



OUTER HOUSE, COURT OF SESSION

[2018] CSOH 83

A97/16

OPINION OF LADY CLARK OF CALTON

In the cause

MARK BAIN AND PAULINE BAIN

Pursuers

against

KARL MARTIN

Defender

Pursuers: C Murray; Lefevre Litigation

Defender: Macpherson; TC Young LLP (for Sneddon Morrison, Shotts)

9 August 2018

Summary

[1] The first pursuer, Mark Bain, and the second pursuer, Pauline Bain are spouses and since at least 2013, have resided at a house in West Lothian. The defender, Karl Martin, also resides in West Lothian. The pursuers have business interests and are directors of and work in an estate agency business which is now a limited company. The defender for many years had business interests as a builder. He now works as a plant operator. The parties first met in 2011 when the defender, using the estate agency business which was at that time run by the pursuers as a partnership, purchased a house in which he continues to reside. Various

contacts took place between the pursuers and the defender over the period from 2011-2014 relating to business interests.

[2] Prior to meeting the defender, the pursuers had instructed an architect to draw up plans for an extension to their house. Some time in 2013 there were discussions about these plans between the pursuers and the defender. According to all the parties the discussions at some date led to a contract for the construction of an extension to the pursuers' house. The parties admitted that a contract was concluded albeit they differed significantly about the circumstances of the formation of the contract, the terms of the contract and the parties to the contract. It was not disputed that: the plans from the first architect were superseded; further plans were drafted; further work was done by a second and third architect; in about November 2013 work relating to the extension commenced; cash payments were made by the first pursuer; work was sporadic; the contract was brought to an end by the pursuers in July 2014 at a time when substantial work had been done but the work had not been completed or approved; various solicitors' letters were sent by the pursuers in relation to the works and other matters; and on 16 March 2016 the present action was raised.

[3] In this action the pursuers seek payment from the defender for reparation for alleged loss and damage through the defender's breach of contract in carrying out the contract works for building the extension. The averments of the pursuers are that "In around June 2013, the pursuers entered into a contract with the defender ...". The averments of the defender are to the effect that the pursuers' contract was not with the defender as an individual but with a company namely K&S Building Services (Scotland) Limited ("the Ltd company").

[4] By interlocutor dated 31 October 2017, the parties were allowed a preliminary proof of their respective averments on record on the issue of whether or not there was a contract

between the parties. This was interpreted by the parties as focussing the issue as to whether or not the defender as an individual or the Ltd company was a party to the contract with the pursuers. Prior to the commencement of the preliminary proof, the parties agreed a statement of disputed issues which stated:

“Whether the contract entered into by the pursuers in or around June to September 2013 for the construction of a single storey extension to their home ... was with : (i) the defender; or (ii) K&S Building Services (Scotland) Limited, a company registered in Scotland, company number SC410744.”

[5] The issue presented by the parties to the court for determination was a narrow issue and in other circumstances might easily have been resolved by a quick look at the contractual documents. But in this case the pursuers alleged that there were no written contractual documents and that the written documents in name of the Ltd company, produced and lodged on behalf of the defender, were not true and reliable documents. In the result therefore a proof took place over three days in which the credibility and reliability of the witnesses to fact were in issue. I heard evidence, relating to the period from about 2011 to 2016, *inter alia* about the relationship between the parties, the contract, the works and the formation and dissolution of the Ltd company.

The witnesses

[6] Evidence was led on behalf of the pursuers in this order: Pauline Bain the second pursuer; John Butler of Geode Forensics, an expert witness in digital forensics; Mark Bain the first pursuer. The witnesses led on behalf of the defender were Karl Martin and his wife, Avril Martin

Summary of factual evidence about the formation of the contract

[7] The second pursuer said she took the plans prepared by the first architect to the home of the defender where she discussed the works with the defender. At some later unspecified date, the defender came to her house and met the pursuers. There was verbal discussion and agreement that he would build the extension. There was no paperwork. The work started in November when the defender arrived with a forklift machine and started digging out the foundations. There were vans on site over the period with the Ltd company logo and other vans. There was no firm start date agreed. She thought the price was £70,000 but that was not a fixed or definite cost and was only for the basic shell. She did not honestly remember the figure but she thought the pursuers had been given a price. She said the agreement was with the defender whom she knew had a building business but the pursuers did not know the name of the business. The pursuers knew the defender only by his name. She was not present at any other meetings with the defender about the contract. The first pursuer dealt with the works and other matters.

