**OUTER HOUSE, COURT OF SESSION**

**[2023] CSOH 77**

**CA69/23**

OPINION OF LORD SANDISON

In the cause

THE SCOTTISH MINISTERS

Pursuers

against

SCOTLAND GAS NETWORKS PLC

Defender

**Pursuers: McIlvride KC; Anderson Strathern LLP**
**Defender: Lindsay KC; Addleshaw Goddard LLP**

7 November 2023

**Introduction**

[1] In this action the Scottish Ministers seek payment from Scotland Gas Networks PLC of a principal sum of £799,522.28 plus VAT. Their claim concerns a dispute arising out of the cost of diverting gas infrastructure to accommodate major road improvements to the M8, M73 and M74. The matter came before the court for a debate on the defender's plea to the relevancy and specification of the pursuers' case.

**Relevant Statutory Provisions**

[2] Section 6(4) of the Prescription and Limitation (Scotland) Act 1973 is in the following terms:

"(4) In the computation of a prescriptive period in relation to any obligation for the purposes of this section—

(a) any period during which by reason of …

(ii) error induced by words or conduct of the debtor or any person acting on his behalf,

the creditor was induced to refrain from making a relevant claim in relation to the obligation …

shall not be reckoned as, or as part of, the prescriptive period:

Provided that any period such as is mentioned in paragraph (a) of this subsection shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be, referred to in that paragraph."

[3] Section 13 of the 1973 Act provided, until 31 May 2022, as follows:

"13. Prohibition of contracting out.

Any provision in any agreement purporting to provide in relation to any right or obligation that section 6, 7, 8 or 8A of this Act shall not have effect shall be null."

**Background**

[4] In late 2012 the parties contracted for the defender to carry out gas pipeline diversionary works in accordance with a budget estimate provided by it. The contract largely incorporated the defender's "Terms and Conditions for Diversion Works" (Version No 1), the relevant terms of which provided that the budget estimate should be regarded as a guide only and that charges would be based on the actual costs reasonably incurred during the carrying out of the works. The defender was entitled to charge a percentage uplift on those costs, which were to consist of payments made by the defender to the subcontractors it instructed to carry out the works. Interim applications for payment were made by the defender and paid by the pursuers as the works progressed.

[5] On 16 January 2014, there was a substantial gas leak at the works near the M73 junction, resulting in around 271 tonnes of gas being released into the atmosphere. As a result of the gas leak, there was a requirement for variation of the subcontract between the defender and J Murphy & Sons Ltd ("Murphy") (which was in the form of the NEC3 Option A Priced Contract with Activity Schedule), resulting in Murphy claiming additional sums through the formal compensation event mechanism in the subcontract.

[6] In July 2015 the pursuers instructed Corderoy Infrastructure Ltd, Chartered Surveyors ("Corderoy"), to audit the defender's account of the sums said to be due to it under its contract with the pursuers. After the works were complete, the defender rendered a Final Account to the pursuers and made a final application for payment on 7 March 2016, stating that the total project out-turn cost was £14,426,496.97, and that the balance then due to the defender was £414,225.29. That sum, plus VAT, was paid by the pursuers to the defender on 23 March 2016, in circumstances later to be set out. The Final Account noted various sums paid by the defender to Murphy.

[7] Corderoy became concerned about a number of events which the defender appeared to have treated as being compensation events in terms of its contract with Murphy, in particular the gas release in January 2014. Corderoy notified the defender that it could not advise the pursuer to make payment of the relative sums claimed in the Final Account until it was able to establish whether the gas release was the fault of Murphy. On 10 March 2016 the defender wrote to the pursuers stating that it was not acceptable that its final invoice should remain unpaid until the audit was concluded and that, failing payment, it would take legal action. The letter further stated that:

> "Once the account has been paid in full [the defender] will assist Corderoy by providing the information reasonably required by NRSWA [i.e. the New Roads and Street Works Act 1991] to undertake the audit of the final account. Following the audit process, and by agreement from both parties, any costs not deemed to be

> reasonably incurred in providing the works shall be refunded to Transport Scotland."

