OUTER HOUSE, COURT OF SESSION

[2015] CSOH 97

CA139/14

OPINION OF LORD DOHERTY

In the cause

GLEN CLYDE WHISKY LIMITED

Pursuer;

against

CAMPBELL MEYER & COMPANY LIMITED

Defender:

Pursuer: Walker; MacRoberts LLP

Defender: Crawford QC, McConnell; Maclay Murray & Spens LLP

22 July 2015

Introduction

[1] The pursuer is a company incorporated under the Companies Acts with its registered office in England and Wales. It has offices in London and Moscow. It imports and distributes alcohol, mainly to Russia and neighbouring countries. The defender is a company incorporated under the Companies Acts and having its registered office in Scotland. It produces, bottles and packages whisky.

[2] In 2009 the pursuer began to purchase whisky from the defender. The whisky was produced by the defender to the order of the pursuer mainly under two brand names, Black Horse Whisky and Glen Clyde Whisky. Glen Clyde Whisky was the pursuer's own brand name. Black Horse Whisky was the brand name of a customer of the pursuer.

[3] Up until 2011 standard bottles and labels had been used for Glen Clyde Whisky. In 2011 the pursuer decided that the bottles and labels should be redesigned to make them more distinctive and to make the product look more like a premium product. Designers were engaged by the pursuer. The new bespoke bottles had fairly sharp bevelled corners and they had panels on the front and rear for the location of labels. They also had embossed lettering on the side. The new front label was T-shaped, with the horizontal axis of the T extending beyond the label panel and over the bevelled corners of the bottle.

[4] In the present commercial action the pursuer maintains that in December 2011 the defender failed to deliver quantities of Black Horse Whisky and Glen Clyde Whisky that had been bought and paid for. It seeks repetition of the price of that whisky and damages representing the loss of profit it maintains it would have made had that whisky been supplied. The pursuer also claims that certain Glen Clyde Whisky supplied in late 2011 was not of satisfactory quality, and it seeks payment of damages in respect of that breach of contract (the damages being remedial costs it incurred in remedying label defects). The defender denies that the Glen Clyde Whisky was not of satisfactory quality. It maintains that it was entitled to withhold performance of its obligations to deliver the Black Horse Whisky and Glen Clyde Whisky which had been paid for because, it avers, the pursuer was in breach of its obligations to pay the purchase price due under other contracts for the sale of Black Horse Whisky and Glen Clyde Whisky. It has counterclaimed seeking payment of the purchase price due under those contracts, failing which for damages for breach of the contracts.

[5] By interlocutor dated 24 September 2014 the court allowed a proof before answer restricted to three issues: (a) the terms of the contracts between the parties; (b) which party (or parties) is (are) in material breach of contract; and (c) whether any such breach entitled the other party to refuse to perform its obligations under that contract or any other contract between the parties. Signed witness statements were lodged in advance of the proof and the statements were treated as comprising the substance of the evidence-in-chief of the witnesses. The proof had been set down for four days. The evidence took five days to complete. Thereafter counsel prepared written submissions and I heard oral submissions on a further day.

The witnesses

[6] The pursuer called three witnesses - Andrey Romanov, Yulia Kalugina and Sergey Kemnev. Mr Romanov is in charge of the commercial side of the pursuer's business. Miss Kalugina is a Russian lawyer and is in charge of the pursuer's Moscow office. Mr Kemnev is a marine and cargo surveyor employed by Baltic Kontor Limited, an independent marine and cargo surveying company in Riga.

[7] The defender's witnesses were Colin Barclay, who was chairman of the defender and of its holding company, JG Distillers Limited. He was the person primarily involved in contractual and commercial discussions with Mr Romanov. Gerrard McSherry is managing director of the defender's holding company. His responsibilities related mainly to the financial aspects of the transactions with the pursuer.

[8] Except where I indicate otherwise I found each of the witnesses to be credible and reliable. Mr Romanov's manner in the witness box was rather off-putting. He had a tendency - especially in cross-examination - to be abrupt and adversarial. Mr Barclay was vigorously cross-examination and appeared to be somewhat taken aback by the experience. It was plain that at various stages of the parties' dispute his understanding of the parties' legal rights had been erroneous (e.g. in relation to whether the defender's written terms and conditions had been incorporated into the contracts of sale; whether the parties had a binding framework agreement that the defender would be the pursuer's exclusive supplier of whisky for a period of three years; what the defender's legal rights were in relation to certain rare whiskies which the pursuer had purchased). However he impressed me as a straightforward witness who answered questions fairly and moderately. He accepted matters put to him when it was correct to do so.

The terms of the contracts

Framework agreement?

[9] In the defences and the counterclaim the defender maintained that the parties had entered into a framework agreement in terms of which the pursuer undertook to purchase whisky from the defender for a period of three years; and that during that period the defender was to be the exclusive supplier of whisky to the pursuer. That position was maintained initially at the proof; but it quickly became apparent during the evidence of Mr Barclay that he considered that the parties' relationship had been subject to certain principles

of "governance" rather than a binding framework agreement. Ultimately he accepted that, while there had been negotiations with a view to concluding a framework agreement, the parties had been unable to agree on appropriate terms and no such contract had in fact been concluded. It is clear that one of the stumbling blocks to agreement being reached was that the pursuer wished to have a credit facility whereas the defender was insistent on prepayment for goods sold.

Uncontentious matters

[10] Certain matters were uncontentious. The pursuer submitted orders to the defender offering to purchase the whisky specified in the order. If the defender agreed to supply all or part of the order it would issue a pro forma invoice in respect of the quantity it agreed to sell. A separate contract of sale was concluded on the issuing of each pro forma invoice. In each of the contracts with which the proof was concerned the pro forma acceptance had provided that the payment terms were "100% prepayment" and that the goods were sold ex-works. It was accepted that the pursuer was obliged to pay for shipping costs. The defender admits (answer 6) that it was an implied term of each of the contracts that the goods supplied would be of satisfactory quality (Sale of Goods Act 1979, section 14).

[11] I turn then to matters which gave rise to some controversy at the proof.

Glen Clyde Whisky origination costs and Black Horse Whisky origination costs and label printing costs

[12] Origination costs were the costs of obtaining new print plates for labels and cases. I accept Mr Barclay's evidence that Mr Romanov agreed to pay origination costs for the new labels and cases for Glen Clyde Whisky. His evidence is confirmed to a very considerable extent by the terms of the correspondence which was produced and by the fact that the pursuer did in fact pay some of the invoices which were rendered for origination costs. Ultimately Mr Romanov was prepared to accept that it was possible that he had agreed that the pursuer would reimburse the defender for such costs: but he did not have a clear recollection of whether he had or had not done so.

