
SCOTLAND / JUDGMENT

Gregor Homes Ltd v. Emlick [2011] ScotSC 9 (11 January 2011)

[2011] ScotSC 9

COURT

Scottish Sheriff Court Decisions

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

[
Home
]
[
Databases
]
[
World Law
]
[
Multidatabase Search
]
[
Help
]
[
Feedback
]
[
DONATE
]
Scottish Sheriff Court Decisions

You are here:

BAILII
>>
Databases
>>
Scottish Sheriff Court Decisions
>>
Gregor Homes Ltd v. Emlick [2011] ScotSC 9 (11 January 2011)

URL: <https://www.bailii.org/scot/cases/ScotSC/2011/9.html>

Cite as: [2011] ScotSC 9,
2012 SLT (Sh Ct) 5,
2011 GWD 8-193
[
New search
]
[
Help
]
SHERIFFDOM OF
LOTHIAN
AND
BORDERS AT
EDINBURGH
A1523/09

JUDGEMENT

of SHERIFF WILLIAM HOLLIGAN in the cause GREGOR HOMES LIMITED, a company incorporated under the Companies Acts with a company registration number SC205102 and having its registered office at 112 Commercial Street, Edinburgh, EH6 6NF Pursuers against MARK ANTHONY EMLICK, residing at 22 Sunbury Street, Belford Lodge, Edinburgh Defender Act: Clark QC , McBrearty, Morton Fraser Alt: Howlin QC, O'Brien, Burness Edinburgh th January 2011 The sheriff having resumed consideration of the cause Finds in Fact :-

- [1] The pursuers are engaged in the development and sale of dwelling houses. They were previously known as Mansecourt Limited. They have their registered office at 112 Commercial Street , Edinburgh . Their company registration number is SC205102.
- [2] The defender is a business man. He is Chief Executive of Consensus Capital. He resides at 22 Sunbury Street , Edinburgh .
- [3] By missives dated 12 th May 2006 and 9 th and 13 th November 2006; 31 st January 2007, 7 th February 2007 (2); and 1 st and 8 th May 2008 and 13 th and 19 th August 2008 ("the missives") the pursuers agreed to undertake certain works and to sell to the defender subjects known as plots 5, 8 and 9 Belford Lodge, Sunbury Street, Edinburgh ("the property") all at a price in excess of £3 million or thereby.
- [4] Manus Gregor is the sole director of the pursuers. Gregor Properties Limited were the main contractor for the development of the property. They were the agents of the pursuers. Until the end of October 2008 or thereby Christopher Beasley was employed by the pursuers as a commercial manager. At all material times James Whitworth was employed by the pursuers as a project manager. At all material times Fraser Swalwell was employed by WYG Planning and Design (formerly Farningham McCreadie) as an architectural assistant.

- [5] Ross Kennedy is a solicitor. He is a partner of Warners, a firm of solicitors.
- [6] Clause 3 of the missive letter of st May 2008 contained a mechanism for determining the date of entry to the property.
- [7] Clause 5 of the missive letter of st May 2008 contained a mechanism for resolving disputes including those as to the standard of workmanship.
- [8] The missives, inter alia , provided that plots 5, 8 and 9 should be combined into one property to be completed to the standard of a luxury home.
- [9] At all material times the defender was a director, and had control, of Belgrave Scotland Limited ("Belgrave").
- [10] At all material times Scott Rutherford was employed by Belgrave. His job description was project manager. He was the defender's project manager in relation to the property. He was also the defender's project manager in relation to properties at Dick Place and Grange Loan, Edinburgh. Scott Rutherford was appointed by the defender to represent his interests during the construction of the property.
- [11] From time to time decisions as to work and materials required to be made in relation to the property.
- [12] The defender was often absent from the United Kingdom . During 2008 he was resident in Dubai .
- [13] In or about November 2007 Mr Beasley wanted to know what authority Mr Rutherford had to make decisions and to authorise things to be done on or at the property on behalf of the defender.
- [14] Mr Beasley asked Mr Gregor to obtain from the defender confirmation as to the authority of Mr Rutherford.
- [15] Mr Gregor spoke to the defender who confirmed that Mr Rutherford had certain authority to act on his behalf. By email dated th November 2007 (5/5), the defender confirmed to Mr Gregor that Mr Rutherford was authorised to instruct the pursuers on the defender's behalf in relation to alterations/variatio
- [16] During the currency of the works on the property, acting on behalf of the defender, Mr Rutherford regularly spoke, and gave instructions, to employees and agents of the pursuers and others in relation to work done or to be done on the property.
- [17] As a project manager Mr Rutherford undertook work for the defender including dealing with planning permission, building warrants and dealing with contractors.
- [18] By September 2008 the pursuers were satisfied that the property was practically complete.

