OUTER HOUSE,
COURT OF SESSION

[2012] CSOH 27

OPINION OF LORD MATTHEWS

in the cause

IAN TETLOW and DOREEN TETLOW

Pursuers;

A494/10

against

(FIRST) THE FIRM OF AMS JOINERS AND BUILDING CONTRACTORS; (SECOND) ALAN SMITH and (THIRD) MARK SMITH

Defenders:

Pursuers: Beynon; Morisons, LLP

Defenders: Artis; Balfour + Manson LLP

16 February 2012

[1] In this action the pursuers seek production and reduction of a "pretended" decree of the Sheriff Court of Banff in an action by the defenders against the pursuers dated 14 December 2009 and extracted on 29 December 2009 in terms of which the Court granted what is said in the first conclusion to be a decree by default but was in fact a decree in absence in favour of the defenders in the sum of £27,161.70 sterling with interest and expenses. The pursuers also seek payment by the defenders to the pursuers of the sum of £27,710.12 sterling, with interest, and the expenses of the action.

[2] The case called before me for a debate on the defenders' pleas-in-law 1 and 2 to the following effect:

"1. The action being incompetent, it should be dismissed.

2. The pursuers' averments being irrelevant *et separatim* lacking in specification, the action should be dismissed".

Background

[3] The pursuers are spouses and the defenders a firm of joiners and building contractors and the partners thereof. The pursuers are the equal joint heritable proprietors of two adjacent three storey houses at 13 and 15 Bridge Street, Banff. In September 2005 the property at 13 Bridge Street is said to have been occupied by their daughter, Gillian Lynsey Tetlow. The property at 15 Bridge Street was occupied by a tenant of the pursuers. A serious fire broke out in No.15 which caused substantial damage to that property and fire and water damage was also occasioned to the other property. The pursuers instructed an architectural consultant, Gordon Phillip, to prepare specifications detailing the repairs which were necessary to both properties. With respect to 13 Bridge Street it is averred that the specification was in respect of joiner work, plumber work, slater work, electrical work and painter work. It is also averred that the specification relative to joiner work was, with the agreement of the pursuers and the first defenders, increased from an initial figure of £17,835 to a figure of £28,822 exclusive of VAT. The total cost for the specified work relative to No.13 inclusive of VAT

was £50,542. In relation to 15 Bridge Street it is averred that the specification was in respect of the same type of work and that the agreed upon joiner work was increased with the figure rising from £27,385 to a figure of £38,159, both exclusive of VAT. The total cost for the works relative to No.15, inclusive of VAT is said to be £80,482. The pursuers entered into a building contract with the first defenders in terms of which the latter would carry out all of the necessary repairs to both properties. It is averred that the contract provided for the works to be those specified in the said two specifications and that as the parties reached no express agreement as to the standard of workmanship required from the defenders, on the basis of business efficacy and necessity, the contract was subject to an implied term that the defenders would carry out the work by means of the exercise of reasonable skill and care. It is also averred that the defenders were under an express duty to supply materials of the type and quality specified in the two specifications. The pursuers aver that they agreed to extras at a price of £2,078 together with a further cost of £1,104 relative to replacement of a section of floor. The averments so far are admitted in general terms by the defenders. The pursuers go on to aver that the defenders commenced work in mid-January 2006 but failed to complete the contractual works relative to both properties. It is said that they failed to carry out material items to any extent and separately carried out work in a materially defective manner. At no stage, it is said, did they submit a final account. It is also averred that they left both properties in June 2006. Thereafter it is averred that by letter of 31 October 2007 solicitors for the first defenders wrote to the first pursuers seeking payment of an outstanding balance of £27,238.27 on the basis that this sum had been approved for payment by Mr Phillip. The letter indicated that in the absence of payment within 14 days court proceedings would ensue. It is averred that at that time the pursuer was working in the Far East. The letter was replied to, it is said, by the second pursuer, on 14 November 2007. It is said that she indicated that payment had not been made because the contract had yet to be completed properly. Her letter stated that there was "still many items not carried out to the specification". A further letter dated 17 November 2007, from the first defender's solicitors, threatened court proceedings again. The second pursuer, it is said, replied to that letter by letter dated 21 November 2007 which stated that "as the work has not been carried out to the drawings and specifications we therefore dispute the figure mentioned in your letter". It is said that in support of the specifications prepared by Mr Phillip he had prepared detailed contractual drawings which are produced. A further letter of 26 November 2007 to the second pursuer threatened litigation again. Thereafter it is said that matters remained in abeyance until a letter to the pursuers dated 23 December 2008 in which the first defender, through his solicitors, suggested that a meeting take place between the pursuers and Mr Phillip in order for the refuted works to be "agreed" upon and the details thereof forwarded to the first defender's solicitors, pending which 80% of the sum originally demanded was being insisted upon. The letter concluded, it is said, by stating that if no reply was received by 12 January 2009 litigation would ensue. The pursuers replied to that letter by letter of 29 December 2008 explaining that Mr Phillip had met the first defenders on 27 October 2008 and in the course of that meeting the nature and extent of the pursuers' complaints had been explained to them by Mr Phillip and the pursuers understood that the complaints had been relayed to the first defenders. The letter also indicated that a new contractor had been instructed to carry out the works necessary for completion certificates to be obtained for both properties. It is said that there was further correspondence between the solicitors and the pursuers in which the latter maintained that the first defenders were well aware of the nature of their failure to complete the works and in the circumstances the pursuers were not prepared to provide any further information, nor was it necessary for them to do so. The pursuers' position, according to the averments, was that prior to the decree passing against them, they were entirely willing to make payment to the first defenders of the whole sum sought by them of £27,238.27 under deduction of sums paid relative to rectification of the first defenders' defective works but only when the remaining works in the specification had been completed to a reasonable standard. It is averred that the whole tract of correspondence between the defenders' solicitors and the pursuers disclosed that the latter were frequently away from Scotland for extended periods. At all material times, it is said, the defenders and their solicitors were aware of the email address of the first pursuer which was maintained throughout the whole relevant period. The final two letters before the raising of proceedings consisted of a letter from the solicitors dated 30 June 2009 and the pursuers' reply of 11 July 2009. In the letter of 30 June the solicitors indicated that they were to exhibit the final account to the pursuers and would go through each paragraph with them in detail. In the reply the pursuers queried the usefulness of producing a final account when the specifications had not been "carried out as agreed to by the parties". The pursuers in that correspondence indicated that the first defenders were in

