**SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT PERTH**

**[2024] SC PER 47**

PER-A69-19

JUDGMENT OF SHERIFF JOHN A MACRITCHIE SSC

in the cause

ROBERT WALKINGSHAW

Pursuer

against

GLENALMOND TRADING INVESTMENTS LTD, a company incorporated under the Companies Acts, also trading under the style Glenalmond Contracts, Floor Screeding Specialists and having its registered office at 19-23 Bertha Park View, Inveralmond Industrial Estate, Perth PH1 3JE

Defender

**Pursuer: J Taylor; Chambers Legal Ltd**
**Defender: R Anderson, Advocate; Anderson Strathern LLP**

PERTH, 14 October 2024

The sheriff, having resumed consideration of the cause, MAKES the following FINDINGS-IN-FACT:

**Parties**

(1) The pursuer is Robert Walkingshaw. He is a qualified joiner to trade.

(2) On 7 July 2015, the pursuer and his spouse incorporated a limited company, RW Building Construction Management Limited (SC510211) ("RW Building").

(3) After its incorporation, the pursuer was employed, *inter alia*, by RW Building in supervising the management of building sites, as opposed to performing the pursuer's

trade. RW Building was not involved in the parties' contractual relationship, when the pursuer has at all times acted as an individual.

(4) The defender is Glenalmond Trading Investments Limited, a company incorporated under the Companies Acts and having its registered office at 19-23 Bertha Park View, Inveralmond Industrial Estate, Perth PH1 3JE. The defender trades under "Glenalmond Contracts, Floor Screeding Specialists." The defender almost exclusively specialises in supplying and installing flowing screeds.

**Initial Anhydrite Dispute**

***Contract Terms***

(5) In 2008, the pursuer purchased a building plot at Kirkpark, Westruther, Berwickshire. He then commenced personally building a house on this plot ("the property").

(6) The pursuer required to instruct a specialist contractor to supply and install his desired floor screed at ground level.

(7) On 17 July 2012, the pursuer e-mailed the defender requesting a quote for them to supply and install a screed to cover the property's entire ground floor.

(8) On 3 August 2012, the defender's Special Products Manager, witness Mr Thomas Vincent Gribben, e-mailed the pursuer attaching a quote, reference Q120711 ("the initial quote"). Attached to the initial quote was a copy of the defender's standard terms and conditions.

(9) Nearly two years later, on or about 30 June 2014, the pursuer contacted the defender and enquired whether they would, *inter alia,* install the screed floor at the property for the same price as in the initial quote.

(10) On 30 June 2014, the defender's Commercial Manager, Stuart Duncan, e-mailed the pursuer attaching a revised quote, reference Q120711 Rev 1 ("the revised quote"). The revised quote also refers to the defender's standard terms and conditions as being applicable.

(11) In the revised quote, the defender offered to *inter alia* supply and install a flowing anhydrite screed floor at the property, for £17.86 per square metre, excluding VAT.

(12) A flowing screed is a mix of sand, binder, and water. It comes to a site in liquid form. The screed is pumped onto a property's subfloor up to pre-chosen level datums to create a floor. The screed arranges itself by filling the available space.

(13) Ordinarily, a final finish is applied to the screed, such as tiles, wooden flooring, or a carpet. The screed's aesthetic appearance may, therefore, be insignificant.

(14) An anhydrite screed is a gypsum-based, flowing screed. Anhydrite, calcium sulphate and gypsum were terms used interchangeably in the evidence heard to describe anhydrite screeds ("the anhydrite").

(15) The terms of the revised quote are *inter alia* that the anhydrite would:

(i) Cover an area of 225 square metres;

(ii) Be to a depth of 65 millimetres (but for the purpose of cost estimating only);

(iii) Have minimal shrinkage, although it may have "perfectly natural and to be expected" minor cracking;

(iv) Comply with "British Standard BS8204 (SR2) Screeds, bases and in situ floorings" ("BS8204");

(v) Comply with surface regularity tolerances (ie flatness) per the NHBC booklet "A consistent approach to finishes", or BS8204 (that being 5 millimetres);

(vi) Have no more than a 10 millimetre deviation from a level (ie height) datum; and

(vii) Would dry at approximately 1 millimetre per day for the first 40 millimetres (in depth) and two days per every millimetre over such 40 millimetres.

(16) The terms of the revised quote also required that:

(i) The pursuer makes payment within seven days before the commencement of work on site, unless otherwise previously agreed;

(ii) There be clearly marked, finished screed level datums, to be advised by the pursuer to the defender's site supervisor at the earliest of:

a. When the site is measured, inspected, and/or surveyed in advance of the works; or

b. On the day of the screed pour but prior to the commencement of the screeding works; and

(iii) There would be no traffic on the screed for 48 hours.

(17) At this time, the part of BS8204 entitled "Part 7: Pumpable self-smoothing screeds – Code of Practice" stated:

**"6.14.2 Departure from datum**

The maximum permissible departure of the level of the screed from a specified or agreed datum plane should be specified taking into account the area of the floor and its use. For large areas for normal purposes, a departure of ±15mm from datum can be found to be satisfactory.

Greater accuracy to datum can be required in small rooms, along the line of partition walls, in the vicinity of door openings and where specialized equipment is to be installed directly on the floor.

**6.14.3 Surface Regularity**

Pumpable self-smoothing screeds will not self-level to a very high standard of surface regularity. SR2 is a typical expectation …

For SR2 the 'maximum permissible departure from a 3 [metre] straightedge resting in contact with the floor is 5 millimetres."

[Although this is stated to have application "for commercial and industrial buildings," there is no reference otherwise to SR2 surface regularity requirements].

**"8.2.3 Adhesion of bonded screeds to the base**

Good preparation of the base is essential and, together with good workmanship, will minimize loss of adhesion. However, it cannot be guaranteed that adhesion will always be complete. If any hollowness is found it is usually confined to the edges and corners of bays and on either side of any cracks that have developed in the screed. A small degree of hollowness, indicating lack of adhesion, does not necessarily mean that the screed is unsatisfactory unless it is accompanied by visible or measurable lifting of the edges of bays or at cracks, to the extent that the edges of screed could break under anticipated loads.

**8.2.9 Assessment of cracks**

Cracks should be assessed in relation to the area involved, the flooring to be applied and likely future movement.

NOTE - Fine cracks are not detrimental to any applied flooring and do not need filling: wider cracks can need filling or other remedial work."

(18) Section 8 of Chapter 1.2 of the then applicable NHBC booklet stated that:

"Acceptable tolerance for surface regularity (flatness) was "4mm out of level per metre for floors up to 6m across, and a maximum of 25mm overall in any other case".

(19) Shortly after 30 June 2014, the pursuer met with Mr Gribben at the property. This meeting was for the pursuer to obtain the defender's specialist advice on the most appropriate materials and methodology to be used, on which specialist advice the pursuer has been wholly reliant throughout the parties' dealings.

(20) The entire area of the ten rooms and relative corridors on the property's ground floor was measured at 210 square metres.

(21) Accordingly, on or about 14 August 2014, the pursuer verbally accepted the revised quote, but on the basis that the installation would be for 210 square metres of anhydrite, as opposed to the 225 square metres quoted for.

(22) The defender then verbally accepted this, whereby the revised quote, with the revised area, constituted the express terms of the parties' contract.

(23) The net contract price was accordingly £3,750.60 (210 square metres at £17.86 per square metre). This price, together with VAT of £750.12, totalled £4,500.72 ("the contract price").

(24) On 15 August 2014, the defender's Mr Duncan sent the pursuer an e-mail enclosing the defender's invoice for the contract price. Therein, Mr Duncan requested that the pursuer arrange to pay the contract price into the defender's bank account or have a cheque ready for the defender's employee "on the day of the pour."

(25) Of even date, the pursuer responded by e-mail that he would "have a cheque ready on the day of the pour." Thus, the pursuer had thereby agreed with the defender to make payment by cheque on the day of the pour, which agreement is provided for in the parties' contract. The pursuer also indicated that he sought "certificates of the screed and guarantees of the product and workmanship".

(26) Of even date, Mr Duncan replied, agreeing to "sort out a guarantee".

***Levels***

(27) On 14 August 2014, shortly before the installation of the anhydrite, the pursuer met with the defender's site-supervisor. As contractually provided for, the pursuer pointed out to this employee seven screed level datums. The pursuer clearly marked these level datums with either blockwork, chipboard flooring or by making marks on stud linings at doors.

(28) The pursuer indicated that these were the levels to which he required the anhydrite to be evenly laid to throughout the respective rooms and corridors of the ground floor of the property.

(29) These level datums were at (i) the front door block work; (ii) the timber floor sills installed at the bi-fold doors in the kitchen; (iii) the timber floor sills installed at the bi-fold doors in the family room; (iv) the block work at the rear door to the South elevation; (v) the block work to the family entrance to the North elevation; (vi) the block work at the double doors to the games room, and (vii) the block work at the internal garage door entrance ("the seven level datums"). The defender's employee acknowledged these, with no indication that only the first of such level datums was to be used by the defender.

(30) A level datum is a reference point on an object, to which the finished height of the anhydrite should endeavour to meet.

(31) At the installation, the pursuer signed a pour authorisation sheet. This only recorded the first of the seven level datums which the pursuer had advised.

(32) To install the anhydrite the defender's employees used a laser, and tripod levelling indicators, utilising only the first level datum provided.

(33) The screed was pumped into the property. However, when the defender's employees uplifted the levelling indicators, it was noted that the bottom of a levelling indicator had accidentally fallen off, causing the levels to be incorrect even utilising the first of the seven level datums.

(34) The anhydrite was between 11 and 23 millimetres under the respective seven level datums in six rooms and the corridors.

(35) In the remaining four rooms and hallway the anhydrite was installed at levels ranging from 10 millimetres under to 2 millimetres over the relative level datum.

(36) Even if utilising only the first of the seven datum levels and allowing for the datum level tolerance of 10 millimetres specified in the parties' contract, these anhydrite levels were accordingly not in accordance with the parties' contract.

***Coverage***

*Pump room*

(37) At the installation of the anhydrite the pursuer advised the defender that he required the pump room to be laid with a fall (ie at a gradient) towards a gully. As the self-levelling anhydrite being utilised was unsuitable for this purpose, it was agreed by the pursuer and the defender's employee, that the defender would later complete the installation of a suitable screed in the pump room when the defender was next in the area.

(38) On 19 August 2014, such an agreement was confirmed in a letter from the pursuer to the defender.

*Other rooms and corridors*

(39) In some of the rooms and corridors the anhydrite was short of the relative walls. At no time had the defender advised the pursuer of their having any issues with the pursuer's preparation of the subfloor which could explain this.

(40) Excepting the pump room from consideration, the anhydrite had not accordingly been installed across the entirety of the ground floor of the property as required by the parties' contract.

*Laitance*

(41) Shortly after installation of the anhydrite, flaking appeared on the surface, called laitance.

(42) Laitance is an accumulation of fine particles on the surface of fresh screed due to an upward movement of water. This is generally a minor defect and can be brushed or ground away.

(43) The laitance was particularly significant in the dining room, kitchen, and hallway.

*Setting/Drying*

(44) The contract provided that the anhydrite would take 48 hours to set and approximately 90 days to dry and did so ((1 day x 40mm) + (2 days x 25mm) for 65mm)). There was therefore no practical issue in this respect.

*Varied Contract Terms*

(45) On or about 21 August 2014, the pursuer complained to the defender that the anhydrite was defective in respect of it having incorrect levels, inadequate coverage, laitance and taking too long to dry. The pursuer cancelled his cheque previously sent to the defender in respect of the payment of the contract price.

(46) On 4 September 2014, the defender's employees attended at the property and attempted to grind the laitance from the top surface of the anhydrite. However, this laitance was not completely removed.

(47) On or about 20 September 2014, the defender's employee "Arron" attended at the property and inspected the anhydrite. The defender's employee agreed with the pursuer that the anhydrite levels were incorrect, its coverage was inadequate, and that remedial

works were required to rectify this by way of a screed topping being installed on top of the anhydrite ("the topping").

(48) However, on 9 October 2014, Mr Gribben wrote to the pursuer. He claimed that the anhydrite had been "laid in accordance with BS 8204 – 7:2003".

(49) Therein, Mr Gribben:

(i) Referred to section 6.14.2 of BS8204, selectively quoting (ie omitting the text referred to in the square brackets), "[For large areas for normal purposes,] … a departure of ±15mm from datum can be found to be satisfactory." [Greater accuracy to datum can be required in small rooms ...]; and the NHBC document stating that acceptable tolerances for floors could be "4mm out of level per metre for floors up to 6m across, and a maximum of 25mm overall in any other case";

(ii) Claimed that, "on the assumption that the [levels datums the defender was] to work to was where [the pursuer had said] it was", the floor was within these referred to standards, "perhaps with the exception of a small area to the pump [plant] and utility rooms"; thereby omitting to recognise that a 10 millimetres deviation from a level datum had been specifically agreed in the parties' contract;

(iii) Referred to having no "written" instructions from the pursuer as to the level datums other than the signed pour authorisation sheet; thereby omitting to recognise that the terms of the parties' contract required the pursuer to advise the defender's site supervisor of level datums which the pursuer had done verbally (with no requirement to do so in writing);

(iv) Indicated that the defender was prepared to carry out "remedial" works to the entire ground floor once the anhydrite was dry enough to facilitate this, but that this was only a "gesture of good customer service"; but

(v) Expressed the view that it was "completely unreasonable" for the pursuer to withhold the entire contract price and that he considered "that the bulk of the contract [price] should be paid."

(50) On 28 November 2014, the pursuer's insurers wrote to the defender stating:

(i) Their understanding that the laitance had been successfully remedied;

(ii) They sought either dehumidifiers to speed up the anhydrite drying or for the defender to lift and re-install the anhydrite; and

(iii) They sought confirmation of the proposed products the defender intended to use to raise the floor to the correct levels, written confirmation from the manufacturers of the suitability and compatibility of such products and details of the works guarantee.

(51) On 3 December 2014, the defender replied by letter to the pursuer's insurers. Therein, the defender again agreed to carry out "remedial" works as a "gesture of good customer service". However, while accepting that some money should be withheld until the matter was resolved, the defender expressed the view that they should not carry out the remedial works without any "promise of payment".

(52) On 16 February 2015, the pursuer wrote by letter to the defender. Therein the pursuer indicated that he would pay 37.5% of the contract price to the defender once he had received the "original warranties", details of the proposed method of rectification of the anhydrite, written guarantees from the screeding suppliers that the defender had used and were proposing to use, and confirmation that these remedial products "will bond to the

other with no future issues". The pursuer advised that if this were not provided, he would instruct another company to rectify the anhydrite.

(53) On 5 September 2014, the pursuer's spouse e-mailed Mr Duncan enquiring if the bonding products Isoseal and Hydraseal were to be used by the defender in the remedial works.

(54) Of even date, Mr Duncan responded that the defender was going to use one coat of Isoseal and one coat of SBR (Styrene-Butadiene Rubber) primer to bond the topping to the anhydrite.

(55) On 9 September 2015, Mr Duncan e-mailed the pursuer's spouse that the defender would attend on-site to install the topping on 23, 24 and 25 September 2015. This was despite the pursuer's continued refusal to make any unconditional payment towards the contract price, as his conditions for doing so had not been met.

(56) On 23, 24 and 25 September 2015, the defender installed the topping on top of the anhydrite. This was an Isocrete 4000 cement-based topping which had been manufactured by Flowcrete.

(57) Subject to the later identified absence or inadequacy of the same, the defender used one layer of Isoseal and one layer of SBR to endeavour to bind the two screeds together.

(58) The topping, binders, and methodology for installing the topping throughout the ground floor of the property, were all chosen by the defender. The pursuer was again relying entirely upon the defender's expertise in this respect.

(59) The installation of the topping *prima facie* resolved the remaining issues relative to the insufficient level and inadequate coverage of the anhydrite as had been intended (other than that relating to the pump room, which remained an agreed outstanding issue).

**Subsequent topping dispute**

***Widespread cracking***

(60) However, shortly after the topping was installed, it developed widespread surface cracking across most of the rooms and corridors.

(61) At or about 5 October 2015, the pursuer raised his concerns about this cracking with the defender.

(62) The defender assured the pursuer that such was normal hairline "settlement cracking" and nothing to be concerned about.

(63) Reliant on this advice from the defender, the pursuer continued with the build. In doing so the pursuer carried out joinery and decoration works across the ground floor of the property.

(64) However, the cracking in the topping got progressively worse.

(65) On 8 January 2016, some three months later, the pursuer became so concerned with the cracking of the topping that he instructed witness Dr John Ashworth, a flooring products and adhesives expert, to inspect and report on the installed screeds.

(66) On 7 April 2017, the pursuer then also instructed witness Mr Greig Adams, a chartered surveyor, and chartered building engineer, to inspect and report on the installed screeds.

(67) BS8024 paragraph 8.2.9 prescribed that cracking required to be assessed in relation to *inter alia* the area involved. In this instance the topping was extensively cracked over most of the ground floor of the property.

(68) The cracking was, accordingly, not in accordance with the tolerance prescribed in the parties' contract as it was not "perfectly natural and expected" "minor cracking."

***Random cracks***

(69) The predominant cracking was directionally random, hairline (less than one millimetre), at times intersecting. These were extensive and as shown on the plans attached to the reports from Dr Ashworth and Mr Adams.

(70) Dr Ashworth drilled out four core samples of 50 millimetres width from the property's ground floor:

(i) The first core sample was removed from intersecting cracks located in the living room. This location had sounded hollow when tapped. The cracking extended to the entire depth of the topping, but not into the anhydrite.

(ii) The second core sample was removed from intersecting cracks located in the dining room. This location had not sounded hollow when tapped. However, the core drilling process resulted in the spontaneous debonding of the topping from the anhydrite, indicating that there was little or no bond present between these. Again, the cracking was exclusive to the topping.

(iii) The third core sample was removed from a much wider crack across the doorway between the corridor and the games room. The bond remained intact after drilling, but the topping could be removed with minimal force. Much narrower cracking than in the topping was also present in the anhydrite. The cracking had therefore originated in the topping and progressed into the anhydrite, rather than *vice versa*.

(iv) The fourth core was taken from intersecting cracks at the junction of the two corridors. This location had sounded hollow when tapped. Again, the core drilling process resulted in spontaneous debonding of the topping from the anhydrite. This was again indicative of there being little or no bond present

between the anhydrite and the topping. Again, the cracking was exclusive to the full length of the topping and did not extend to the anhydrite.

(71) While all screeds can have minor cracking, from an examination of these four sample cores and of the extensive cracking throughout the ground floor of the property, it was patent that the topping had structurally failed.

(72) The random cracking was exclusive to the topping and hence this failure was not the result of other structural movement of the ground or foundations (ie not settlement cracks) ("structural movement").

***Straight cracks***

(73) There were also nominally straight, much wider (approximately 2 millimetre) cracks across doorways between the corridor and games, utility, and pump rooms.

(74) These straight cracks were caused by the defender not having used movement joints and bays when installing the anhydrite.

(75) These wider straight cracks were consistent with movement originating in the topping and these were, therefore, also not the result of other structural movement.

***Movement joints & bays***

(76) The cement-based topping installed by the defender had very different movement characteristics to the anhydrite screed ie in terms of shrinkage and expansion.

(77) All screeds will encounter some element of thermal movement. These screeds however had markedly different professional recommendations for the provision of movement bays and joints. To avoid theses straight cracks when installing cement-based

screeds, bays and joints are required, as cement-based screeds are much less flexible than anhydrite screeds.

(78) As there were no movement bays or joints used, there was insufficient allowance for movement in the topping causing it to crack.

***Primer application***

(79) In three of the drilled cores, the failure interface was within the top of the anhydrite and below the topping. In one of the cores the failure was within two layers of anhydrite possibly from a repair or flow line. An examination of the cores showed that the topping and anhydrite had debonded extensively.

(80) Tapping the surface of the topping, and getting a hollow echo confirmed that the bond strength between the topping and the anhydrite was in places non-existent and otherwise generally low.

(81) A very thin discontinuous yellow layer of Isoseal was found on all four of the core samples. On two of the cores, Isoseal was the only primer layer present. On the other two cores there was a clear rubbery layer identified as SBR. The primer application was either non-existent or inconsistent across the ground floor of the property.

(82) A more consistent and thicker binder across the entire ground floor was required for an effective bond to have been made between the anhydrite and the topping.

(83) This bond was necessary, to give the floor the necessary structural integrity for every day domestic use, particularly over time.

(84) The debonding was too widespread a failure to be rectified by cutting out and patching individual areas.

(85) The debonding would have progressed with time due to foot traffic and furniture stresses.

(86) The combination of the debonding and intersecting cracks would have resulted in localised disintegration of the floor, causing the topping structure to fail even further.

***Later laitance/scarification issues***

(87) In two of the cores the anhydrite possessed a thin smooth laitance-like surface layer residue. All such residues should have been removed, leaving a dry and dust-free open textured surface if the bond was to be fully effective.

(88) Sufficient scarification of the anhydrite was also necessary for the bond between the anhydrite and the topping to be fully effective.

(89) The presence of laitance confirmed that there had been insufficient scarification of the anhydrite before the topping was installed.

(90) The presence of laitance and the insufficient scarification were factors in the screeds debonding.

***Debonding (bossing) issue***

(91) For the topping to have been and remain structurally sound the anhydrite and the topping required to have been strongly bonded together.

(92) The debonding (caused *inter alia* by the inadequate primer application and failure to remove laitance and scarification) did not meet BS8204 paragraph 8.2.3.

(93) This was due to the extensive nature of the debonding, it being across most of the ground floor, with the topping having structurally failed.

(94) BS8204 paragraph 8.2.3 refers to an expectation that any hollowness would usually be confined to edges and corners of bays and that only a "small degree of hollowness" should be tolerated.

***Embedded tape***

(95) Along the edges of the topping at the folding windows in the family room and at the far end of the short corridor tape used to mask the topping edges had been left partially embedded and as such had caused spalling to the topping whereby the same was breaking up along these edges.

***Corners breaking up***

(96) Several corners of the topping were locally breaking up and not flush or level.