After receipt of that letter, and in claimed reliance on the passage just quoted, the pursuers paid the defender the whole sums demanded in its Final Account, and invited Corderoy to continue its audit. In the course of the audit, Corderoy made enquiries of the defender and of the Health and Safety Executive (which was investigating the matter) as to whether the gas release had been caused by the fault of Murphy. It received no substantive response, the defender and the HSE apparently taking the view that to release such information to Corderoy might prejudice an ongoing criminal investigation. On 31 July 2020 the HSE issued a press release disclosing that Murphy had entered guilty pleas to breaches of regulation 15 of the Pipelines Safety Regulations 1996 and section 33(1)(c) of the Health & Safety at Work etc. Act 1974 in Hamilton Sheriff Court, and on 28 September 2020 responded to a Freedom of Information request from Corderoy by providing a redacted copy of its report on the incident, which confirmed Murphy had been at fault. Corderoy thereafter completed its audit and provided its proposed Final Account to the defender on 19 July 2021. It took the view that, the gas leak having been caused by Murphy, it constituted an act, breach or default on Murphy's part within the meaning of clause 61.4 of the NEC3 subcontract and that the Project Manager ought, accordingly, have declined to treat the additional costs claimed by Murphy as recoverable by it. Corderoy concluded that the pursuers had overpaid the defender by the sum of £799,522.38, comprising sums paid as a result of the compensation events relative to the gas leak and other amounts said to have been paid to Murphy by the defender in error or otherwise without justification. The defender refused to accept that it was due to repay that, or any, amount to the pursuers, claiming that, if it ever did have any obligation to repay any sums, that obligation had prescribed.

The pursuers claim that the defender ought not to have claimed, and obtained, payment of the sum ultimately identified by Corderoy from the pursuers, as it did not represent "costs reasonably incurred" during the carrying out of the works within the meaning of clause 3.1 of the defender's Terms & Conditions. They claim that when they paid what the defender asked to be paid in March 2016 there was an agreement that matters would be revisited and a reasonable accommodation reached as to what adjustment, if any, was required to that final payment when the Corderoy audit was complete. They separately maintain a claim in unjust enrichment for repayment of the sum in question. The defender, in essence, denies that any agreement between the parties had the effect contended for by the pursuers, maintains that any payments made to Murphy which were not properly due were nonetheless made in the genuine belief that they were due, and says in any event that any right to repetition has prescribed.

**Defender's Submissions**

[8] On behalf of the defender, senior counsel submitted that the action should be dismissed for three independent reasons. Firstly, any right the pursuers may have had to recover the alleged overpayments had prescribed; secondly, there was no relevant averment of a proper legal basis upon which the alleged overpayments were repayable; and thirdly, the pursuers' claim in unjustified enrichment was irrelevant.

**Prescription**

[9] The last alleged overpayment was made on 29 March 2016. The summons in the present action was served on 14 April 2022. Any right to recover the supposed overpayments had accordingly *prima facie* prescribed by dint of section 6 of the Prescription

and Limitation (Scotland) Act 1973. The pursuers sought to avoid that conclusion by relying on the defender's letter of 10 March 2016 and on section 6(4) of the 1973 Act.

[10] However, the letter of 10 March 2016 had no contractual force or effect. It did not create any new enforceable contractual rights or obligations, nor did it modify any existing such rights or obligations. Properly understood, it did no more than permit the pursuers to pay the disputed overpayments under protest and thereby prevent any issues of waiver or acquiescence arising should the pursuers subsequently sue for their repayment. The pursuers' payment of the additional sums claimed by the defender remained exclusively governed by the terms of the existing contract between the parties. Nothing in the letter was capable of suspending, or otherwise delaying, the commencement of the quinquennium in terms of section 6 of the 1973 Act. It did not expressly or impliedly agree to delay the commencement of the quinquennium until Corderoy had concluded its audit. Nor did it agree to extend the quinquennium and (given that it predated the commencement on 1 June 2022 of a relevant amendment to section 13 of the 1973 Act) it was in any event not possible in point of law for the parties to agree to extend the quinquennium. Accordingly, the pursuers' averments, insofar as they sought to rely upon the letter to delay the commencement of the quinquennium, or to otherwise extend it, were wholly irrelevant.

[11] In relation to section 6(4) of the 1973 Act, the pursuers claimed that, by seeking payment from them throughout the currency of the parties' contract, the defender implicitly represented that the sums claimed had been reasonably incurred by it when they had not, and that the pursuers were in that respect led into error by the conduct of the defender. However, the pursuers averred that they had instructed Corderoy to audit the defender's account of the sums said to be due under its contract with the pursuers and that Corderoy, being concerned about the justification of payments to Murphy, had declined to advise them

to make payment of the further sum claimed by the defender in its Final Account until it could be ascertained whether the gas release had resulted from the fault of Murphy. In those circumstances, there was no basis upon which a subsequent demand by the defender for payment of the Final Account could fall within the scope of section 6(4); when the pursuers paid the sum brought out by the Final Account they were on notice from their own auditors that Murphy might not have been entitled to the additional payments made to it. A mere demand for payment of the Final Account could not in those circumstances have induced any error on the part of the pursuers: *Adams* v *Thorntons WS (No 3)* 2005 1 SC 30, 2005 SLT 594 at [66]; and *Pelagic Freezing Ltd* v *Lovie Construction Ltd* [2010] CSOH 145 at [116]. The only conclusion which the court could reach, even if a proof on the pursuers' averments were to take place, was that they had made payments to the defender while being aware of a question mark as to whether those payments were truly due.