[8] According to the first pursuer, he met the defender at the pursuers' house in the late summer of 2013. He had known the defender since 2011. The pursuers recommended him as a builder to clients. The defender "was just Karl up the road". There was a conversation about the extension. He could not recall if the second pursuer was present. He could not recall how the pursuers said to go ahead or whether he was there when that was said. He thought the price was £47,000 for a minimum build and there was no mention of VAT. The price had been based on the square footage and the defender had "knocked a bit off for working with us". There were to be cash supplements. The start date was when the defender turned up with his digger but he was not sure of the date. There was nothing in writing. He thought that there would be a long-term working relationship with the

defender as a builder after the extension was completed. He described his actions of paying in cash with no receipt as "I have been an idiot in that". He used that description about himself on a number of occasions. Under reference to bank statements in the name of KnightBain (A Firm) he said he had withdrawn from the account and paid in cash a total of £70,440 to the defender. He was unable to explain what particular works or materials he was paying for. His explanation for payments at the time when the pursuers were plainly unhappy with the work and progress and the relationship between the second pursuer and the defender had broken down was that he wanted the work finished.

[9] The defender said that the contract agreed was with the Ltd company. He referred to production 7/3 which was a letter of estimate dated 4 September 2013 in the name of the Ltd company for building the extension for the pursuers in line with plans still to be approved. Over three pages, various works were specified with standard finishes and the option to upgrade. The estimate excluded painting, decorating, tiling and landscaping. The total cost estimated is £49,500 plus 20% VAT totalling £59,400. The defender explained that two letters (7/4 and 7/5 of process), dated 21 November 2013 and 4 December 2013 in the name of the Ltd company, to the pursuers in respect of two payments of £8,000 in respect of agreed building work at their address were receipts for cash payments for the works made by the first pursuer. On 4 September 2013, Avril Martin created the document dated 4 September 2013 on the computer, with his assistance, in accordance with their normal practice. He had previously done detailed calculations on separate sheets of paper to reach the estimated figure. He took the signed copy of the letter 7/3 of process to the home of the pursuers where he met the second pursuer and tried to explain the estimate to her. He said that she seemed happy with it and she was left with a signed copy. He gave little information about what happened thereafter except to explain that at some later date there

was discussion between the pursuers and him and there was agreement. The pursuers said they wanted to pay cash although he asked them to pay into the business account of the Ltd company. He agreed that payments could be made by cash. The system agreed was for the defender to ask the first pursuer in advance for payment and arrangements would be made for them to meet up at a convenient place in public. The first pursuer handed over the cash payments to the defender. There were no payments by the first pursuer after December 2013. Work started in November but there were delays because of the need for underpinning, weather problems, and two weeks holidays over Christmas. In about March 2014 there were problems in the defender's own house for a period of 8-10 weeks and the workmen employed by the Ltd company were redirected to sort out problems caused by dry rot in the defender's house. There were problems in communication between him and the second pursuer in the Spring of 2014 because he blamed her for the fact that the survey on his house had not picked up serious problems of dry rot. Communication between them ceased and he communicated only with the first pursuer. The work on the pursuers' site came to an end after a telephone call in July 2014 when the pursuers wanted the work to stop. The workmen returned probably that day to remove their tools. He did not send in a final account as by that time solicitors' letters about defective work had been sent and the pursuers plainly were not happy.

