled.

[123] Accordingly having regard to the substance of the papers before me and looking beyond the pleadings I believe the defender is bound to lose with respect to this part of its defence as it cannot show that this part of the clause was fulfilled.

[124] As regards the various other matters which the defender asserted required remedial work my understanding was that none of this work had been carried out by the defender by the relevant date and they accordingly could not form a basis for a valid and effective PLN.

[125] As regards whether the expert report fulfils Clause 6.2.2 I am not persuaded that it does. Clause 6.2.2 refers to defects and it appears to me that what is identified in the report is failures to complete. At paragraph 3.03 of the report this is said:

> "These individual issues represent incomplete work that requires to be addressed by Muir under the Building Contract."

[126] At paragraph 4.06 the works referred to in that part are said to "represent significantly incomplete work."

[127] As regards to the matter dealt with in section 6, it is described as follows at 6.06:

> "Resolution remains outstanding consequently this represents potentially significantly incomplete work that falls to be completed by Muir under the terms of their Building Contract with Kapital."

[128] Thus in these three sections of the report what appears to be detailed is incomplete work. I am satisfied that this is not the same as a defect.

[129] Defective work is described in this way in *Hudson's, Building and Engineering Contracts* at paragraph 4.071:

> "… work which fails to comply with the requirements of the contract and so is a breach of contract. … this will mean work which does not conform to express descriptions or requirements, including any drawings or specifications, together with any implied terms as to its quality, workmanship, performance or design."

[130] Incomplete work on the other hand is, as it says, work which has not been completed and is nothing to do with quality, workmanship, performance or design. This essential difference is confirmed in the Construction Contract: the issue of failure to complete works is dealt with from 2.27 onwards and involves the issuing of a non-completion notice. Defects on the other hand are dealt with in terms of 2.35 and involve the issuing of a schedule of defects.

[131] So far as the specification argument put forward by Mr Manson with respect to the report I believe looking to the whole terms there is just enough to identify what matters are being brought to the attention of the pursuer and in particular looking to paragraphs 2.06, 3.03, 4.06 and 6.06 there is sufficient specification that the reporter is confirming the problems he identifies are the pursuer's responsibility.

[132] For all the foregoing reasons I am satisfied that Clause 6 has not been properly complied with and that accordingly a valid and effective PLN has not been issued.

[133] I now turn to consider the second broad chapter of submissions which related to the issue of waiver.

[134] The argument turned on the proper construction of the terms of Clauses 9.1.1 and 9.1.2 of the Settlement Contract.

[135] There was no argument advanced by the defender that the issues were latent and fell within Clause 9.1.2. Accordingly parties primarily joined issue as to what is the proper construction of the words "appear within the relevant rectification period" in Clause 2.35 of the Construction Contract referred to within Clause 9.1.1.

[136] The defender advanced an argument that it did not matter that the pursuer was aware of the issues prior to the rectification period as long as the issue had been raised by the defender with the pursuer during the course of the rectification period. The pursuer's position was straightforward that the word "appear" should be given its ordinary and natural meaning and thus matters known about by the defender prior to the rectification period could not be said to have appeared during the rectification period.

[137] Neither party advanced any authority in support of the particular construction for which it contended. Accordingly in the first place I believe it appropriate to look to the natural and ordinary meaning of the language used. I am persuaded this clearly supports

the pursuer's contention regarding construction. In the Oxford English Dictionary "appear" is defined, so far as relevant to the context in which it is used in the instant case, as meaning "become noticeable", "come into existence". The defender's proposed construction is I think inconsistent with the natural and ordinary meaning of the language used.

[138] It appears from the terms of the Scott Schedule that a number of the items therein neither became noticeable or came into existence during the rectification period. It is clear from the defender's averments within the Scott Schedule that they were known about by the defender and had been intimated to the pursuer prior to the start of the said period.

[139] The following further points I believe also support the pursuer's contended for construction being sound.

[140] If parties had intended to preserve all claims which were intimated during the rectification period they could have used that word and not "appear".

[141] I observe that the general purpose of the Settlement Contract is set out at paragraph (E) of the preamble which provides:

> "The Parties wish to enable a comprehensive and final resolution in respect of any and all differences and disputes under the Contract or arising out of or in connection therewith, and this settlement agreement sets out the terms on which the parties have agreed to achieve that."

[142] Reading short, the general purpose of the settlement is to settle all disputes between the parties. The defender's contended for construction is not consistent with said general purpose. It allows any claim to be preserved as long as it is intimated within the rectification period. That appears to negate the general purpose. Equally, the defender's contended for construction appears inconsistent with the very wide scope of the terms of Clause 8 of the Settlement Contract which defines released claims.