***Failure to grind down***

(97) In the family room and front WC the anhydrite, having been laid to the correct level datum, had not been ground down to accommodate the thickness of the topping being added. Therefore, the yellow primer has not been adequately covered and was exposed.

***Surface regularity (flatness)***

(98) At the junction of the hallway and living room, there was an 8-millimetre surface irregularity (flatness) gap.

(99) This deviation was measured over a 3-metre straight edge resting in contact with the floor, which exceeded the 5 millimetre tolerance permitted by BS8204 paragraph 6.14.3.

***Screed incompatibility***

(100) While it may be possible to install a combination of an anhydrite under screed and a cement-based topping screed without issue, such screeds have very different strengths and shrinkage characteristics. These different characteristics, when combined with the extensive debonding and lack of movement joints and bays in the topping, increased the effects of these issues, causing a particularly catastrophic failure of the topping by its cracking across most of the ground floor.

***Remedial works required***

(101) To rectify the topping the pursuer required to remove and reinstall it.

(102) The pursuer also required to (i) remove and reinstall ground floor internal doors, door linings, architraves, skirtings, and facings ("the joinery works"); and to (ii) redecorate ground floors walls, ceilings, skirtings, and architraves ("the redecoration works") as a consequence of having to remove and install the topping.

(103) The joinery works had to be removed, then replaced and repainted, as these required to sit on top of the finished topping once it was laid. Without this there would inevitably have been large gaps between the topping and the joinery works, preventing NHBC certification of the property.

(104) The facings and door frames also required to be removed. The door frames likewise are required to sit on the topping so that there is also minimal clearance between the new topping as laid and the doors.

(105) Particularly with the double doors, the sporadic heights of the topping could require there to be more clearance with one door as compared to another.

(106) The joinery works were also required to protect the relative woodwork from unavoidable damage to them in the removal and reinstallation of the topping.

(107) The redecoration works were also required as replacing the topping involved the mechanical digging up of the topping using power tools thereby creating a considerable amount of dust and debris.

(108) No attempts at covering structures could avoid the effects of such dust and debris and the need for such redecoration.

***Reinstalling topping***

(109) From 2 to 4 August 2018, Foggs Floors Limited ("Foggs") ground all areas of the existing anhydrite and vacuumed the same, applied epoxy resin and sand scatter and installed 6-12 millimetres of Uzin NC110 anhydrite topping at a reasonable cost of £5,750.00.

(110) On 20 August 2018, the pursuer made payment to Foggs of this sum of £5,750.00.

***Joinery and redecoration works***

(111) The pursuer personally carried out the remedial joinery and redecoration works.

MAKES the following FINDINGS IN-FACT AND IN-LAW:

**Liability**

***Jurisdiction***

(1) The defender, being incorporated under the Companies Acts and having its registered office and therefore its seat in Perth, is domiciled there. Accordingly, this court has jurisdiction.

*Implied contract term*

(2) It was an implied term of the contract that all works be carried out by the defender with the skill and care to be expected of a reasonably competent tradesperson ("the trade standard").

*Contract terms*

(3) The parties having concluded the parties' contract (including as varied to require the installation of a topping) are bound by the terms and conditions of the same.

**Breach of contract in the initial anhydrite dispute**

(4) The failure of the defender to install the anhydrite to (i) levels within the 10 millimetre tolerance of the seven screed level datums, advised by the pursuer to the defender's site supervisor, and (ii) cover the entire ground floor of the property (excepting the pump room), were material breaches of the terms of the parties' contract.

(5) A tradesperson carrying out the installation of the anhydrite to the trade standard would not have so individually and cumulatively failed.

(6)

**Breach of contract in the subsequent topping dispute**

(7) The defender failed to install the topping without:

(i) major random cracking occurring across most of the ground floor of the property, which topping had structurally failed and would have continued to get worse (as compared to the perfectly natural and expected minor cracking tolerated by the parties' contract);

(ii) avoidable straight cracks across doorways caused by there being no movement joints and bays;

(iii) properly preparing the anhydrite base by fully removing laitance, sufficiently scarifying the same and utilising sufficient primer, resulting in widespread debonding of the screeds;

(iv) surface irregularity at the junction of the hallway and living room, there being an 8 millimetre surface irregularity (flatness) gap; and

(v) proper finishing, with tape being left embedded in the topping, corners breaking up, inadequate grinding down of the anhydrite, causing spalling, further corner break up and exposed primer, respectively.

(8) The failures by the defender to: carry out sufficient anhydrite surface preparation (by failing to remove all laitance and sufficiently scarify the same); use sufficient primer; use required movement joints and bays; and thereby installing the topping with widespread cracking and debonding; were individually and collectively material breaches of the parties' contract; and, when combined with the anhydrite and topping screeds differing movement characteristics, caused the topping to catastrophically structurally fail.

(9) The failures by the defender to install the topping within the tolerated surface regularity and to properly finish it, while likewise material breaches of the parties' contract requiring repair, became essentially irrelevant due to the topping requiring to be removed and replaced in any event due to its structural failure.

(10) A tradesperson carrying out the installation of the topping to the trade standard would not have so individually and cumulatively failed.

**Quantum**

***Reinstalling topping***

(11) A reasonable sum to recompense the pursuer for his having had to make payment to Foggs is the sum he paid of £5,750.00.

***Joinery works***

(12) A reasonable sum to recompense the pursuer for his having carried out the joinery works is £2,854.57 (£845.10 for removal and £2,009.47 for reinstallation).

***Redecoration works***

(13) A reasonable sum to recompense the pursuer for his having carried out the redecoration works is £1,650.00.

***Travel time & mileage***

(14) A reasonable sum to recompense the pursuer for his lost travel time and mileage is £1,247.00 (£350.00 and £576.00 for the joinery works; and £125.00 and £216.00 for the redecoration works).

***Other time lost***

(15) A reasonable sum to compensate the defender, based on the very limited evidence led, for his time spent in communicating with the defender, his insurers and experts is £100.00.

***Total damages***

(16) Accordingly, the total reasonable sum payable by the defender to the pursuer to compensate the pursuer for the defender's breaches of contract is £11,621.57 (£5,750.00 for the Foggs' reinstallation; £2,854.57 for the joinery works, £1,650.00 for the redecoration works; £1,247.00 for travel time and mileage; and £100.00 for other time lost).

***Set off/counterclaim***

(17) To calculate the loss which the pursuer has actually incurred because of the defender's breaches of contract, the sum which the pursuer would otherwise have paid to the defender in respect of the contract price requires to be deducted from these damages *viz* £4,500.72.

***Net loss***

(18) Accordingly, the pursuer's net actual loss because of the defender's breach of contract is £7,120.85 (£11,621.57 less £4,500.72).

***Interest***

(19) It is objectively reasonable to find the pursuer entitled to interest at the rate of 4% per annum from:

(i) 20 August 2018 in respect of the sum of £2,094.38; and

(ii) 3 April 2019 in respect of the sum of £5,026.47, being the remainder of the sum found as being due.

THEREFORE, (one) in the substantive cause: Sustains pleas-in-law numbered one and two for the pursuer in so far as they relate to the defender's breaches of contract and the

damages found as being due; Repels pleas-in-law one, two, three and five for the defender; Sustains pleas-in-law numbered four for the defender, to the extent that the sum sued for is excessive; and (two) in the counterclaim: Repels pleas-in-law one and two for the defender; and Sustains plea-in-law one for the pursuer; and

ACCORDINGLY, (one) in the substantive cause, Finds the defender liable to make payment to the pursuer in the sum of £7,120.85 as first craved, with interest from 20 August 2018 on that part of such sum amounting to £2,094.38, and from 3 April 2019 in respect of the remaining part of such sum amounting to £5,026.47, all at the rate of 4% per annum; (two) Dismisses the pursuer's second crave as being unnecessary; and (three) in the counterclaim, Assoilzies the pursuer from the first crave in the counterclaim; and

CONTINUES, consideration of (one) in the substantive cause, crave 3 for the pursuer and (two) in the counterclaim, crave 2 for the defender, thereby Reserving the question of expenses; and Assigns **25 October 2024 at 9.30am** *via* Webex as a diet to be heard thereon; Parties should e-mail the sheriff clerk at perthcivil@scotcourts.gov.uk not later than 4pm two working days prior to the hearing with their e-mail and telephone contact details in order to make arrangements for the hearing and with their written submissions.

**NOTE**

**Judgment structure**

[1] Due to the significant number of factual and legal issues in dispute in this cause, structured sections have been used to consider the relative evidence, parties' positions and to perform an analysis and conclusion of these issues individually and latterly collectively. From the conclusions of such analyses, the findings are then reached on the balance of probabilities. It is hoped that this structure will assist in the comprehension of how these

numerous issues have been so individually and collectively determined. Quoted terms are underlined in places to add emphasis throughout.

**Factual summary**

[2] On the instructions of the pursuer, the defender initially supplied and installed anhydrite screed floors ("anhydrite") throughout the ground floor of the domestic property ("the property") being built by the pursuer.

[3] The pursuer was initially not satisfied that the anhydrite had been installed to the correct level and extent. The pursuer was also concerned as to the presence of surface laitance and the length of time that the anhydrite was taking to dry. The pursuer, accordingly, complained, and cancelled his cheque for payment of the contract price, to the defender.

[4] The defender then ground the anhydrite, endeavouring to remove the surface laitance. The anhydrite also fully dried over time.

[5] To satisfy the pursuer's remaining issues with the levels and extent of the anhydrite, the defender supplied and installed a topping screed ("topping") to the anhydrite.

[6] The pursuer then noted extensive random hairline cracking across the majority of the topping, and wider straight cracking across some doorways. The defender advised the pursuer that this cracking was normal and not of concern.

[7] The pursuer, relying on such advice from the defender continued with the build, including joinery and decoration works.

[8] However, the pursuer, became more concerned with the increasingly extensive cracking in the topping. The pursuer instructed skilled witnesses Dr Ashworth and Mr Adams to inspect and report on the topping. These skilled persons advised the pursuer

that essentially the topping had structurally failed, that it could not be repaired and that the topping would only get worse over time, unless replaced.

[9] The pursuer claims that this cracking, later identified debonding of the screeds and ultimately the structural failure of the topping, was due the combination of various breaches by the defender of the parties' contract, by the defender having failed to:

(i) install a topping that was compatible with the anhydrite;

(ii) utilise recommended primers to bond the screeds;

(iii) provide for necessary movement joints and bays in the topping;

(iv) use sufficient primer to adequately bond the screeds; and

(vi) sufficiently scarify and remove all surface laitance from the anhydrite before installing the topping.

[10] The pursuer also takes issue with the defender having failed to properly finish the topping there having been:

(i) surface irregularity (unevenness);

(ii) embedded tape;

(iii) corners that were breaking up;

(iv) exposure of primer in high areas of the anhydrite; and

(v) no topping installed in the pump room.

[11] The defender, at least on record, refuses to accept that the topping had structurally failed and accordingly that it required to be replaced. Despite having not inspected the topping, the defender's Mr Gribben, at least initially, extensively expressed the view that the cracking, debonding, surface irregularity, and poor finishing were all comparatively minor issues which could readily have been repaired.

[12] On the basis that the topping had structurally failed in breach of the parties' contract, that it could not be repaired, would only get worse and that it required to be replaced, the pursuer accordingly used other contractors (Foggs) to reinstall the topping.

[13] The pursuer now seeks to be recompensed for the necessary, foreseeable, and reasonably incurred losses he has incurred in remedying the defender's material breaches of the parties' contract in the total sum of £22,581.92

[14] The defender, at least on Record, refuses to accept that they were in material breach of the parties' contract. However, if the defender was in breach of the parties' contract, the defender only accepts that the sum paid to Foggs for reinstalling the topping (£5,750.00) was necessary, foreseeable, adequately vouched and reasonable, and not the sums claimed relating to joinery and redecoration works.

**Witnesses – credibility and reliability**

*Evidence*

[15] The witnesses in the cause were the pursuer, his skilled witnesses Dr John Ashworth and Mr Greig Adams; and for the defender, their manager Mr Thomas Vincent Gribben.

[16] All witnesses provided lengthy affidavits, as the parties had been ordered to do. These were initially adopted by the witnesses in their examination in chief. However, it soon became apparent that due to the volume, relative complexity and technical nature of the issues, these affidavits required to be considerably supplemented by each witness, with substantial further examination, cross examination and re-examination.

***Pursuer's position***

[17] Where there is a conflict between them, the evidence of the pursuer and his two independent skilled witnesses Dr Ashworth and Mr Adams, should be preferred to the defender's potentially biased employee, Mr Gribben.

***Defender's position***

[18] Where there is a conflict, the defender's employee Mr Gribben's evidence should be preferred to that of the pursuer, Dr Ashworth, and Mr Adams.

***Analysis and conclusion***

[19] Notwithstanding references in the substantial written submissions of parties as to the credibility of witnesses requiring to be assessed, in final verbal submissions, it was acknowledged by both parties that where the witnesses' evidence did not converge with each other, such was ultimately more likely to be an issue of reliability, as opposed to credibility.

[20] The defender referred to *Gestmin SGPS SA* v *(1) Credit Suisse (UK) Limited and (2) Credit Suisse Securities (Europe) Limited* [2013] EWHC 3560 (Comm) at [15]-[22] where it is stated:

> "An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory … External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection … The process of civil litigation itself subjects the memories of witnesses to powerful biases.
>
> The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings … In the light of these considerations, the best approach for a judge to adopt in the trial of a

> commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".

[21] The necessity of applying caution as regards the factual evidence of all the witnesses, recounting events from at or about 10 years ago, in some part, was properly highlighted and was considered when assessing the witnesses' evidence. The reference to "powerful biases" and a witness having "a stake in a particular version" is also apposite in the cause and has been carefully considered in the assessment of the evidence.

[22] Differences in evidence were principally either through a lack of independence resulting in unconscious bias, a failure to remember or record events adequately or accurately, and witnesses, particularly the pursuer's skilled witnesses having a higher level of independence, knowledge, skill, qualifications, and experience.

[23] There were no significant differences in the evidence of Dr Ashworth and Mr Adams, although the latter was more definite about the compatibility of products being a factor in the topping structurally failing so catastrophically, as opposed to Dr Ashworth who merely suggested that such incompatibility required to be considered.

[24] Dr Ashworth and Mr Adams were particularly impressive, credible, and reliable witnesses and their evidence where it conflicted with the pursuer and defender was preferred.

***Robert Walkingshaw ("the pursuer")***

*Pursuer's position*

[25] The pursuer was credible and reliable and should be preferred to that of Mr Gribben.

*Defender's position*

[26] Where there is a conflict, the defender's employee Mr Gribben's evidence should be preferred to that of the pursuer.

[27] The pursuer has been shown to be unreliable in his recollection of the facts when confronted with the defender's productions. The pursuer's failure to keep adequate contemporaneous records, was such that the court should be cautious to accept his evidence as urged by Leggatt J (as he then was) in *Gestmin SGPS SA, supra.*

*Analysis and conclusion*

[28] The defender rightly cautioned as to the lack of vouching for the pursuer's losses claimed and the difficulties with evidence based on recollection alone being a reliable guide to the truth.

[29] Where there was a conflict between the respective positions of the pursuer and Mr Gribben's evidence, on some occasions the pursuer's evidence has been preferred and *vice versa*, all for the reasons undernoted.

[30] There were some concerns as to the pursuer's reliability, understandably, standing the passage of over ten years since some of the relative events took place.

[31] He had been 100% sure that no written documentation had been produced on the morning of the anhydrite pour on 18 August 2014, yet a pour authorisation sheet had in fact been signed by him.

[32] His initial assertion was that there was no agreement to complete the screed in the pump room on a later date. This conflicted with his recording such an agreement in the letter he had sent to the defender on 19 August 2014.

[33] His affidavit at paragraph 3 indicated that by the time he had incorporated a limited company RW Building Construction Management Limited (SC510211) on 7 July 2015 "the problem with the defender … and the works done" had been all over. The reality was that the installation of the topping was carried out by the defender on 23, 24 and 25 September 2015. Equally the reinstallation of the topping carried out by Foggs was at or about August 2018.

[34] The pursuer also did not initially accept that the defender's employees had attended at the property and attempted to remove the laitance from the surface of the anhydrite, yet in his affidavit and in the letter from his insurers, it was acknowledged that this had taken place.

[35] The pursuer's introduction of third-party online consumer complaints, also referred to in pursuer's written submissions was wholly irrelevant and of no assistance in determining any of the issues in the cause.

[36] The pursuer was in general terms attempting to do his best in giving his evidence. Where he has provided differing estimates of timings for his remedial works, yet where these have appeared reasonable, having the benefit of being analysed against comparative quotes from contractors and the opinion of Mr Adams, the most favourable times from the defender's position have been considered most reasonable.

***Dr John Ashworth ("Dr Ashworth")***

*Pursuer's position*

[37] Dr Ashworth was credible and reliable.

*Defender's position*

[38] While Dr Ashworth was credible, reliable and "gave his evidence in a straightforward manner; and … had the manner of a competent witness" the only information the court has as to his expertise is that "he has been carrying out inspections relating to flooring failures and disputes for 25 years".

[39] The evidence of Dr Ashworth as to there being three "workmanship defects" relative to (i) spalling at the topping edges, (ii) unacceptable surface irregularity and (iii) exposed yellow primer was "mere *ipse dixit*".

[40] Dr Ashworth did not profess to be a tradesperson and had not "set out the standards to be expected of a reasonably competent" tradesperson.

*Analysis and conclusion*

[41] Dr Ashworth was an impressive witness who had been carrying out inspections relating to flooring failures and disputes for more than 30 years. While noting that Dr Ashworth had the qualifications of PhD and MPRI, no further explanation had been provided in evidence as to what these specifically related to.

[42] It was only in the defender's submissions that any question arose as to Dr Ashworth's expertise, due to such qualifications having not been detailed in evidence. It would have been preferable to have heard the details of these qualifications and likewise for any challenge to Dr Ashworth's expertise to have been made during his cross-examination.

[43] However, having considered Dr Ashworth's report and listened to his evidence, Dr Ashworth's stated vast experience was unchallenged, and his expert knowledge was patent, perhaps explaining the omission to detail his academic qualifications.

[44] Dr Ashworth's report which he adopted in his evidence describes his company as providing services relating to *inter alia* chemical analysis, on-site investigations, being a skilled witness and having areas of expertise in *inter alia* building materials and flooring. Again, no such descriptions were challenged in evidence.

[45] Reference is made to the findings in fact anent the cores drilled by Dr Ashworth and their analysis *brevitatus causa*. The reality was that Dr Ashworth had removed cores from the anhydrite and topping. He had then expertly analysed the same, all as set out in his report.

[46] Mr Adams recognised Dr Ashworth's expertise and broadly agreed with his conclusions.

[47] Even the defender's only witness Mr Gribben unilaterally acknowledged in his evidence that Dr Ashworth should be regarded as an expert in respect of the matters in issue, although Mr Gribben was less approving of Mr Adams.

[48] Dr Ashworth was an impressive expert in screed flooring and credible and reliable in the factual and opinion evidence which he gave.

***Greig William Adams***

*Pursuer's position*

[49] Mr Adams is the divisional director of Capita Real Estate and Infrastructure. He holds a Bachelor of Science degree in Building Surveying with Honours and the Legal

Experience Training Advanced Professional Award in Expert Witness Evidence (LETAPAEWE).

[50] He is a surveyor member of the Housing and Property Chamber of the First-tier Tribunal for Scotland. He is dual-qualified as both a chartered surveyor and a chartered building engineer.

[51] Mr Adams is a Fellow of the Royal Institution of Chartered Surveyors (of which he is a professional competence assessor), and a Fellow of the Chartered Association of Building Engineers.

[52] He has 19 years' post graduate experience in all aspects of building surveying and engineering. He has worked for some of Scotland's most prominent surveyor practices.

[53] In the last five years he has focused on providing expert opinions relative to building pathology, condition, and related aspects of building workmanship in building disputes. This has included opining on a considerable number of screed floor failures. He routinely inspects such flooring as part of his daily work. He has provided 80 to 100 reports in the last year alone and has given evidence on some 15 occasions as a skilled witness.

[54] Mr Adams provides around 15 to 20 reports specifically relating to screed works each year.

[55] As a dual-qualified building surveyor and engineer, his expertise extends over many more areas than just screed floors.

[56] As part of his BSc (Hons) degree from Heriot Watt University (from 1996-2000) he studied material science which involved learning about screeds.

[57] Since then, Mr Adams has had a considerable amount of experience in opining on disputes involving screeds and many other building surveying and engineering matters.

[58] Mr Adams having had sight of Dr Ashworth's report before preparing his own had not affected his conclusions and this was unobjectionable.

*Defender's position*

[59] Mr Adams was "broadly credible," but limited weight should be attached to his opinions. He was unwilling to make concessions. Having carried out an inspection in April or May 2017 some 18 months after the topping was laid his conclusions were very limited.

*Analysis and conclusion*

[60] Mr Adams was equally an expert in this field and a most impressive witness. There was no challenge to the skilled evidence of Mr Adams being received as such, although, again, all his ultimate conclusions were not, at least initially, accepted by the defender.

[61] There was no issue with Mr Adams having seen Dr Ashworth's report before he had completed his own. It was plainly appropriate for all relevant information, including Dr Ashworth's report, to have been provided to Mr Adams for him to assess, agree with or dissent from the same.

[62] Mr Adams was an impressive expert in screed flooring, remedial costings and credible and reliable in the factual and opinion evidence which he gave.

***Thomas Vincent Gribben ("Mr Gribben")***

*Pursuer's position*

[63] Mr Gribben's irrelevant evidence that the pursuer had referenced taking litigation, his rejection of there being other consumer complaints against the defender, and his being unnecessarily argumentative were indicative of bias.

*Defender's position*

[64] Over 25 years, Mr Gribben has gained experience in the production, supply, and installation of screed products. He has been employed as the defender's special products manager for over 20 years.

[65] In this current role Mr Gribben is responsible for sales and specification of the defender's flowing floor screed products and services, the management of projects, the procurement of materials, quality control, and health and safety.

[66] He has been a special products manager at one of the world's leading concrete, screed, and mortar producers. During this earlier employment he had completed a City and Guilds course in concrete technology.

[67] Mr Gribben considered himself to be a loyal employee of the defender. His good relationship with the defender's "owner" pre-dates his employment with them. Such "owner" had been a fellow employee at the pursuer's previous employer.