Submissions by counsel for the pursuers

[10] Counsel for the pursuers provided detailed written submissions which I have considered and this is a very brief summary. I was invited to find that the pursuers entered into a contract with the defender as an individual for the construction of an extension to the pursuers' home. Counsel was very critical of the evidence given by the defender about the

creation of the contract and challenged the defender's credibility and reliability. There was no challenge to the credibility of Avril Martin, albeit her reliability was challenged in relation to the documents 7/3 to 7/5 of process. There was a detailed attack on the authenticity of the documents 7/3 to 7/5 of process based on the evidence of Mr Butler and his examination of the USB stick which the defender claimed he had found. I was asked to give significant weight to the evidence of Mr Butler, to refuse to accept the authenticity of productions 7/3 to 7/5 and draw favourable inferences in relation to the evidence given by the pursuers.

[11] Counsel accepted that the evidence of the second pursuer was generally unimpressive but I was invited to accept her evidence as credible and reliable. He submitted that the first pursuer "had a slightly firmer grasp on dates" and that he was candid, albeit naive. He accepted that there were some inconsistencies in the evidence of the first pursuer and the second pursuer, though the same could be said for the evidence of the defender and Avril Martin. I was invited to conclude that the contract was formed between the pursuers and defender personally at a time when neither pursuer knew of the existence of the Ltd company and did not know its name. He referred to the lack of documentary evidence that the Ltd company ever received any part of the price under the contract and invited me to accept that the pursuers only became aware of the name of the Ltd company after the contract was terminated. Counsel submitted that the evidence supported cash payments totalling approximately £70,000 by the first pursuer to the defender over the period to June 2014. The evidence of the defender that only £16,000 had been paid but nevertheless the contract continued should not be accepted. No attempt had ever been made by the defender to seek further payment.

[12] Despite the terms of the solicitors' letters 7/1 and 7/2 of process, I was invited to accept that the pursuers were unaware of the existence of the Ltd company, did not know the name of the company and that the circumstances demonstrated that they contracted, as they said in evidence, with the defender as an individual. There was no evidence that there was any detailed legal discussion about this with solicitors and there was merely an assumption after the event that the contract was with the Ltd company.

Submissions by counsel for the defender

[13] Counsel for the defender submitted that, for the purposes of this proof, there were five important documents: the solicitor's letters 7/1 and 7/2 of process, the estimate from the Ltd company 7/3 of process and the two receipts from the company 7/4 and 7/5 of process. The defender disclosed the Ltd company to the pursuers and the letters 7/1 and 7/2 of process demonstrate that the pursuers were plainly aware that they had entered a contract with the Ltd company and not a contract with the defender as an individual. Counsel referred to the prior communing between the parties and the discussions between the second pursuer and the defender that the company had been incorporated. In relation to the productions and evidence relating to 7/3 to 7/5 of process, counsel accepted that the expert evidence raised questions and anomalies about when the documents were created and he accepted the evidence was problematic. He submitted however that the evidence of the pursuers was also problematic and that the court might conclude that neither pursuer was wholly credible and reliable about important parts of their evidence. On the evidence, the court should conclude that the pursuers knew that the Ltd company existed and knew that the defender was not contracting as an individual but on behalf of the Ltd company. Albeit there were problems in the evidence, it was not disputed that there was a contract and there

was clear evidence that the pursuers knew before the contract that the Ltd company existed as demonstrated in the letters 7/1 and 7/2. The expert evidence was inconclusive. Even if the evidence of the defender was discredited, it does not follow that the defender and not the Ltd company was party to the contract with the pursuers.

General assessment of witnesses

[14] I regarded the second pursuer as a witness who was so vague about the dates, timing and circumstances of the formation of the contract and events both before and after the contract that her evidence about this was of little assistance to me. I found it hard to believe that someone who claimed to have developed a successful estate agency business over many years, to have knowledge of the local business community and to have regular contact with solicitors in the course of her business, appeared to have no understanding of the difference in fact or law between a contract with an individual and a contract with a Ltd company. Her lack of appreciation was not restricted to the period up to 2014 but appeared to relate to her current and continuing state of knowledge despite the fact that the partnership business she was involved with became a Ltd company in 2015 and despite the issue which is focussed in the present action. The second pursuer did not support the evidence of the first pursuer about the date, place and method of formation of the contract, or the agreed price. She said she did not know that substantial payments in cash were made to the defender in the manner described by the first pursuer and that she learnt about the payments after they had been made. She was never present when payments were made. She was unable to disguise her animosity to the defender and seemed at pains to distance herself from knowledge about the defender's business structure and the history and circumstances of the contract.