[13] The defender averred that the pursuer had agreed to pay label and case origination costs and label printing costs for Black Horse Whisky, and energy surcharges (charged to the defender by the manufacturer of the Glen Clyde Whisky bottles). Mr Romanov did not accept that. None of these additional costs were mentioned by Mr Barclay in his witness statement. Objection was taken when Miss Crawford sought to address the deficiency by asking Mr Barclay supplementary questions during examination-in-chief. I sustained the objection on the basis that if the defender had wished to lead evidence as to these matters it ought to have been dealt with in the witness statements.

Payment of the price

[14] The defender maintains that it was an implied term of each of the contracts that the pursuer would make payment of the price within a reasonable time after the contract's conclusion. That is admitted by the pursuer in Condescendence 8:

"Admitted that it was a term of the contracts between the parties that the pursuer would make payment to the defender within a reasonable time after concluding contracts for the supply of whisky."

The same admission is repeated by the pursuer in the answers to the counterclaim (answer 8).

[15] Mr Walker argued that, in relation to each contract, payment did not require to be made until a short period – 5 to 14 days - before a confirmed shipping date had been provided by the defender. He maintained the pleadings and the witness statements had given fair notice of the pursuer's position in this regard, and that a finding that the payment obligation was in those terms ought to be made. If it were necessary to do so he sought leave to amend the admission in Condescendence 8 by adding after the word "whisky" the words "under explanation that in terms of the parties' practice the pursuer only paid a few days before shipping dates provided by the defender." As evidence to that effect had been led without objection the motion to amend should be granted despite the late stage at which it was brought (*Kennedy* v *Chivas Bros* 2013 SLT 981, at paragraph 35). The evidence relied upon came from Mr Romanov, Ms Kalugina and Mr Barclay, and Mr Walker submitted that it was consistent with the correspondence between the parties. He accepted that it was inconsistent with the evidence of Mr McSherry; but he maintained that Mr McSherry 's evidence should be rejected because it was at odds with the rest of the evidence, and because he had not in fact been involved in concluding the various contracts. He submitted that even if the evidence as to practice did not illustrate the parties' respective obligations, it was a relevant factor to consider when determining whether payment had been made within a reasonable time after a contract had been concluded.

[16] Mr Romanov had prepared a witness statement and a supplementary witness statement. In neither of them had he made reference to payment not being required to be made until a few days before a shipping date. In examination-in-chief Mr Walker asked him to "look at how the ordering procedure worked". Mr Romanov indicated that the orders were made and were accepted by the issue of a pro forma invoice; and that the pursuer paid for the product "2 weeks to 5 days" before it was shipped. Mr Walker then asked Mr Romanov to look at an email from Mr Barclay to him of 31 May 2010 (Joint Bundle ("JB") 2), and at the statement "I would propose payment to be made at production with finished goods held under bond to your order and subsequent call off instructions". Mr Walker asked him if that accorded with what he had said. Mr Romanov agreed. Mr Walker then put it to Mr Romanov: "The defender says there was no production until payment." Mr Romanov replied: "We never had a practice to make payment before production." He said that production JB 242 showed that shipping had in fact usually been between two weeks and five days after payment. In practice goods had been ordered, then produced, then paid for, then shipped. In cross-examination Mr Romanov said that the pursuer paid the price after it had received a shipping draft which contained the shipping date. Under reference to JB 242 he accepted that the period between payment and shipping varied considerably. In re-examination Mr Walker asked Mr Romanov to "clarify the facts for ordering and receipt". Mr Romanov indicated that the order was placed. The pro forma invoice was received. The product was produced. The shipping draft was received. Then a payment was made five to 14 days before the shipping date: "Before we pay we are told when they are going to ship".

[17] In Ms Kalugina's witness statement she stated:

"27. … It was our practice to pay the pro formas a few days before the goods were due to be dispatched. Campbell Meyer would *estimate* dispatch dates and we would pay shortly before those dates.

28. The terms of payment were not clearly agreed therefore we paid shortly before the shipments were made. According to our own practice with Campbell Meyer, the normal payment terms for Black Horse were around 4 to 14 days before *the scheduled* dispatch date." (emphasis added).

In re-examination, under reference to JB 60, Mr Walker asked the witness whether, prior to the end of November 2011, when loading dates had been confirmed payments had been made. She answered "We never had arguments and payments were made accordingly with the pro formas." Mr Walker then asked "After the pro formas or the shipping dates?" She answered "The shipping dates."

[18] In cross-examination of Mr Barclay Mr Walker put to him that how the contracts operated was (i) the pursuer issued an order with proposed delivery dates; (ii) the defender issued a pro forma accepting the order (in whole or in part); (iii) the defender would provide estimated loading dates; and (iv) the pursuer would

pay a few days before loading. Mr Barclay responded "That was how it worked out." Mr Barclay agreed that it was important for the pursuer to have a timeline. Mr Walker referred Mr Barclay to the second sentence of the email of 8 November 2011 from the pursuer's Mr Timen to the defender's Mr Boytcho Nikolov: "As it is agreed in the terms of payment - we are prepaying all the goods just before loading not months before." Mr Walker asked whether that sentence accorded with what Mr Barclay had just said about how things had worked out. Mr Barclay agreed it did.

[19] Mr McSherry's evidence was that the defender's pro formas would indicate the payment required; and that in return for payment the defender would produce the whisky and then ship it. His understanding was that goods were to be paid for prior to production, and that the defender was not obliged to begin production until payment had been received. In an email of 28 November 2011 to the pursuer (JB 62) he had reminded it that payment was required before production. The purpose of spreadsheet JB 242 had simply been to show that, in general, payments were made in advance of shipping: it did not show when shipping dates were provided or confirmed.