[68] He did not accept that he had even an unconscious bias towards the defender as he was "only referring to standards and facts."

[69] Mr Gribben indicated that the defender is almost exclusively engaged in the supply and installation of around 100,000 square metres of flowing screed each year, for a wide range of clients, with projects ranging from 50 to 10,000 square metres.

[70] He had initially met with the pursuer at the property to provide advice, which he accepted the pursuer had been reliant upon throughout the parties' dealings.

[71] At this meeting, the pursuer initially referred to having sued someone about getting access to the property.

[72] Mr Gribben noted that the pursuer had begun installing his underfloor heating system but was doing so incorrectly. When he pointed this out, the pursuer went "berserk" and referred to suing his architect.

[73] The reality was that the architect's drawing showed the requirement to install the heating in accordance with the relative British Standard. The 500-gauge membrane which the pursuer had omitted to install had been detailed for him as being required.

[74] Mr Gribben mentioned these references by the pursuer to such litigation and the potential for litigation, as it was possible that the pursuer was a litigious person, and he was "entitled to an opinion on that."

[75] Mr Gribben expressed the opinion that if the pursuer had more than one of such conflicts, the pursuer may think that everybody was "out to get him." He suggested that this was maybe why the pursuer was suing the defender.

[76] It was accepted that Mr Gribben is not independent of the defender. He had observed that he had referred to standards and facts and stated that he would not defend something he could not defend.

[77] Mr Gribben may even have agreed with Dr Ashworth as to the failure of the topping, if he had seen it.

*Analysis and conclusion*

[78] There were many occasions when a concern arose as to the reliability of Mr Gribben's evidence on technical and factual issues. He lacked independence, appeared to have unconscious bias by arguing issues for the sake of it, throughout. He had not personally inspected the complained of screeds and did not have the same academic level of understanding to that of Mr Adams in particular.

[79] As an employee of the defender, Mr Gribben's technical evidence required to be particularly carefully assessed when evaluating the same alongside that of Dr Ashworth and Mr Adams as independent skilled witnesses. While Mr Gribben had experience in this field of work, he was not assisted in the assessment of whether he was affected by unconscious bias and rationally giving his evidence despite being an employee of the defender, by his giving essentially irrelevant evidence that the pursuer had been mentioning other litigations, could be litigious and that this may be the pursuer's motivation for the cause.

[80] Of concern, leading to a conclusion that Mr Gribben was subject to unconscious bias, was his attempt to attribute fault to the pursuer for the anhydrite initially not reaching the walls of the property by claiming that the pursuer had not prepared the site properly. It would have been for the defender's employees, as instructed specialists, to have noted and advised on any unsatisfactory preparation of the floor at the specifically arranged pre-installation site inspection, had that been the case.

[81] The evidence of Mr Gribben that only one level datum could ever be used, despite the accepted evidence of the pursuer that he had marked up and advised the site-supervisor of seven level datums and the provision in the parties' contract for "datums" to be advised, was also a concern.

[82] Equally, Mr Gribben's selective reference to paragraph 8.2.3 of BS8204 as requiring that the topping lift at the edges of bays or at cracks for such topping to fail this standard is misleading, and created doubts as to how technically reliable the evidence of Mr Gribben was. After spending a very considerable time challenging any suggestion that there was other than minor issues with the defender's workmanship, Mr Gribben, however, ultimately appeared to be prepared to accept the findings and conclusions of Dr Ashworth.

**Initial anhydrite dispute**

***Contract Terms***

*Pursuer's and defender's positions*

[83] The parties admitted the terms of the correspondence between them or their agents.

[84] The parties acknowledged that they had respectively sent and received such, and the pursuer had accepted the revised quote from the defender which revised quote essentially contained the express terms of the parties' contract.

[85] Parties were also agreed that the only implied term of the parties' contract, based on common law precedent for such contracts, was that the works required to be carried out with the skill and care to be expected of a reasonably competent tradesperson ("the trade standard").

[86] There was no reliance being made by the pursuer on any statutory provisions, either in the submissions or on the record.

*Analysis and conclusion*

[87] As stated in *Morton* v *Muir Brothers & Co,* 1907 SC 1211 and especially Lord McLaren's observations at p1224, cited with approval in *Gloag on Contract*, 2nd edition, at p288:

> "The conception of an implied condition is one with which we are familiar in relation to contracts of every description, and if we seek to trace any such implied conditions to their source, it will be found that in almost every instance they are founded either on universal custom or in the nature of the contract itself. If the condition is such that every reasonable man on the one part would desire for his own protection to stipulate for the condition, and that no reasonable man on the other would refuse to accede to it, then it is not unnatural that the condition should be taken for granted in all contracts of the class without the necessity of giving it formal expression."

[88] It was an implied term of the parties' contract that the works be performed to the trade standard that being universal custom and in the nature of the contract itself necessary, and that it is such that every reasonable person on the one part would desire for their own protection to stipulate for the condition, and that no reasonable person on the other would refuse to accede to it, and that it was not unnatural that the condition should be taken for granted in all contracts of this class without the necessity of giving it formal expression.

***Levels***

*Evidence*

[89] On 18 August 2014, the defender had installed the anhydrite. The pursuer's evidence was that in accordance with paragraph 6(b) of the "Site Requirements" in the defender's terms and conditions, the pursuer had previously advised and pointed out to the defender's site-supervisor seven level datums that the pursuer contractually required the defender to install the anhydrite to.

[90] The pursuer had no recollection of having signed a pour authorisation sheet which refers to only the first of such seven level datums, but ultimately accepted that he had.

[91] The pursuer was unhappy that the anhydrite levels were in many places lower than the seven level datums he had provided.

[92] Mr Gribben's position was that there can be only one level datum as the anhydrite is self-levelling. He noted that the pursuer had claimed in his affidavit that nine level datums had been provided but had then listed only seven.

[93] Despite Mr Gribben having not been directly involved, he indicated that the defender's pour authorisation sheet, signed by the pursuer on the installation date, was

indicative of only one level datum being provided by the pursuer, that being at the "Blockwork at Front Door".

[94] Mr Gribben opined that the anhydrite was "generally" installed in accordance with BS8204 and NHBC Standards as provided for in the parties' contract. While some rooms were at a reasonable level taking account of tolerances, he accepted that "a couple of rooms" were not.

[95] Mr Gribben indicated that, as part of the defender's investigation, the defender had discovered that the bottom of a levelling stack had fallen off. This had resulted in rooms having anhydrite installed at a different level than had been intended.

[96] However, Mr Gribben did not consider this to be a particularly serious issue as most levels were still within tolerance of the one level datum provided.

*Pursuer's position*

[97] The anhydrite was not installed to the contracted for level datums.

*Defender's position*

[98] The pursuer had agreed in evidence that it was ultimately the case that he had agreed a single datum point could be used in signing the pour authorisation sheet.

*Analysis and conclusion*

[99] It was unlikely that the pursuer had somehow unreliably created a recollection of having marked up and pointed out the seven level datums he referred to. The reference to nine datum levels on record is patently a typographical error if read in context. There was

specific provision in the parties' contract for the pursuer to have advised the defender's site-supervisor of these level "datums", as the pursuer did.

[100] Mr Gribben was not reliable in his evidence that only one level datum can ever be used across the entire ground floor screed. He did not persuasively explain why different level datums could not be used in separate self-contained areas of the ground floor, using appropriate barriers such as the foam or timber referred to by Mr Adams.

[101] Indeed, Mr Gribben's evidence in this respect was contradicted by the parties' contract terms which specify that clearly marked finished screed level "datums" be advised to the defender's site supervisor and that a 10mm deviation from "a" not "the" level datum should be tolerated.

[102] Mr Gribben was simply not there at the time of these directions being given by the pursuer to the defender's site-supervisor.

[103] The pursuer had ultimately accepted that he signed the pour authorisation sheet but had not thereby agreed to only a single level datum as was being submitted by the defender. It is most probable that the pursuer had signed the pour authorisation sheet which also deals with other matters, without any appreciation that the reference therein to only the first level datum would affect his previous contractual directions.

[104] The anhydrite was accordingly not laid in accordance with the parties' contract, having not met the pursuer's properly communicated level datums or indeed even the first level datum used, within tolerance.

[105] This was not only in respect of "a couple of rooms" using the single first datum as conceded by Mr Gribben, but extensively across the ground floor of the property.

***Coverage***

*Evidence*

[106] The pursuer had requested that the pump room floor be splayed into a drain. He was unhappy that this had not been immediately installed as he believed that a thicker anhydrite could have been used. The pursuer initially indicated that he had not agreed with the defender that the pump room would be laid when the defender was next in the area, notwithstanding the terms of his letter to the defender dated 19 August 2014 which *prima facie* confirms such agreement.

[107] The pursuer was also unhappy that the floors did not meet with the walls in places.

[108] Mr Gribben indicated that it was only on the day of the installation that the pursuer had advised the defender that he required the pump room to be laid with a fall. It was then agreed that this would be completed later with a more suitable screed.

[109] Mr Gribben suggested that as the pursuer had carried out the sub-floor preparation and as the screed flows up to a prepared surface such as a wall, any deviation from the wall would have been due to the pursuer's preparation of the site.

*Pursuer's position*

[110] The anhydrite was not installed to cover the entire 210 square metres of the ground floor of the property as required by the parties' contract.

*Defender's position*

[111] The anhydrite had been installed as required by the parties' contract.

*Analysis and conclusion*

[112] The failure to lay the anhydrite in the pump room appeared to have been because of initial miscommunication.

[113] Once this was addressed on the day of the installation, as the defender did not have a suitable screed to perform this task, the parties had agreed that this would be attended to when they were next in the area, all as the pursuer had confirmed in writing.

[114] However, Mr Gribben's attempt to avoid the defender being considered responsible for the anhydrite not meeting some of the walls of the property, by blaming the pursuer's site preparation, was unpersuasive.

[115] If there had been any issues with any preparation of the sub-floor, there had been a pre-installation inspection carried out by the defender' employee.

[116] It would be expected that any such issue would have been identified then by the defender's employee, whose expertise it was accepted in the evidence the pursuer was fully relying upon.

[117] Excepting the pump room floor from consideration, the anhydrite had not been installed across the entirety of the remaining ground floor of the property as required by the parties' contract.

***Laitance issue***

*Evidence*

[118] The pursuer was also unhappy that the floor was showing significant signs of laitance. Initially, the pursuer did not accept that the defender's employees had attended at the property to attempt to grind the laitance from the top surface of the anhydrite.

[119] However, when put to the pursuer that his insurers had by letter of 28 November 2014 written to the defender stating that this had happened, and that he had also stated this in his affidavit, he then accepted the position.

[120] On being asked several times, the pursuer eventually accepted that this had been done, but then finally adopted the position that as he was not an expert he did not know if it had been done.

[121] Mr Gribben indicated that laitance was readily removed and that as far as he was aware, as a gesture of goodwill, this had been later removed by the defender, taking less than a day to do so.

*Pursuer's position*

[122] The anhydrite was not installed in accordance with the trade standard as required by the parties' contract.

*Defender's position*

[123] The anhydrite had been installed as required by the parties' contract, and the residual laitance was not an issue.

*Analysis and conclusion*

[124] The laitance could readily be removed by being ground down, and the defender tried to do so. The remaining laitance would not have been an issue were it not for its contribution to the debonding of the screeds at a later stage.

***Setting/drying issue***

*Evidence*

[125] The pursuer had also been unhappy with the time the floor was taking to dry having understood that the same would be dry within 24 hours.

[126] Mr Gribben indicated that the defender had not agreed that the anhydrite would be dry in 24 hours. This was clear from the specific terms of the parties' contract, which provided for a considerably longer timescale for drying.

*Pursuer's position*

[127] It was accepted that the express terms of the contract provided for a considerably longer timescale for the anhydrite to dry than 24 hours.

*Defender's position*

[128] The express terms of the parties' contract provided for considerably longer timescale for the anhydrite to dry.

*Analysis and conclusion*

[129] The pursuer appears to have misunderstood the distinction between the anhydrite setting and fully drying, the times for which were all clearly prescribed in the parties' contract.

***Varied Contract Terms***

*Evidence*

[130] The pursuer specified that within a few days of the anhydrite installation, he phoned the defender and complained about the works being defective in the foregoing respects. The defender's employee agreed to meet with the pursuer on or about 20 September 2014.

[131] On or about 20 September 2014, the defender's employee "Aaron" attended at the property and inspected the anhydrite.

[132] The defender's employee agreed that the anhydrite as laid was not satisfactory (that the heights and coverage were not acceptable) and that remedial works were required, namely the installation of a topping screed.

[133] The pursuer confirmed that it was agreed that the parties' contract would be varied to require that such a topping screed be installed to rectify the remaining level and coverage issues which the pursuer had with the anhydrite.

[134] On 23, 24 and 25 September 2015, the topping was laid. All materials and methods for this were chosen by the defender.

[135] The pursuer accepted he had got the date of installation wrong in his affidavit.

[136] Mr Gribben confirmed that the defender had agreed with the pursuer that they would on 23, 24 and 25 September 2015 install a topping "to raise the levels to the correct levels" and duly did so.

[137] He indicated that this "wiped out any profit margin and then some" for the defender.

*Pursuer's and defender's positions*

[138] It had been agreed by parties to vary the terms of the parties' contract to provide for the topping to also be supplied and installed by the defender.

*Analysis and conclusion*

[139] There was no dispute that parties had agreed that the defender would install a topping to rectify the anhydrite level and coverage issues.

[140] Whether these issues had caused there to be material breaches of the parties' contract and required the defender to remedy the same if requested to do so by the pursuer, as was the case, therefore became essentially irrelevant.

[141] As the parties had agreed to vary the terms of the parties' contract, such that the defender would then also supply and install the topping to the anhydrite, the subsequent issues with the topping essentially superseded the issues with the anhydrite.

**Subsequent topping dispute**

***Widespread cracking issue***

*Evidence*

[142] Within a week of the topping being installed, the pursuer noted widespread surface cracking which looked "like a spider's web." The pursuer raised his concerns about this cracking with the defender.

[143] The defender did not inspect the topping, but simply assured the pursuer that the cracking was normal "settlement cracking" and was nothing to be concerned about. Relying upon this advice, the pursuer continued with the build of the property including joinery and decoration works.

[144] The pursuer indicated that he had, however, thereafter became so increasingly concerned with the advancement of the cracking that he sought independent skilled opinions on the cracking, the relationship of trust between the parties having by then mutually broken down.

[145] On 8 January 2016, Dr Ashworth, having shortly beforehand been instructed by the pursuer to do so, inspected the topping.

[146] On 25 January 2016, Dr Ashworth provided his report to the pursuer, detailing his findings and conclusions, which Dr Ashworth adopted as part of his evidence.

[147] On 7 April 2017, Mr Adams, having shortly beforehand been instructed by the pursuer to do so, inspected the topping. Mr Adams had been requested to provide his opinion on the screeds supplied and installed by the defender, any remedial works that were necessary and the reasonable cost of having to pay a contractor to carry out such remedial works.

[148] On 3 May 2017, Mr Adams provided his report to the pursuer, the terms of which he adopted and "stood by" in his evidence.

[149] The pursuer following on from these experts' reports believed that the topping had been incorrectly installed as detailed in the background, *supra*.

[150] Mr Gribben, until nearing the end of his evidence, refused to accept that the functionality or the structural stability of the topping was such that it required to be replaced or that the topping could not be repaired.

[151] His initial position and the defender's position on record was to dispute the conclusions in Dr Ashworth and Mr Adams reports in this respect.

[152] The following effects and causes were noted by Dr Ashworth and Mr Adams in their reports and spoken to by them in their evidence.

*Random cracking*

[153] Dr Ashworth observed extensive random cracking in the topping across most of the ground floor. He opined that such was indicative of the floor having structurally failed.

[154] He further opined that as the extensive random cracking as shown on a plan attached to his report was exclusive to the topping, it could not be the result of structural movement (ie settlement cracks).

[155] Dr Ashworth indicated that the damage to the topping "was most certainly not minor." The topping had structurally failed.

[156] His conclusions were not based on only the four 50-millimetre core samples he had taken but were taken from an inspection across the 210 square metres of the ground floor. His diagram of the property attached to his report, shows the widespread cracking over all areas of the ground floor.

[157] Dr Ashworth opined that the combination of intersecting cracks with the later identified debonding may result in localised disintegration in areas of particular weakness in the floors. It is something that he had seen countless times. For these reasons, the only viable remedial solution was the total removal of the topping and its replacement. From having analysed the four core samples it was probable that the topping could be removed without damaging the anhydrite, as much of the floors appeared to have little or no required bonding.

[158] In many areas the topping would have been able to be lifted quite easily, because of this. However, there might have been some areas with greater bonding.

[159] Mr Adams also observed the extensive random cracking throughout the ground floor of the property. He also considered this to be because the topping had structurally

failed. The cracking appeared to have progressed and become even more extensive since seen by Dr Ashworth from his consideration of the floor plan attached to Dr Ashworth's earlier report.

[160] When referred in cross examination to the BS8204 [paragraph 8.2.9] stating that "Fine cracks are not normally detrimental to any applied flooring and do not need filling", Mr Adams indicated that the cracks present at the property were not the type of fine cracks which were being referred to therein.

[161] Mr Adams indicated that the cracking at the property was not normal. He was clear that these cracks extended right through the topping and that a structural failure of the topping had occurred.

[162] Mr Adams also opined that the cracking was not caused by structural movement. Structural movement would happen from the ground up. There was no vertical displacement in the random cracking.

[163] From an inspection of the holes left by the core samples taken by Dr Ashcroft no random cracking extended through the anhydrite corresponding directly with the random cracking within the topping.

[164] Mr Adams concluded that the floor was structurally unsound due to the extensive cracking and later identified debonding. Given the significant areas of "extremely bad" failure noted across the topping, it was highly likely, being "only a matter of time," that on occupation of the property further debonding would spread out.

[165] Mr Adams emphasised that he was not being speculative, the failure in the floor had occurred and as such the topping required to be replaced and could not be adequately repaired.

[166] Mr Gribben's position was that all screeds crack. He indicated that there was cracking in very well laid screeds and that it was a very common thing. Sometimes there are no cracks and sometimes you have "crazy paving." He conceded that the cracking was probably at the higher end of what you would expect to get. He, however, expressed the view that this cracking did not "necessarily" mean that the topping had failed.

[167] Mr Gribben indicated that while it might not be aesthetically pleasing and if not familiar with the cracking in screeds it might concern you greatly, this was normal. Most hairline cracks are just on the surface of a screed. BS8204 indicates that fine cracks are generally not an issue. You would not even bother to fill them.

[168] Mr Gribben indicated that the Foggs' quote also refers to the possibility of there being shrinkage joints and cracks not affecting the comprehensive strength of the screed. Foggs are a very reputable and good company.

[169] Mr Gribben opined that it would have been easy to remedy the cracks. There are dozens of proprietary products sold to stitch these back together.

[170] Mr Gribben described how a tradesperson would run a 6-millimetre drill bit to open the crack a little bit, remove the dirt and debris out of it and then fill it with epoxy resin.

[171] If the crack was more than 5mm the tradesperson would put an angle grinder and then little pins in, almost like stitches. It would take about five minutes to fix a crack across a doorway. The defender fixes all such cracks as part of their service at no extra charge, if necessary.

[172] Mr Gribben agreed with Dr Ashworth and Mr Adams that the absence of random cracking in the anhydrite was indicative that the cracking was not the result of other structural movement.

[173] At the latter part of his evidence Mr Gribben, however, conceded that there are occasions when a topping does fail and that it does require to be removed and replaced. He indicated that this would involve grinding down the topping, putting on two coats of primer and reinstalling the topping again. He described it as a fairly simple process.

***Straight cracks***

[174] Dr Ashworth also noted straight cracking at doorways. The features of this cracking were consistent with movement originating in the topping.

[175] Mr Adams likewise observed straight cracking at doorways. These straight cracks were typical of stresses caused by thermal expansion and cracking movements within a topping where no movement has been provided for. He could not see how it could be argued otherwise.

[176] Mr Adams indicated that it was not possible for such stresses to be caused simply by people walking on the topping.

[177] Mr Adams further indicated that the cracking was not anything to do with traffic or wear since the topping had been laid. This would cause a different type of wear to the surface.

[178] The slight cracking seen in the anhydrite from the core sample taken from the straight crack between the games room and the corridor, indicated that such cracking in the anhydrite had also emanated from the topping and was not caused by any structural movement.

[179] Mr Gribben's position was that at a doorway, as you come out of a room, the screed naturally stresses. Again, his position was that this was quite common. Again, he referred to there being numerous repair products which can be used to repair such.

[180] Mr Gribben, again, agreed with Dr Ashworth and Mr Adams that the absence of such straight cracking throughout the depth of the anhydrite was indicative of the same not being the result of any other structural movement.

*Pursuer's position*

[181] The extent of the random cracking was such that the topping had structurally failed and was therefore not installed in accordance with the trade standard as required by the implied term of the parties' contract.

*Defender's position*

[182] The topping had been installed as required by the terms of the parties' contract and any cracks could be easily repaired if need be.

[183] Most of the cracks were hairline.

[184] Mr Adams had selectively referred to BS8204 as the "most commonly used standard in the flooring industry" and had then inconsistently and defensively indicated that such had relevance to "large projects, not residential".

*Analysis and conclusion*

[185] The evidence of the Dr Ashworth and Mr Adams that the extensive cracking across most of the ground floor was indicative of the topping having structurally failed was to be preferred as they had independently inspected the topping.

[186] It was not in dispute that the cracking was not because of structural movement.

[187] There was no difficulty in rejecting the (at least initial evidence) of Mr Gribben that the extensive cracking (which he had never actually seen in person) was normal, as being unreliable.

[188] The defender's accepted revised quote states that the floor would have minimal shrinkage, and that it may have "perfectly natural and to be expected" minor cracking.

[189] The parties' contract also specified that the floor would be installed to BS8204. Paragraph 8.2.9 thereof states that "Fine cracks are not normally detrimental to any applied flooring and do not need filling", but before that note there is stated that "Cracks should be assessed in relation to the area involved, the flooring to be applied and likely future movement".