[15] The first pursuer appeared to have a reasonable understanding that there was a difference in fact and law for contractual purposes between a sole trader, a partnership and a Ltd company. He said that a Ltd company for the estate agency business was formed in April 2015, after discussion over a long period and with professional advice and assistance. He was a director along with the second pursuer of said Ltd company formed in 2015. He appeared reasonably frank about the prior business relationships with the defender as an individual with the estate agency partnership. He accepted that the pursuers were trying to get a local builder who could help clients and that clients on a few occasions were put in touch with the defender. His evidence about the formation of the contract was vague and on important matters contradicted the evidence of the second pursuer. The evidence he gave about cash payments of large sums to the defender made in public places did not appear to me to be good practice for payment to a Ltd company or to an individual sole trader and the first pursuer did not seek to justify this practice. His evidence was that there were no contract documents and no receipts; he did not know the defender operated the building business with the Ltd company structure; He did not know the name of the Ltd company until after the contract was terminated in July 2014.

[16] I found the explanations by the pursuers about the solicitors' letters 7/1 and 7/2 of process unconvincing and I deal with this in paragraphs [31] to [36].

[17] I accepted the evidence of Mr Butler based on his report 6/17 of process which was not challenged in any significant way. Because of that evidence, I was unwilling to place any reliance on the estimate and receipts in name of the Ltd company (7/3 to 7/5 of process). I considered that this evidence made it unsafe to accept the evidence of the defender and Avril Martin to the extent that they relied on these productions.

[18] I did not consider that the defender was an impressive witness. *Prima facie* his explanation about the formation of the contract based on documentary evidence made much more sense than the evidence given by the pursuers. The defender was vague about financial matters, repetitive and seemed to positively avoid answering some of the questions particularly in relation to financial matters and the accounts of the Ltd company. His evidence about the finding of the paperwork and the USB stick which I discuss in paragraph [22] did not strike me as inherently improbable. The solicitors' letters were received in 2014 and separating out contract paperwork with these letters was an explanation which might be acceptable. But the evidence of Mr Butler, as I explain in paragraphs [25] and [26], raised too many problems about the authenticity of this paperwork and the defender's evidence based on this. The evidence demonstrated that the defender had basic skills only in computer work. Avril Martin was the person who had the skills and generated the documents for the business using a computer.

[19] I considered that Avril Martin was a peripheral witness to the essential facts in this case. She was trained as a typist and had administrative and computer skills which she used in her employment. I was satisfied that in the course of the building business, both before and after incorporation of the Ltd company she gave significant assistance to the defender in generating by computer various business documents for clients. She identified the documents in dispute in this case on the basis that she remembered the contract with the pursuers and that any documents that she generated, as a matter of her general practice, bore the date that they were generated. She denied any knowledge of or handling the USB stick and was not cross-examined on these denials. I was prepared to accept this evidence from her.

[20] I found much of the evidence from the pursuers and the defender bearing directly upon the formation of the contract vague, contradictory and unsatisfactory. I had some concerns that this was deliberate and that the pursuers and the defender were not prepared to be open and honest about the nature of the arrangements which were made. My concerns were focused on the fact that the first pursuer and defender gave evidence about the transfer of large cash payments in circumstances which I considered unsatisfactory. But I have also taken into account that at the time of the commencement of the contract, all parties were on amicable terms and mutually advantageous business contacts were expected to outlive the building of the extension. A bitter dispute, disappointment, financial worries and loss did not appear to be part of anyone's thinking. Time has passed, memories may have faded and been affected by the problems and the dispute which followed. The pursuers were very busy business people and appear to have suffered significant disruption and financial loss in dealing with what they regarded as an unsafe and "not fit for purpose" extension. The defender and his wife have had serious family, financial and business problems. This litigation must have been a source of concern for all parties.