[20] Miss Crawford founded upon the pursuer's admission in the pleadings that it was a term of each contract that it would make payment to the defender within a reasonable time after concluding the contract. The pursuer ought not to be permitted to depart from that clear and unambiguous admission. There was no record for the proposition that it was a term of each contract that no payment was due until the defender provided shipping dates, or that payment was not due until "a few days before" loading. Neither was there any record for the proposition that that was how the contracts had been operated in practice. The evidence of Mr Romanov and Ms Kalugina in that regard was unsatisfactory. It was not a matter that Mr Romanov had dealt with at all in his witness statement. The evidence now relied upon by Mr Walker had been taken during the "scene-setting" part of Mr Romanov's evidence-in-chief and during re-examination. In relation to both his evidence and the evidence of Ms Kalugina there had been a degree of leading and prompting by Mr Walker. In any case the evidence founded upon had been couched in the language of practice. That was why no objection had been taken to it. It did not establish that the provision of shipping dates by the defender was a condition precedent to there being an obligation to pay the price: nor did it establish that the obligation was to pay a few days before shipping. Had it been squarely put to any of the witnesses that those matters were terms of the contract, objection would have been taken. It was far too late to seek to amend the pleadings after proof had been heard. The defender would be prejudiced. It had approached proof preparation and the conduct of the proof on the basis that it was admitted that payment required to be made within a reasonable time of the conclusion of each contract. Had it been made apparent before the proof that estimated, or confirmed, shipping dates were said to be important, the defender would have prepared its case accordingly. Reference was made to *Morrisons Associated Companies Ltd* v *James Rome & Sons* 1964 SC 160 per, Lord President Clyde at page 182, Lord Guthrie at page 190; *Kennedy* v *Chivas Bros*, supra, at paragraph 35; *McFarlane v Thain* 2010 SC 7, at paragraphs 20-22.

[21] I agree that the pleadings contain clear and unambiguous admissions that it was a term of each contract that the pursuer would make payment to the defender within a reasonable time after concluding the contract. The pursuer does not aver that it was a term of the contracts that no payment was due until the defender provided a shipping date (estimated or confirmed). Nor does it aver that it was a term of the contracts that payment was not due until "a few days before" any such date.

[22] I accept that Ms Kalugina's witness statement made reference to the pursuer's practice in relation to payment: but it fell well short of laying the ground for the withdrawal of the pursuer's admission that payment was to be made within a reasonable time of a contract having been concluded, or asserting that the terms now suggested by Mr Walker were terms of the contracts. I also accept that the evidence from Mr Romanov, Ms Kalugina and Mr Barclay upon which Mr Walker relies was led without objection from the defender. The nub of the evidence as to practice which I accept is that the pursuer would often pay for goods about 5 to 14 days before an estimated shipping date. That was the scenario set out by Ms Kalugina in paragraph 27 of her witness statement, and it was the scenario which was put to and accepted by Mr Barclay in cross-examination. I do not accept that the practice was also that a shipping draft confirming shipping

dates required to be issued before payment was made. In so far as Mr Romanov and Ms Kalugina suggested that was the case I reject their evidence as being unreliable. In my view it would be unjust to the defender to do otherwise given the lack of notice in the witness statements, the way the evidence was elicited and the way matters were put to Mr Barclay during cross-examination. It is clear that the practice was far from invariable. There were many instances where payment was made well in advance of loading (sometimes in advance of production, sometimes where loading had not been arranged).

[23] I have no difficulty in accepting that the defender's preparations for proof and its conduct of the proof have been shaped by the admissions which the pursuer made and the case which it pled. It would be unfair and prejudicial to the defender to allow the pursuer to found upon the evidence of practice in order to maintain that the terms of the contracts relating to payment differed from the admitted term. However I accept Mr Walker's subsidiary submission that the evidence of practice is a relevant factor which will require to be considered when determining whether the pursuer was in breach of its obligations to make payment within a reasonable time. In my opinion it is not necessary for the pursuer to amend its pleadings in order to found upon the evidence of practice for that purpose. On that basis I shall refuse the motion to amend.

Implied term in relation to SWIFT bank drafts

[24] In paragraph 13 of the joint minute of agreement it is agreed:

"The pursuer paid for whisky by instructing its Bank to transfer money to the defender's Bank. It confirmed the transfers by sending the defender copies of SWIFT receipts recording *inter alia* the instructions to transfer and details of which pro formas were being paid by each payment made."

The defender maintained it was an implied term of each of the contracts that the pursuer would not cancel SWIFT transfers which it had instructed and exhibited to the pursuer. The implication of such a term was said to be necessary in order to give the contract business efficacy. The pursuer did not accept that it was necessary to imply the term desiderated by the defender. Mr Walker argued that since the defender was not obliged to load the goods until payment had been received the implication of the term was not essential to protect its interests. In any event, the term proposed was wider than was required. The pursuer might have good grounds for cancelling a SWIFT payment.

[25] I am not persuaded that it is necessary in order to give business efficacy to the contracts that the term suggested by the defender requires to be implied. I do not think that reasonable businessmen in the position of the parties would have considered its inclusion to be both reasonable *and* necessary (see *McBryde,* supra*,* paragraphs 9-70 and the authorities there discussed). I reach that conclusion because if the payee was informed immediately of the cancellation it would not place any further reliance on the representation that payment had been made. The representation would no longer be a continuing one.

[26] However I am satisfied that in the whole circumstances business efficacy does require an implied term that where intimation of a SWIFT payment is made but the payment is cancelled, the pursuer is obliged to inform the defender immediately of the cancellation. Reasonable businessmen in the position of the parties would have known that on receipt of evidence that the pursuer had instructed its bank to make a SWIFT payment the defender would be very likely to incur expenditure in relation to the contract and that it might even ship the goods. They would have realised that unless immediate notice of cancellation was given the defender would be likely to continue to take such steps. Whether or not there was in fact a "dirty trick" here (and on the evidence before me I do not conclude that there was) the lack of such an implied term would allow a "dirty trick" to be perpetrated. I am in no doubt that had the parties been asked at the outset whether, in the event of cancellation of a SWIFT, immediate notice should be given they would have said "Yes, of course." (See *McBryde,* supra*,* paragraphs 9-71 and the authorities there discussed).