material breach of contract in respect of failure to carry out specified items of work and in respect of defective workmanship. They indicated that they would pay a sum to the first defenders which was found to be properly due to them. The correspondence is said to be produced and referred to for its whole terms although it is not said to be adopted and held to be incorporated in the pleadings *brevitatis causa*.

[4] As I have indicated, the defenders admit that there were contractual arrangements between them and the pursuers and that they carried out certain works. According to the averments for the defenders the sum for which the sheriff granted decree was lawfully and resting owing and that payment of that sum had been approved by the pursuers' architect. The pursuers, it is said, did not intimate dissatisfaction with the defenders' work until late in 2008 which was about 2 years after the work had been carried out and about a year after the final account had been rendered. It is averred that by a number of letters the defenders' agents asked the pursuers for details of their alleged grounds for dissatisfaction but no specific reply was made. They also offered the pursuers the opportunity to pay by instalments but it was not taken up by them. It is averred that in 2006 the second pursuer told a subcontractor of the defenders working in the properties that she and her husband were being indemnified for most of the costs of the defenders' works by their insurers but that there was a shortfall of about £30,000 between those costs and the limit to which the insurers would indemnify them. Standing that she said this, and the similarity of the sum which is said to be £27,161.70 which the pursuers failed to pay, with the sum of £30,000 to which the second pursuer referred, the defenders believe and aver that what the second pursuer said was true.

[5] The pursuers go on to aver that between 29 October 2009 and the beginning of March 2010 they were on an extended vacation in Thailand. On or about 17 November 2009 sheriff officers purported to serve a service copy Initial Writ but due to their absence abroad they were not aware of the service having taken place. Decree in absence was obtained on 14 December 2009 for the sum of £27,161.70. The pursuers go on to aver that on or about 9 February 2010 their daughter visited their home to check that their property was intact following upon a period of prolonged snow and ice in Banff. On entering the property she became aware of a charge for payment at the instance of the defenders against the pursuers for the said sum. She is said to have contacted the pursuers by email advising them of this. Thereupon the pursuers instructed solicitors to attempt to repone against the granting of the decree but the reponing motion was refused on 9 March 2010. It is said that, in order to prevent further diligence against them at the instance of the defenders, they made payment in full in terms of the decree on or about 19 May 2010. It is also averred that they made payment to the defenders of a further sum of £1,749.57 in respect of further interest, a Sheriff Officer's fee and the expenses of the reponing note procedure. Overall it is said that they made payment to the first defenders of a total sum of £29,459.69.