[21] To explain my conclusions I refer in more detail to some of the chapters of evidence. In the circumstances of this case, I was prepared to accept evidence which was not apparently in dispute and evidence which made sense to me and which I considered had a credible and reliable foundation.

Evidence about the documents in name of the Ltd company

[22] The dispute in this case commenced in 2014. The Ltd company was in financial difficulties by 2015 and went into liquidation in February 2016. In 2017, following the death of a close relative, the defender said he was clearing out the garage with Avril Martin and

they discovered a box with various files. Avril Martin found the letters 7/3 to 7/5 of process. The defender gave these letters to his solicitor in about November 2017. At a later date, his solicitor asked him to check if there was any other relevant information. The defender emptied the box and discovered the USB stick in March 2018. He did not know anything about the USB stick but put it into a computer and found that it had some documents recorded on it and sent the USB stick to his solicitor.

[23] In relation to finding the documents, Avril Martin gave a different account. She denied being present when the box was found in the garage and said that the defender told her about it when she came home from work. She said she was not really interested as the liquidation of the company was very stressful and her father had recently died. She said that she was not present when the USB stick was found, did not see the content and had nothing to do with the USB stick.

[24] A report was instructed by the solicitors for the defender by James Borwick of KJB Computer Forensics Consultancy Ltd and thereafter a report dated 15 April 2018 was lodged as a production. The writer of that report was not led as a witness and the report was not agreed by joint minute.

[25] An expert, John Butler of Geode Forensics was led in evidence on behalf of the pursuers. In his evidence he presented information relating to the provenance of the three productions 7/3 to 7/5. He took account of and made reference to the information in Mr Borwick's report and the USB stick. The evidence he gave was technical but was not seriously challenged in cross-examination. In cross-examination, Mr Butler accepted that there might have been other digital expressions of productions 7/3 to 7/5 on other devices. He had not examined any other devices.

[26] I considered that there was force in the careful analysis by counsel for the pursuers of this evidence which led to his submission that reliance should not be placed on productions 7/3 to 7/5 of process. I was not prepared to rely on these productions and the evidence of the defender and Avril Martin relating to them. I accepted that there were contradictions in the factual evidence about the finding of the documents and the USB stick but my reasons for rejecting this evidence were founded on the anomalies identified by Mr Butler in his evidence. The main anomalies identified are that when the "metadata" were analysed it appeared that the content of the letter dated 4 September 2013 on the USB stick was created on 20 October 2013, that is some weeks after the date the letter bears. The letter appeared to have been last printed on 15 April 2013 which pre-dated the date of the letter. In relation to an analysis of the receipt dated 4 December 2013, it appeared from an analysis of the word "metadata" that the content was created on 3 October 2017 some four years after the date of the receipt.

[27] The rejection of this evidence however does not mean that the pursuers must succeed. There was some evidence from the defender and Avril Martin which I was prepared to accept as credible and reliable. It is necessary to consider whether the evidence which I accepted bears out the pursuers' case that the contract entered into by them was with the defender as an individual.

Evidence about the business vehicle used by the defender

[28] During the period 2011 to about 2013 it was the second pursuer who was primarily involved with the defender. Their initial involvement related to three different transactions with the defender as an individual dealing with the pursuers' estate agency partnership, as it then was. The pursuers had a close relationship with their clients and the defender was a

client at that time. The pursuers were aware from an early stage that the defender was involved in a building business and they knew that he had a business vehicle of some kind but claimed to have no knowledge about it or its name. The pursuers had sufficient interest in the building business of Karl Martin to recommend on a number of occasions to other clients that they contact the defender. The pursuers obviously valued their clients and wanted to develop their business interests.