- [19] By email dated th September 2008 (5/12) Mr Beasley asked the pursuers' agents to notify the defender of the pursuers' request to inspect the property with a view to obtaining practical completion. The defender saw and read the email. The email was notice pursuant to clause 3.1 of the missives.
- [20] On or before th September 2008 Ross Kennedy spoke to Mr Rutherford as to the meeting proposed by the pursuers.
- [21] Mr Kennedy sent Mr Rutherford a copy of the missives by email dated th September 2008 (5/77). A copy of that email was also sent to the defender.
- [22] Mr Kennedy recommended the attendance of a building surveyor at the meeting. Mr Kennedy told Mr Rutherford what Mr Rutherford needed to know about the missives. Mr Rutherford knew the procedure to be followed by the defender if he was to avoid deemed acceptance of practical completion.
- [23] The defender knew of the pursuer's proposal to have a meeting on rd October 2008 in relation to practical completion.
- [24] By email dated th September 2008 (5/13) Mr Kennedy told the pursuers' solicitor, Mr Hunter, that Mr Rutherford would attend the inspection meeting to determine if practical completion should take place in terms of the missives.
- [25] 5/13 was copied to Mr Rutherford and the defender. Mr Rutherford read the email. The defender read the email.
- [26] By that time certificates from Zurich Insurance and the local authority had been produced.
- [27] A meeting on site took place at the property on th October 2008 attended by the defender, Mr Gregor, Mr Beasley and Mr Rutherford. To the knowledge of the defender and Mr Rutherford, the purpose of the meeting was to determine whether practical completion could take place.
- [28] Practical completion was not determined at that meeting. It was agreed that there should be a further formal meeting.
- [29] The defender said he was generally happy with the property.
- [30] By email dated th October 2008 (5/14) the pursuers notified their lenders, The Royal Bank of Scotland plc, of the outcome of meeting.
- [31] A further meeting took place at the property on th October 2008 . Mr Rutherford was present. The defender was not present. Mr Rutherford represented the defender. Mr Rutherford decided that practical completion had not taken place.
- [32] Scott Stevens, building surveyor, was present on th October 2008 . He was present on behalf of the defender. Scott Stevens was asked to provide a list of items requiring completion.

- [33] Mr Rutherford spoke to Mr Kennedy following the meeting on th October 2008 . Mr Rutherford told Mr Kennedy that practical completion had not taken place.
- [34] By email dated th October 2008 (5/15) Mr Kennedy told Mr Hunter that the defender did not accept that practical completion had taken place and that Scott Stevens of Savills would prepare a list of items to be done. The email also told Mr Rutherford that a statement in relation to items to be done needed to be sent within 5 working days of the next inspection.
- [35] Scott Stevens declined to provide a list of snagging items for the property because he did not consider he was sufficiently familiar with the property to do so.
- [36] The emails of 10 th and th October between Scott Stevens and Mr Kennedy were copied to Mr Rutherford and the defender. The email from Mr Kennedy states inter alia that the defender has five days within which to object to practical completion or practical completion will be deemed to have been accepted. (5/76/1)
- [37] A further meeting was arranged for th October . The meeting did not take place.
- [38] By email dated th October 2008 (5/16) Mr Beasley asked the defender to arrange for Mr Rutherford to contact Mr Beasley to rearrange a final practical completion meeting.
- [39] The defender did contact Mr Rutherford and a meeting was arranged to take place on th October 2008 at 2pm at the property. The meeting took place on th October 2008 . Mr Beasley, Mr Whitworth, Mr Rutherford and Mr Smalwell were in attendance.
- [40] Mr Swalwell attended on behalf of the defender. Mr Rutherford attended the meeting as a representative of the defender and with his authority.
- [41] Pursuant to clause 3 of the missives a certificate of practical completion dated 20th October 2008 (5/74) was issued on behalf of the pursuers at or about the time of the meeting.
- [42] The pursuers accepted that certain works required to be completed and annexed a list thereof to the certificate of practical completion.
- [43] The pursuers undertook to complete the foregoing works within 14 days of th October 2008 .
- [44] During the meeting those present made a tour of the property.
- [45] As requested by Mr Rutherford, Mr Smalwell made a list of items he considered required to be done.
- [46] Mr Smalwell sent a note of his list of items to be done by letter dated st October 2008 (5/72).
- [47] Mr Rutherford received a copy of the certificate of practical completion at or shortly after the meeting on 20 th October. By email dated st October 2008 , acting as the representative of the defender, Mr Rutherford sent Mr Kennedy a note of the work which needed to be completed on the property (5/76/6).