[6] In response the defenders admit that Sheriff Officers served the service copy Initial Writ on 7 November 2009, that on 14 December 2009 they obtained decree for payment of £27,161.17 and that a charge was served. It is admitted that a reponing motion was refused on 9 March 2010 and that the pursuers made payment to the defenders. The pursuers' whereabouts between 29 October 2009 and the beginning of March 2010 and, subject to certain other averments, the actions of their daughter and her correspondence with them are not known and not admitted. They go on to aver that in 2009 the pursuers retained their residence at which they have been designed in both actions. It was their home address. Upon service of the Writ they say that the Sheriff Officers were told by the pursuers' daughter that in her parents' absence she passed on post to them. The defenders believe and aver that she did so. Although the pursuers now aver that due to their absence abroad they were unaware of service of the Writ it is said that they wrote to the Sheriff Officers from Thailand in the following terms:

"Dear Sirs

We understand that a Notice has been served at our address in Kirkton of Alvah, Banff, intimating that AWS (*sic*) Builders intends to bring an action against ourselves (Banff Holdings). We wish to make it known that we wish to defend this action but we are out of the country and will be until the end of March 2010. Any

correspondence will need to be sent via e-mail to ian.tetlow@tiscali.co.uk or to the above address in Thailand. Could you please inform any other relevant parties of this information.

We have requested our daughter to sign the relevant papers on our behalves and return them to you.

Yours sincerely

Ian and Doreen Tetlow

[Signed] pp G Tetlow".

The defenders go on to aver that in the reponing note the pursuers averred that:

"Paperwork was delivered to the defenders' home address some time in December 2009. The parties (*sic*) daughter opened and informed the first and second named defenders of the contents but the first and second named defenders did not have sight of the paperwork. The first and second defenders asked their daughter to forward to the pursuers' Agents a letter in the belief that matters could thereafter await their return".

[7] The defenders believe and aver that the pursuers' daughter signed the letter which is quoted above with their authority and that they either wrote it or were aware of its terms when it was sent. Since there was no other letter received by the defenders' agents at the time, the defenders believe that that is the letter to which their reponing note referred. It is averred that the pursuers were aware at the time that the Writ had been served. It is averred that on 8 December 2009 the Sheriff Officers forwarded the pursuers' letter to the defenders' agents and that on minuting for decree the latter drew to the court's attention the fact that the defenders were apparently abroad and forwarded a copy of the letter to the sheriff. In refusing the pursuers' reponing note it is averred that the sheriff correctly held that the pursuers had been disingenuous and that the explanation for what had happened was that they had wished to deal with the action against them at a time of their own convenience rather than in accordance with the rules of Court.

[8] *Separatim* under reference to sections 27 and 28 of the Sheriff Courts (Scotland) Act 1907 it is averred that the pursuers could have appealed against the sheriff's interlocutor refusing the reponing note within 14 days but they did not do so. Neither did they seek dispensation to mark a late appeal. Since the pursuers had failed to take advantage of a mode of review which was open to them it was not competent for them now to seek to challenge by way of reduction what could have been challenged by appeal.

[9] The pursuers go on to aver that they would have had a substantive defence to the action against them. They aver that they instructed a qualified architect, Alan William Cumming, to inspect both properties, to consider the terms of the two specifications and the drawings and to report on whether or not the work specified had been carried out in a reasonably careful fashion. It is averred that:

"Mr Cumming has now produced a report of June 2010 which is produced. That report indicates that, with respect to the property at 13 Bridge Street, the pursuers have made payment to the first defenders relative to work that has not been carried out to the required standard or not carried out at all. Total amount of overpayment relative to 13 Bridge Street is estimated to be £10,059 exclusive of VAT. With respect to 15 Bridge Street, the relevant figure is £5,562. Allowing for value added tax on the total of £15,621 of £2,733.67 a total emerges (inclusive of value added tax) of £18,354.67. The pursuers are wishing to proceed with a defence, in the event that they succeed in this process, relying upon the terms of the report from Mr Cumming and their own evidence".

[10] They go on to aver that the defenders and those acting for them knew that the pursuers spent long periods abroad. They aver that there was no contact between the parties between the middle of July 2009 and the date on which decree was minuted for, namely 14 December 2009. It would have been reasonable for the defenders or those acting for them to have communicated with the pursuers by email indicating that proceedings had been or were about to be served at the Banff address. Separately the defenders were aware

that the pursuers' daughter was resident at 13 Bridge Street and, given the defenders and their solicitors' awareness of the pursuers' frequent absences abroad, it would have been reasonable for service of the action also to have been made or attempted on the pursuers at 13 Bridge Street and separately a letter sent to the pursuers care of their daughter at that address advising of the raising of proceedings. No such obvious and reasonable step was taken. Separately it was unreasonable of the defenders to oppose the reponing note in all the circumstances.