[29] In the local community, Karl Martin never traded under the name of Karl Martin. Until the business was incorporated as the Ltd company on 7 November 2011 (7/6 of process) the defender traded as a sole trader under the name of K&S Building & Joinery Services. I accepted the evidence from the defender and Avril Martin that an effort was made to market and publicise the new Ltd company structure from the beginning of 2012. Vans were leased and bore the Ltd company logo, business cards were used and advertising of the Ltd company was carried out in various forms. The Ltd company had employees. I was satisfied from the evidence, which included reference to the Ltd company accounts which were produced, that there was substantial work traded through the Ltd company accounts and there was a turnover of some £500,000. There was no evidence, apart from the pursuers' evidence, that the defender entered into any contractual arrangements for building work as an individual in addition to work which he promoted and arranged through the Ltd company. The work done on the pursuers' extension appears to have been done by employees of the Ltd company and the second pursuer accepted that there were vans used by workmen which bore the Ltd company logos. The defender did do some work on site and in particular turned up at the commencement of the work in November 2013 but he was rarely on site and the work was done by the employees of the Ltd company and also some other workers. There was no evidence that money was paid in respect of the contract

through the accounts of the Ltd company. I have commented earlier about the unsatisfactory nature of the payment system and such a system might be considered unsatisfactory for any business model.

[30] I accepted that the defender's business model took the form of the Ltd company from the end of 2011 and he actively promoted the Ltd company from the beginning of 2012. That must have been public knowledge in a small community and I am not prepared to accept the evidence of the pursuers that they knew absolutely nothing about any of it until after the contract commenced or even after the contract was terminated. The second pursuer in her evidence did accept, albeit reluctantly, that there had been some discussions between her and the defender about the fact that the defender had set up the Ltd company. She said that this was after the contract had commenced but her evidence about timings was, in my view, totally unreliable. Avril Martin had some memory of some discussion between the defender and the second pursuer about this in the summer of 2013 when the second pursuer was at the family house of the defender. I consider it highly improbable that the pursuers did not know that the defender was using the Ltd company as a business vehicle. I do accept that the pursuers may not have understood or cared about the implication of that at the time but the factual position seems to be pretty plain. The defender was not doing business as a sole trader builder. His business operation was public and open in a small community where the pursuers were very involved with the local population and local businesses. As the circumstances which led to the formation of the contract are somewhat shrouded in mystery in this case, this evidence alone might not have persuaded me to conclude that the contract which all parties say existed was not a contract between the pursuers and the defender as an individual. Nevertheless I consider that this evidence does have significance when I come to

consider the correspondence sent on behalf of the pursuers after the termination of the contract.

The termination of the contract and the solicitor's letters sent on behalf of the pursuers

[31] It was not disputed that the contract was terminated in the course of a telephone call in early July 2014, shortly before the pursuers went on holiday. According to the first pursuer he made the call in the presence of the second pursuer "or perhaps he left the house to get a signal". The first pursuer did not recollect what the defender replied but he thought the defender accepted that there had been signs for some time that the relationship had broken down. According to the first pursuer, the extension was nearly finished but there had been problems for a long period. The work was substandard and progress too slow.

[32] The pursuers accepted that they contacted Norrie Moore Limited who were solicitors with whom they had a business relationship relating to conveyancing. The initial letter (which was not a production) raised concerns about workmen coming to the site and that letter was dated 18 July 2014. It is not clear from the evidence to whom that letter was addressed. The second letter from the same solicitors dated 2 October 2014 was addressed to Karl Martin K&S Building Services Scotland and stated:

"... the works carried out by your company have been inspected by a quantity surveyor instructed by our clients and by the building control officer. We enclose copies of both reports and you can see that the works fall far short of an acceptable standard and there are numerous defects which will require to be rectified before the extension can be progressed further ..."

The first pursuer explained that the reference to the company was because the solicitor asked for the name of the company and the first pursuer thought the name had been looked up on the internet by the second pursuer as they did not know the name.

[33] The pursuers later instructed Anderson Strathern LLP who wrote a letter dated 18 November 2014 to Karl Martin K&S Building Services Limited. The first paragraphs of said letter stated:

“We act on behalf of Mr and Mrs Bain who have consulted us regarding a contract into which they entered with K&S Building Services Limited (“K&S”) for the construction of an extension to their home ... In terms of this contract entered around August 2013 K&S were obliged to construct an extension in accordance with drawings ICR(BW)001B prepared by Graphite Studio and supplied by our client to K&S.