[190] The fact that the extensive random cracking was across most of the ground floor is indicative that such was abnormal, such being the opinions of the pursuer's skilled witnesses. This was particularly so as the topping was expected to get worse with likely future movement.

[191] This failure of the topping was so extensive such that it could not be repaired. The pursuer's independent skilled witnesses were to be believed that with such a significant failure across the ground floor, there was no option but to remove and reinstall the topping by the application of simple common sense.

[192] As before, the evidence of the pursuer's skilled witnesses (Mr Adams in particular) that the straight cracks were because of a failure to provide for movement of the topping was preferred.

[193] Mr Gribben's assertion that such straight cracks could have been repaired becomes academic standing the finding that the entire topping required to be removed and reinstalled because of its structural failure.

***Movement joints & bays***

*Evidence*

[194] Dr Ashworth indicated that the topping had been laid continuously across the whole ground floor with no movement joints or bays. He opined that, whilst anhydrites can be laid continuously up to 40 linear metres, this is not the case for cement screeds such as the topping. For these, bays of 6 metres are regarded as a maximum. This, he opined, was the cause of the wider cracks across doorways.

[195] Mr Adams also indicated that anhydrite is a flexible product which can be laid over large areas without requiring movement joints or bays.

[196] However, Mr Adams advised that the cement topping installed by the defender has different movement characteristics to the anhydrite.

[197] While all screeds will encounter some element of thermal movement, Mr Adams opined that the differential rate of thermal movement ie shrinkage and expansion, could be problematic where an anhydrite is overlaid with a cement-based topping, as in this instance.

[198] Mr Adams indicated that these screeds have markedly different recommendations for the provision of movement bays and joints.

[199] He opined that when installing cement screeds, as these are much less flexible than anhydrite screeds, you generally require to break the screed up into 6 metre bays with movement bays and joints to avoid cracking. This should have been done by the defender and was not.

[200] As there were no movement bays or joints used, there was insufficient allowance for movement in the topping. Mr Adams agreed with Dr Ashworth that this had resulted in the straight cracks evidenced in the doorways.

[201] Mr Gribben's position was that six metre bays are only required with thicker sand cement screeds.

[202] Mr Gribben indicated that there are no recommendations from the manufacturers to have any movement joints or bays and that in practice these are laid over hundreds of square metres without such.

*Pursuer's position*

[203] The absence of the required expansion joints and bays is another example of the topping not being installed in accordance with the trade standard as required by the parties' contract.

*Defender's position*

[204] There was no requirement for joints and bays.

*Analysis and conclusion*

[205] The independent skilled opinions of Dr Ashworth and Mr Adams are again preferred in this respect. They both convincingly explained why such movement joints and bays were necessary to avoid the straight cracking.

[206] Mr Gribben's position that such were not required, conflicts with the factual reality that there were expansion cracks across the doorways.

[207] Mr Gribben had given evidence that such cracks were common and easily repaired. That might again suggest that these would not be so common and not need such repair if provision were made for movement joints and bays, as was indicated were required by the pursuer's skilled witnesses whose opinions were preferred.

***Primer application***

*Evidence*

[208] Dr Ashworth indicated that acoustic percussion, that is tapping the floor with a small hammer, had revealed hollowness, indicative of the topping having extensively de-bonded from the anhydrite across the ground floor. He found bond strength between the topping and anhydrite was generally low and in places non-existent. Unbonded patches had been noted in three rooms and in the corridors.

[209] The acoustic percussion Dr Ashworth carried out, was consistent with the findings he had made from the core samples he had taken being replicated elsewhere. Only a very thin discontinuous yellow layer of Isoseal was found by him on all sample cores. However, on two cores, there was the only one primer layer present. On only two of the cores was there a clear rubbery layer, identified as an SBR. Accordingly, Dr Ashworth opined that the primer system (where present) was inconsistent across the floors.

[210] Mr Gribben stated that primers are coloured so a tradesperson can see if they have got coverage. These are put on with a roller.

[211] Mr Gribben accepted that in a 210 square metre house there might be some thicker patches of primer and that in a floor of that size the defender could have missed a patch.

[212] Mr Gribben ventured that there were several potential explanations beyond workmanship and product choice, for the bonding not being as it should be.

[213] These explanations included, for example the area in question being exposed to direct sunlight and getting up to 30 degrees that day, humidity, temperature, or air flow if someone has left the door open.

[214] Mr Gribben suggested that those were all outwith the defender's control. If there were such an issue the defender might, for example, suggest to the contractor that the window needed to be boarded up.

[215] Mr Gribben opined that once the defender leaves the property someone could open a door or a window and there are lots of factors that the defender cannot be responsible for.

[216] However, Mr Gribben ultimately accepted that what should have happened was that there was a "consistent and thick enough" primer "barrier" between the two screeds.

*Pursuer's position*

[217] The absence of primer in parts and adequate primer in other parts is another example of the topping not being installed in accordance with the trade standard as required by the parties' contract.

*Defender's position*

[218] There are other explanations for the absence or inadequacy of primer which are unrelated to the workmanship of the defender.

*Analysis and conclusion*

[219] Again, it was not disputed that a "consistent and thick enough" primer "barrier" between the two screeds was required.

[220] The independent evidence of Dr Ashworth and Mr Greig, who had inspected the screeds, that there had not been any, or insufficient primer used by the defender was again to be preferred.

***Laitance/scarification issues***

*Evidence*

[221] Dr Ashworth gave evidence that in two core samples the anhydrite possessed a thin smooth laitance-like surface layer indicating that there had been insufficient scarification.

[222] Such scarification by mechanical sanding is required by the Flowcrete specification ie "Isocrete, Isoseal, Hydraseal – Surface Preparation". This preparation required the removal of all laitance residues to leave a dry and dust-free open textured surface.

[223] Mr Adams referred to the analysis of these two samples (being 50% of those taken) as indicating that there was still laitance present when the topping was laid. This should not have been there had the anhydrite been properly prepared and scarified before the topping was laid.

[224] Mr Adams explained that to prepare the anhydrite for the topping to be laid, the defender had to (i) make it "a bit rougher" so there was more surface contact; (ii) then apply a primer to seal the surface; and (iii) utilise one or two layers of Hydraseal on top of that. This prepares the anhydrite surface so that there is the required strong bond with the topping. This had not been sufficiently done and was a factor in weakening the bond between screeds, where such a bond existed at all.

[225] Mr Gribben indicated that he did not see the cores and could not say if there had been insufficient scarification. He, however, accepted that such a process was necessary for a bond to be effective.

*Pursuer's position*

[226] The presence of laitance and the insufficient scarification are further examples of the topping not being installed in accordance with the trade standard as required by the implied term of the parties' contract.

*Defender's position*

[227] The defender had not seen the cores to be able to comment.

*Analysis and conclusion*

[228] There was no dispute that there required to be no laitance and sufficient scarification for a bond to be effective.

[229] Dr Ashcroft and Mr Adams were able to see the continued presence of laitance which should have been removed, which in turn was indicative of there having been insufficient scarification.

[230] The presence of laitance and the lack of scarification were factors contributing to the extensive debonding between screeds.

***Debonding (Bossing)***

*Evidence*

[231] The fact that there was debonding between the anhydrite and topping was identified by a hollow sound ("like a cave echo") from acoustic percussion. Such debonding was also confirmed from an inspection of the core holes created by Dr Ashworth.

[232] Mr Adams opined that there should ideally be no hollow sounding areas. These were caused by a failure of the bonding between the anhydrite and topping. For the floor to be and remain structurally sound the anhydrite and topping require to be bonded together.

[233] When referred in cross examination to the BS8204 [para 8.2.3] stating that:

> "A small degree of hollowness, indicating lack of adhesion, does not necessarily mean that the screed is unsatisfactory unless it is accompanied by visible or measurable lifting of the edges of bays or at cracks, to the extent that the edges of screed could break under anticipated loads",

Mr Adams indicated that there was not a "small" degree of hollowness as referred to. There was extensive cracking across most of the floors. Such a part of the BS8204 standard might have relevance when considering a large factory floor and where there was a "small" degree of hollowness but was not relevant in the circumstances of there being the extensive cracking in this 200 square metre domestic home. Such an extensive bonding failure could not be repaired and required that the entire topping be removed and replaced.

[234] As to the cores being only a small proportion of the overall floor, Mr Adams considered that the four core samples were sufficient to identify the issues he had outlined. In any event, there was clearly a widespread failure of the bond between the anhydrite and topping from his having carried out acoustic percussion tests across the ground floor.

[235] Mr Adams indicated that such adhesion failures concentrated more stress in other floor areas. The topping would become incapable of standing these additional stresses imposed on it. This would then cause the topping in turn to fail by breaking up. This will happen especially around the areas where the debonding and cracking appear in the same place. Accordingly, the removal and replacement of the topping was necessary to remedy this, and to ensure that the contracted works were completed to the trade standard.

[236] Mr Gribben's position was that whether a floor meets BS8204 depends on the scale of any debonding. He understood BBS8204 8.2.3 as requiring that the topping must lift at the edges of bays or at cracks to fail this standard. Mr Gribben opined that if the crack is not curled, it would not snap and fail.

[237] Mr Gribben did not accept that the pursuer's skilled witnesses could determine whether there was an inconsistency in the application of the primer from analysis of only two of the cores showing an absence of the SBR primer. He suggested that the entire 210 square metres of floor would require to be lifted to determine such.

[238] Mr Gribben thought that Dr Ashworth's findings about the bond strength were "not a problem." As a bond is compressed its low strength is "irrelevant," as in real life you would not walk along a carpet and pull it up. He further expressed the view that any inadequately bonded areas identified by acoustic percussion could have been treated in isolation by cutting out these and patching the same. He considered "the whole bond thing" to be "a bit of a red herring."

[239] Mr Gribben indicated that whether the debonding said to have been found by Dr Ashworth and Mr Adams was likely to progress with time due to foot traffic, furniture stresses etc was "an if, but and a maybe," as opposed to directly answering the question asked of him. When requested by the court to answer the question, he disagreed with this being likely, based on his experience.

[240] When Mr Gribben was asked in cross-examination how many "disbonding" cases the defender had experienced, he indicated that he "wouldn't say there were very many" but he had looked at these for other people.

[241] When further asked whether the "combination of disbonding" and "intersecting cracks may well result in localised disintegration" as concluded by Dr Ashworth,

Mr Gribben responded "may well". He continued, "He was being asked to comment on something that a man was predicting might happen." When again requested by the court to indicate whether he was agreeing with this evidence of Dr Ashworth or not, he responded "yeah, there's a possibility that that could happen."

[242] As regards the only viable solution being the total removal and replacement of the topping Mr Gribben at one stage indicated that as he did not have the "luxury afforded" to Dr Ashworth of having inspected the floor, it was very, very difficult to comment on what could have been done. Mr Gribben stated that Dr Ashworth has formed one conclusion.

[243] Mr Gribben then indicated that it could have been that some of the topping needed to come up, it could have been all of it. He indicated that if Dr Ashworth is right, the works carried out by Foggs were required, but that was all that was required.

*Pursuer's position*

[244] The topping was not installed in accordance with the trade standard as required by the parties' contract.

*Defender's position*

[245] Only three of the ten rooms had unbonded patches, there was primer although it was said to be inconsistent.

*Analysis and conclusion*

[246] The independent evidence of the pursuer's skilled witnesses in this respect was again to be preferred. Mr Gribben's selective reference to paragraph 8.2.3 of BS8204

requiring that the topping lift at the edges of bays or at cracks to fail this standard is incorrect. What paragraph 8.2.3 of BS8204 states is:

> "If any hollowness is found it is usually confined to the edges and corners of bays and on either side of any cracks that have developed in the screed. A small degree of hollowness, indicating lack of adhesion, does not necessarily mean that the screed is unsatisfactory unless it is accompanied by visible or measurable lifting of the edges of bays or at cracks, to the extent that the edges of screed could break under anticipated loads. The type of flooring to be applied subsequently, the thickness of the screed and the end use of floor may also influence whether hollowness is acceptable …."

[247] This is a reference to a small degree of hollowness being acceptable, but only if it is not accompanied by visible or measurable lifting of the edges of bays or at cracks, to the extent that the edges of screed could break under anticipated loads. If it is, even that small degree of hollowness would not be acceptable. It does not state that the topping requires to lift at the edges of bays or at cracks, for the screed to fail this standard as was being suggested by Mr Gribben.

[248] Accordingly, where there is the widespread failure of the bond between the anhydrite and topping, identified from carrying out the acoustic percussion across the ground floor and not only from the core samples taken (from three of the ten rooms), the pursuer's skilled witnesses were again correct that such debonding did not come within the tolerance provided for in this part of BS8204.

[249] Mr Gribben's repeated position that the debonding was only shown to have been in the four drilled cores, ignored the experts' evidence that they had carried out extensive acoustic percussion testing elsewhere which indicated the presence of widespread debonding.

[250] The debonding was again so extensive that it could not be repaired, and the pursuer's skilled witnesses' evidence was again preferred, that with such a significant failure across the ground floor, there was no option but to remove and reinstall the topping.

***Embedded tape***

*Evidence*

[251] Dr Ashworth observed that along the edges of the topping at the folding windows in the family room and at the far end of the short corridor, there was what he believed to be packaging tape. This had been used to mask the topping edges. Whether it was packaging tape or screed tape, the issue was that it had been left partially embedded.

[252] As such the embedded tape had caused spalling to the topping, whereby the same was breaking up along the edges.

[253] Mr Adams considered that the use of and leaving, what appeared to be, packaging tape at various edges causing flaking around such tape was unacceptable. He indicated that something more substantial should be utilised such as foam or timber and that nothing should have been left embedded in the screed. He, however, considered this to be "a small point in the scheme of things."

[254] Mr Gribben indicated that the tape referred to by the pursuer and his skilled witnesses would have been screed tape and not packaging tape, although they looked similar. While he had not inspected the topping, given that the defender has a palette of this at a time, it would be highly unlikely that parcel tape had been used by an employee. This is one of the most used sundries in the screeding industry.

[255] Mr Gribben indicated that screed tape may look like parcel tape as they do not use proprietary marking as others do. Parcel tape is sticky. Screed tape has a completely

different tack and needs pressure applied to it for adhesion. It is commonly used to stop screeds pouring away. Parcel tape would not work for that purpose. Mr Gribben's position was that it was easy to remedy this minor "finishing" issue by simply pulling the tape out and repairing any spalling.

*Pursuer's position*

[256] The leaving of such tape in the topping was another example of the topping not being installed in accordance with the trade standard as required by the parties' contract.

*Defender's position*

[257] The defender referred to Mr Adams' evidence when he referred to this issue as a "fairly small, very small point in the scheme of things," not "a big point, it is not of significance" and being a "minor repair, nothing to get excited about."

*Analysis and conclusion*

[258] Mr Gribben was at pains to explain that this would have been screed tape, which without proprietary marks may look like parcel tape. On this occasion the evidence of Mr Gribben was preferred that what was being used was most probably screed tape. For the reasons Mr Gribben outlined it was unlikely that parcel tape had been used. Whether it was parcel tape or screed tape that was used is however not the real issue. It is the leaving of any tape embedded in the topping, causing flaking around such tape at various edges, which is rightly complained off by the pursuer.

[259] Whether such could have been repaired, as it could have been, again becomes academic standing the conclusion that the entire topping required to be replaced.

***Corners breaking up***

*Evidence*

[260] Mr Adams noted as another example of "poor workmanship" several of the topping corners breaking up and not being flush or level.

[261] Mr Gribben's position was again that this was easy to remedy and but a minor finishing issue.

*Pursuer's position*

[262] The topping corners breaking up and not being flush or level was another example of the topping not being installed in accordance with the trade standard as required by the parties' contract.

*Defender's position*

[263] This was a minor issue which could have been repaired.

*Analysis and conclusion*

[264] The corners which had broken up were a poor finish because of bad workmanship.

[265] Again, whether such could have been repaired, which it could have, becomes academic standing the conclusion that the entire topping required to be replaced.

***Failure to grind down***

*Evidence*

[266] Dr Ashworth noted that in the family room and front WC the anhydrite having been laid to the correct level datums had not then been ground down to accommodate the thickness of the topping. Because of this the yellow primer had not been adequately covered and was exposed in places.

[267] Mr Gribben considered this again to be a minor matter, which could readily be rectified by its removal.

*Pursuer's position*

[268] The failure to grind down the anhydrite was another example of the topping not being installed in accordance with the trade standard as required by the parties' contract.

*Defender's position*

[269] This was a minor issue which could have been repaired.

*Analysis and conclusion*

[270] The failure to grind down the anhydrite was a poor finish because of bad workmanship.

[271] Again, whether such could have been repaired, which it could have, becomes academic standing the conclusion that the entire topping required to be replaced.

***Surface regularity (flatness)***

*Evidence*

[272] Dr Ashworth and Mr Adams both found that a floor surface was not level. On measuring it, they found it to be outwith the tolerances in BS8204 at the junction between the hallway and living room.

[273] This floor had a deviation of 8 millimetres over a 3 metre straight edge resting in contact with the floor. This exceeds the 5 millimetres tolerance allowed for by BS8204.

[274] Mr Adams considered this to be a sizeable amount to be out. He described a deviation of 8mm deviation from the level as being "quite big" and "well beyond what [he] would expect to see". In any event, Mr Adams disagreed in cross-examination that BS8204 would necessarily provide a court with an objective benchmark for the trade standard. Mr Adams opined that often British Standards become outdated, do not reflect current practice, and some parts of the same are only considered relevant to bigger projects.

[275] Mr Gribben accepted that the BS8204 surface regularity standard had not been met in this one area at the junction of the hallway and living room, emphasising that this was but one such area in 210 square metres.

[276] Mr Gribben indicated that otherwise it came down to the pursuer's expectations as compared to the deviations that the defender is allowed by BS8204. It would have taken the defender a day to resolve this surface regularity issue.

*Pursuer's position*

[277] The failure to conform to the tolerances for surface regularity was another example of the topping not being installed in accordance with BS8204 and the trade standard as required by the parties' contract.

*Defender's position*

[278] Dr Ashworth found one 3 metre area, 3mm out of the surface regularity tolerance in BS8204. This was a minor issue capable of repair.

[279] Mr Adam's conclusion that he considered a deviation of 8mm deviation to be "quite big" and "well beyond what I would expect to see" is unreasoned.

*Analysis and conclusion*

[280] The failure to conform to the tolerances for surface regularity was another example of the topping not being installed in accordance with BS8204 and the trade standard as required by the parties' contract. The focus of Mr Gribben on the same being only 3 millimetres over tolerance as opposed to recognising that the surface was 8 millimetres from being level was unimpressive.

[281] Again, whether such could have been repaired, which it could have, becomes academic standing the conclusion that the entire topping required to be replaced.

***Screed incompatibility***

*Evidence*

[282] Dr Ashworth recognised the topping as being a cement-based screed such as Isocrete 4000, as indeed it was. He opined that anhydrite and cement-based screed have very different strengths and shrinkage characteristics.

[283] Dr Ashworth expressed the opinion that it would have been much wiser to have used an anhydrite topping or to seek advice from the anhydrite manufactures, Gyvlon.

[284] Mr Adams accepted that it was possible, in principle, to add a topping to rectify the issues with an underlying screed being of insufficient height and extent, as here.

[285] Mr Adams also opined that there could be incompatibility issues between an anhydrite and a cement topping screed. This was because when bonding two screeds together each should have similar movement characteristics or ideally the topping should be more flexible, if cracks are not to form. If the screed layers are moving at different coefficients this can create a shear, which would put even a good bonding under pressure and cause the floor to fail, as had happened.

[286] Whilst the extensive debonding Mr Adams found on inspecting the floors, caused by *inter alia* insufficient bonding and preparation of the anhydrite under screed will have contributed to, and therefore be interlinked with, the random cracking he had viewed, the floors had structurally failed so badly, that there was in his opinion something greater causing the catastrophic structural failing of the topping.

[287] Mr Adams opined that an interlinked cause of the random cracking and debonding was that the anhydrite and cement-based topping were incompatible. He was not definitively stating that these different screeds were "simply incompatible."

[288] Mr Adams opined that the anhydrite and topping used, appeared to him to be incompatible in said respects and that he had not seen anything from the manufacturers to suggest otherwise.

[289] He opined that without the after mentioned specific provision for movement being made in the cement–based topping, this incompatibility would again have been even more significant. Even were the manufacturers to consider these screeds to be compatible, he would still have concerns, as manufacturers can be wrong in this respect.

[290] Mr Gribben expressed a view that the coefficient of expansion for anhydrites and concrete based screeds is very similar. He indicated that these combinations are routinely used in the trade without issue and approved of by the manufacturers. An issue with the anhydrite-based screed eating into the concrete screed over time, only arises when they have contact with each other. A primer prevents this.

*Pursuer's position*

[291] The lack of compatibility between the screeds was a factor in the failure of the topping.

*Defender's position*

[292] Given that neither Dr Ashworth nor Mr Adams were able to say which products would have been compatible, it cannot be said that the evidence establishes a breach of contract on the part of the defender.

[293] Mr Adams had concluded that the defects were attributable variously to either incompatibility issues between the anhydrite and topping and/or poor installation including poor preparation of substrate and/or primers, or a combination of both; and that the causes of the defects outlined were a result of the workmanship of the defender being below the trade standard and/or the use and selection of materials that were not fit for purpose.

[294] Mr Adams had also indicated that he did not think it was a workmanship defect, more of a specification issue, that unless you open the whole thing up, you cannot say, but that they had identified issues with the primer. He expressed a view that the "ultimate thing" is lack of compatibility.

[295] The defender referred to Dr Ashworth as having said that a reasonably competent tradesperson would have consulted the manufacturers to check compatibility but did not indicate what the appropriate topping should be.

[296] Mr Gribben's evidence was that the defender had checked with the manufacturers.

[297] The defender suggested that Mr Adams' view was simply that using a cement-based topping with an anhydrite under screed "at all" was problematic because of thermal movement problems. He was not able to identify what would have been a compatible topping.

[298] The defender referred to Mr Adams' position in oral evidence being that he agreed with Dr Ashworth that the manufacturer should be consulted, but he also then sought to say that he would not take the manufacturer's word for it. The actual import of his opinion on what a reasonably competent tradesperson ought to have done was therefore unclear.