Submissions for the defenders

[11] Mr Artis accepted that the question of reduction of a decree in absence was one which had to be considered in the whole circumstances and that exceptional circumstances need not be averred and proved. In this regard he referred to the case of *Robertson's Executor* v *Robertson* 1995 SC 23. In that case a widow had brought an action seeking declarator that she was the sole uninfeft proprietor of a dwellinghouse in respect of which her deceased husband had granted a disposition to her which had been held as unrecorded by his agents. The executor nominate of the deceased failed to lodge defences and decree in absence was granted. The executor thereafter sought to be reponed and to tender defences to the action but the period for reponing had expired and a motion to be reponed late was refused. A reclaiming motion in respect thereof was also refused for want of leave of the Court. The widow then recorded the disposition and became the sole infeft proprietor of the house. The executor thereafter brought an action of reduction of the decree in absence which was dismissed by the temporary Lord Ordinary on the basis that there were insufficient averments to support a relevant case of exceptional circumstances. It was held by an Extra Division that the wrong test had been applied but that the whole circumstances had to be considered. There was no obligation on the pursuer to establish exceptional circumstances and a proof before answer was allowed. Reference was made to *Sinclair* v *Brown* (1837) 15 S 770.

[12] As far as the competency of the current action was concerned, Mr Artis contended that the circumstances were different. In the present case the opportunity for reponing had not been missed. In fact the motion to be reponed had been refused. That matter was now *res judicata*, the decision was one pronounced *in foro* and the pursuer could not reduce the decree in absence without also dealing with the later decision. That later decision could only be reduced in exceptional circumstances since it was pronounced *in foro*.

[13] Mr Artis submitted that it was incompetent to seek to reduce a decree which was not the final judicial step in an action and referred to the cases of *Coutts* v *Keith* (1843) 6 D 125, *Broom* v *Hair* (1837) 15 S 977 and *Buchanan* v *Lumsden* (1837) 15 S 958.

[14] In support of the contention that the refusal of the reponing note was *in foro* Mr Artis referred to the Opinion of Lord Young in *Gow* v *Henry* (1899) 2 F 48, at page 52, where he said the following:

"In any action in this Court or the Sheriff Court litiscontestation (which has important effects) commences when defences are lodged, and subsists until the action is judicially disposed of so as to be put out of Court. The parties may, of course, at any time agree to settle the *lis* on such terms as they please, their agreement being submitted to and approved of by the Court in which it is *lis pendens*".

[15] Reference was also made to the case of *Campbell* v *Glasgow Housing Association Ltd* 2010 SLT 274. In that case a housing association brought an action of payment and ejection against a tenant after he fell into arrears. The tenant failed to attend court and decree was granted on 27 August 2008. The action was described as undefended in the minutes. The decree was later recalled and following sundry procedure the case was continued until 29 September 2009 to allow the tenant to make fortnightly payments towards his arrears. When the case called the association moved for decree of ejection and payment following the tenant's alleged failure to meet one of his due payments. Decree was granted in the tenant's absence although it later transpired that the payment had in fact been made on 29 September but had not shown up in the association's records until later. In terms of the decree, ejection could not take place earlier than 27 October. The tenant moved for interim suspension of the decree and interim interdict against ejection contending that he had a *prima facie* case for reduction and that the balance of convenience favoured the grant of interim relief. The

pursuer submitted *inter alia* that the decree was a decree in absence rather than a decree *in foro*. The contrary was submitted by the defenders.

[16] Lord Bannatyne held that on a proper construction of the decree the phrase 'in absence' meant no more that on the occasion when the decree was pronounced the pursuer was not physically present and did not refer to the technical concepts of decree in absence and decree *in foro*. The nature of a decree was decided by the stage in the court proceedings in which it was granted, with the critical question being whether there had been compearance for a defender and defences put into process. Both requirements had been met in that case and as such the decree must have been one *in foro*.

[17] In those circumstances, said Mr Artis, the parties having appeared to argue the reponing note it was *in foro* and special circumstances had to be averred amounting to a miscarriage of justice to allow it to be reduced. Since there were no such special circumstances averred the refusal to allow the pursuers in the current action to be reponed meant that they could go no further.

[18] Reference was made to *Adair* v *Colville & Sons* 1926 SC (HL) 51, *Philp* v *Reid* 1927 SC 224 and *Accountant in Bankruptcy* v *Allans of Gillock Ltd* 1991 SLT 76.

[19] Mr Artis submitted that the refusal of the reponing note was appealable in terms of sections 27 and 28 of the Sheriff Courts (Scotland) Act 1907. It was not appealed and in the absence of special circumstances reduction of the interlocutor refusing reponing, were it to be pleaded, which it was not, would be incompetent.