The breakdown of the parties' business relationship

[27] On 24 November 2011 the defender's production manager, Louise Sloan, sent the pursuer an email headed "Update on loadings" (JB 60). The email stated, *inter alia,* that the Glen Clyde Whisky purchased by contracts GC4 PF 3-4 was ready to load. In relation to Black Horse Whisky it indicated that the goods for the contracts BH9 PF 21 and BH10 PF11 15 were to be loaded during the week commencing 28 November; that the goods for contracts BH10 PF1-5 were scheduled for loading during the week commencing 5 December; that the goods for contracts BH10PF6-10 were scheduled for loading during the week commencing 12 December; and that the goods for contracts BH11 PF 1-8 were scheduled for loading during the week commencing (sic) 12-19 December. Of those consignments the only ones which had been paid for by 24 November were BH9 PF21 (paid on 1 November 2011) and GC 4 PF3-4 (paid on 7 November 2011). Accordingly, the email had concluded: "We await confirmation of further payments to progress loadings…"

[28] On the same day Liya Ravodina, an import manager with the pursuer, replied. She provided dates for payment of the unpaid orders referred to in Ms Sloan's email. In several instances the dates Ms Ravodina provided were later than the loading dates which Ms Sloan had given. In relation to BH10 PF 1-10 Ms Ravodina indicated "we plan to pay w/c 12th December". Mr McSherry replied the same day pointing out that prepayment was required. On 29 November Ms Ravodina proposed that the defender should ship goods in return for partial prepayment, which proposal was rejected.

[29] On 30 November 2011 the pursuer paid for BH10 PF1, BH10 PF2 and BH10PF11. On 1 December 2011 it paid for BH10 PF12-PF15.

[30] By 2 December 2011 there were eight contracts for the supply of Black Horse Whisky (BH9 PF21, BH10 PF1-2, BH10 PF11-PF15) and two contracts for the supply of Glen Clyde Whisky (GC4 PF3-4) where the pursuer had paid for the goods but they had not yet been shipped to it.

[31] On 6 December 2011 the pursuer instructed a SWIFT payment be made to the defender's bank as payment for eight containers of Black Horse Whisky (BH10 PF3-PF10) and at the same time it emailed the defender a copy of the SWIFT receipt.

[32] On 7 December 2011 Ms Ravodina emailed Mr Barclay:

"Dear Colin,

BLACK HORSE

First of all I'd like to remind you that we still have not received the bottling and loading plan for Black Horse. The peremptory date for delivery from BG is 16/12/11.

Our customer is waiting for the delivery plan today.

In case you don't ship goods in established terms we will be forced to stop the order and insist on payment return."

The email also enclosed the Mr Kemnev's report dated 6 December 2011, which I shall return to. À propos the shipment of goods to which the report related Ms Ravodina indicated that either the defender should pick up the goods and send other goods with properly fixed labels, or it should grant a discount of 20% and provide the pursuer with empty cases and labels. Ms Ravodina went on to state that there were further large quantities of Glen Clyde Whisky in Moscow (77,524 bottles) and Riga (163,396 bottles). The email concluded in relation to them:

"I see only one solution of this problem – you grant us 20% discount for all these goods, send us labels as many as we need and we ourselves remove the defects.

GLEN CLYDE orders

Gerry inquired me when we plan to pay for the following invoices:

GC04 2011 PF5

GC04 2011 PF6

GC04 2011 PF7

GC04 2011 PF12

I'd like to inform you that until we solve the problem with goods that are in Riga and Moscow we should not discuss the payment of any Proforma invoice

Please reply my mail ASAP."

[33] At about the same time Mr Romanov had emailed Mr Barclay in the following terms:

"Dear Colin,

Let me know something about paid goods:

Order [BH] 9 Prf 21 12x 70cl – paid 30/10/2011

Order [BH] 10 Prfs 11-15 12x 70cl – paid 29/11/2011 (PF11) and 30/11/11

Order [BH] 10 Prfs 1-5 24x 50cl – paid 30/10/2011 (PFs 1,2) and 6/12/11

Order [BH] 10 Prfs 6-10 24x 50cl – paid 6/12/11

All paid goods must be shipped to Riga the latest 16/12/11 and if you have any problems with bottling I have to know it ASAP."

The goods listed as paid goods included the goods to which the SWIFT receipt of 6/12/11 related.

[34] Mr McSherry emailed Mr Romanov at 12.55pm on 8 December 2011 stating that the SWIFT payment of £138,570 had not been received in the defender's bank account; that it awaited payment for GC04 2011 PFs 6, 7 and 12; that in fact all of PF5 and part of PF6, 7 and 12 had already been produced with a total invoice value of £82,068.60 and that on receipt of that payment it would be shipped. He noted that the defender had already purchased materials to the value of £66,597.24 for GC4 2011 PF8, 9, 10, 11 and 13, GC 12YO PF2, GC05 2011 PFs 1-14; and materials to the value of £10,052.89 for BH11. He indicated that the defender intended to invoice the pursuer for the materials it had purchased and would make them available to the pursuer or would purchase them back if payments for the relevant outstanding orders was made. He responded to the Mr Kemnev's report, refuting the suggestion that 99% of bottles had labels partially peeled off. The email concluded: "Given the current trading position we have placed the [pursuer's] account on hold."

[35] Mr Romanov replied by email of 16.03 the same day:

"Dear ALL,

I recognise that you are not interested in our further collaboration but we have to be constructive.

I'd like to offer you following plan of action:

Black horse

1. You bottle and ship all paid PF invoices from orders 9 and 10 before 16/12/11. Unpaid PF we would like to pay by letter of credit against documents.

Glen Clyde

2. All Glen Clyde (each bottle) produced and ready for shipment in frame of placed orders (Order 4, 5, GC 12YO) should be inspected by independent surveyor.

After we get the copy of their report that all is OK we'll confirm the shipment and pay for goods by letter of credit against documents.

3. You give us exact instructions how should be sorted out goods in Riga and Moscow, in whose presence (independent surveyor or without him) and give reference what are you ready to cover basing on the reports of these sorting out.

Please confirm whether you accept this offer and lets go ahead."

[36] At 17.58 the same day Mr Nikolov responded by email:

“Dear All,

We are surprised and disappointed that you feel we are not interested in further business together. The following are the facts of the matter:

You notified us on Tuesday that you had instructed a payment of GBP 138,570 and provided a copy of the Swift transfer. We accepted your word on this and proceeded to produce further stock of Black Horse. The payment did not arrive and we have ceased further production.

You cancelled several orders in the full knowledge that we had purchased the relevant materials necessary to fulfil our commitment to you. You have so far failed to pay for GC stock which we have bottled and for which we have paid labour, materials and whisky.

You have failed to pay for all the transport costs which have been detailed on the statements sent to you. All these transport costs are in respect of goods already sent to Riga.

In view of the above we are not in agreement with your request to alter terms to settle accounts by Letter of Credit against documents.