**Ground of Action**

[12] It was unclear whether the pursuers were seeking to enforce a contractual right for repayment or were seeking damages for breach of a contractual obligation. If the cause of action was a contractual right to repayment, it was unclear whether the contract in question was the original contract between the parties or a new contract based on the defender's letter of 10 March 2016. If it was the latter, such a claim would be irrelevant, as the letter had no contractual force or effect. At its best for the pursuers, it was an unenforceable "agreement to agree". The pursuers' suggestion that the defender should be "deemed" to have agreed to reimburse the sums sued for was unintelligible. Nothing the defender was averred to have done could amount to an acceptance of any liability to repay the sums sued for.

[13] The pursuers' references to alleged breaches of contractual obligations were equally opaque. The alleged breaches of contract were said to have been a refusal to engage in the determination and agreement of what sums required to be repaid. However, any such lack of engagement had no impact on the quantum of the alleged overpayments, which were averred to be the result of alleged errors in the defender's requests for payment. There was no causal connection between the alleged breaches of contract and the sums sued for.

[14] The pursuers' payment of the additional sums claimed by the defender was governed exclusively by the terms of the existing contract between the parties and not by the terms of the defender's letter of 10 March 2016. It was that contract that determined whether or not the pursuers had any right to demand repayment of the alleged overpayments from the defender. The pursuers' averments failed to engage with the terms of that contract and were accordingly irrelevant. The defender's Project Manager, in good faith and on the basis of the information that was available to him at the material time, had decided that Murphy's claims to be entitled to payment for compensation events arising out of the gas escape were valid. Payment had thus been properly made in accordance with the requirements of the NEC3 subcontract.

**Unjustified Enrichment**

[15] The pursuers' averments relating to unjustified enrichment were wholly irrelevant for three reasons: (i) there were no averments that the defender had been enriched; (ii) the pursuers had no averments explaining why it would be equitable to compel the defender to redress the alleged enrichment; and (iii) the unjustified enrichment ground of action was not averred to be an alternative to any contractual right of action and, therefore, was excluded by the contractual right of action.

[16] In *Dollar Land (Cumbernauld) Ltd* v *CIN Properties Ltd* 1998 SC (HL) 90, 1998 SLT 992 Lord Hope had provided an authoritative formulation of the requirements for a claim of unjustified enrichment at 99E (1998 SLT 998J):

> "that the pursuers must show that the defenders have been enriched at their expense, that there is no legal justification for the enrichment and that it would be equitable to compel the defenders to redress the enrichment".

[17] The pursuers had not averred that the defender was enriched at their expense. They did not aver that the alleged overpayments were retained by the defender, but rather that they were paid by the defender to Murphy without Murphy having any right to them. Taking those averments at face value, it was Murphy that had been enriched at the pursuers' expense; Murphy received payment for works for which it supposedly had no contractual entitlement. That was enrichment of Murphy, at the expense of the pursuers, who were the source of the funds which paid Murphy, those funds merely passing through the defender's hands. The defender had not been enriched; it had not retained any of the alleged overpayments and had not been relieved of any liabilities it owed to Murphy. Any claim by the pursuers for unjustified enrichment should be directed against Murphy. There was no bar on recovering such indirect enrichment: *Fernie* v *Robertson* (1871) 9 M 437 per Lord Benholme at 442; and *M&I Instrument Engineers Ltd* v *Varsada* 1991 SLT 106.

[18] Further, although the pursuers averred barely that it was equitable that the defender should be required to reimburse the payments in question, there were no averments explaining why that was the case. In circumstances where the defender had not retained the alleged overpayments and the works had required to be carried out, the balance of equities was not obvious or implicit and required to be the subject of express averment by the pursuers. It was recognised that this was, in essence, a question of the specification of the pleadings which would not in itself justify dismissal of the action.