[20] If that did not raise an issue of competency it certainly raised an issue of relevancy, according to Mr Artis.

[21] He turned then to address the question of relevancy more generally. In his submission the pleadings were irrelevant to instruct the conclusions. The pursuers undertook to show that the decree ought not to have been granted and that they ought to have been reponed. It was incumbent on them to show why the reponing note should not have been refused and nothing was said about that in their pleadings so the action did not get off the ground. He referred again to the case of *Robertson's Executor* and then to the case of *Nunn* v *Nunn* 1997 SLT 182.

[22] In that case a man brought an action of reduction of a decree in absence obtained by his former wife. The original action was for divorce, custody, aliment, periodical allowance and a capital sum. The husband, who was resident in England, had begun proceedings there himself and had received service of the Initial Writ but had failed to lodge a Notice of Intention to defend. In the action of reduction he averred *inter alia* that the original decree was "unwarranted on the facts". His averments were principally directed at the financial aspects of the decree. Lord Macfadyen in the Outer House, following *Robertson's Executor*, held that since the decree was in absence it was not necessary to aver "exceptional" circumstances but the pursuer had to aver that in the whole circumstances of the case on the true facts and relevant law the decree ought not to have been granted and it was not enough merely to attack the detail of the averments made or the evidence led in the original action. In deciding whether to reduce a decree in absence an important aspect of the circumstances to which the Court had to have regard was a candid account of how it came to be granted without any opposition being stated. The pursuer had failed to make clear averments on certain essential points including whether the failure arose through his not having given instructions to his English solicitors or through those solicitors not having acted on instructions given and as to his own financial circumstances. Without a full and candid statement of those the Court could not judge on the proposition that the awards made should not have been made and the action was dismissed.

[23] In the instant case the pursuers had to show why it was that decree was allowed to pass and it was equally important to explain why no appeal against the refusal of the reponing note was taken. Secondly there had to be averments sufficient to show that the decree in absence was not justified in fact.

[24] Mr Artis submitted that the pursuers' averments lacked candour. There was nothing said about the reasons for not appealing against the refusal of the reponing note and nothing said as to why it should not have been refused. Certain general averments were made about the defenders allegedly failing to complete the work and reference was made to certain correspondence. There had to be sufficient specification to give fair notice of what it was that rendered the decree inappropriate. It was nowhere averred what was wrong with the work and it was not enough simply to give a bare assertion that there were things wrong. The defenders' averments about the letter written on behalf of the pursuers were met with a general denial and it was incumbent on them to deny those matters specifically. They had given a less than candid account of what had taken place and there was no attempt properly to explain their defence to the action. The reference to the report, which was not incorporated in the pleadings, at most indicated that they had overpaid the sum of £18,354.67. That said nothing about the works which were defective and did not amount to the sum of £27,000 or so to which the defenders had been found entitled. The report was deficient. It was opinion evidence and based on information given by the first pursuer, a site inspection in 2010 and a selection of documents. It contained opinions as to the quality of workmanship but did not price what was not done. There was no suggestion that there was to be a counterclaim by the present pursuers and none would now be available standing the operation of prescription. The report gave no fair notice of any defence against the action for payment and the compiler of it had had no contract documents to assist him. The author said that he had visited the premises but no intrusive opening up was carried out. There was no specification of the sort which should be on Record as to what was wrong which did not justify payment. On the one hand the pursuers said that they paid too much but that did not amount to the sum in the decree. In any event it was not properly incorporated into the pleadings and was merely opinion. Reference was made to the cases of *Eadie Cairns* v *Programmed Maintenance Painting Ltd* 1987 SLT 777 and *Royal Bank of Scotland plc* v *Holmes* 1999 SLT 563 as authorities for the proposition that documents which were not incorporated into the pleadings could not be referred to when considering their relevancy.

[25] Mr Artis went on to note that there was a conclusion for payment in the case. It was said to be equitable to order the payment. Nothing, however, was averred in support of the equitable basis for payment. There were no averments of error, improper pressure, unwarranted diligence or unjustified enrichment. The pursuers averred that they made payment against the decree but their liability was under contract, which they did not impugn. They accepted that they were due to pay something. Reduction of the decree did not of itself instruct any entitlement to repayment. If the pursuers were reponed to the Sheriff Court action they could counterclaim for any sum overpaid because that would not be caught by prescription. The whole case was founded on the pursuers' assertion that they did not get notice of the action against them. Mr Artis referred to the case of *Central Motor Engineering Co* v *Galbraith* 1918 SC 755 at page 766 where the Lord President said the following:

"There is really nothing occult or mysterious about citation. It is simply the calling of a person to appear in a Court proceeding. And, if he is called (it matters not how), and does *de facto* know all about the proceedings to which he is convened, he cannot lie by and challenge the method by which he is convened after a long interval of time. The challenge to be effectual must be instant. Otherwise it fails. Assuming, therefore, the objection to the mode of citation here to be well founded, inasmuch as the pursuers do not aver that they took action the instant knowledge of the sequestration proceedings was brought home to them, I hold the action to be irrelevant".