Between October 2013 and July 2014 our clients made payments to K&S in relation to the contract works of the sum of £70,400. The cost of additional works instructed by our clients came to £22,400 which sum has also been paid by our clients.

Despite this the work carried out by K&S was completely unsatisfactory and not in conformity with the normal standard of building work that our clients were entitled to expect from a ordinarily competent builder. On Friday 18 July 2014 they invited K&S to stop work and leave their home because K&S were in material and repudiatory breach of the contract and to allow our clients to have the extension completed by a competent contractor.

...

Our clients therefore holds K&S to be in breach of the contract and we are instructed to place you on notice of our clients intention to pursue recovery of (a) the wasted cost of the original construction and (b) the additional costs they have incurred and may continue to incur in having the extension demolished and rebuilt in consequence of K&S’ breach of contract.

Our clients seeks repayment (or K&S’s reasonable proposals for repayment) within 7 days of the date of this letter ...”

The letter described in general terms the alleged defects and stated:

“... Our clients will take whatever steps they deemed necessary to recover their losses and to alert the authorities and or the press to the dangerous and unsatisfactory nature of the works carried out by K&S.”

[34] It was not disputed by the first pursuer and defender that after 18 November 2014 there was a letter from a third solicitor dealing with this matter. The letter was not lodged as a production. It was not suggested in evidence that any of the letters from the three firms

of solicitors made any complaint against Karl Martin as an individual without reference to a company.

[35] Unsurprisingly, both pursuers were asked about the terms of these letters, particularly the letter dated 18 November 2014. Both pursuers accepted that they were aware of the terms of the letter at the time it was sent and the first pursuer appeared to go as far as to say that the terms had been approved by the pursuers. Insofar as any explanation was given by the second pursuer this seemed to be to the effect that she did not understand anything about any of this. She thought that in the course of her business, now formed as a Ltd company, that any contract with the client would be with her personally. She accepted that the letters said what they said but maintained that the contract was with Karl Martin “whom we knew as a client” and we were unaware of the name of his business. The first pursuer explained that he never gave it a moment’s thought that the contract was with a company. It was not fully explained by the solicitors. The first pursuer said he did not pay any attention to the wording of the letters and he did not think the wording of significance. He seemed to suggest that this was all mere verbal legalese. None of the solicitors gave evidence and there was no explanation from the pursuers as to why the solicitors instructed in the present action were instructed to sue not the Ltd company but the defender personally.

[36] I found this evidence rather extraordinary. Even if neither of the pursuers, at the time these letters were written, understood the legal implications of the protection afforded by limited liability, I am not prepared to accept that if the simple fact was that their contract was with the individual Karl Martin, that they were incapable of telling their solicitors that at the time. I do not accept that they allowed three different solicitors from different firms, all separately instructed by the pursuers to misrepresent that fact and that somehow all the

solicitors failed to represent the position of the pursuers which they now adopt that the contract was with the defender as an individual.

[37] The second pursuer in evidence was keen to inform the court in answers, which seemed to be non-responsive to the questions, that she discovered shortly after the problems with the extension emerged that there were other dissatisfied customers and other problems for the building business of the defender. All these parties worked in a small community and both pursuers considered that they were well informed about what was happening in the community. In my opinion it would not be difficult for them to infer, before the raising of the present action, that the Ltd company was in trouble, as indeed it was.

Decision

[38] In this preliminary proof it is for the pursuers to satisfy the court on the balance of probabilities that the contract they say they entered into for the extension of their house was with the defender as an individual. As I have explained, I am not prepared to accept their evidence in relation to that issue and therefore on this issue the pursuers' case fails. On the hypothesis which the parties adopted in this case that a contract was concluded in agreed terms before work commenced in November 2013, I consider that on the balance of probabilities the contracting parties were likely to have been the pursuers and the Ltd company. I infer that the pursuers know that the business vehicle used by the defender was the Ltd company and that he was acting on behalf of the Ltd company, not as a mere sole trader.

[39] All questions of expenses are reserved and the case will be put out By Order to discuss further procedure