[19] Finally, a cause of action in unjustified enrichment was properly applicable either to cases where there was no contract between the parties, or to cases where work was done under a contract in circumstances which precluded any direct contractual claim. Where there was a contractual right of action, there was no scope for a claim based on unjustified enrichment: *Dollar Land* per Lord Hope at 94 (1998 SLT 995L – 996A). This meant that any claim the pursuers had based on unjustified enrichment had to be averred as an alternative to the claim based on contract which they advanced. Advancing it on a "separatim" basis, as the pursuers did, was inept, although it was again conceded that this was a pleading point which in itself would not justify dismissal of the action.

**Pursuers' Submissions**

[20] On behalf of the pursuers, senior counsel submitted that a proof before answer should be allowed.

**Prescription**

[21] The pursuers did not contend that the defender's letter of 10 March 2016 expressly or impliedly agreed to delay the commencement of the quinquennium. That would be futile in circumstances in which the unamended terms of section 13 of the 1973 Act, which governed the present claim, stated that any agreement which purports to provide that the provisions of section 6 shall not have effect is null and void. Rather, what the pursuers averred was that by virtue of the defender's letter of 10 March and the pursuers' acceptance thereof (by way of making payment of the sums claimed in the Final Account) the parties entered into a contract that in consideration of the pursuers making payment of the balance claimed by the defender in its Final Account prior to the conclusion of Corderoy's audit, the defender

would provide Corderoy with the information it reasonably required to undertake that audit, and that following the audit "and by agreement from both parties, any costs not deemed to be reasonably incurred in providing the works shall be refunded to Transport Scotland."

[22] That contract gave rise to obligations incumbent on the defender, being the obligations to assist Corderoy in carrying out its audit and thereafter to refund such sums as were agreed by the parties, acting reasonably, not to have been reasonably incurred by the defender. In light of the plain meaning of the language employed by the parties to reflect the terms of their agreement it was difficult to understand the basis on which the defender asserted that its letter had no contractual force and effect.

[23] Given that the pursuers' primary case was one for reimbursement of such sums as ought reasonably to have been agreed not to have been reasonably incurred by the defender, the critical question for the purposes of prescription was when the defender's obligation to make any repayment in terms of the letter of 10 March 2016 became enforceable. That was the date on which the prescriptive period would have begun to run: 1973 Act, section 6(2) and (3) and Schedule 1, paragraph 1(g). That was the date on which any sums reasonably due to be refunded by the defender were agreed by the parties in light of the terms of the Corderoy audit, failing which the date on which the defender advised the pursuers that it refused to engage in the process of reasonably agreeing those sums. In either event the date on which the defender's obligation to repay the pursuers (or else its obligation to pay damages for failure to implement its obligations under the contract) became enforceable was within five years before the present action was commenced.

[24] Alternatively, the pursuers averred that the defender's restitutionary obligation to refund overpayments made by the pursuers had not prescribed because of section 6(4) of the

1973 Act. The pursuers offered to prove that until the publication of the HSE press release in relation to Murphy's conviction and the release of the HSE's report to Corderoy which established that the gas release had been caused by the fault of Murphy, the pursuers were labouring under the erroneous belief that all of the sums claimed by the defender in its invoices in respect of Murphy were costs which had been reasonably incurred. The pursuers offered to prove that, by rendering its various invoices and claiming instalment payments, the defender induced the pursuers to believe that the sums claimed were properly due by them, ie that the costs claimed by the defender had been properly incurred by it for the purposes of the substantive contract: *Rowan Timber Supplies (Scotland) Ltd* v *Scottish Water Business Streams Ltd* [2011] CSIH 26. The pursuers did not found upon the defender's Final Account alone. As the pursuers offered to prove that they had already been induced to believe that all of the payments to Murphy claimed by the defender had been reasonably incurred in terms of the substantive contract, the question then became whether the fact that Corderoy had concerns in March 2016 that certain payments made by the defender to Murphy might not have been costs reasonably incurred by the defender meant that the pursuers had "discovered" their error within the meaning of section 6(4). That was not the case. For the purposes of section 6(4) it was not whether a party had a concern which was important. Instead, the question was whether error has been discovered by or revealed to the creditor, as the removal of the error restored the creditor to the state of knowledge which enabled him to make a relevant claim: *BP Exploration Operating Company Ltd* v *Chevron Shipping Co* 2002 SC (HL) 19, 2001 SLT 1394, *per* Lord Hope at [35]. The critical issue was whether it was possible to establish that the creditor in the obligation had in fact been labouring under an error and when he could or should have known that he was in a position to make a relevant claim.