[26] Mr Artis invited me to repel the first and second pleas-in-law for the pursuers, sustain the defenders' first and second pleas-in-law and dismiss the action.

Reply for the pursuers

[27] In reply Mr Beynon indicated that he agreed that the relevant test for reduction of a decree in absence, such as the one in question, required a consideration of all the circumstances.

[28] The refusal of the reponing note was a matter for the discretion of the sheriff arrived at on an *ex parte* basis without evidence. The reponing procedure and the outcome might or might not be relevant as part of the determination of the whole circumstances. Of all the authorities referred to, only *Robertson's Executor* and *Nunn* were in point. It was clear that the executor in *Robertson's Executor* sought to repone but his motion was too late. There was an attempt to repone which was unsuccessful and in the instant case exactly the same thing happened. The same outcome resulted except that those instructing Mr Beynon were on time with their reponing attempt. In *Robertson's Executor* there was no competent appeal pursued on the reponing issue because of a failure to seek leave. Nowhere was it suggested that a reponing process created a contestation whose outcome was a decree *in foro*. At most it might form part of the whole circumstances. The pursuers' position was that they were not in the country and were not aware of service of the Initial Writ. Their daughter only became aware of documents being served at a later date, after decree in absence had been granted. The defenders had a different version of events but that was a matter for proof. According to the defenders' averments the sheriff was correct to say that the pursuers' denial of knowledge was disingenuous but the pursuers denied that. The opinion of the sheriff was not in point. He was not dealing with evidence and looking at the relevant documents. The sheriff had a discretionary power to allow or refuse reponing but the refusal of a reponing note and the absence of an appeal did not preclude, on competency or relevancy grounds, an action of reduction. That was clear from *Robertson's Executor*. Mr Beynon accepted, though, that the reponing procedure was something which had to be considered in all the circumstances. It could not be regarded as determinative at this stage. It was illogical to suggest that an unsuccessful person in a reponing situation had ended up with a decree *in foro*. The court was in fact saying that that person could not get into the *forum* in the first place. In the instant case the pursuers had settled the full amount of the decree and the reponing procedure. They were not unable or unwilling to pay what was due but wanted to exercise their correct remedy, one of reduction. Although there were no averments as to why they had not appealed one had to say that no reasonable sheriff could have arrived at the decision and that was difficult. The absence of averments about that matter could not be said to render the action irrelevant or incompetent.

[29] As far as relevancy was concerned Mr Artis had said that there was no fair notice as to what the defence would be in the Sheriff Court action. There were three points to make in that regard.

[30] In the first place, it was not appropriate in this case to plead and prove the defence in the substantive action to the same degree. That would involve two proofs on the same point.

[31] In the second place, it was enough to set out *prima facie* the basis of the defence.

[32] In the third place, the terms of the proposed defence were set out in fact in sufficient detail in the form of the report, No.6/26 of process.

[33] Furthermore it was averred that a contract was entered into for the works to be carried out according to the specifications in the documents. The pursuers contended that there was an implied term that reasonable care would be taken and there was an express duty to use materials of a certain quality as set out in the specifications. The second part of the defence was that there was no final account submitted by the first defenders and that was averred at page 9 of the Record, paragraphs C to D. All that was in the context of what was said about the correspondence at page 12C. The third aspect of the defence was all of the correspondence complaining of works of poor standard and telling the defenders that they were quite well aware of the defects in connection with failing to carry out work at all and carrying out other work in a substandard fashion.

[34] In the fourth place, at page 11 of the Record the pursuers averred that they were willing to pay the whole sum under deduction of the cost of the rectification so that completion certificates could be obtained and subject to completion of works which were never carried out properly.

[35] In the fifth place, there was the report by Mr Cumming. The purpose of that was to allow the pursuers to show that they had some independent evidence that the work was not carried out in terms of the

specifications or not carried out at all. The defenders were well able to understand what Mr Cumming was saying.

[36] Mr Beynon recognised the technical objection to the report and moved to incorporate pages 14 to 16 of it by adding at page 22A after the sentence "Mr Cumming has now produced a report of June 2010 which is produced", the words "and of which pages 14 to 16 are held to be incorporated *brevitatis causa*".