[299] The defender suggested that Mr Adams acknowledged he was not a screeding expert.

*Analysis and conclusion*

[300] Mr Adams had in fact opined that a product with similar movement characteristics would be compatible with the base screed, (ie such as a similar anhydrite topping as was in fact used by Foggs to replace the cement topping). Mr Adams had not "acknowledged he was not a screeding expert." He indicated that this was just one of the many areas of expertise that he had as both a building surveyor and engineer.

[301] Mr Adams's independent opinion based on his considerable experience and expertise in this field that the failure of the topping screed was so structurally catastrophic

as to be explained only by having been caused by a combination of factors, was again preferred.

[302] Factors referred to by Mr Adams were the extensive debonding he found on inspecting the floors, (caused by insufficient preparation of the anhydrite under screed and a failure to remove laitance and insufficient bonding) and the absence of movement joints and bays where the screeds had very different strengths and shrinkage characteristics.

[303] It was not proved that an anhydrite screed and a concrete-based topping were inherently incompatible, such that they could never be installed together. Mr Gribben's evidence that in the trade a concrete topping screed is routinely used with an anhydrite base without issue may be the case. Mr Gribben stated that he had communicated with the manufacturer and had been advised that such were compatible. However, there continues to be the same doubt as to his independence, unconscious bias and his attempting to justify a position by quoting out of context.

[304] To determine whether such a combination of screeds is always compatible, there would require to be considerably more evidence from skilled witnesses who had carried out specific research in this respect. I was not prepared to accept Mr Gribben's evidence on this issue alone so as to conclude that in some instances such could be compatible, although it is possible that Mr Gribben may be correct in this respect.

[305] Therefore, it may be possible to install a combination of anhydrite and cement-based screeds without compatibility issues despite such screeds having very different strengths and shrinkage characteristics.

[306] However, it is probable, as opined by Mr Adams that such different characteristics also became a factor, in these circumstances where there had been inadequate bonding and

no provision for movement joints and bays, thereby explaining the topping's catastrophic structural failure.

***Primer suitability***

*Evidence*

[307] Dr Ashworth indicated that the topping manufacturers, Flowcrete, recommended that an Isoseal primer plus one or two coats of Flowcrete Hydraseal (dependent on the moisture content of the anhydrite) should be used for bonding an Isocrete 4000 topping to another screed. The primer system utilised by the defender (that is an Isoseal primer with SBR) was not in accordance with such Flowcrete recommendation.

[308] Mr Gribben described how a primer was required to stop the anhydrite base screed eating into the concrete screed. He did not "think it was a problem", as this combination was commonly used, without any known compatibility issues and with the manufacturer's approval.

*Pursuer's position*

[309] The pursuer appeared to accept that it had not been proved that there were any issues with the suitability of the primers used by the defender to bind the screeds.

[310] Having stated that, the pursuer ventured that the defender had taken no steps to produce any evidence from the product manufacturers of that stated by Mr Gribben.

*Defender's position*

[311] Dr Ashworth and Mr Gribben had said that appropriate primers were Isoseal and SBR as used.

[312] Mr Adams had not carried out an analysis of the primer. He indicated that applying the topping involved "gluing something onto anhydrite, causes stress and thermal expansion."

[313] Both Dr Ashworth and Mr Gribben had identified that what is required is a primer and both accepted that there is supposed to be no contact between the topping and the anhydrite.

*Analysis and conclusion*

[314] Dr Ashworth had indicated what had been used. His evidence was that the primers used were not in accordance with the manufacturer's recommendations. Again, Dr Ashworth had, at least implicitly, raised his concern that the primers used were not that recommended by the manufacturer.

[315] There was insufficient evidence to prove whether the primers utilised by the defender were or were not suitable. Dr Ashworth merely indicated that the manufacture's recommendations had not been followed.

[316] Mr Gribben's evidence that in the trade such a bonding combination is routinely used without issue may again be correct. In the absence of independent credible and reliable support for such a position, such evidence was not sufficiently convincing as to be more probable than not, despite it being a possibility.

[317] To determine whether such a combination of primers was compatible, there again would have required to be considerably more evidence from skilled witnesses who had carried out specific research in this respect. There are accordingly no findings in fact relative to the suitability of the primers utilised by the defender.

***Pump room***

*Evidence*

[318] **T**he pursuer had indicated to Dr Ashworth that the pump room anhydrite was too low and that at the pursuer's request the topping had been removed by the defender as the pursuer was concerned about the potential for an adverse chemical reaction.

[319] Mr Gribben indicated that any issues with the pump room were caused by the pursuer having not initially made his requirements clear.

*Pursuer's position*

[320] The pursuer did not give direct evidence about this matter and the issue arises in that it is commented upon by Dr Ashworth in his report and mentioned in the defender's submissions.

*Defender's position*

[321] It was unclear if Dr Ashworth's evidence that the pump room anhydrite was too low and that at the pursuer's request the topping had been removed by the defender as the pursuer was concerned about the potential for an adverse chemical reaction was opinion evidence he was qualified to give, or merely repeating what the pursuer had told him.

*Analysis and conclusion*

[322] Dr Ashworth had given evidence through adopting his report, in this respect.

[323] Counsel for the defender's submission that it was unclear as to whether this was skilled opinion evidence or merely repeating what the pursuer had told has merit. There

was not sufficient evidence to come to any determination as to whether there was in fact any such potential chemical reaction issue which required the removal of the topping.

[324] In any event the entire topping had required to be removed and reinstalled and any separate issues with the pump room appears to have little relevance.

[325] There are accordingly no findings in fact in this respect.

***Breach of contract in anhydrite dispute***

*Evidence*

[326] The pursuer was firmly of the view that the anhydrite was not initially laid according to the parties' contract in that it was not installed to the correct level datums, did not cover the entire ground floor, had surface laitance, and had taken longer to dry than he had expected.

[327] Mr Gribben, despite having spent significant time in endeavouring to validate the defender's workmanship in the laying of the anhydrite, ultimately appeared to accept that it had been necessary to apply a topping to "rectify" at least the rooms which were outwith tolerance.

[328] Mr Gribben's position was, however, that the defender had only agreed to install a topping to cover the entire floor as this would look aesthetically superior and be a better "client outcome" and that this was but a "gesture of goodwill".

*Pursuer's position*

[329] It was submitted that the defender had been in material breach of contract as the anhydrite had not been laid in accordance with the parties' contract.

*Defender's position*

[330] As regards the anhydrite, it was submitted that the defender had not been in any material breach of contract. The couple of rooms out of tolerance could have been easily rectified.

[331] The anhydrite levels, height and extent had otherwise been within acceptable tolerances. The anhydrite had generally been laid to the trade standard. There was no evidence that the anhydrite was defective as the cracking was exclusive to the topping.

*Analysis and conclusion*

Legal Basis

[332] The initial discussion in submissions on liability focussed on identifying the legal basis which the pursuer was proceeding upon in the cause. There were various references to potential contractual and other duties, in some instances repeatedly, throughout the record. At submissions, parties were however agreed that the cause should be determined based on the accepted revised quote, referred to terms and conditions, with the trade standard being the only implied term of the parties' contract.

[333] Accordingly, the pursuer did not seek to rely upon any other contractual terms which could arguably have been implied at common law or by statute.

[334] The defender's counterclaim was simply craving payment of the contract price, on the basis that the relative works had been completed as contracted for and therefore that the pursuer was accordingly contractually required to make payment to the defender.

Levels

[335] The contract specifies a maximum deviation from a level datum of 10 millimetres. The defender failed to install the anhydrite to within 10 millimetres of the various clearly marked seven level datums, advised by the pursuer to the defender's site-supervisor, in accordance with the parties' contract.

[336] Equally, a tradesperson carrying out the installation of the anhydrite to the trade standard, as the defender was required by the parties' contract to do, would not have failed to install the anhydrite to the contractually required levels.

Coverage

[337] The parties' contract specifies that the screed requires to cover the 210 square metres of the ground floor of the property. The defender failed to cover the ground floor as required by the parties' contract, with the anhydrite falling short of the walls in some of the ground floor rooms.

[338] Equally, a tradesperson carrying out the installation of the anhydrite to the trade standard, would not have failed to install the anhydrite to all the contractually required areas.

Conclusion

[339] Such initial failures were material breaches of the parties' contract, requiring the defender to remedy the same when requested to do so by the pursuer, and which the defender endeavoured to do.

[340] The presence of laitance (ignoring the issues which arose with the later required bonding for the present) and the time taken for the anhydrite to dry were not breaches of

the parties' contract. The laitance would have presented no issues as the floor would still require to be covered by tiles or wooden flooring etc. The total drying time was within that stipulated in the parties' contract.

[341] Despite taking up a significant amount of time in the evidence, these initial level and coverage issues became essentially irrelevant to the merits of the pursuer's claim. This is because the parties then agreed to vary the terms of the parties' contract to require the defender to install a topping to the anhydrite.

[342] The installation of this topping *prima facie* solved the level and coverage issues but has created many more issues which have then become the relevant issues in this dispute.

***Breach of contract in topping dispute***

*Evidence*

[343] Dr Ashworth concluded that the cracking and debonding over most of the topping was not the result of structural movement, but directly related to the products and procedures carried out, for which the defender alone is responsible.

[344] Mr Adams opined that setting aside the bad finishing, the more significant defects were "all linked together." The topping had simply structurally failed and accordingly did not meet BS8204. Because of the structural failure of the topping, its installation fell below the trade standard, and/or had involved the selection and the use of materials which were not fit for that specific purpose. No such topping failure would be expected to occur in well prepared floors, using appropriate and compatible materials, if carried out to the trade standard, in the absence of any structural movement.

[345] Mr Adams rejected any suggestion that it had been in any way inappropriate for him to have seen Dr Ashworth's report before carrying out his inspection and forming his

similar opinions. The greatest benefit of his seeing the report was that Dr Ashworth was a person skilled in obtaining disruptive core examinations. These cores enabled the visual confirmation of otherwise identified issues with there being extensive debonding and identified that there was also insufficient scarification and the presence of laitance.

[346] Mr Adams indicated that he was aware of his duties as an independent expert witness and would not ever be inappropriately influenced by another expert report.

[347] Mr Gribben, at least initially, had refused to accept that there were any significant defects with the topping other than what he considered to be the minor matter of the floor at the junction of the hallway and living room being outwith surface regularity tolerances.

*Pursuer's position*

[348] It was, again, essentially submitted that the defender had been in material breach of contract as the topping had been defectively installed.

[349] Had the topping been laid to the trade standard, such a structural failure would not have arisen.

*Defender's position*

[350] Dr Ashworth had not expressed a view as to whether "the work as a whole" conformed to BS8204.

[351] As regards the topping, it was submitted that the defender had not been in material breach of contract. The cracking and bossing in the topping were usual. The topping had been laid to the trade standard.

[352] Based on *Dundee City Council infra* it is not sufficient to try to eliminate other possible causes for the purposes of imposing liability and in this instance the experts were not able to adequately identify the cause of the alleged defects.

*Analysis and conclusion*

Random cracking/straight cracking/movement joints & bays

[353] The parties' contract specified that the screed may have "perfectly natural and to be expected" minor cracking.

[354] The incorporated BS8204 paragraph 8.2.9 specifies that cracks should be assessed in relation to the area involved, the flooring to be applied and likely future movement.

[355] The defender failed to install the topping without major random cracking occurring across most of the ground floor, which floor had structurally failed and would have continued to get worse.

[356] This is as compared to the perfectly natural and expected minor cracking tolerated by the parties' contract.

[357] The defender had also failed to install the topping without avoidable straight cracks across doorways due to there being no required movement joints and bays.

Debonding, primer, laitance and scarification issues

[358] The parties' contract specified that "good preparation of the base is essential and, together with good workmanship, will minimize loss of adhesion." The parties' contract applied BS8204 paragraph 8.2.3 which states that "it cannot be guaranteed that adhesion will always be complete". It, however, further provided that any hollowness found is usually confined to the edges and corners of bays and on either side of any cracks that have

developed in the screed and that a small degree of hollowness, indicating lack of adhesion, does not necessarily mean that the screed is unsatisfactory unless it is accompanied by visible or measurable lifting of the edges.

[359] The defender failed to properly prepare the anhydrite base by removing laitance, sufficiently scarifying the same, utilising sufficient primer and removing all laitance as required by such express contractual term of the parties' contract, resulting in widespread unconfined and major debonding of the screeds.

Surface regularity (flatness)

[360] The parties' contract provided that the topping would be installed within surface regularity tolerances, (that is a deviation in the height of the surface over short distances in a local area ie how flat it is), per the NHBC booklet "A consistent approach to finishes", or BS8204, that being no more than 5 millimetres in terms of paragraph 6.14.2 of the latter *supra*.

[361] The defender failed to install the anhydrite within this surface regularity tolerance as required by the parties' contrcat, at the junction of the hallway and living room as that location had an 8 millimetre surface irregularity (flatness) variation.

Embedded tape/corners breaking up/ failure to grind down

[362] The defender failed to finish the topping properly with said tape being left embedded in the same, corners having broken up and there having been inadequate grinding down of the anhydrite; thereby causing spalling, further corner break up and exposed primer, respectively.

***Conclusion***

[363] A tradesperson carrying out the installation of the topping to the trade standard would not have so individually and cumulatively failed in doing so.

[364] Dr Ashworth's evidence was not "mere ipse dixit," because of Dr Ashworth not being a tradesperson and not having specifically setting "out the standards to be expected of a reasonably competent" tradesperson. It is a matter for the court to analyse all witnesses' evidence and draw any reasonable inferences therefrom, to conclude if the failures claimed have been proved, and if so whether any such failures would have occurred had the topping been installed to the trade standard.

[365] The defender submitted that it was not for Dr Ashworth to express in his report the conclusion that he was of the "firm opinion that the responsibility must rest with" the defender. While such a conclusion is ultimately a matter for the court, a skilled witness is entitled to express such a factual conclusion.

[366] Dr Ashworth factually opined that the defender was responsible for the topping being cracked and debonded, that such was not "the result of any structural movement" but "directly related to the products and procedures carried out".

[367] In any event, the report was not prepared for the court in the first instance and was for the benefit of the pursuer and rightly should express such an opinion.

[368] In *Dundee City Council* v *D Geddes (Contractors) Ltd* [2017] CSOH 108, referred to by the defender in submissions, the pursuer did not prove that failures of the road surface dressing were caused by the characteristics of the chippings supplied by the defender. Lord Doherty at paragraph [67] stated:

> "In my opinion the state of the evidence is such that deciding the case on the burden of proof is the only just course for me to take (cf *Rhesa Shipping Co SA* v *Edmunds* (*The Popi M*) [1985] 1 WLR 948, per Lord Brandon of Oakbrook at p956A). Where, as

> here, all relevant facts are not known, the sort of elimination process proposed by the pursuers appears to me to be inappropriate (cf *The Popi M*, per Lord Brandon of Oakbrook at p956B). In any case, ultimately I am not satisfied that the proposition posited by the pursuers is more likely than not to be true. In my opinion, on the evidence it is more sensible and just to conclude that the cause or causes of the failures of the surface dressing are unknown or unproven, than to say that an effective cause must have been some characteristic of the aggregate (*The Popi M*, per Lord Brandon of Oakbrook at p 956C-D; *Palmer* v *Nightingale* (t/a *Andover Pest Control*) [2016] EWHC 2800 (TCC), [2016] 170 Con LR 19 , per Coulson J at para 50ff and the authorities there discussed)".

[369] The defender submits that even assuming the topping had structurally failed, on the approach in *Dundee City Council*, the pursuer had failed to prove that this was because of anything done by the defender in breach of the parties' contract.

[370] Firstly, any such an argument fails in that *Dundee City Council* was a case where the defender had supplied materials, and the pursuer had used the same in building roads. The pursuer required to prove that the cause of the failure of the roads installed by them was the materials supplied by the defender and they factually did not do so.

[371] In this cause the defender supplied and installed the topping. It was proved by the accepted evidence of Mr Adams and Dr Ashworth, that in the absence of structural movement the only explanation for the topping failure was as a result of the products supplied and the procedures carried out, for which the defender alone were responsible.

[372] There was no factual basis for the speculations of Mr Gribben as to other potential causes. In any event in such technical matters the evidence of Mr Adams was preferred, it being independent, more learned and appearing simply to make more sense.

[373] Secondly, on the accepted evidence of principally Mr Adams and, where supported by Dr Ashworth, it was specifically proved that all these failures by the defender to: carry out sufficient anhydrite surface preparation (by failing to remove all laitance and sufficiently scarify the same); use sufficient primer; use required movement joints and

bays; and thereby installing the topping with widespread cracking and debonding; were individually and collectively material breaches of the parties' contract; and that when these were combined with the anhydrite and topping screeds' differing movement characteristics, this caused the topping to catastrophically fail, requiring that the overall remedy for such breaches of contract was the removal and reinstallation of the topping.

[374] The failures by the defender to install within the tolerated surface regularity and to properly finish the topping, while likewise material breaches of the parties' contract requiring repair, became essentially irrelevant due to the topping requiring to be removed and replaced due to its structural failure.

[375] A tradesperson carrying out the installation of the topping to the trade standard would not have so individually and cumulatively failed.

**Quantum**

***General principles***

[376] In *Attorney General of the Virgin Islands* v *Global Water Associates* [2020] UKPC 18, [2021] AC 23 at [31]-[35], Lord Hodge DPSC, outlined general principles which are applicable to the assessment of damages for breaches of contract:

> "[31] First, in principle the purpose of damages for breach of contract is to put the party whose rights have been breached in the same position, so far as money can do so, as if his or her rights had been observed.
>
> [32] But secondly, the party in a breach of contract is entitled to recover only such part of the loss actually resulting as was, at the time the contract was made, reasonably contemplated as liable to result from the breach. To be recoverable, the type of loss must have been reasonably contemplated as a serious possibility …
>
> [33] Thirdly, what was reasonably contemplated depends upon the knowledge which the parties possessed at that time or, in any event, which the party, who later commits the breach, then possessed.

> [34] Fourthly, the test to be applied is an objective one. One asks what the defendant must be taken to have had in his or her contemplation rather than only what he or she actually contemplated. In other words, one assumes that the defendant at the time the contract was made had thought about the consequences of its breach.
>
> [35] Fifthly, the criterion for deciding what the defendant must be taken to have had in his or her contemplation as the result of a breach of their contract is a factual one".

[377] Lord Shaw of Dunfermline stated in *Watson, Laidlaw, & Co Ltd* v *Potl, Cassells, & Williamson* 1914 1 SLT 137:

> "The restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe."

[378] The following conclusions in respect of quantum have been arrived at exercising the court's wide judicial discretion. This has indeed required the employment of a sound imagination and repeatedly the practice of a broad axe (*Watson, Laidlaw & Co Ltd supra*).

[379] In *Duncan* v *Gumleys* 1987 SLT 729, at 732L it was stated that the case could readily be regarded as "a variation, modification or development of what is averred" and not as "something which is new, separate and distinct" and that the case made can accordingly be regarded as falling within the terms of the record.

[380] Further, in W McBryde, *The Law of Contract in Scotland* (W Green, Edinburgh, 3rd edn) at pp 654-655, para 22-93 the learned author states:

> "A broad approach can be taken to assessment of loss, which is largely a jury question, with various measures of loss being used as a cross check on each other … The law of damages should not be reduced to a rule of thumb … Although the court is not bound by rigid rules, an award of damages must, nevertheless, be based on evidence. The court should not take an arbitrary sum 'plucked from the air'." (Referencing *Duncan* v *Gumleys, supra*)

[381] Accordingly, various methods of measuring loss have ultimately been employed.

[382] Various methods of calculation have also served as a cross check on each other, taking a broad and varied approach, not being reduced to a rule of thumb or bound by rigid

rules, but nevertheless being based on the evidence (*The Law of Contract in Scotland*, para 22-93, *Duncan, infra*).

[383] In *Euro Pools* v *Clydeside Steel Fabrications Ltd* 2003 SLT 411, Lord Drummond Young found at paragraph [13] that:

> "In relation to quantification, the overriding principle is that the loss must be quantified in a manner that is objectively reasonable. What is reasonable in any particular case will, however, depend on the facts and circumstances of that case."

[384] The use of differing formulae is considered necessary to ensure that damages are restricted to that which, on the evidence, is objectively reasonable (*Euro Pools, supra,* para [13]), and to ensure a just decision in the cause for both parties.

***Disproportionate claim***

*Evidence*

[385] Mr Adams opined that remedial and reinstatement works were often much greater than the costs of the original works themselves.

[386] Mr Gribben, thought that some parts of the claim were "ridiculous".

*Pursuer's position*

[387] There is no direct correlation between the costs of repair and the costs of the original work. The defender's submission that there is, is manifestly wrong.

[388] The example referred to by the defender in *Ruxley Electronics, infra* is quite different from the current circumstances, as the swimming pool in that case was quite functional and useable and otherwise free from defect.

*Defender's position*

[389] The approach to the quantification of damages in a breach of a contract involving building work is the difference between the contract price and the price of making the work conform to contract, even if the originally contracted for work would have left the owner with problems. Based on *Ruxley Electronics and Construction Ltd, infra* if the cost of cure is grossly and unfairly out of proportion to any diminution in value, the damages are not recoverable.

*Analysis and conclusion*

[390] *Ruxley Electronics and Construction Ltd* v *Forsyth* [1996] AC 344, per Lord Jauncey of Tullichettle, states:

> "In this case 'the [plaintiff] entered into a contract with the appellants for the construction by them of a swimming pool at his house in Kent. The contract provided for the pool having a maximum depth of 7 feet 6 inches but, as built, its maximum depth was only 6 feet. The respondents sought to recover as damages for breach of contract the cost of demolition of the existing pool and construction of a new one of the required depth …' at p354G
>
> What constitutes the aggrieved party's loss is in every case a question of fact and degree. Where the contract breaker has entirely failed to achieve the contractual objective it may not be difficult to conclude that the loss is the necessary cost of achieving that objective.
>
> Thus if a building is constructed so defectively that it is of no use for its designed purpose the owner may have little difficulty in establishing that his loss is the necessary cost of reconstructing … However where the contractual objective has been achieved to a substantial extent the position may be very different … My Lords, the trial judge found that it would be unreasonable to incur the cost of demolishing the existing pool and building a new and deeper one. In so doing he implicitly recognised that the respondent's loss did not extend to the cost of reinstatement. He was, in my view, entirely justified in reaching that conclusion." at p358D-H and 359A.