[143] When looked at in the context of Clause 9.1.2 the defender's suggested construction is shown not to be sound. Both Clauses 9.1.1 and 9.1.2 point in the same direction; namely: to claims which are unknown until a particular point (a) the rectification period or (b) latent at the date of the Settlement Contract and thereafter becoming patent being preserved. Only the pursuer's proposed construction of 9.1.1 fits in with Clause 9.1.2.

[144] Overall the defender's construction is inconsistent with the terms of the contract as a whole.

[145] Accordingly I am persuaded that unless a defect appeared as I have defined the word "appeared" within the rectification period or was latent at the date at which the Settlement Contract was entered into then any claim has been waived. Equally, if any claim is not founded upon a defect as I have defined it, then it has been waived.

[146] I now turn to the issue of specification and the related issues which were raised by Mr Manson in relation to the defender's case as set out in the Scott Schedule. I am persuaded that with respect to claim 1 in the Scott Schedule that this is lacking in specification for the reasons advanced by Mr Manson. Although a very large amount of documentation is produced on behalf of the defender in respect to a large number of snagging items this documentation does not allow the pursuer to understand the basis of these claims in that there is no specification of precisely what remedial work it is claimed is required and secondly how the sum claimed with respect to any such remedial work has been calculated. These matters are not set out with respect to each item listed within the snagging list.

[147] Although the above are material deficiencies in specification I would not be minded to dismiss this branch of the defender's claim on that basis alone. Rather in so far as claims survived the various other arguments I would intend that the matter should be dealt with

by making a detailed order requiring additional specification to be produced within a specific period of time. That would appear to me to be an appropriate way to deal with the issue.

[148] With respect to the issue of a clerk of works raised in terms of claim 1 I do not believe that I can hold at this stage that this claim is irrelevant. I believe that the court would have to hear evidence regarding the precise nature of the work done by the clerk of works and the necessity for him to carry out this work having regard to the nature and extent of the problems with which he was required to deal.

[149] As regards the second item I reject the argument the claim has not crystallised. The local authority have made it clear they will not in present circumstances issue a substantial completion letter until certain issues have been resolved. I would make reference to an email of 17 December 2015 by the said authority. This was followed up by an inspection in April 2017 setting out outstanding snagging issues relative to the roads. Against that background (assuming the responsibility for these matters is the pursuer's, which is a matter for Proof) then I am satisfied that the claim has crystallised.

[150] Turning to the issue of specification of the *quantum* of this head of claim there is no specification as to how this is calculated again I would intend that this be dealt with by way of an appropriate order for further specification to be produced.

[151] With respect to items 3 and 4 in the Scott Schedule I observe that on the basis of the defender's averments these appear to have arisen prior to the rectification period.

[152] As regards the argument that item 3 was not a defect as I have defined it, I reject this argument. The factual position put forward on behalf of the defender in the Scott Schedule is that "the water wall has been installed in the wrong location". Having regard to the definition I gave for defect earlier in this opinion it is a defect.

[153] Lastly the argument with respect to item 9 on the Scott Schedule I am persuaded that the pleadings supporting this claim are irrelevant. There is no proper basis for the believed and averred averment. It is not a proper inference to draw from the factual averments that every other house on the site suffers from the defect of silver tape being used as a jointing material. The factual averments are these: the fault has been discovered in only one house on the site; in addition at 15 out of 62 houses a problem with silver tape was identified with respect to a wholly different part of the plumbing system. The latter averment shows that it is not appropriate to draw the inference that because a problem exists in one place it exists in every other possible place. The foregoing averments cannot properly justify intrusive inspections of all other 61 properties and the inference that in all 61 other properties the same fault will be found and will require to be repaired.

[154] There is, however, I believe a more fundamental problem: the claim in large part is contingent. It has not been established that any remedial work is required in relation to any property. That could only be established after intrusive inspection. That it is a contingent claim I believe can be illustrated by considering this question: if there is no problem to remedy in say 45 houses, why should the defender be entitled to damages in relation to carrying out repairs to these 45 houses? The defender in those circumstances is not entitled to damages, and would be unjustifiably enriched were he to be awarded damages.

Decision

[155] It was agreed by parties that I should give my decisions on the various core issues which were argued before me. However, parties also agreed that rather than seeking to pronounce a detailed interlocutor I should allow parties to consider these conclusions and

either reach agreement as to the effect of them or put before me any further argument as to the detailed effect of my conclusions.

[156] Accordingly the matter will be put out by order for the above purpose and in order to hear parties with respect to the issue of expenses.