In order to resolve this matter, and for the business to be fairly concluded, I would propose the following solution:

1. [The pursuer] pays for all the outstanding transport and origination as detailed in the accounts statements

2. [The pursuer] pays for all bottled stock

3. CMC ships all paid stock

4. [The pursuer] pays for all GC and BH material in stock

5. CMC invoices all transport costs in advance of shipment

CMC are prepared in this instance to absorb all the costs incurred and caused by the sudden cancellation of orders at this crucial time of the year subject to settlement of the 5 points above. CMC will also have to absorb the costs incurred in procuring and transporting the materials and whisky required for production prior to the cancellation of orders.

I would be grateful if you would give consideration to the foregoing in order to facilitate a fair and reasonable conclusion.”

[37] At 15.26 on 12 December 2011 Ms Ravodina emailed the defender. The email concluded:

"Summery (sic)

1. Brand Black Horse belongs to the third part and should be shipped to Riga in terms approved by the client - the latest 20/12/11.

2. At the present moment you have prepayment for 131432.93 GBP. Do you plan to ship paid goods this week or you prefer to return us the payment?

3. We are ready to fulfil our obligations in case you fulfil yours."

[38] At 17.09 the same day Mr McSherry replied:

"You claim you recalled the promised payment of GBP138570 in the absence of requested information. This is completely untrue as you have always been informed of production and shipping information. You provided your instruction to the bank and we bottled more product in good faith. This is a risk which we took but, unfortunately for us, we did not anticipate you breaking your promise.

Louise provided a schedule on 24 October and, in fact, containers were sent to Riga for which payment had not yet been received. This was another risk taken by us which should not have been necessary.

We have already informed you that we have bottled stock of Glen Clyde and Black Horse. This is because we accepted orders from you in good faith which you subsequently cancelled. As a result, we now have stock of finished goods and dry materials which are relevant only to your brands. We repeat that it will be necessary to raise an invoice to you for all these materials and finished goods.

It is noted that you wish to offset some amounts against the costs we have already paid on orders shipped. This is disappointing as, again, we accepted in good faith that you would settle these transport invoices. In a similar vein it is surely in order for us to offset the costs of the materials we have purchased against some of the goods you have paid.

CONCLUSION

You will understand that we have no use whatsoever for Black Horse and Glen Clyde materials and finished stock therefore we are obliged to raise an invoice to you for the large quantities remaining in stock. You will also understand that we shall raise invoices in respect of associated costs.

You may also find that the cost of all GC/BH materials, together with those invoices already raised but unpaid will be greater than the value of those orders which you have part paid. In that event Campbell Meyer & Company will have a deficit.

Our email of 8 December has the 5 point proposal which can resolve the issue. However, it is of (sic) particularly vital that you address the importance of the value of all of the materials we have purchased on your behalf and which are exclusive to your company.

I look forward to hearing from you."

[39] Ms Ravodina responded the following day by saying that the goods for BH9 PF21 and BH10 PF 11-15 should have been loaded in the week commencing 28 November; that the claim for bottles and dry materials was "equalized by our claim concerning prepayments"; that the transport costs payment ought to be credited against the sum which had been paid for BH7 12YO which had not been delivered. The email concluded:

"In the created situation both of us carry on losses and our further confrontation will just increase them. I'd like to suggest you getting out of the present situation step by step:

1) Shipment of the paid goods (8 containers) the latest 20/12/11

2) Immediate transfer to your account of 35845 GBP for transportation

3) Providing us with the information about BH 12YO 801 cases

4) Providing the information about bottled and ready for shipment unpaid goods

5) Endorsement of buyout terms of bottled products."

[40] Mr McSherry responded to that email the same day. He noted that the pursuer had not made payment for the BH10 PF 11-15 goods until after the notified loading dates; that the contract terms were for prepayment; that trust had been broken when the SWIFT payment had been cancelled without any notice to the defender; and that the cancellation of orders at very short notice had caused inconvenience and costs. The response concluded:

"…it is very difficult to accept any promise of payment from you as you are likely to cancel as before. I believe you must show a willingness to co-operate and should firstly pay for all those previous invoices listed on our statement relating to transport, label origination and case origination…Only when the payment arrives in our bank can we move to the next stage of despatching products to you. Please let me know what you plan to do at your earliest convenience."

[41] During December 2011 and January 2012 the defender indicated to the pursuer that it would decant its stocks of cases of bottled Glen Clyde Whisky and Black Horse Whisky unless the parties reached a resolution of their disputes. No such resolution was reached and the defender decanted the whisky. It invoiced the pursuer for costs incurred by it in acquiring goods and materials for the outstanding contracts.

[42] During late 2011 and 2012 the pursuer obtained Glen Clyde Whisky from another supplier, Inver House Distillers. Problems in relation to peeling labels, squint labels and bubbling of labels were also experienced with that supplier. The problems were eventually resolved by Inver House changing the label paper and the substrate adhesive.

Was the defender in breach of contract?

Satisfactory quality?

[43] The pursuer claims that certain of the Glen Clyde Whisky which was supplied by the defender under the contracts of sale was not of satisfactory quality. In this regard it relies upon two reports (JB 77, 86) prepared by Mr Kemnev, and on Mr Kemnev's evidence (which was given by live link from Riga). Mr Kemnev adopted his witness statement and his supplementary witness statement. He spoke to the terms of his reports.

[44] Mr Kemnev's initial inspection was carried out on 5 December 2011. It related to a single container (CRXU 0978185). The container contained goods supplied under contract GC3 PF16 (1286 cases of whisky which were on 22 pallets). In accordance with the pursuer's instructions Mr Kemnev inspected one case per pallet. He took 68 photographs. On 6 December 2011 he completed a cargo inspection report. The most significant finding was that almost all of the inspected bottles had front labels which were partially peeling off at the edges, but he also noted other problems including squintness of some front and back labels and minor defects to some bottle tops.

[45] Between 28 December 2011 and 6 January 2012 Mr Kemnev inspected 13,052 cases (157,156 bottles) of Glen Clyde whisky in the PLG warehouse at Riga. That represented the unloaded contents of 10 containers, including the container from which 22 cases had been opened at the time of his initial inspection. He took 395 photographs. He found that 117,396 bottles had problems with labels peeling off; that 39,572 bottles had front or back labels which were squint to some degree or had air bubbles under the labels; and that relatively small numbers of other bottles exhibited other problems such as minor dents or blemishes to the bottle top.