[37] At this point Mr Artis indicated that he was minded to oppose the amendment but if allowed then no doubt I would consider the question of expenses if the amendment affected the issue. He submitted that it was not a list of what was wrong but what it would cost to put things right.

[38] In the circumstances I allowed the amendment at the bar under reservation of all questions of expenses.

[39] Mr Beynon then returned to his submissions. He repeated that the pursuers were simply required to show a *prima facie* case and it would not do for everything to be explored in an action of reduction. Certain criticisms of the report had been made but they did not stand up to scrutiny. Mr Cumming had obtained all the contract documents. He was aware that the pursuers had paid all the sums the defenders said were due. He had to make a number of assumptions and of course there was a mixture of fact and opinion but that was inherent in the type of opinion he produced. At the end of his report he indicated what it would cost to rectify the defective works and to carry out those which had never been carried out at all. He indicated that there had been an overpayment. The pursuers would not have paid those sums if they had been in a position to defend the action.

[40] As far as repayment was concerned, Mr Beynon submitted that if the pursuers were correct that the decree was wrongful then equity would dictate that their satisfaction of the decree and the subsequent procedure should be reversed so that the parties could be back to square one. It would not be correct to allow reduction and not order repayment because the pursuers would then have no basis for repayment. The matter was not equivalent to unjustified enrichment but was rooted in the challenge to the decree.

Reply for the pursuers

[41] Mr Artis submitted that if I was with Mr Beynon then the correct course would be to allow a proof before answer leaving all pleas standing. He reiterated that in *Robertson's Executor* there had been no decision on the reponing note because it was not allowed in late. There was then a failure to obtain leave to appeal. That case said nothing at all about the effects of a decision on a reponing note. He acknowledged that any appeal against the refusal of a reponing note was a difficult matter because it involved an exercise of discretion. The fact that the sheriff looked at the reponing note as part of an *ex parte* process did not matter. The whole essence of it was that it was *inter partes*. There did not need to be proof for there to be a decree *in foro*. If a reponing note was successful the decree would be recalled and matters would then proceed as if a Notice of Intention to defend had been lodged. Thereafter every decree would be *in foro*. Even if it was not strictly *in foro* the refusal had to be addressed as a material factor, even if nothing else. If there was no averment about it then nothing could be said about it and nothing could be proved.

[42] One aspect absent from Mr Cumming's report was any suggestion that a new contractor had been instructed to complete work. In terms of taking the report as being indicative of what the defenders were said to have omitted or done wrong one would have expected the pursuers to be told that certain works would have to be done by other parties.

[43] In any event on no ground did equity require repayment of awards of expenses or Sheriff Officer's fees etc.

Discussion

(a) Competency

[44] In my opinion the submissions of Mr Beynon are to be preferred. In the first place I agree with Mr Beynon that the only two cases which are in point are those of *Robertson's Executor* and *Nunn*. In *Coutts* v *Keith* there was no extracted decree and the case was still pending in the Sheriff Court. In *Broom* v *Hair* the interlocutors were not final and in *Buchanan* v *Lumsden*, an unusual case in respect that the pursuer in the original action sought to reduce a decree in his favour he being dissatisfied with the amount which he was awarded, the difficulty was that the decree was not extracted. The pursuer himself could have extracted it but declined to do so and the circumstances were very special.

[45] In the second place, I do not consider that a decision in a reponing note can properly be regarded as a decree *in foro*. Reponing involves an attempt to get into the process by a defender who is not yet in it. Success means that he will have an opportunity to lodge defences and litiscontestation will begin. Refusal of the note will have the opposite effect. The fact that parties are present and arguing the reponing note does not convert the decision into a decree *in foro* any more than the parties' absence from a particular hearing will mean that a decree pronounced in that hearing will necessarily be one in absence. In this regard I respectfully adopt the reasoning of Lord Bannatyne in *Campbell* v *Glasgow Housing Association Ltd*.

[46] In my opinion the fact that a reponing note has been unsuccessful does not place the pursuers in the instant case in a worse position than they would have been in had they not reponed at all. Thus, following the decision in *Robertson's Executor*, it seems to me that no issue of competency arises and the matter must be looked at according to the whole circumstances of the case. The failure to appeal is of course one of those circumstances and no doubt the pursuers may wish to make something of that in any proof but I am driven to the conclusion that the attack on competency fails. I cannot hold that the refusal of a reponing note is *res judicata* as far as an action of reduction is concerned. Although the two may be directed to some extent towards the same ultimate end, they are separate remedies proceeding along different paths. The refusal of a reponing note does not stand in the way of an action of reduction as a hurdle, except to the extent that it falls to be taken into account along with all the other circumstances.