[391] The defender's submissions, based on *Ruxley,* that the claimed total costs are so disproportionate as not to be a reasonable assessment of the pursuer's losses, appears to

have no factual foundation. The defender has entirely failed to achieve the obvious contractual objective of installing the topping in terms of the parties' contract. The pursuer's losses are the reasonable costs of achieving the contractual objective of installing the topping in conformity with that contract.

[392] That contractual objective had not remotely been achieved to any substantial extent. In *Ruxley* the installed pool had otherwise been properly installed although moderately reduced in depth from that contracted for. In this cause, the topping had catastrophically structurally failed and therefore *Ruxley* provides no assistance in the required approach to the assessment of the pursuer's loss.

***Opportunity to rectify***

*Evidence*

[393] The pursuer indicated that after discovering the defects with the topping the relationship with the defender had broken down. He was not prepared to allow the defender to carry out yet further works, having already provided them with an opportunity to remedy the initial anhydrite dispute.

[394] Equally, the defender refused to accept that the topping was defective and had not offered to carry out any remedial works, denying the need for such.

[395] Mr Gribben accepted in cross-examination that the parties' relationship had indeed so broken down at this stage.

*Pursuer's position*

[396] The parties' contractual relationship had broken down on both sides. In the prevailing circumstances, the pursuer was entitled to arrange for the remedial works to be carried out by other than the defender.

*Defender's position*

[397] In submissions the defender indicated that the poor finish items were capable of being remedied and that the 3 millimetre surface irregularity on a single 3 metre area in a 210 square metre area cannot be described as material breaches of the contract. Based on *Lindley Catering Investments Limited, infra*, the defender ought to have been provided with a further opportunity to remedy these minor defects.

[398] Based on *Attorney General of the Virgin Islands, supra,* it is only losses which may be said to have been in the reasonable contemplation of the parties at the time of contracting that are recoverable. A reasonable person in the position of the parties could not reasonably have contemplated at the time of offering to lay the topping free of charge that the defender would not be afforded the opportunity of inspecting or making good minor defects.

*Analysis and conclusion*

[399] The topping had structurally failed. Whether the defender should have been given an opportunity (assuming they had expressed a willingness to do so, which they had not) to rectify the minor defects is essentially irrelevant as the topping required to be replaced.

[400] The defender referred to *Lindley Catering Investments Limited* v *Hibernian Football Club Limited* 1975 SLT (Notes) 56 where Lord Thomson states:

> "In my opinion the legal position in a case like the present can be broadly stated thus: if one party so breaches a material stipulation in the contract as to preclude the other from fulfilling his part of the contract, the innocent party is entitled to regard himself as absolved from further performance of his obligations and to rescind the contract. But if the breach is such, by degree or circumstances, that it can be remedied so that the contract as a whole can thereafter be implemented, the innocent party is not entitled to treat the contract as rescinded without giving to the other party an opportunity so to remedy the breach".

[401] On this basis the defender submits that they ought to have been provided with a further opportunity to remedy the minor defects. However, unlike in *Lindley* the pursuer is not seeking to rescind the future performance of a continuing service contract.

[402] In *Turnbull* v *McLean & Co* (1874) 1 R 730, a coal supplier rescinded the contract to supply coal as the other party was refusing to pay for the same as he had experienced demurrage costs in respect of the detention of the vessels to be used to ship the coal. Therein it was stated:

> "… where one party has … failed to perform his part of the contract in any material respect the other is entitled either to insist for implement, claiming damages for the breach, or to rescind the contract altogether, - except so far as it has been performed."

[403] The pursuer is claiming damages for breach of contract, from his having incurred losses in completing the parties' contract which the defender had repeatedly failed to perform. Lord Thomson (in *Lindley*, *supra*) refers to the defaulting party being given "an" opportunity to remedy the breach. The defender had already been given that opportunity to remedy their previous failures in the installation of the anhydrite.

[404] Further, on the accepted evidence, the defender had not shown any willingness to accept the existence of, far less to rectify, in particular the catastrophic structural failure in the topping.

[405] The parties' mutual trust had essentially and undeniably broken down. Even on Record the defender, and in Mr Gribben's earlier evidence, it was denied that there had been anything other than minor issues with the topping requiring remedying.

[406] In those circumstances, the pursuer was not required to provide the defender with another opportunity to rectify any of these individually and *in cumulo* material breaches of the parties' contract whether minor or otherwise. The pursuer is entitled to claim damages for the necessary, foreseeable, vouched, and reasonable losses incurred by him in remedying the defender's defective workmanship.

***Removing Topscreed***

*Evidence*

[407] On 5 April 2016, the pursuer received a quote from Profound to remove the topping and clear it from the site for £20.55 per square metre. This therefore amounted to £4,315.50 for the 210 square metres of the ground floor of the property.

[408] On 10 June 2016, the pursuer received a quote from Samuel Contracts (Edinburgh) Ltd ("Samuel") to remove the topping and remove it from the site for £4,680.00, without any further breakdown as to how that was calculated.

[409] Mr Adams' opinion was that the estimates for removing the topping appeared to be high. He indicated that a reasonable cost for removing the 210 square metres of topping would be at a rate of £15.00 per square metre, that being £3,150.00.

[410] The pursuer did not accept either of these quotes. The pursuer indicated that at the time of the topping being removed he was an employee of Morrison Construction, who are a "quite big building company."

[411] Morrison Construction were doing a lot of work at schools. As the schools were opening in August, they were running out of time to do this work. One of these jobs was at Kelso School.

[412] The pursuer indicated that in a barter like transaction, he agreed with this employer that in return for his "forfeiting" a week's holiday and continuing to work at the school, his employer would arrange, at no cost to him, for Scottish Borders Council to lift about half of the depth of floor including the existing topping.

[413] The pursuer referred to a record sheet. This is split over two pages and headed SBC CONTRACTS – Record of Costs. "SBC" refers to Scottish Borders Council. The record sheet *prima facie* relates to the weeks ending 13 and 20 August 2017. The pursuer claimed this to be "an invoice" which was paid by his then employer Morrison Construction, to Scottish Borders Council. This has a sub-heading "Contract: Kelso High School – Description of Works: Works as agreed direct with MCS to premises off site." The pursuer then described this as "a quote that" his "employer paid [to] the contractor, to uplift the floor."

[414] This record sheet also appeared to relate to replacing "flat top edgers" which the pursuer indicated had been damaged by heavy goods vehicles coming in and out. These entries are marked with asterisks and were stated by the pursuer not to relate to the removal of the topping. This sheet *prima facie* recorded charges of £2,589.85, as follows:

i) Two employees working 40 hours from 13 to 16 August 2017 and one other employee working on 16 August 2017 for 9 hours, at a rate of £19.25 per hour and therefore totalling £1,713.25;

ii) A "JCB3X" for 16 August 2017 for 4 hours at a rate of £30.00 per hour and therefore totalling £120.00;

iii) A pickup truck for 13 to 16 August for 48 hours at a rate of £9.00 per hour and therefore totalling £432.00;

iv) A transformer and leads for 13 to 16 August for 39 hours at a rate of £1.50 per hour and therefore totalling £58.50;

v) Two hammer drills for 13 to 16 August each for 40 hours at a rate of £1.50 each per hour and therefore totalling £120.00; and

vi) A Plant and Machinery charge of 20% of such charges and therefore totalling £146.10.

[415] The pursuer claims for "contractors' labour to break and uplift defective floor" in the sum of £2,660.13 (cf £2,589.85 *supra*). The pursuer indicated that he was unaware of whether this barter type "arrangement" had been described or mentioned in his pleadings or affidavit. It had not.

[416] In cross examination, the pursuer accepted that the documentation produced did not "evidence" this "holiday arrangement" and that he could have obtained evidence of this from the director that "ok'd" it, but he had not.

[417] Mr Gribben was of the view that this head of claim lacks clarity. It also appears to relate to removing some of the anhydrite, which was unnecessary. If this was for removing the topping only, the Foggs invoice included grinding the floor. This grinding would ordinarily remove the topping and scarify the anhydrite. This and the installing of the new topping are normally done "in one go." Accordingly, this appeared to be a "double claim".

[418] Mr Gribben indicated that if the topping had debonded to the extent suggested it would simply come up with a floor scraper and a hoover taking about 2 hours. In any event it had not been necessary to break up any part of the anhydrite as there was nothing wrong with it from a functional/structural perspective.

*Pursuer's position*

[419] The pursuer was entitled to claim the sums in the record sheet.

*Defender's position*

[420] The pursuer's oral evidence in this respect was "odd" and the purported vouching using a time sheet is not intelligible. The time sheet postdates the incorporation of the pursuer's limited company, yet he also claims to have been an employee of Morrison Construction at that time. The court has no material before it by which it can be satisfied that this is an expense which the pursuer has in fact incurred in respect of removing the topping. It is not clear how the court should go about valuing the pursuer choosing to forego his annual leave.

[421] The Foggs invoice appears to charge for grinding down all areas and there would therefore be a double charge if this were allowed.

*Analysis and conclusion*

Necessity

[422] The independent and skilled evidence of Dr Ashworth and Mr Adams is to be preferred to that of Mr Gribben, again principally for the foregoing reasons of greater skill, independence, and reliability. It was plainly necessary for the failed topping to be removed.

Foreseeability

[423] The cost of uplifting the topping as "part of the loss actually resulting as was, at the time the contract was made" should plainly have been "reasonably contemplated as liable to result from the breach" (*Attorney General of the Virgin Islands, para [32]-[35], infra),* and if

properly vouched, losses arising from having paid the reasonable costs of a contractor doing so would, in the circumstances, ordinarily be recoverable.

[424] However, the pursuer has not incurred the loss of making any payment to contractors as is *prima facie* claimed on Record.

[425] It would not have been reasonably contemplated by the defender, that if found to be in breach of contract, they could be liable for compensating the pursuer for not taking a week's annual leave (*Attorney General of the Virgin Islands, infra par [32]-[35])*.

[426] In *Douglas* v *Stuart Wyse Ogilvie Estates Ltd* 2001 SLT 689 at 694C, Lord Kingarth stated that:

> "The proper approach would appear to be whether the losses in question could be , from the defender's point of view, to have been not unlikely, or quite likely, to occur — to take two phrases from Lord Reid's speech in *Czarnikow Ltd* v *Koufos* recently referred to with approval in *Balfour Beatty Construction (Scotland) Ltd* v *Scottish Power plc* (although it is clear from the whole terms of the speech that although Lord Reid spoke of "a very substantial degree of probability", he did not mean that it was necessary that the prospects be better than even)".

[427] It was neither likely, quite likely and nor was there a very substantial degree of probability that such a loss to the pursuer would arise.

Vouching

[428] The time sheet does not adequately vouch the loss which it is claimed the employer had agreed to bear in this arrangement, namely £2,589.85 (cf £2,660.13 claimed). In the absence of at least a receipted invoice, it is unknown whether this sum represents the pursuer's employer's actual loss or whether these sums were again set off in another barter-type arrangement with the contractor. Even if it were objectively reasonable (*Euro Pools, infra, para [13])* to use such as a basis for calculating the pursuer's loss of annual leave, which

it is not, this head of claim is not adequately vouched so as to prove what the actual cost was to the pursuer's employer, as appears to be the basis for calculating this head of claim.

[429] The circumstances surrounding this alleged transaction were so "odd," as the defender properly submitted, as to require considerably more proof, than the pursuer's own understanding of what had happened. It was even unclear if the pursuer was reliably recalling being employed by Morrisons at this time as he had by then incorporated his company. It was unclear as to whether he took annual leave at any later time. It was unclear if the pursuer was reliably recollecting that the documentation produced related to the alleged task as there were other transactions referred to therein which appeared to have nothing to do with lifting a topping.

Reasonableness

[430] It is also not objectively reasonable (*Euro Pools, infra, para [13])* even exercising a sound imagination and the practice of a broad axe (*Watson, Laidlaw & Co Ltd*, *supra*) and taking a broad approach (*The Law of Contract in Scotland, supra*, para 22-93) for the pursuer to equate his loss of annual leave with the alleged costs that he understands his employer had agreed to meet, in some undetailed third party arrangement.

[431] This sum, at best, would only be a measure of the cost which the employer was prepared to incur for the pursuer relinquishing his leave, to enable that employer to use the pursuer to meet their urgent contractual obligations in schools.

[432] Essentially, the pursuer had foregone being paid a week's wages without doing any work for the same. To put the pursuer in the same position, so far as money can do, (*Attorney General of the Virgin Islands, para [31], infra*), it might objectively be argued as reasonable (*Euro Pools, infra, para [13])* that he is simply recomposed a week's wages. There

is however no evidence of the pursuer's hourly rate, working hours and taxation in this employment.

[433] The pursuer also makes no reference to this barter arrangement on Record. *Prima facie* the pursuer appears to claim for having incurred costs to this contractor in the sum of £2,660.13.

[434] In *The Law of Contract in Scotland* at pp654 para 22-93 the learned author states:

> "The result may be that written pleadings which state all necessary facts for a proof are sufficiently relevant, even although in the end an alternative method of calculation of damages might be used … An award of damages is based on a calculation. Averments of proof should demonstrate how the pursuer arrives at the sum sued for."

[435] This is so unusual an arrangement that the defender was entitled to notice of the same on Record and all "necessary facts" as to how the pursuer arrived at this sum were not sufficiently plead. Even if there had been evidence of the pursuer's weekly income to attempt to objectively and reasonably calculate a loss in this head of claim, this would be something which is so new, separate, and distinct as not to fall within the Record.

[436] In the circumstances of it not being reasonably contemplated (*Attorney General of the Virgin Islands, infra, paras [32]-[35])* that the pursuer would forfeit his annual leave, nor being objectively reasonable for the pursuer to equate his loss of annual leave with any cost to his employer, there being no satisfactory evidence to calculate objectively and reasonably any actual loss and, in any event, this head of claim being so new, separate and distinct as not to fall within the Record, the pursuer has not proved any loss in this respect.

[437] The defender's position that Foggs' invoice appeared to cover this work and that this therefore is a second charge, becomes irrelevant. Had this not been so this would also have required clarification from Foggs or Border's Council witnesses as the same is unclear.

[438] While some anhydrite may have been removed in the initial removal of the topping by the contractors, Foggs may still have had to grind the anhydrite surface to ensure that it was properly prepared.

[439] It being unclear as to what has in fact taken place in this "arrangement" there are no factual findings in this respect.

***Reinstalling Topping***

*Evidence*

[440] The pursuer had received the Profound quote to prepare the remaining anhydrite and install a new topping for £42.70 per square metre. This would therefore amount to £8,967.00 for the 210 square metres of the ground floor of the property.

[441] The pursuer had also received the quote from Samuel to inspect and retain the existing screed where able to do so and apply new 30mm thick topping to an approximate area of 230 square metres at a cost of £9.915.00 (which *pro rata* for 210 square metres would amount to £9,052.83).

[442] Mr Adams' opinion was that these estimates for the installation of a new topping appeared to be high, equating to £42.70 per square metre as compared to a typical cost for installing 210 square metres of topping at £35.00 per square metre, therefore £7,350.00.

[443] On 23 July 2018, the pursuer obtained the quote from Foggs to grind all high areas so coverage can be made, grind all areas and vacuum, apply an epoxy resin and sand scatter and install a 6-12mm Uzin NC 110 topping, for £6,500.00. The Foggs quote was accordingly less than had been assessed by Mr Adams to be reasonable.

[444] From 2 to 4 August 2018, Foggs installed a new anhydrite topping at a reduced cost of £5,750.00 which the pursuer had negotiated.

[445] On 20 August 2018, the pursuer made payment to Foggs of the sum of £5,750.00 in respect of their having carried out the anhydrite topping.

[446] Mr Gribben indicated that this would be the only work that would require to be done if Dr Ashworth was right and the topping had to be removed. The Foggs invoice is the only cost which is vouched by an invoice.

[447] Mr Gribben indicated that the pursuer had originally claimed £6,500.00 plus VAT (ie £7,800) (as is confirmed from a perusal of the Record of 26 September 2022). When he had requested an invoice, it then showed the total sum in fact paid was £5,750.00.

*Pursuer's Position*

[448] The pursuer claimed recompense from the defender for having paid £5,750.00 to Foggs in respect of reinstalling the topping.

*Defender's Position*

[449] *Esto* the defender had been in material breach of contract due to the topping not having been installed to the trade standard, any relative cracking and bossing could have been rectified without requiring the removal and replacing of the entire topping. These cracks could simply have been filled at less cost.

[450] *Esto* the defender had been in such material breach of contract to require that the topping be removed and re-installed, it was accepted that the pursuer should be recompensed the sum of £5,750.00 paid by him to Foggs, which was a reasonable sum for such works.

*Analysis and conclusion*

Necessity

[451] Again, the independent and skilled evidence of Dr Ashworth and Mr Adams is to be preferred to that of Mr Gribben, again for the reasons of greater skill, independence, and reliability. It was plainly necessary for the failed topping to be reinstalled.

Foreseeability

[452] There is no dispute that the payment made to Foggs for the reinstallation of the topping was a loss resulting and reasonably contemplated as liable to result from the breach, at the time the contract was made, (*Attorney General of the Virgin Islands, supra para [32]).*

Vouching

[453] It is, again, accepted that a receipted invoice had been produced and spoken to in evidence properly vouching this cost.

Reasonableness

[454] That the pursuer should be recompensed for the £5,750.00 he paid to Foggs, is not in dispute were it found, as it has been, that the topping required to be removed and re-laid.

***Joinery Works***

*Evidence - removing doors, skirtings, etc.*

[455] The pursuer gave evidence that he was not only required to remove the failed topping and reinstall a replacement topping, but to ensure that the build of the property

was completed properly he was also required to (i) remove and reinstall all ground floor internal doors, door linings, architraves, skirtings and facings, and (ii) redecorate all ground floors walls, ceilings, skirtings and architraves.

[456] The pursuer, supported by Mr Adams, described how these additional joinery and redecoration works were necessary so that the joinery works would have no gaps to the new topping, the presence of which would inhibit NHBC certification. The woodwork, after its removal and refitting, with fixing holes being refilled, would require to be repainted.

[457] The walls and ceiling were unavoidably affected by dust and debris and also required to be re-painted.

[458] Although the pursuer carried out the joinery and redecoration works personally, he did not keep any timesheets, diaries, or other records relative to these. When asked why there was no photographic evidence of these items being taken down, the pursuer indicated that he thought these photographs should have been lodged in process.

[459] The pursuer accepted that from his role as a construction supervisor he was aware of a need to be clear about specifications of work and to keep a record of things.

[460] The pursuer was claiming *inter alia* for the loss of the time which he could have "spent working for someone else making money." He indicated that his losses are generally based on what a tradesperson would charge or what he would have picked up had he been working. He had "applied trade rates or even below trade rates" in assessing his claims.

[461] The pursuer had done some of these works on weekends or at nights as he had initially been working in employment. When he finished his employment with Morrison Construction, he had been able to work on the property full time. He had other offers of work at the time but had not provided evidence of this.

[462] He had found in the past that it is common for the cost of taking out defective work and reinstating the same, to cost more than doing the work correctly in the first place.

[463] His total losses claimed were broadly similar to that estimated by Mr Adams for all remedial works to be carried out by a tradesperson, namely £20,000 excluding VAT.

[464] The pursuer indicated that he did not have the funds to instruct a third-party joiner or painter to do the joinery and redecoration works. He did not present any evidence of such impecuniosity other than him stating such.

[465] The pursuer received the quote from Profound offering to remove all ground floors internal doors, door linings, skirtings and facings and move these to the first floor for storage for £997.50, again without further breakdown.

[466] The pursuer received the quote from Samuel to remove all existing doors and surrounding woodwork and retain for re-fit for £1,010.00 again without further breakdown.

[467] The pursuer claims the sum of £350.00 for his personal labour in taking down, removing, and storing 14 oak doors. This is calculated by charging £25.00 for each of the 14 doors removed. To fit a door a joiner would ordinarily charge £50.00. This is less work and therefore the pursuer has utilised a £25.00 charge.

[468] The pursuer further claims the sum of £275.00 for his personal labour for taking down, removing, and storing 11 door frames. This is calculated by charging £25.00 for each of the 11 door frames removed. The 11 door frames charged for included three double doors.

[469] The pursuer further claims the sum of £699.87 for his personal labour in taking down, removing, and storing 26 sets of facings (6 double and 20 single sets). This is calculated by charging the £5.69 per linear metre rate recommended by the Royal Institute

of Chartered Surveyors ("RICS") for such works for the 123 linear metres of facings on the ground floor.

[470] The pursuer further claims the sum of £762.46 for his personal labour in taking down, removing, and storing 134 linear metres of skirtings, marking on them room locations and numbers. This is calculated by charging the £5.69 per linear metre rate recommended by the RICS for such works, for the 134 linear metres of skirtings.

[471] The pursuer responded to the suggestion that it was "odd" to fix all these items if he thought the floor was defective, by indicating that at that stage the defender had advised him that it was nothing but hairline cracks and nothing to be concerned about and he had proceeded based on that advice being given, on which he had totally relied.

*Evidence - reinstalling doors, skirtings etc.*

[472] The pursuer received the quote from Profound to re-install the doors and door linings for £1,769.00 and to refit the skirtings and architraves for £3,225.60, again without further breakdown.

[473] The pursuer obtained the quote from Samuel to reinstall the previously removed doors and surrounding woodwork for £1,685.00 and the skirtings and architraves for £3,305.00, again without further breakdown.

[474] Mr Adams' opinion was that these estimates for reinstating the skirtings and architraves appeared to be high. He indicated that a reasonable cost of reinstalling 268 metres of skirtings and architraves throughout the ground floor would be at a rate of £5.69 per linear metre, that being £1,524.92.

[475] Mr Adams noted that the estimate allowed for a full fitting of skirtings and architraves throughout the ground floor. However, he commented that his on-site

inspection did not show works as being as advanced as this and as such the costs associated with the joinery elements of the work were considered by him to be higher than would be expected for the remedial works solely associated with the flooring defects. When he visited the property, the joinery was "quite far progressed," but there were small areas where the skirtings were not in place.