[46] Miss Crawford submitted that on a proper analysis of the evidence the defender had merely undertaken to supply whisky, bottles, labels and cases to the pursuer's order; and that it was not a term of the contract that the finished product required to be of satisfactory quality. I reject that contention. The contract of sale in each case was for the finished product. The finished product was the goods sold in terms of each contract. It is a matter of admission that it was an implied term of each contract of sale that the goods be of satisfactory quality. It is clear that goods may be of unsatisfactory quality due to defects in labelling or packaging (see *e.g. Niblett* v *Confectioners' Materials Co. Ltd* [1921] 3 KB 387; *Gilbert Sharp & Bishop* v *Wills* [1919] SASR 114; *Atiyah, The Sale of Goods* (11th ed.), page 197).

[47] I am satisfied on the basis of Mr Kemnev's evidence that he did indeed discover the matters which he spoke to when he carried out his inspections. The issue is whether because of those defects the affected goods were not of satisfactory quality.

[48] Subsections 14(2A) and (2B) of the Sale of Goods Act 1979 (as substituted by the Sale and Supply of Goods Act 1994, section 1(1)) provide:

"(2A) For the purposes of this Act goods are of satisfactory quality if they meet the standard which a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

(2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among other things) are in appropriate cases aspects of the quality of the goods –

(a) fitness for all of the purposes for which goods of the kind in question are commonly supplied,

(b) appearance and finish,

(c) freedom from minor defects,

(d) safety, and

(e) durability. "

[49] Mr Walker suggested that the market for Glen Clyde Whisky in Russia was a luxury market. I am not persuaded that I should approach matters on that basis having regard to the evidence as a whole, including the price paid by the pursuer to the defender and Mr Romanov's own description of Glen Clyde Whisky as "a middle of the range blended product"(paragraph 6 of his witness statement). However, it was certainly not "a low sector entry level whisky" like Black Horse Whisky (paragraph 7 of the same statement). There is no doubt that Glen Clyde Whisky's profile was important to the pursuer. It spent significant time, effort and expense trying to create a presentation of the product which suggested that it was a premium blended whisky.

[50] For her part Miss Crawford urged me to have regard to the fact that such problems as there were with label peeling, bubbling or squint application were substantially attributable to the pursuer having specified bottle and label designs and materials which made it very difficult to attain a perfect and identical result with every bottle. She emphasised that in any production process a certain variation was inevitable. No tolerance limits for label positioning had been specified in the contracts. Satisfactory quality did not mean that each label required to be perfectly applied. It was relevant to have regard to the fact that none of the goods had been rejected. The pursuer's warehousemen in Riga, PLG, had been able to remedy the problems with the labels at a relatively modest cost (0.04 euro per bottle for checking and sorting and 0.04 euro per bottle for manual processing of the bottle labels).

[51] While I agree that the bottle and label designs came from the pursuer and its specialist advisers, the defender had not insignificant input in discussions relating to the choice of paper and adhesive for the labels. In any case, the defender undertook to supply a finished product of satisfactory quality. In the whole circumstances I have no doubt that a reasonable person acquainted with all of the facts of the case (and in particular one in the position of the buyer with its knowledge) would not regard the bottles which had peeling labels as being of satisfactory quality. The peeling would be noticeable to wholesalers, retailers and consumers and would tend to make the bottles concerned look more like a basic rather than a premium product. I reach that conclusion notwithstanding that the cost of remedying the label defects was relatively small. Cost is not the only consideration. The time required to remedy the problem, and the resultant delay in having a product ready for the market, are not insignificant factors.

[52] I am less convinced in relation to the complaints of squint application of labels. Mr Kemnev described affected bottles as having front labels which deviated 2-3 millimetres from the centre line, with the deviation in some cases being up to 5 millimetres. He had identified offending bottles simply by visual examination. I agree with Miss Crawford that it is not necessary for labels to be perfectly positioned on a bottle for the goods to be of satisfactory quality. With the best will in the world, some degree of variation

and deviation from perfect alignment is likely to be almost inevitable in any production process. In this regard I accept the unchallenged evidence of Mr Barclay that a variation of plus or minus 1mm would be a very good result. In relation to front labels, I think that a reasonable person acquainted with all the facts would not regard a bottle as being of unsatisfactory quality unless the misalignment was clearly noticeable. Most of the examples of squint front labels in the photographs do not appear to me to fall into the category of being clearly noticeable. Those which are clearly squint are likely to be the ones where the deviation is nearer the top than the bottom of the range Mr Kemnev identified. It is also far less likely that a deviation in relation to a back label would be regarded as significant. Its position at the back of the bottle means that it would be much less important. It would not be evident to the eye when displayed on a shop shelf. I think that it would only be in a fairly extreme case that misalignment of a back label would result in a goods not being of satisfactory quality. Very few of the back labels which have been photographed appear to me to fall into such a category.

[53] So far as the other reported visual defects are concerned, if air bubbling under a front label was readily noticeable it would be likely to make the bottle of unsatisfactory quality. I doubt however if minor bubbling under a back label would have that effect. Nor do I think that very minor dents or blemishes to a bottle cap would be likely to have that result.

[54] It follows that the 117,396 bottles which Mr Kemnev identified as having peeling labels were not of satisfactory quality. In addition, a proportion of the 39,748 bottles which he identified as having squint labels, air bubbles under labels, or damaged bottle tops were also of unsatisfactory quality: but I am not persuaded that anything like the majority of them fell into that category. On the evidence led it is very difficult to be more precise than that. As a matter of broad general impression it seemed to me that perhaps only about one-quarter to one-third of the photographs which were put forward as providing examples of defects other than peeling labels demonstrated significant defects which resulted in bottles not being of satisfactory quality.

[55] The above findings relate only to the 10 containers which Mr Kemnev examined. The pursuer's claim for damages is in relation to breach of the implied term of each of these 10 contracts that the goods be of satisfactory quality. The claim is for the remedial costs of 12,782.08 euro incurred to PLG. While Mr Romanov did indicate that further bottles of Glen Clyde Whisky in the pursuer's Moscow warehouse suffered from similar label defects (and that the pursuer remedied these defects itself), no case of breach of contract and no claim for damages were advanced in relation to those bottles.

[56] I am satisfied that where bottles were not of satisfactory quality in the respect(s) described the defender was in breach of contract, and that the breach was not a trivial breach. Whether the breach was a material breach which would have entitled the pursuer to reject the goods is more moot. There is a colourable argument that it was not, having regard in particular to the nature and extent of the defects and to the relatively modest costs of remedying them, and to the fact that the pursuer did not reject any of the goods in the 10 containers (or indeed any other goods which the defender supplied). Mr Romanov's evidence was that the goods were remedied and sold. He suggested that in some instances sales may have been at a discount. On the other hand, as already noted, the pursuer had made significant efforts to present Glen Clyde Whisky as being a premium blended whisky. While the matter is somewhat finely balanced, I think that the better view in the whole circumstances is that the breach was a material breach.