[25] The pursuers offered to prove that despite having made, through Corderoy, repeated attempts to obtain information from the defender and the HSE to establish whether or not the gas release had been caused by Murphy, and thus could not give rise to an entitlement for Murphy to be paid for compensation events, both the defender and the HSE continued to deny any information to Corderoy until well within the period of 5 years before the present action was raised. In those circumstances the pursuers' error could not be identified and thus removed until the publication of Murphy's conviction and the release of the redacted HSE report in 2020. Until then the pursuers were entitled to await the outcome of the HSE's official investigation: *Glasgow City Council* v *VFS Financial Services Ltd* [2022] CSIH 1, 2022 SC 133, 2022 SLT 181 at [57]; see also *Heather Capital Ltd (in liquidation)* v *Levy & McRae* [2017] CSIH 19, 2017 SLT 376. Until then the pursuers could not know (rather than simply have concerns) that they had been in error in believing that the defender's invoices represented correctly what sums had reasonably been incurred in carrying out the diversionary works. The pursuers' case could not, at the stage of debate, be held to be bound to fail on the basis that it had prescribed.

**Ground of action**

[26] The pursuers' averments made it clear that as their primary case they were founding upon the contract said to have arisen out of the defender's letter of 10 March 2016 and concluded by the payment of the sums requested on the basis set out therein.

[27] The pursuers averred that the defender's refusal, contrary to its obligations under the agreement entered into in March 2016, to engage in the process of agreeing what sums, if any, were properly due to be repaid to the pursuers, meant that the condition of that agreement that sums would be repaid to the pursuers as reasonably agreed by the parties

was deemed to have been purified and the defender fell to be regarded as having agreed that it was obliged to reimburse the sums concluded for. That approach was entirely consistent with longstanding authority, for example *Mackay* v *Dick & Stevenson* (1881) 8 R (HL) 37, per Lord Watson at 45 (under reference to Bell's Principles, §50):

> "If the debtor bound under a certain condition have impeded or prevented the event, it is held as accomplished. If the creditor has done all that he can to fulfil a condition which is incumbent on himself, it is held sufficient implement"

and McBryde, *The Law of Contract in Scotland* (3rd Ed) at paragraph 20.17. It was a condition of the 2016 agreement that the sums to be refunded to the pursuers should be as reasonably agreed by the parties in light of Corderoy's audit. On the pursuers' averments, they did all that they could to fulfil that condition by providing the defender with Corderoy's audit report and the defender prevented any consideration or agreement on Corderoy's findings by refusing to engage with Corderoy. In those circumstances it could not be said that the pursuers' case on this issue was bound to fail.

[28] The alternative contractual case advanced by the pursuers was that the defender had breached the terms of the 2016 agreement by refusing to engage with Corderoy in considering the results of its audit and in consequence was liable in damages. The pursuers averred that the sums which fell to be repaid by the defender were as identified in Corderoy's proposed Final Account in July 2021, maintaining that those were the sums which would reasonably have been agreed to be due had the defender not refused to engage with Corderoy, and accordingly represented the pursuers' loss as a result of the defender's breach of contract.

**Existing Contract**

[29] The defender's argument that any right to repayment enjoyed by the pursuers had to be found in the substantive contract alone was unsound. The pursuers did not dispute that their liability to make payments to the defender was governed by the substantive contract. However, the question of the repayment by the defender of costs previously claimed but subsequently found not to have been reasonably incurred was not addressed in any way by that contract. What the pursuers offered to prove was that in 2016 the parties entered into a further agreement which thereafter determined their respective rights and obligation in relation to any costs claimed by the defender which had not been reasonably incurred. It was that later agreement which was founded upon in relation to the repayment of costs not reasonably incurred.

[30] The defender was free to make such payments to Murphy as it saw fit. That was a matter between the defender and Murphy alone. However, in terms of the substantive contract between the pursuers and the defender, the latter was entitled to recover the amount of its payments to Murphy from the former only to the extent that those were costs "reasonably incurred". It was the reasonableness of the payments now in dispute which was in issue, not their lawfulness.

**Unjustified Enrichment**

[31] The defender's argument that it had not been relevantly enriched because it was not averred that the payments now in dispute were retained by the defender, failed to recognise that the remedy sought by the pursuer in this branch of its case "is available where the enrichment lacks a legal ground to justify the retention of the benefit. In such circumstances it is held to be unjust": *Dollar Land* 1998 SC (HL) 98I, 1998 SLT 998 E-F, per Lord Hope. The

pursuers had averred that the defender ought not to have claimed, and obtained payment, from them of the sums now in dispute as those were not costs "reasonably incurred" within the meaning of the substantive contract; that the defender had been enriched by the overpayments claimed and obtained by it; and that by obtaining payment of the disputed sums from the pursuers in the circumstances claimed the defender was unjustly enriched.