(b) Relevancy

[47] The pursuers have averred certain circumstances involving their absence abroad which they say caused them to be unaware of the raising of the action. The defenders have averred circumstances which, if proved, tend to throw a different light on the matter. I do not consider that it is necessary for the pursuers to meet these averments with a specific denial. The general denial suffices in my opinion. As I have indicated, there is no averment as to why an appeal was not taken against the refusal of the reponing note. That refusal was, however, a matter for the discretion of the presiding sheriff and one can see how an appeal might well have been thought to have been hopeless. The fact that that is not averred, while doubtless a circumstance which the defenders can pray in aid, does not seem to me to lead necessarily to the conclusion that the pursuers must fail in any proof, however powerful such a circumstance might be.

[48] I am satisfied that the averments as to the reasons for the failure to defend the action are sufficient to go to proof.

[49] Of more difficulty, I think, is the question whether the averments are sufficient to entitle the pursuers to establish that they had a defence to the Sheriff Court action.

[50] As I understand the pleadings and the argument of Mr Beynon there is an averment that the defenders failed to complete the contractual works relative to both properties, that they failed to carry out material items to any extent and, separately, carried out work in a materially defective manner. In the second place, the pursuers aver that they did not submit a final account.

[51] In dealing with this matter I cannot take any account of the correspondence except in so far as it has been quoted in the pleadings, following the *Eadie Cairns* line of authority. The correspondence is not properly incorporated in the pleadings otherwise.

[52] I respectfully agree with Mr Beynon that it is not necessary to provide the same degree of specification as one would in the substantive action, but at least a *prima facie* case has to be averred and one which gives the defenders fair notice of the defence to the action. As the pleadings stood when the debate began, I do not consider that fair notice was given. Notwithstanding the averment that no final account was submitted, the averments as to the defects are in my view vague. The incorporation of pages 14 to 16 of Mr Cumming's report does, in my view, give notice of the defects in the work which was carried out or not carried out, if only by inference. The criticisms of the report on its merits seem to me to be matters for proof rather than legal argument.

[53] I am satisfied therefore that, as the pleadings now stand, sufficient notice is given of the basis of the defence for me to be able to say that the pursuers are not necessarily bound to fail if they prove their averments.

[54] I am minded therefore to allow a proof before answer.

[55] That is not, however, an end of the matter. The pursuers also seek repayment of the sum of £27,710.12 sterling with interest. Quite how that sum is made up is not entirely clear on the pleadings. The sum in the decree was £27,161.70, which differs from the sum of £27,238.27 demanded in the letter of 31 October 2007, according to the pursuers' averments. The pursuers aver that in order to prevent further diligence against them they made payment in full in terms of the decree on or about 19 May 2010 and also made payment of a further sum of £1,749.57 in respect of further interest, a Sheriff Officer's fee and the expenses of the reponing note procedure. Adding these two sums together does not amount to the total of £29,459.69 which the pursuers are said overall to have paid the defenders. It may be that the explanation is that the Sheriff Officer's fee and the expenses of the reponing note are not included in the figure of £1, 749.57. On any view the amounts are not specified.

[56] Furthermore the pursuers' averments are that they have overpaid the defenders to the extent of £18,354.67, inclusive of VAT. The relationship between all these figures is not easy to understand. As it happens I heard no detailed argument on the point and I do not think it appropriate for me to speculate.

[57] I am not satisfied that the pursuers are bound to fail to persuade the Court that some payment is due in equity if the decree is reduced. They have averred that the sums were paid in virtue of the decree, rather than in virtue of the contract. If the decree is reduced without ordering repayment then the pursuers would be left in limbo. If a bare reduction were granted, what would happen if the defenders immediately chose thereafter to abandon the Sheriff Court action?

[58] Whilst it is for the pursuers to aver and prove their case, I am not satisfied that they are bound to fail to prove that some payment is due. Since I heard no detailed argument on the make up of that sum, I am not prepared at this stage to restrict it to any particular amount.

Decision

[59] I repel the defenders' first plea-in-law. *Quoad ultra* I shall allow a proof before answer.

[60] Had the only issue been one of competency, I would have found the defenders liable to pay the pursuers the expenses of the debate. The pursuers have been successful in obtaining a proof before answer. However, I would have found the pleadings to be so lacking in specification as to the nature of the defects alleged as to be irrelevant in relation to the defence to the Sheriff Court action, had I not allowed the amendment made at the bar incorporating Mr Cumming's report. In order to do broad justice to the parties it seems to me to be appropriate in the circumstances that I find no expenses due to or by either party in respect of the hearing before me.