Goods paid for but not supplied

[57] The goods purchased under contract BH9 PF21 had been paid for in 1 November 2011. Those purchased under contracts GC4 PF3 and GC4 PF4 had been paid for on 7 November 2011. According to the defender all three consignments had been produced and were ready to load as at 24 November 2011. In those circumstances I consider that a reasonable time after payment for supply of those goods had passed by 8 December 2011. The defender was accordingly in breach of those contracts unless he was entitled to

suspend performance of his obligation to supply. On the other hand, in relation to the orders which were paid for on 30 November 2011 (BH10 PF1, PF2 and PF11) and 1 December 2011 (BH10 PH12-15) a period of only one week had passed since payment had been made. With those contracts a reasonable period after payment for delivery had not expired by 8 December 2011. The defender will only have been in breach in relation to those contracts if its subsequent withholding of performance was unjustified.

[58] The defender submits that it was entitled to withhold performance of its obligations to deliver goods. It contends that the pursuer was in breach of its obligation to make payment for the Black Horse Whisky under contracts BH10 PF 3-10, as its cancellation of the SWIFT payment for those contracts demonstrated. It maintains that because of that breach it was entitled to suspend performance of its obligations to supply the whisky sold under the earlier contracts. It relies upon the mutuality principle.

[59] In my opinion the defender's reliance on that principle is clearly ill-founded. In the contracts where the defender withheld performance of its obligations to supply goods the pursuer had duly performed its corresponding obligations to pay for the goods. It was entitled to have the goods supplied. There was no legitimate basis for the defender to suspend performance of its obligations to supply those goods. The alleged failure of performance relied upon related to other distinct contracts. Nothing in the terms of any of the contracts or in the surrounding circumstances indicates an intention that the defender's obligations to supply the goods under a particular contract should be dependant not only upon payment of the price for those goods being made, but also upon payment of the price being made for goods to be supplied under other contracts. The obligations which the defender withheld performance of and the obligations of the pursuer which the defender says were not performed were not concurrent obligations. In each case the pursuer's obligation to make payment had as its counterpart the defender's obligation to supply the goods purchased. The pursuer's obligations to make payment for the goods sold under contracts BH10 PF 3-10 and the defender's obligations to supply the goods purchased under contracts BH9 PF21, GC4 PF 3-4, BH10 PF1-2, 11 and 12-15 were not corresponding or reciprocal obligations: see *Bank of East Asia Ltd* v *Scottish Enterprise* 1997 SLT 628, per Lord Jauncey at pages 1217H - 1218C; *Macari* v *Celtic Football and Athletic Co Ltd* 1999 SC 628, per Lord President Rodger at pages 639E - 642 E, per Lord Caplan at page 650D-E; *McNeill* v *Aberdeen City Council* 2014 SC 335 per Lord Drummond Young at paragraphs 26-30; *McBryde,* supra, paragraphs 20-44 to 20-56.

[60] It follows that the defender was not entitled to withhold performance of its obligations to supply the goods which the pursuer had paid for. Its withholding of that performance was a material breach of each of the contracts BH10 PF 3-10. It is plain that the pursuer accepted that repudiation and rescinded those contracts. It demanded repetition of the purchase price paid. In this action it seeks repetition and damages for breach of those contracts.

Anticipatory breach?

[61] I did not understand Mr Walker to suggest that the defender had been in anticipatory breach of the other unperformed contracts. In my opinion he was correct not to do so. On the evidence there is no basis for maintaining that anything the defender said or did indicated unequivocally that it did not intend to perform its obligations under those contracts. The fact that the defender had previously supplied Glen Clyde Whisky which was not of satisfactory quality did not indicate unequivocally an intention on its part not to perform its obligations under other contracts. The fact that the defender had not supplied goods in the BH9 PF21, BH10 PF1-2, 11 and 12-15, and GC4 PF 3-4 contracts did not amount to a declaration that in other contracts it would fail to deliver goods within a reasonable time of payment. Putting the pursuer's account "on hold" after the cancellation of the SWIFT payment was not an abandonment of the contracts.

Was the pursuer in breach of contract?

Contracts BH10 PF 3-10

[62] The contracts for sale of Black Horse Whisky BH10 PF 3-10 had been concluded on 28 September 2011 when the defender issued the relevant pro forma invoices accepting the pursuer's offer to purchase the goods. On 24 November 2011 the defender had indicated that goods for contracts BH10 PF 3-5 were scheduled for loading during the week commencing 5 December 2011 and that goods for contracts BH10 PF 6-10 were scheduled for loading during the week commencing 12 December 2011. The pursuer did not instruct a SWIFT payment for PF 3-10 until 6 December 2011.

[63] I accept Mr McSherry's evidence that usually SWIFT transfers from the pursuer were received by the defender's bank within 24 hours of their instruction. I found it surprising that the pursuer appeared not to be in a position to lead evidence which showed more precisely when the SWIFT instruction was cancelled. The evidence of both Mr Romanov and Ms Kalugina on this issue was less than satisfactory. Initially rather vague and evasive on the matter, when pressed Mr Romanov indicated he could not recall for sure when the SWIFT was cancelled; but that he believed it was "several days" after 6 December 2011. That cannot be correct as it is plain that the very latest time at which it could have been cancelled was 8 December 2011.

[64] Mr Romanov was still pressing for delivery of the BH10 PF3-10 goods at 17.16 on 7 December (JB 78). Ms Kalugina, while specific in relation to most other matters, said that given the passage of time she simply could not remember precisely when the SWIFT had been cancelled. It struck me as strange - and rather convenient for the pursuer - that the evidence of both witnesses was unhelpful on this issue.

[65] In paragraph 40 of his witness statement Mr Romanov stated in relation to cancellation of the SWIFT payment:

"The reason we cancelled the payment was because the previous goods we had paid for had not been sent and no delivery date had been provided or confirmed."

In the course of his oral evidence he indicated that that had been the main reason; but the fact that defects had been found on Mr Kemnev's first inspection which the defender did not appear to be taking appropriate steps to deal with had also been a consideration.