[476] The pursuer indicated that he had "by being careful" managed to reuse all the fixings except for a "very few skirtings which were inevitably damaged beyond reuse when being removed."

[477] The pursuer claims £350.00 for his personal labour in reinstating 14 oak doors. This is calculated by charging £25.00 per hour, each door frame taking an hour. He indicated that this involved reinstating the hinges and handles as well as reinstating the doors themselves.

[478] The pursuer claims £350.00 for his personal labour in reinstating 14 door frames. This was calculated by charging £25.00 per hour for each door frame each taking an hour. He had charged for 14 door frames as opposed to the 11 door frames charged for in his removal claim as three of the door frames were for two doors.

[479] The pursuer claims £762.00 for his personal labour in reinstating the architraves. This is again calculated by applying the rate recommended by the RICS of £5.69 per linear metre for such works (However, if these architraves are the 123 linear metres of surrounds that go around the door frame referred to previously as being the facings removed, it remains unclear how this sum is calculated as applying a charge of £5.69 per metre to 123 linear metres is £699.87, as above).

[480] The pursuer also claims £762.46 for his personal labour in reinstating the skirtings. This is calculated by charging the £5.69 per linear metre rate recommended by the RICS for such works for the 134 linear metres of skirtings.

[481] Mr Gribben indicated that he had "no idea" if the work was carried out. He did not know how the personal labour figures or sundries had been calculated. If these were sums the pursuer would have earned elsewhere had he not been involved in carrying out these works, he had understood the pursuer was an employee of a large contractor.

[482] Mr Gribben indicated that on 25 September 2014, the pursuer had written to the defender indicating that he had delayed fitting these joinery items whilst awaiting resolution of the level issue.

[483] Mr Gribben questioned as to why the pursuer had fitted these before all issues were resolved (ignoring that this "level issue" had supposedly been resolved by the installation of the topping and it was only then that the pursuer had carried out the joinery and redecoration works).

[484] Mr Gribben indicated that there are quotes from builders, but they did not do the work. There are no receipts, no photographs, no timesheets, and no progress reports. The costs appear to be based on other builder's estimates. Those types of costs involve contributions to overheads, include profits and do not seem to relate to any actual costs that the pursuer incurred.

[485] In any event, none of these joinery works were required. What Foggs carried out is something that is carried out daily in existing houses when people decide to change their floor, and you do not require to remove the joinery fittings.

*Pursuer's position - removing and reinstalling joinery works*

[486] The pursuer did not have the financial resources to employ outside contractors for the necessary remedial works, other than for the reinstallation of the topping. Based on para 20-40 of *The Law of Contract in Scotland* and *Banco de Portugal* v *Waterlow & Sons Ltd infra* this was permissible.

[487] It would have been difficult for the pursuer to work out his losses from contracts he had turned away and any submission that he was required to do so, was going too far. The only reasonable way to calculate the pursuer's loss was by determining "what he would have charged a customer if he had been working for them and" applying "that cost on time, to the work he was doing on his own property instead."

[488] This was particularly so, as the pursuer's calculation of loss in respect of the joinery works was just under that estimated by Mr Adams, for the same to be done by other tradespersons.

[489] It was not being suggested by the defender that the works had not actually been done by the pursuer.

[490] The evidence of the pursuer and Mr Adams that the joinery works were necessary to effect the necessary remedial works of removing and replacing the topping should be preferred to that of Mr Gribben.

[491] The pursuer continued with the building works, relying on the defender's assurances that all was well, and that the cracking was cosmetic. By the time the pursuer had lost faith and obtained Dr Ashworth's report, the joinery works that required to be removed and replaced had been done.

[492] In the circumstances, the cost of joinery works should have been in the contemplation of parties where in a new build these defects were identified.

*Defender's position – removing and reinstalling joinery works*

[493] There was insufficient evidence that any of the joinery and related works were necessary because of any breach of the parties' contract by the defender. As regards all the joinery works, these are unvouched.

[494] It also cannot be said to have been reasonably contemplated as a serious possibility that the Pursuer would build around the floor he considered to be defective and then seek to replace it three years later. It is not at all intelligible why he proceeded with other construction aspects around the screeded floor, doors, door frames and skirting boards, if he was maintaining a claim for repair or replacement of the floor and he considered that further work would be imperilled by the floor remaining.

[495] There are difficulties with Mr Adams' approach as he has not produced the photographs referred to and there is no explanation as to why it was necessary to remove the joinery works in the first place other than referencing in his report "Facilitatory works in relation to joinery elements disrupted from the works".

[496] Were it found that the defender's had been in material breach of contract requiring the topping to be removed and re-installed, it was denied that the joinery works were necessary. Mr Adams "does not appear to have been in a position to know whether it was necessary to remove the skirtings and doors." It cannot be said that it was ever in the reasonable contemplation of the parties that to remedy any problem with the floor, fittings such as skirtings, doors and joinery would have to be removed.

[497] Were it found that it had been necessary for the pursuer to carry out the joinery works to facilitate such removal and replacement of the topping, then the pursuer is required to prove his loss of profit from contracts he had turned away to do such work. The

pursuer cannot charge for such works as a tradesperson, as he has, as he would thereby be making a profit on the same, as opposed to being recompensed for his actual loss.

*Analysis and conclusion - removing doors, skirtings, etc.*

[498] The evidence of the pursuer (as a qualified joiner) and Mr Adams as an independent and skilled evidence as to whether the joinery works were necessary, is preferred to that of Mr Gribben, while equally acknowledging the obvious interest of the pursuer.

[499] The evidence of the pursuer and Mr Adams appeared to be more logical and probable. Mr Gribben had spent a considerable time in his evidence in attempting to defend there being unavoidable differences in levels when a screed is installed, and therefore a wide level of tolerance was necessary.

[500] By the same token, in a new build such as that being carried out by the pursuer, it would have been unacceptable to have damaged joinery works and even if not so damaged, for the same to have unacceptable gaps between the respective joinery works and the topping, preventing NHBC certification.

[501] These gaps would not have been there had the topping been installed correctly and the joinery had then been fitted afterwards, in doing so taking account of the varied topping levels within tolerance, as ultimately happened after the replacement topping was installed.

[502] The accepted evidence of the pursuer and Mr Adams that such would have been necessary, also corroborated that the pursuer had in fact carried out the remedial joinery works now claimed for.

Foreseeability

[503] From the accepted evidence of the pursuer and Mr Adams, it was again clear that the defender must be taken to have had in their contemplation that such joinery and redecoration works would be necessary because of a breach of the parties' contract (*Attorney General of the Virgin Islands, supra, paras [32]-[35]).*

Vouching

[504] It was not entirely clear from the pursuer's evidence whether he would have been working on other contracts at the time of carrying out the remedial works to enable a calculation of his losses based on contracts he had turned away. The defender's submission that this was the only measure of his relative loss, was however going too far. The pursuer had obtained the quotes from Profound and Samuel in addition to Mr Adams' skilled report.

[505] The accepted evidence from the pursuer that he had carried out these works and his evidence supported by Mr Adams' report that such were necessary, together with these quotes as a check, adequately vouch an assessment of what would be reasonable compensation to the pursuer for carrying out these works.

Reasonableness

[506] In respect of this head of claim, Profound had quoted a cost of £997.50, Samuel £1,010.00 and Mr Adams has not challenged these as being unreasonable.

[507] The pursuer being a qualified tradesperson could perform the joinery and redecoration works he carried out and was therefore entitled to do so and to claim reasonable recompense for his having had to do so because of the defender's breach of

contract. This was whether the pursuer was financially able to pay another contractor or not.

[508] In this respect, the pursuer claims recompense totalling £2,087.33, (£350.00 for taking down doors etc., £275.00 for taking down door frames etc., £699.87 for taking down facings etc., and £762.46 for taking down skirtings etc.).

[509] In *Euro Pools, supra,* Lord Drummond Young also found at para [13] that:

> "Where employees are required to spend time on rectification works following a breach of contract, the employer will normally be entitled to receive the cost of the salary, or wages paid to those employees for the time taken to perform the remedial work. In addition, the employer will normally be entitled in my opinion to recover some contribution to the general overheads … such as the cost of maintaining the business."

[510] In *Euro Pools infra*, the pursuer company had been required to pay their employees overtime for these employees to fulfil their normal contractual obligations, such employees having been diverted to attend to remedial works arising from the defender's alleged breach of contract during their normal working day.

[511] In *Euro Pools infra*, the pursuer had not claimed for doing these remedial works at their normal charge out rates but had claimed for the wages of these employees with an overhead uplift. The pursuer had not utilised their more significant normal charge-out rates to customers for such assessment of loss, as such rates would have included an element of profit over and above the employees' wages and their other overheads. However, this was because the corporate pursuer had not *de facto* lost any such profits in this scenario of their employees having to do overtime work.

[512] The defender submitted that it is not reasonable for the pursuer to claim damages for the works he carried out, based on the full amount which he would have charged to a client. It was argued that this was because the pursuer's hourly charge out rate and recommended

rates of the RICS utilised by the pursuer would include an element of profit and an allowance for overheads which were not reflective of any loss which the pursuer has incurred and cannot therefore be claimed.

[513] The pursuer indicated that the figures that he would ordinarily charge are his reasonable assessment of the recompense due to him for his personal time in doing such works.

[514] The pursuer when doing these works was not working as an employee. He simply sought to be paid a reasonable sum for the time he had expended as an individual, in carrying out the necessary remedial joinery and redecoration works, which he had the skill to perform.

[515] The question therefore is whether the pursuer, as an individual, in having carried out such remedial joinery and redecoration works has incurred a loss and if so whether he has quantified that loss in a manner that is objectively reasonable. In *Euro Pools, infra* the pursuer made no claim for a loss of profit as there simply was no such loss.

[516] The understandable rationale in *Euro Pools, infra* does not preclude the pursuer from quantifying his loss of time by utilising normal charge-out rates.

[517] The pursuer would have had the same overheads if acting as a self-employed person and there is no obvious reason to make any deduction from a sum which is otherwise deemed to be objectively reasonable (*Euro Pools, infra para [13]).*

[518] This is a very different scenario than in *Euro Pools, infra* as the pursuer would as a self–employed tradesperson receive the whole sum based on his charge out rates, from which he would meet his overheads (which may include nails, glue, portaloos, etc.). What is reasonable in any case will depend on the facts and circumstances of that case.

[519] It requires to be emphasised that this is not a claim for loss of profits and nor is it a claim for recompose of sums expended. The pursuer would have received all such sums for his time had he been contracted to do the work. As he is self-employed there is no separable element of profit to be deducted as with the corporate employer in *Euro Pools*.

[520] Exercising a sound imagination and the practice of a broad axe (*Watson, Laidlaw & Co Ltd*, *supra*) and taking a broad approach (*The Law of Contract in Scotland, supra*, para 22-93), utilising the charge-out rates as a basis for quantifying a value which reasonably recompenses the pursuer for his individual loss of time in having to carry out these remedial works, appears objectively, entirely reasonable.

[521] The pursuer's calculations were however more than the quotes from Profound and Samuel and there is therefore an issue arises as to whether these works could have been performed at lesser cost by these contractors.

[522] The pursuer sought to rely upon WW McBryde, *The Law of Contract in Scotland*, *supra*, pp 632-633 paras 20-40 and *Banco de Portugal* v *Waterlow & Sons Ltd* [1932] AC 452, 506 *per* Lord Macmillan, to explain why the pursuer had carried out the joinery and redecoration works himself, namely:

> "where the sufferer from a breach of contract is placed in a position of embarrassment the measures he may be driven to adopt to extricate himself ought not to be weighed in fine scales at the instance of the party whose breach of contract has occasioned the difficulty …."

[523] This reference, continues:

> "… he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

[524] Accordingly, the pursuer claims a larger sum for his doing the works himself, having been placed in a position of embarrassment because he did not have the financial resources to employ outside contractors.

[525] However, there was no satisfactory evidence other than the pursuer's statement that he was unable to pay such contractors, to vouch such impecuniosity. In the absence of any such evidence a loss in this respect has not been proved.

[526] As stated in WW McBryde, *The Law of Contract in Scotland* (3rd edn, Sweet & Maxwell 2007) states at pp 653, para 22.91:

> "The general principle is that, subject to the concepts of causation, of mitigation and of remoteness, the pursuer should be put in the same position, so far as money can, as if the contract had been performed."

[527] Accordingly applying the concept of mitigation of loss by choosing the most economical remedial cost, a reasonable sum to recompose the pursuer for this head of claim is that quoted by Profound, viz. £997.50.

[528] However, Mr Adams had indicated that while the joinery works were quite far progressed there were small areas where skirtings were not in place. Rather than reject this head of claim as incalculable, a reasonable assumption is that such small areas could not be described as such if they had amounted to more than 20% of skirtings.

[529] Utilising a broad axe (*Watson, Laidlaw & Co Ltd*, *supra*) and to account for such, an appropriate deduction of 20% from the £762.00 charge claimed for reinstating the skirtings proposed by the pursuer, there being no breakdown in the Profound quote, should be deducted from the Profound quote. A reasonable sum to recompense the pursuer in respect of this head of claim is therefore £845.10 (£997.50- £152.40 (20% x £762.00)).

*Analysis and conclusion – reinstalling doors, skirtings, etc.*

Necessity

[530] As it was necessary for the joinery works to be removed so was it necessary for these to have been reinstalled.

Foreseeability

[531] Again, as it was foreseeable for the joinery works to be removed so was it necessary for these to have been reinstalled.

Vouching

[532] Again, there was sufficient vouching for the cost of these being reinstalled as there was for their removal.

Reasonableness

[533] In respect of this head of claim, Profound had quoted £4,994.60 (£1,769.00 for reinstalling the doors and linings and £3,225.60 for reinstalling the skirtings and architraves).

[534] Samuel had quoted £4,990.00 (£1,685.00 for reinstalling the doors and surrounds and £3,305.00 for reinstalling the skirtings and architraves).

[535] Mr Adams opined that the cost of reinstalling the skirtings and architraves should reasonably be £1,524.92. Adding that assessment of £1,524.92 to the part of the quote from Samuel of £1,685.00 for reinstalling the doors and surrounds, a reasonable charge for a contractor to carry out this head of claim could be assessed at £3,227.95 (£1,685.00 and £1524.92).

[536] However, the pursuer claims £2,161.87 for reinstating the joinery works (£350 (for reinstating the doors etc.), £350.00 (for reinstating the door frames), £726.00 which should be £699.87 *supra*, (for reinstating the architraves) and £762.00 (for reinstating the skirtings).

[537] This is less than the combined part assessment and part quote of £3,227.95, *supra*.

[538] The pursuer's calculations accordingly appear objectively to be more reasonable, as they are significantly less than the quotes from Profound and Samuel (even as adjusted by the opinion of Mr Adams).

[539] However, again, Mr Adams had indicated that while the joinery works were quite far progressed there were small areas where skirtings were not in place. Again, rather than reject this head of claim as incalculable, a reasonable assumption is made that such small areas would not have amounted to more than 20% of skirtings.

[540] Utilising a broad axe (*Watson, Laidlaw & Co Ltd*, *supra*) to account for such, an appropriate deduction of 20% from the £762.00 charge for reinstating the skirtings is necessary, such that the reasonable sum due to the pursuer in respect of this head of claim is £2,009.47 (£2,161.87- £152.40 (20% x £762.00)).

***Miscellaneous Costs***

*Evidence*

[541] The pursuer claimed £20.00 for the cost of new screws to replace the doors, without further breakdown as to how this was calculated.

[542] The pursuer claimed £60.00 for the purchase of glue and nails to reinstate the architraves.

[543] The pursuer claimed £30.00 for the cost of nails to reinstate the skirtings.

[544] The pursuer claimed £20.00 for the cost of additional electricity consumption.

[545] The pursuer claimed £50.00 for the cost of the additional hire of a portaloo and 5kv transformer.

[546] These miscellaneous costs were all "just estimated" by the pursuer with no further details.

[547] Mr Gribben stated that he was unaware of why these costs would have been incurred even if all the works had been carried out.

*Pursuer's position*

[548] These miscellaneous costs were reasonable estimates of the pursuer's loss in this respect.

*Defender's position*

[549] These miscellaneous costs are unvouched with simply no evidence of where these costs were incurred.

*Analysis and conclusion*

Necessity

[550] Utilising screws, glue, nails, and additional electrical consumption would plainly have been necessary.

[551] Whether any additional hire of a portaloo and of 5kv transformer was necessary is impossible to tell without further vouching and explanation.

Foreseeability

[552] The utilisation of screws, glue, nails and additional electrical consumption, additional hire of a portaloo, 5kv transformer, if necessary, would have been foreseeable.

Vouching

[553] These miscellaneous costs amounting to £180.00 were all "just estimated" by the pursuer with no further detail.

[554] To have been proved these there would need to have been some further vouching to indicate how these sums are broken down, receipts for their purchase and what they were used for.

[555] The figures presented are essentially random and have not accordingly been proved.

Reasonableness

[556] In any event, on the basis that the foregoing allowed compensation has in built some allowance for expected overheads, the pursuer has already been compensated for miscellaneous charges.

[557] Accordingly, such charges are not only unproved but would have been unreasonable and there are no findings in fact in this respect.

***Redecoration***

*Evidence – redecoration walls and ceilings*

[558] The pursuer received the quote from Profound to decorate the walls and ceilings of the ground floor of the property, with 2 coats of emulsion for £6.71 per square metre.

[559] This would therefore amount to £5,529.04 for the 824 square metres of the property's walls and ceilings.

[560] The pursuer received the quote from Samuel to decorate using two coats of emulsion paint on all walls and ceilings of £5,800.00.

[561] Mr Adams' opinion was that these estimates for the redecoration of the walls and ceilings appeared to be high. A reasonable cost for redecorating the 824 square metres of walls and ceilings with two coats of emulsion would be £5.00 per square metre, that being £4,120.00.

[562] The pursuer, however, indicated that he disagreed with some of Mr Adams' calculations as these costs had been underestimated. While Mr Adams had allowed for two coats for the walls and ceilings and one coat of paint for painting the door frames, skirtings, and architraves; four coats, "a primer, an undercoat and two topcoats, had been required to properly cover up marks, damage, dirt and so on."

[563] The pursuer claimed £4,120.00 for his personal labour in repainting the ceilings and walls. This was calculated based on £25.00 per hour, that covering time and materials. Some of the materials he had and others he had bought. He could not remember the cost of the materials used.

[564] As regards all the painting, both he and his spouse had spent probably a week and a half to two weeks doing this. When pressed as to how long he personally had spent doing these works the pursuer then indicated that he would have probably spent 3 weeks (as compared to a week and a half to two weeks stated earlier), based on at least a 44-hour week and therefore 132 hours of work. This at £25.00 per hour would only total £3,300 or for one and a half weeks £1,650.00.

[565] Mr Gribben considered that there would have been no need to repaint the walls and ceilings.

*Evidence – redecoration door frames, skirtings and architraves*

[566] The pursuer had received the quote from Profound to decorate the ground floors skirtings and architraves with 2 coats of satin finish for £3.95 per linear metre. This would therefore amount to £1,058.60 for the 268 linear metres of the property's skirtings and architraves.

[567] The pursuer obtained the quote from Samuel to decorate with two coats of satin finish paint all newly re-installed skirtings and architraves being approximately 260 linear metres for £1,020.00.

[568] Mr Adams' opinion was that these estimates for the redecoration of the skirtings and architraves appeared to be high. A reasonable cost for redecorating the 268 linear metres of skirtings and architraves with one coat of satin finish (being all that Mr Adams considered necessary) would be £2.03 per linear metre, that being £544.04.

[569] The pursuer indicated that no matter how careful tradespeople are, skirtings and facings would get damaged or marked and would require to be repaired and repainted.

[570] The pursuer claims £1,200.00 for his personal labour in double filling and sanding holes and repainting the skirting and architraves. This was calculated based on a charge for 48 hours at £25.00 per hour.

[571] The pursuer claims £800.00 for his personal labour in double filling holes and repainting the door frames. This was calculated based on the time he had spent and the materials he had used without the pursuer again being able to provide any further detail.

[572] In respect of all redecoration, the pursuer accepted that there was no vouching lodged. He indicated that he had receipts for "paint and that" which had not been produced. He indicated that when Mr Adams had inspected the property it was "one coat away from finish." He accepted that it was not the defender who had caused the scuff marks to the walls. He blamed the damp on the defender having not completed the floor to allow the underfloor heating to become operational.

[573] Mr Gribben indicated that he considered the claim for the redecoration works to be a "ridiculous" amount of money. If the topping was de-bonded to the extent suggested, then it would simply come up with a floor scraper and a hoover taking about 2 hours. The grinder extraction has a skirt and vacuum. There would only be possibly a little bit of dust that you would have to clean off afterwards. It is not a messy process, and the screed would just run under a door when laid. As regards the effects of damp, Mr Gribben opined that the issues with the floor did not affect the operation of the underfloor heating. There are also numerous other ways to have kept the house warm. Again, there were no receipts or any evidence to vouch that this was done.

*Pursuer's position – redecoration walls, ceilings, door frames, skirtings and architraves*

[574] These costs were reasonable estimates of the pursuer's loss in this respect.

*Defender's position – redecoration walls and ceilings*

[575] The works are unvouched. It is highly unlikely that there had been full decoration if some of the skirtings/doors were not fitted in April and May 2017 when Mr Adams inspected the property.

[576] In any event, these are not losses in the reasonable and probable contemplation of the parties. None of the scuffing was caused by the defender. When they carried out work, the pursuer praised the defender for not scuffing the property.

[577] It is not at all clear why damage was caused to paintwork; or why usual measures in relation to dust could not have been taken; or how the defender can possibly be deemed to have assumed responsibility for the costs of redecorating.

*Defender's position – redecoration door frames, skirtings and architraves*

[578] As stated, in April or May 2017, some skirtings and doors had not been fully fitted.

*Analysis and conclusion - redecoration walls and ceilings*

Necessity

[579] The independent and skilled evidence of Mr Adams, generally supporting the pursuer, that some redecoration would be unavoidable is preferred, due to (i) the joinery works requiring to be repainted to cover the effects of their removal, and (ii) the works involved in removing and replacing the defective topping unavoidably producing considerable dust and debris which the walls and ceilings could not be totally protected from.