[32] Those averments, if proved, were sufficient to entitle the court to hold that the enrichment of the defender in consequence of the receipt of the payments in question lacked a legal ground to justify the retention by it of the benefit it thereby acquired. Lord Hope's reference to "retention" was directed to the question whether the recipient of a benefit was entitled to retain that benefit as against the party who provided it. His Lordship was not suggesting that the reversal of an unjustified enrichment was only open to the court if the recipient had retained the subject of the benefit in his possession or in his bank account. The fact that the defender might have used the overpayments received from the pursuers to make payments to Murphy was nothing to the point, just as it would be equally irrelevant if the defender had chosen to employ those sums in some other way. The authorities cited by the defender did not vouch the proposition that the pursuers had any valid claim against Murphy on the ground of unjustified enrichment, far less that the only claim open to the pursuers on that ground was against Murphy.

[33] As to the complaint that the pursuers had no averments explaining why it would be equitable to compel the defender to reverse the enrichment, the authorities were clear that if the pursuers had relevantly averred a case that the defender has been enriched and that there was no legal ground justifying the enrichment, it was for the defender to raise any issues which might lead to a decision that the remedy of reversal should be refused on equitable grounds: *Morgan Guaranty Trust Company of New York* v *Lothian Regional*

*Council* 1995 SC 151 at 165D-166B, 172H-173E, and 175E-176C, 1995 SLT 299 at 316A-D, 320G-L, and 322C-I; *Compagnie Commerciale Andre SA* v *Artibell Shipping Co Ltd (No 2)* 2001 SC 653 at 668I-669A; and Gloag and Henderson, *The Law of Scotland* (15th ed), at paragraph 24.01.

[34] In any event, the pursuers had averred, in general terms at least, that it would be inequitable for the defender to retain the benefit of the overpayments it received. That averment, taken with the averments regarding the circumstances demonstrating the absence of any contractual basis on which the defender was entitled to the overpayments, provided a sufficient basis on which the court could hold, after proof, that it would be inequitable to allow the defender to retain the benefit of the overpayments.

[35] The pursuers' presentation of their case in unjustified enrichment by the use of "separatim" was sufficient to indicate clearly and sufficiently that what followed was being stated as a separate and alternative case. It would be absurd, particularly in a commercial action, if the relevancy of alternatives pled in an action was dependent on such a minor point of form.

**Decision**

***Contractual Case***

[36] A fair and careful reading of the pursuers' somewhat involved pleadings discloses that their primary case is based on the hypothesis that the defender's letter of 10 March 2016, followed by their payment of the sums then demanded by the defender, created a new contract between the parties in terms of which the defender agreed, in return for that payment, to facilitate and co-operate with Corderoy's audit process and to repay to the pursuers any sums which it might transpire were not properly due to it in terms of the

parties' substantive contract. That putative contract is not one which falls foul of the prohibition against contracting out of section 6 of the 1973 Act as that prohibition existed in 2016. It did not seek to disapply section 6 from the parties' substantive contract; rather, it created fresh obligations to which section 6 (and thus the quinquennial prescriptive period) would apply. Although it necessarily harks back to the parties' substantive contract as providing the means for determining the extent (if any) of the defender's freshly-created obligation to repay any sums not truly due to it in terms of that contract, it is not, either in point of form or in substance, seeking to enforce any obligations under that contract.

[37] Whether the issue of the letter and the consequent payment of the sums demanded by the defender actually created a new contractual relationship between the parties along the lines just described is a separate matter. The defender's contention is that no such relationship was created, but rather that the letter simply operated as confirmation that it understood that if the payment it was demanding was indeed made, it would be made under protest and no plea that the pursuers had waived any right that might exist *aliunde* to claim repayment could properly be stated by it.