[66] Mr Romanov seemed to consider that it was acceptable to cancel the SWIFT payment without giving the defender notice. In my opinion it was not, and it is unsurprising that the defender took a dim view of it. Even if the SWIFT was cancelled after Mr Romanov's email of 17.16 on 7 December, it ought to have been plain to him that the defender might be incurring costs on the strength of the SWIFT; and that the goods might even be shipped before the defender became aware of the cancellation. In failing to give the defender immediate notice of the cancellation the pursuer was in breach of the implied term of each of contracts BH10 PF3-10 that such notice should be given. The breach was not a trivial breach. However, in my opinion it was not a material breach which entitled the defender to rescind those contracts.

[67] As at 8 December 2011 was the pursuer in breach of its obligations to make payment within a reasonable time after the conclusion of each of the contracts? As already indicated, I agree with Mr Walker that in answering that question it is appropriate to have regard to the parties' practice. I have already set out my findings on that matter. Estimated shipping dates had been provided in Ms Sloan's email of 24 November 2011 - loading for BH10 PF3-5 during the week commencing 5 December 2011 and for BH10 PF 6-10 during the week commencing 12 December 2011. Given that the estimate entailed BH10 PF3-5 being loaded at the latest by 11 December 2011 and BH10 PF 6-10 at the latest by18 December 2011, payment for the earlier consignment during the period between 27 November and 6 December and for the later consignment between 4 and 13 December would have accorded with the parties' practice. In those circumstances, while I am satisfied that the payments had fallen due by 6-8 December, I am not satisfied that at that point the pursuer was in breach of its obligations to make payment within a reasonable time.

Was the pursuer entitled to withhold performance?

[68] The pursuer contends that from about 6-8 December 2011 it was entitled to withhold performance of its payment obligations under BH10 PF3-10 because (i) the defender had not performed its obligations to supply the goods which the pursuer had paid for (BH9 PF21, BH10 PF 1, 2, 11, 12-15, and GC4 PF 3-4); and (ii) the Glen Clyde Whisky examined by Mr Kemnev on 5 December 2011 was not of satisfactory quality and the defender had not made any adequate proposals to remedy that problem. I reject the pursuer's contention for reasons similar to those which led me to reject the defender's claim to withhold performance of its obligations to supply the goods. The alleged failures of performance upon which the pursuer relies relate to distinct contracts. Nothing in the terms of those contracts or their surrounding circumstances, or in the terms of the contracts where the pursuer seeks to withhold performance or their surrounding circumstances, indicates an intention on the part of the parties that the defender's obligations to supply the goods under contracts BH9 PF21, BH10 PF 1, 2, 11, 12-15 and GC4 PF3-4 and the pursuer's obligations to pay the price under different contracts were to be counterpart obligations. The obligations which the pursuer withheld performance of and the obligations of the defender which the pursuer says were not performed were not concurrent obligations. The fact that certain of the goods under an earlier contract for the sale of Glen Clyde Whisky may have been of unsatisfactory quality did not entitle the pursuer to withhold performance of later, distinct contracts relating to (a) Glen Clyde Whisky, or (b) Black Horse Whisky. The fact that the defender had not yet performed its obligations to supply goods under contracts where the pursuer had paid the price did not entitle the pursuer to withhold performance of its payment obligations under distinct contracts for the purchase of Glen Clyde Whisky and Black Horse Whisky.

[69] The pursuer's withholding of payment was wrongful and was a material breach of the BH10 PF3-10 contracts.

Was the pursuer in anticipatory breach?

[70] In my opinion the cancellation of the SWIFT taken together with the pursuer's subsequent correspondence was also an anticipatory material breach by the pursuer of the BH10 PF3-10 contracts. Further, it was an anticipatory material breach of all the other contracts where payment had not been made. The cancellation and the subsequent correspondence indicated clearly and unambiguously that the pursuer did not intend to honour its contractual obligations. The pursuer made it plain that it was no longer prepared to comply with the contract terms anent prepayment; that it was only prepared to make payment by letter of credit against shipping documents; and that in relation to Glen Clyde Whisky it was also not prepared to make payment unless and until goods had been inspected and passed by an independent surveyor.

Rescission

[71] In my opinion for these reasons the pursuer repudiated all of the contracts where it had not made payment. It is clear that the defender accepted the repudiation and that it rescinded those contracts. It ceased production and treated the trading relationship as having ended. It invoiced the pursuer for goods and materials which it had obtained in order to carry out the contracts. It indicated that it intended to disgorge cases of Black Horse Whisky and Glen Clyde Whisky which had already been produced, and in due course it did so. It advanced its counterclaim for damages in respect of the pursuer's breach of contract.

Conclusions

[72] The defender was in material breach of contract GC3 PF16 in that a substantial proportion of the goods supplied were not of satisfactory quality.

[73] The defender was also in material breach of contracts BH9 PF21; BH10 PF 1, 2, 11, 12-15; and GC4 PF 3-4. It was not entitled to withhold performance of its obligations to supply the goods purchased

under those contracts. The pursuer accepted the defender's repudiation and rescinded those contracts.

[74] In relation to contracts BH10 PF3-10, the pursuer was in breach of the implied term that the defender be given immediate notice of cancellation of a SWIFT payment. In each case the breach was not a trivial breach, but it was not a material breach.

[75] The pursuer was not entitled to withhold performance of its payment obligations under contracts BH10 PF3-10. The wrongful withholding was a material breach of contract.

[76] The pursuer was in anticipatory material breach of all the contracts where it had not made payment. It indicated unequivocally that it did not intend to comply with its prepayment obligations under those contracts.

[77] The defender accepted the pursuer's repudiation of the contracts where payment had not been made and rescinded them.

Remedies

[78] During the course of her submissions Miss Crawford briefly touched upon the question of the defender's remedies for the pursuer's breaches of contract. Under reference to *Lloyds Bank* v *Bamberger* 1993 SC 570 she advanced an argument that, notwithstanding the defender's rescission of the contracts where payment had not been made, the defender remained entitled to seek payment of the contract price in some of the contracts. In those contracts she submitted that the defender's right to payment had accrued before rescission. Mr Walker made a short submission in response. It is unnecessary that I record it here. The submissions were not fully developed on either side; and, since it appears to me that the restricted proof which was allowed did not extend to the question of remedies, it is not appropriate to say more on the topic at this stage.

Disposal

[79] I shall put the case out by order for parties to address me as to (i) the terms of an appropriate interlocutor to give effect to my decision; and (ii) further procedure. I reserve meantime all questions of expenses.