Foreseeability

[580] Having accepted Mr Adams' evidence in this respect, redecoration costs would have been foreseeable.

Vouching

[581] The absence of any reliable records of any kind detailing relative times could have been fatal to the pursuer's claim in this respect. However, the pursuer is again saved from this fate by having obtained quotes from Profound and Samuel and an independent assessment of these costs having been carried out by Mr Adams. The pursuer has again provided adequate vouching to prove some of this head of claim, but only to the following limited extent.

Reasonableness

[582] In respect of this head of claim, Profound had quoted a cost of £5,529.04, Samuel £5,800.00 with Mr Adams expressing the opinion that the sum of £4,120.00 was reasonable.

[583] The pursuer indicated that his claim was again based on a charge of £25.00 per hour for his time and materials.

[584] The pursuer had stated at various stages in his evidence that he had been painting for one and a half to two weeks, then for two weeks and then he estimated this at three weeks. He also indicated that his spouse had also carried out the painting. In the absence of a service agreement whereby his spouse requires to be paid for her services, such time is not a loss to the pursuer and therefore not recoverable.

[585] The most reasonable figures for the defender from the pursuer's evidence, are that the pursuer was painting for one and a half weeks, for 44 hours per week at an hourly rate of £25.00 per hour. Reasonable compensation for his requiring to do this painting on that basis, would be £1,650.00.

[586] Considering that related to only the pursuer and not to his spouse and comparing the same with the quotes from tradespersons and the opinion of Mr Adams, such a sum to compensate the pursuer is objectively reasonable, even in the absence of any detailed timesheets.

*Analysis and conclusion – redecoration door frames, skirtings and architraves*

Necessity

[587] This redecoration was necessary for the reasons stated.

Foreseeability

[588] This redecoration was foreseeable for the reasons stated.

Vouching

[589] The pursuer has again provided limited vouching to prove the costs of redecoration from said quotes.

Reasonableness

[590] In this head of claim, Profound had quoted a cost of £1,058.60, Samuel £1,020, with Mr Adams expressing the opinion that £544.04 was reasonable. The pursuer claims the sum of £2,000 (£1,200.00 and £800.00).

[591] However, there is no further loss under this separate head of claim. This is because the foregoing reasonable quantification of the pursuer's loss was in respect of all redecoration works for the period of one and a half weeks.

[592] Any reduction in recompense relating to some of the skirtings not all being in place before hand would be so *de minimis* as not to require further consideration when assessing this head of claim, broadly.

[593] In adopting the most reasonable scenario for the pursuer of one and a half weeks painting, it is recognised that the defender would not be responsible for careless scuffing by other contractors. Equally, while it was unclear when precisely the original redecoration works were carried out, the property was but one coat away from being finished in any event. It was entirely reasonable for the pursuer not to commission the underfloor heating in the floor and that no other heating had been installed in the property as the build had been stalled by the floors requiring rectification.

[594] Utilising a broad axe and wide discretion the limited compensation of £1,650.00 in this respect is objectively reasonable, particularly when compared to the saving to the defender from the pursuer having carried out the work himself as opposed to that which would have been charged by an independent contractor.

***Travel Time & Mileage***

*Evidence*

[595] The pursuer claims £2,000.00 for his personal travel time from his home to the property for six weeks of joinery and two weeks of painting.

[596] This sum was calculated in respect of travel to complete the joinery works at two hours every day for six weeks from the pursuer's home to the property totalling 84 hours. The pursuer then indicated that as it was nine years previously, he could not remember if he was travelling every day of the week.

[597] He accepted that he probably would not have been working seven days a week at the time. As regards the charge for two weeks painting the pursuer indicated that he had been working 44 hours per week at £25.00 per hour, which he considered to be a reasonable rate to charge for his time. This £2,000 charge is therefore to compensate him for 80 hours at a rate of £25.00 per hour.

[598] Finally, the pursuer claims for £1,160.00 mileage, which was rounded up from £1,152.00. This appeared to be arithmetically calculated as being for 80 journeys (8 weeks x 5 days x 2 journeys) at £0.45 per mile, each journey being 32 miles. The pursuer indicated that this was only for travel relating to his carrying out the rectification works.

[599] Mr Gribben did not consider these heads of claim to be valid or vouched.

[600] When asked if he thought it was fair for the pursuer to be paid "something" if he had done the work, Mr Gribben responded that if he had to do it, then the pursuer should be recompensed for it, but not at contractor's rates. This is because he did not have any overheads such as staff or offices to pay and there would be a profit margin in those rates which the pursuer would not have had if he did the work himself.

*Pursuer's position*

[601] These costs were reasonable estimates of the pursuer's loss in this respect.

*Defender's position*

[602] Based on *Douglas, supra,* at 693-694, these charges are too remote. They are unvouched as in *Incremental Group Ltd, infra,* at [184] and [197-200]. Some contemporaneous record could have been taken and produced. As a result, the claim should be refused.

[603] At the time of the contract, the subjects were purchased to be a private residence for the Pursuer and his spouse. The Pursuer would therefore have been spending time on the property anyway.

*Analysis and conclusion*

Necessity

[604] The defender has benefitted from a considerable reduction in damages when compared to what would have been objectively reasonable had the pursuer employed contractors. It was necessary for the pursuer to travel to and from his home to the property with there being a loss of his time and common mileage charges being incurred, for the defender to so benefit.

Foreseeability

[605] It was likely that were there to be remedial works carried out by the pursuer personally, thereby saving the defender considerable sums, that the pursuer would have incurred reasonable travel and mileage costs related to his personally carrying out such remedial works.

Vouching

[606] In *Incremental Group Ltd* v *HiETA Technologies Ltd* [2021] CSOH 13 at [184] when dealing with travel expenses, Lord Ericht stated simply:

> "No vouching was produced for these costs. As I am not satisfied that this element has been adequately vouched, I shall disallow it."

[607] While there is no vouching, this is not the real issue. Any vouching claiming for the personal travel time and mileage would generally be but written documents produced by the pursuer. The real issue is one of specification.

[608] The pursuer claims the £2,000.00 as damages for his loss in having to travel to and from the property to carry out the remedial works. From his evidence this appears to be calculated as follows:

i) One hour travel time from the pursuer's home to the property and one hour travel time from the property to the pursuer's home, each day;

ii) Five days a week, therefore 10 hours a week;

iii) A compensation rate of £25.00 per hour, therefore £250.00 per week; and

iv) For the joinery works, 6 weeks, therefore £1,500.00;

v) For the redecoration works, 2 weeks, therefore £500; and

vi) Accordingly, all totalling £2,000.

[609] The pursuer claims £1,160.00 as damages for his loss in respect of mileage costs in having to travel to and from the property to carry out the remedial works. From his evidence this appears to be calculated as follows:

i) 32 miles each journey

ii) Five days a week, therefore 10 journeys a week, therefore 320 miles per week;

iii) A compensation rate of £0.45 per mile, therefore £144.00 per week; and

iv) For the joinery works, 6 weeks, therefore £864.00;

v) For the redecoration works, 2 weeks, therefore £288.00; and

vi) Therefore, all totalling £1,152.00 rounded up to £1,160.00.

Reasonableness

[610] There was no difficulty in accepting that the pursuer had necessarily required to travel to carry out the remedial works. A reasonable basis for such a calculation would require the utilisation of similar reduced time scales as for painting.

[611] While the sum of £25.00 per hour is considered objectively reasonable to compensate the pursuer for his loss of time in performing the joinery and redecoration works, it is not so for his travel time. A charge of half the otherwise appropriate rate is commonly compensated and therefore £12.50 per hour is considered a reasonable rate for this purpose.

[612] As a matter of fairness to the defender, the journey period of 1 hour also appears excessive for the distance claimed recognising that the national rural speed limit is 60 miles per hour. While some travel may be in areas with a reduced speed limit, in the absence of specific evidence that such was so, as a matter of fairness to the defender, a journey time between the property and the pursuer's home of 40 minutes appears to be more objectively reasonable.

[613] Reasonable compensation for the travel related to the joinery works is £500.00, being 40 hours (80 minutes x 5 days x 6 weeks) x £12.50.

[614] The objectively reasonable sum of £852.30 for removing the joinery work was based on a quote from Profound, which *prima facie* must be deemed to have also included their travel time and mileage costs. For this element of the claim no such travel costs should therefore be allowed.

[615] In respect of the reinstallation of the joinery works, such was based on compensating the pursuer for his time based on his actual time and therefore it is objectively reasonable to allow for compensation for his related travel time in this respect.

[616] The sum considered as reasonable compensation for the reinstallation joinery works was £2,016.67. This is at or about twice the reasonable compensation for the removal joinery works (£852.30).

[617] Applying the broad ratio of these two figures (two thirds/one third) to the total travel compensation for the joinery works of £500.00 *supra*, a reasonable sum to compensate for travel time related solely to the reinstallation joinery works would be £333.00 (Two thirds of £500.00).

[618] Reasonable compensation for the travel time relating to the redecoration works is £125.00, being 10 hours (80 minutes x 5 days x 1.5 weeks) x £12.50.

[619] Reasonable mileage charges for the reinstallation joinery works are, using the same formula, 1,920 miles (2 journeys x 5 days x 6 weeks x 32 miles) x £0.45 (being recognised by HMRC as reasonable recompose to employees), again reduced by one third, to £576.00.

[620] Reasonable mileage charges for the redecoration works are, using the same formula, £216.00 (480 miles (2 journeys x 5 days x 1.5 weeks x 32 miles) x £0.45).

***Other time lost***

*Evidence*

[621] The pursuer indicated that he had spent "a lot of time talking with the defender," with experts and his lawyers losing "time working and earning." While "difficult to say" the pursuer estimated he had spent "administrative time and all the further extra travelling from his home to the property for a minimum of 80 hours". For such administrative time the pursuer sought to be recompensed at a rate of £25.00 per hour, totalling £2,000.00. The sum sought in crave 2 is £2,400.00.

[622] Latterly the pursuer's spouse was doing a lot of the communications, as he felt he had better step back because he thought the defender might be more sympathetic to a woman. He also had to get his insurance company to help him pursue the defender.

[623] The pursuer stated that he was offered and had turned down other work as he had been involved with the carrying out not only the remedial works but the administration relating thereto, but he had not produced any record of this.

*Pursuer's position*

[624] This sum is reasonable estimate of the pursuer's loss in this respect.

*Defender's position*

[625] None of the claimed for time is detailed or vouched.

*Analysis and conclusion*

Necessity

[626] The pursuer will have necessarily spent some time in administering the rectification of the defender's breach of contract.

Foreseeability

[627] Equally, it would plainly have been in the contemplation of parties that in the event of a breach of contract the wronged party would require to dedicate time to such administration.

Vouching

[628] However, there was a complete dearth of vouching for this head of claim. Unlike other heads of claim there was no comparative check to vouch the claims of the pursuer as to time spent on a particular issue. The only vouching was the various limited correspondence produced and referred to. There would have been administrative time in rectifying the defender's breach of contract but to assess such beyond the terms of such correspondence becomes guesswork, as opposed to the broad axe previously employed.

[629] In the absence of details of the timings of all correspondence, telephone calls, meetings and travel, this head of claim is insufficiently vouched other than to support a relatively nominal sum of £100.00 as compensation, exercising judicial discretion broadly, being for 4 hours (at £25.00 per hour) being a reasonable estimate of the specific lost time in entering into the various communications referred to. This is deliberately minimal as it relies only on the documentation lodged.

[630] If such time was in fact very considerably more, the defender's lack of full and proper specification of the same, preventing any greater sum being considered as reasonable, is something that only he can take responsibility for, having not proved the same.

Reasonableness

[631] A moderate and minimal sum is all that has been proved. Applying a broad axe, a reasonable estimate for the correspondence is £100.00.

[632] There appeared to be no reason why this is contained in a separate crave. There are also no pleas in law to support crave 2. As such evidence was lead without objection, is

referred to on record, such sum has simply been included in the assessment of damages in the crave 1, with crave 2 being dismissed as unnecessary.

**Set Off/Counterclaim**

***Evidence***

[633] The pursuer made no mention of retaining the contract price because he had not received a guarantee, and this was only raised in submissions.

[634] Mr Gribben's position was that the sums that the pursuer would have paid the defender required to be set off against any sums which are found to be due by the defender to the pursuer.

*Pursuer's position*

[635] The pursuer endeavoured to suggest that the defender was not entitled to set off the contract price against the pursuer's losses. This was on the basis that the defender was and remained in material breach of contract, by having failed to issue a guarantee to the pursuer.

[636] The pursuer submitted under reference to *The Law of Contract in Scotland*, paras 20-48 to 20-60 *infra*, referring to *Graham* v *United Turkey Red Co Ltd, infra,* and *Turnbull* v *McLean & Co supra,* that the defender may not insist on payment under the mutuality principle where there remains a material breach of contract.

*Defender's position*

[637] The principal position of the defender was that as the defender had not been in material breach of contract, no sums were due to the pursuer. It was the pursuer who was due to make payment of the contract price to the defender in terms of the counterclaim.

[638] It was initially submitted that if the defender were found to be liable to the pursuer for any sums more than the contract price, decree in terms of the counterclaim was the "proper way" to allow a deduction of this amount from the quantification of any damages. However, in verbal submissions it was accepted that in those circumstances the contract price simply required to be deducted from the pursuer's damages claim in assessing the pursuer's actual loss, and that in those circumstances the pursuer would simply be assoilzied from the first crave in the counterclaim.

[639] As regards the pursuer's submissions that the defender remained in breach of contract by having failed to produce a guarantee, and that the defender was therefore not entitled to set off the contract price, there is no Record for any such an argument and as such the same should not be considered.

*Analysis and conclusion*

[640] In *Hoenig* v *Issacs* [1952] 2 All ER 176 CA Lord Justice Denning at p181, para A stated:

> "It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach does go to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross-claim for the defects and omissions, or, alternatively, set them up in diminution of the price. The measure is the amount which the work is worth less by reason of the defects and omissions, and is usually calculated by the cost of making them good."

[641] The pursuer was accordingly entitled to refuse to pay the contract price to the defender.

[642] In W McBryde, *The Law of Contract in Scotland*, *infra*, at p558, para 20-48, the learned author states:

> "A party who is in breach cannot enforce performance by the other party …

[643] In *Turnbull* v *McLean, supra*, Lord Justice Clerk Moncrieff stated:

> ''… that a failure to perform any material or substantial part of the contract on the part of one will prevent him from suing the other for performance."

[644] In *Graham* v *United Turkey Red Co Ltd* 1922 SC 533 a case dealing with whether an agent in default can demand an accounting after such default, Lord Justice Clerk Dickson at p541-2 states in quoting Erskine:

> "No party in a mutual contract, where the obligations on the parties are the causes of one another, can demand performance from the other, if he himself either cannot or will not perform the counterpart, for the mutual obligations are considered as conditional … If the deviations are material and substantial, then the mere fact that the house is built would not prevent the proprietor of the ground from rejecting it and calling on the contractor to remove it, and he might do so if not barred by conduct from insisting in his right. If this right were so insisted in, then the contractor would of course have right to the materials, but he would have no right to payment. If, on the other hand, the proprietor made the best of it and let the house stay, the only claim which the contractor could have would be a claim of recompense …"

[645] The pursuer seeks to rely on this general principle to support a submission that as the defender remains in breach of contract by not having produced a guarantee, they are not entitled to payment of or credit for the contract price when the pursuer's loss is calculated. Despite a brief reference to such a guarantee being issued in a post contract e-mail between the parties, the absence of anything in the Record to support any such submission is fatal to any findings being made in this respect.

[646] In any event, there was no evidence that the defender was unwilling or unable to guarantee the entire works as rectified. There was no specific contractual provision for the physical guarantee to be provided by the defender to the pursuer.

[647] While the defender does indicate post-installation of the anhydrite in the e-mail exchange of 15 August 2014 that they will "sort out a guarantee", there is no specification of

what period that would be for and now more than 10 years having since elapsed, the terms of such e-mail are so inspecific in respect of the term of any guarantee, as to be unenforceable, for even if a reasonable time was implied, there was no evidence of what that might be.

[648] Any measure of damages for a failure to provide such a guarantee would, in any event, not be retention of the entire contract sum, but the cost of obtaining such a guarantee or relative insurance, or where costs have been incurred which would have been covered by such a guarantee, the amount of the same.

[649] If the defender is in breach of the parties' contract, as they are, then the defender properly seeks merely to deduct the contract price from any proved losses which the pursuer has had, to properly calculate the actual loss to the pursuer.

[650] Accordingly, as the defender has been found liable to make payment to the pursuer for a sum more than the contract price, the contract price of £4,500.72 requires to be set off against such damages, so as to determine the pursuer's actual loss, and the pursuer requires to be assoilzied from the first crave in the counterclaim.

**Interest**

***Pursuer's position***

[651] The pursuer claims interest at the judicial rate of 8% from 18 August 2014 in respect of crave one for general damages and 8 per cent per annum from the date of citation, that being 3 April 2019, in respect of crave 2 for essentially administrative time lost.

***Defender's position***

[652] The basis for interest is presumably the Interest on Damages (Scotland) Acts 1958 and 1971.

[653] The defender submits that on no view can interest be due from 18 August 2014. The facts do not support such an award. The problems that have arisen arose from remedial work which was carried out in September 2015. The pursuer's own evidence is that the work carried out by Foggs was not quoted for until June 2018. The pursuer lodged on the second day of proof, the invoice said to have been paid to Foggs. The pursuer had to be recalled to depone that he in fact paid this invoice in August 2018. In these circumstances, the defender submitted that any claim for interest cannot precede the date of citation, that being 3 April 2019.

[654] Since the claim is for interest on damages, the rate of interest should be limited to 4% for the same reason as in *Incremental Group Ltd* at [201], that being the until recently considerably lower interest rates.

***Analysis and conclusion***

[655] In Incremental Group Ltd v HiETA Technologies Ltd [2021] CSOH 13 at [201] it was stated:

> "Under reference to *Farstad Supply AS* v *Enviroco Ltd* 2013 SC 302, the solicitor advocate for the defender invited me to exercise discretion on the judicial rate of interest. He submitted that the date of citation [on] 11 March 2020, the Bank of England base rate was 0.75%. It was then reduced to 0.25%. On 19 March 2020 the rate was reduced to 0.1%. He submitted that rather than the judicial rate of 8% a rate of no more than 4% should be applied. Counsel for the pursuer accepted that Farstad applies. In my opinion an award of interest at 8% per year will substantially overcompensate the pursuer. I shall award interest at the rate of 4% per year".

[656] In *Farstad Supply AS* v *Enviroco Ltd, supra,* in the opinion of the court at para [30] it was stated:

> "Given that the Lord Ordinary was faced with a disputed question of the allowance of interest on a substantial principal sum, which had been outstanding for many years, we have ultimately come to the conclusion that his decision to have regard to the collapse in interest rates following the financial crisis cannot be to be an irrelevant factor to the overall exercise of his discretion within the ambit of existing practice".

[657] The legal basis for the pursuer's claim to interest is the Interest on Damages (Scotland) Acts 1958 and 1971. Interest in crave 1 is sought from the 18 August 2014. The defender is correct that the facts do not support such an award. The Foggs invoice of £5,750.00 was paid on 20 August 2018. The contract price falls to be set off against sums then due, meaning that the pursuer would have at that date been entitled to £845.10 (for the removal joinery works) and £5,750.00 (for the Foggs invoice) less £4,500.72 (for the contract price) *viz*. £2,094.38. In these circumstances, it is objectively reasonable to award interest on the sum of £2,094.38 from 20 August 2018.

[658] It not having been proved when precisely the reinstallation joinery works or redecoration works were carried out interest can reasonably only be awarded on the remaining £5,026.47 due to the pursuer from the date of citation, that being 3 April 2019.

[659] Again, in the exercise of judicial discretion, standing the historically lower interest rates set by the Bank of England, a rate of 4% interest on all sums is reasonable as submitted by counsel for the defender. While interest rates may currently be marginally greater, such requires to be balanced against the considerably lower prevailing interest rates in the period prior to 2021.

**Disposal**

[660] Accordingly, in the substantive cause the defender is found liable to make payment to the pursuer in the sum of £7,120.85 as first craved, with interest from 20 August 2018 on that part of such sum amounting to £2,094.38 and from 3 April 2019 in respect of the remaining part of such sum amounting to £5,026.47, both at the rate of 4% per annum; the pursuer's second crave is dismissed as unnecessary; and the pursuer is assoilzied from the first crave in the counterclaim

**Expenses**

[661] A hearing has been assigned to determine the issue of expenses. If parties can agree this issue, they should advise the clerk of court, and the matter can be dealt with administratively.

JAM

Perth, 25 October 2024

Having considered the submissions and latterly written correspondence from parties, in respect that expenses are now agreed, discharges the Hearing on Expenses previously assigned for 25 October 2024 at 09:30am within Perth Sheriff Court, and;

(One) In so far as the same have not already been determined in the cause, Finds the defender liable to the pursuer in the expenses of the cause, subject to;

(1) In terms of paragraphs 5(a) of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993, to reflect the divided

success of the parties, the fees authorised by the Table of Fees shall be subject to modification, by a reduction of 15%;

(2) In terms of paragraphs 5(b)(i) and (ii) of the said Act of Sederunt, taking account of:

(i) The complexity of the cause and the number, difficulty and novelty of the questions raised, and

(ii) The skill, time and labour, and specialised knowledge required, of the pursuer's solicitor;

Allows a 30% increase in the fees authorised by the Table of Fees, to cover the responsibility of the pursuer's solicitor in the conduct of the cause;

(Two) In terms of paragraph 9 of the Act of Sederunt (Fees of Witnesses and Shorthand Writers in the Sheriff Court) 1992, Certifies that it was necessary to employ Dr John Ashworth and Mr Greig Adams as skilled persons to make investigations prior to proof in order to qualify them to give evidence, and Directs that charges therefore, and for their attendance at proof, shall be allowed in addition to the ordinary witness fees of such persons, at such rates which the Auditor of Court in their discretion shall determine is fair and reasonable; and

(Three) Allows an account thereof to be given in and remits same, when lodged, to the Auditor of Court to tax and to report.