[38] Viewing the matter objectively, as it must be viewed, it is plain that it is at least arguable that the letter was proposing some element of modification to the pre-existing legal relationship between the parties. The crucial sentence already narrated appears to suggest that once the pursuers have paid the defender's Final Account, it will assist in Corderoy's audit and in light thereof will ultimately engage in some process which may lead to the reimbursement of sums to the relevant agency of the pursuers. Such engagement was not something in which the defender was obliged to join as matters stood before the letter in question was written. The letter states that the defender will undertake that obligation "once" (which in context may well be taken to mean "in consequence of") payment of the

sum it is demanding from the pursuers has occurred. It is not difficult to analyse that situation in classical contractual terms as an offer on the part of the defender to undertake a legal obligation to which it is not presently subject on condition that the pursuers do something which they may or may not presently be obliged to do, namely pay the full sum being demanded by the defender. It is the offered undertaking by the defender of that obligation which makes it difficult to accept the argument that, objectively viewed, all that was done by the letter was the furnishing of an acknowledgement that any payment would be made and accepted under protest. There would have been no need for that obligation to have been undertaken had that been all that the letter was to effect. I conclude, then, that the pursuers have at the very least a viable argument in law that the letter of 10 March 2016 and their consequent payment of the sum demanded at that time amounted to the creation of a new contract between the parties, whether or not that was what the defender subjectively intended.

[39] The next question is whether it is possible to regard such a new contract as giving rise to an obligation capable of founding the present action. Although the pursuers maintain that the defender did not comply with its apparent obligation to co-operate with Corderoy's audit, breach of that obligation is not said to provide the basis for the action; rather, it is the failure to obtemper the claimed obligation to agree what (if anything) should be refunded to the pursuers which is in issue. It will be recalled that the salient sentence of the letter of 10 March 2016 in this regard states:

> "Following the audit process, and by agreement from both parties, any costs not deemed to be reasonably incurred in providing the works shall be refunded to Transport Scotland."

Breaking that sentence down, it appears to provide for a point in time at and a background against which a discussion about potential repayment should take place ("following the

audit process"). It also provides for a potential outcome of that discussion, namely repayment to the pursuers' agency of costs not deemed (sci. agreed) to have been reasonably incurred in providing the works in question ("costs reasonably incurred" being the criterion for a payment falling due from the pursuers in terms of clause 3.1 of the defender's Terms & Conditions forming part of the substantive contract). What is not explicitly clear is the import of the stipulation that any refund is only to take place "by agreement from both parties", and in particular whether the parties are to be entirely free to agree or disagree about that matter, or whether they are to be constrained to act reasonably in determining what they should agree. A pure "agreement to agree" would almost certainly be unenforceable as a contractual obligation. The pursuers argue that a duty to act reasonably in deciding what to agree falls to be implied into the wording of the letter, on the basis that it is so obviously required to give the putative contract business efficacy as to go without saying. I accept that such a term could, if necessary, be so implied. However, standing the increased recognition in modern law of a general principle of good faith in contract – see for example *Van Oord UK Limited* v *Dragados UK Limited* [2021] CSIH 50; 2021 SLT 1317 at [19] – and in particular the principle recognised at [20] that clear language is required to place one contracting party completely at the mercy of the other, I am able to reach the conclusion that the same practical result can be reached by a process of construction of the words used in the letter, rather than having to resort to the implication of any further term. In other words, the duty to act reasonably is intrinsic to the nature of the obligation undertaken, rather than being an unexpressed condition as to its performance.

[40] Proceeding, then, on the basis that the pursuers have a relevant case that the letter of 10 March 2016, followed by their payment of the sums then demanded, created a fresh contract between the parties which obliged the defender to act reasonably in the light of

Corderoy's audit to identify any sums not reasonably incurred in the provision of the contractual works, and to repay such sums to the pursuers, how can its flat refusal to do any such thing be transmuted into a cause of action for them? The pursuers first seek to rely on the principle set out in *Mackay* v *Dick & Stevenson*, which is essentially to the effect that a precondition to a particular contractual obligation, if deliberately impeded by the obligant, is to be held as fulfilled. However, in the present case if the condition that the defender should participate in discussions with a view reasonably to agreeing what, if any, sums are due to be refunded to the pursuers is held as fulfilled on account of the defender's refusal so to participate, no answer to the question as to what (if any) pecuniary liability the defender should in consequence of that refusal be subjected is thereby supplied. For that reason I do not consider that the *Mackay* v *Dick & Stevenson* principle assists in supplying the pursuers with a cause of action for enforcement of the claimed payment obligation in the putative contract. Nor do I consider that recourse to that principle is necessary where, as here, the failure of the obligant in question to do what the contract contemplates may itself properly be regarded as a breach of that contract.

[41] That is the next alternative cause of action posited by the pursuers; they argue that the failure of the defender to participate in discussions and to agree reasonably any sums due for repayment to them constitutes a breach of contract on its part and that, in assessing the damages flowing from that breach, the court may determine for itself the conclusion, or at least the range of conclusions, at which reasonable parties would have arrived had the discussions contemplated by the putative contract taken place. I accept that the court may be able to arrive at some sort of conclusion as to the likely outcome of such discussions as were contemplated by that contract and that the pursuers ought to have the opportunity to attempt to prove what they can in that regard. I shall accordingly permit the pursuers'

contractual case to proceed to proof before answer, under excision only of those averments relating to the claimed application of the principle in *Mackay* v *Dick & Stevenson*.

**Unjustified Enrichment**

[42] The pursuers maintain that, if their contractual case fails, they have an ultimate redoubt in the form of the *condictio indebiti*; a claim that they paid sums to the defender believing those sums to be due under the parties' substantive contract when in fact they were not, and that the defender ought therefore to make repetition of such sums to the extent that it has been enriched by their payment.

[43] The defender's first response to that claim is to maintain that, if it ever existed, it would have prescribed in terms of section 6 of the 1973 Act in March 2021, five years after the last payment made, which was before the present action was raised in April 2022. The pursuers maintain that they are entitled to the benefit of subsection (4) of that section and that, having been induced until the true position about Murphy's fault emerged in 2020, or perhaps even until their receipt of Corderoy's audit in July 2021, to refrain from making a relevant claim because they mistakenly believed as a result of the defender's various demands for payment of the sums paid to them that those sums were indeed due, their claim for repetition has not prescribed. The defender's answer to that is to point out that Corderoy had raised a query about its Final Account in March 2016 and that the pursuers must, from that point at least, be taken to have been fixed with the knowledge that its demands for payment ought not necessarily to be regarded as implicitly representing that the sums demanded were indeed due.

[44] The principal authority on this issue, *Rowan Timber*, might be regarded as somewhat lightly reasoned. The exact circumstances in which a demand for payment falls to be

regarded as a representation that the sum demanded is indeed due, whether as a matter of fact or as a matter of law, remains at least slightly opaque. I do not consider that it can be determined on the pleadings alone in this case that it would be impossible, after proof, for the pursuers to persuade the court that they were labouring under a relevant misapprehension as to the exigibility of the payments demanded of and paid by them, whether before or after Corderoy's expressed doubts on the matter, until a point less than five years before the present action was raised. The defender's prescription plea will be reserved for proof before answer. For the avoidance of doubt, that plea does not extend to the pursuers' contractual case, in which (upon the hypothesis upon which that case proceeds) *damnum* and *injuria* would not have concurred until after the issue of Corderoy's audit in July 2021.

[45] The other substantial retort by the defender to the pursuers' claim for repetition consists in the observation that, as the pursuers knew when they made the payments in question, the defender intended to, and did, pass the bulk of those payments to Murphy. On the hypothesis adopted by the pursuers, that Murphy had no right to be paid for the work it did in consequence of the gas release which it caused, or in the other respects in which it is said to have been overpaid, the answer to the question of who retains the benefit of the payments made by the pursuers to the defender, appears – in large measure at least – to be Murphy rather than the defender. I consider that there is a good deal of force in the defender's position, and it may well be that proof will furnish no answer to it.

[46] However, and not without hesitation, I conclude that this issue, too, is best resolved after proof before answer. That is because (i) it cannot be determined on the pleadings alone whether all of the payments made to the defender and in respect of which the pursuers advance their claim were passed on to Murphy, or whether some element thereof was

retained by the defender as its percentage cut in terms of the main contract; (ii) it remains to be seen to what extent the pursuers can make good their claim that none of the payments made to Murphy was in fact due to it (a matter which is capable of affecting the decision as to who, if anyone, retains a unjustified benefit from the payments made) and (iii) because the equities of the situation may be capable of being affected by the terms of the defender's letter of 10 March 2016 even if that letter ultimately fails to qualify as part of a new contract between the parties. Given these current uncertainties, it would be going a little too far a little too fast to decide now that the court could not after proof reach the conclusion that the defender ought to be regarded for the purposes of the pursuers' restitutionary case as having retained at least some element of the sums paid to it by them in circumstances which equity should not countenance.

**Conclusion**

[47] I shall sustain the defender's first plea-in-law to the relevancy and specification of the pursuers' averments only to the extent of refusing probation to the averments made by the pursuers in relation to the *Mackay* v *Dick & Stevenson* element of their case, namely, the averments in Article 17 of Condescendence that

> "In the circumstances the condition that the parties would agree what sums, if any, were to be repaid to the pursuer is deemed to have been purified and the defender is deemed to have agreed that it is obliged to reimburse the sums now concluded for."

and *quoad ultra* shall remit the action for proof before answer.