- [48] By letter dated 1st October 2008 the agents for the pursuers wrote to the defender's agent confirming that a certificate of practical completion had been issued and that the date of entry would be 18th October (5/18).
- [49] By email dated 1st October 2008 (5/76/4) Mr Kennedy sent to the defender and Mr Rutherford a copy of the letter from the pursuers' agents and confirmed that the defender required to send a list of incomplete matters to the pursuers' agents within 5 days.
- [50] By email dated 1st October 2008 (5/76/5) headed "Re Belford - Fax from VMH re practical completion" the defender asked Mr Kennedy to ring him because he needed to know where he stood.
- [51] On the instructions of the defender, by letter dated 24th October 2008 (6/12) Mr Kennedy sent a letter to the pursuers' agents pursuant to clause 3.2 of the missives, inter alia, disputing that practical completion had occurred and that work set out in documents annexed to the letter required to be carried out in order to achieve practical completion.
- [52] By letter dated 1st October 2008 (6/9) the agents for the pursuers purported to reject the foregoing letter from the defender's agents and set out their reasons why.
- [53] A further meeting took place at the property between Mr Whitworth and Mr Rutherford on 11th November 2008. Mr Rutherford attended the meeting as the representative of the defender. He had the defender's authority to agree that practical completion had taken place.
- [54] Mr Whitworth prepared a letter on letter paper headed "Gregor Properties Limited" relating to practical completion.
- [55] Mr Whitworth and Mr Rutherford went around the property.
- [56] Mr Rutherford was satisfied that the works detailed as at 18th October 2008 had been completed by the pursuers. The work specified in the certificate of practical completion had been completed by the pursuers.
- [57] Mr Rutherford and Mr Whitworth signed the document dated 13th and 14th November 2008 stating that practical completion can now be issued (5/6).
- [58] At the request of the defender Mr Gregor met with the defender at the defender's apartment in Dubai on 11th November 2008. The defender intended to tell Mr Gregor that the defender did not have the funds with which to settle the transaction.
- [59] The defender did not tell Mr Gregor in advance what specific matters the defender wanted to discuss at the meeting. Mr Gregor had documents relating to the property with him, including a copy of 5/6.
- [60] Mr Gregor and the defender discussed the costs of certain works relating to the property.

- [61] The defender told Mr Gregor that the defender was unable to settle the transaction because the sale of another property upon which he was relying for finance had fallen through.
- [62] The defender proposed that, in return for taking title to the property, he would pay the pursuers £1.5 million; the balance to be paid within 24 months; interest would be paid on the balance at 2% above base rate; the defender would provide security for the balance by way of property in Dubai.
- [63] Mr Gregor told the defender he required the defender to put this proposal in writing to him and that he would require to consult the pursuers' bankers.
- [64] By email dated 18 th November 2008, as instructed by the defender, Mr Kennedy put a proposal to the pursuers' agents in terms put by the defender to Mr Gregor at the meeting (5/20).
- [65] The pursuers' bankers and the pursuers refused to accept the proposal, principally because the alternative security in Dubai was not acceptable to them.
- [66] Mr Gregor and the defender continued to discuss resolution of the matter but without success. By letter dated nd December (5/8) agents acting for the pursuers issued an ultimatum to the defender requiring him to settle the transaction.
- [67] By letter dated th January 2009 (5/9) agents for the pursuers rescinded the missives.
- [68] The property was remarketed by the pursuers. The defender offered to purchase the property for £1.6 million, later £1.8 million, on condition that the pursuers drop all claims against him. The pursuers refused to accept the offer.
- [69] The property was sold by the pursuers to a Mr Hogg at a price of £1.7 million.
- [70] Shortly thereafter, Mr Hogg transferred his interest in the property to the defender.
- [71] At no time has either party invoked the dispute resolution procedure pursuant to clause 5 of the missives. Finds in Fact and Law:- That the date of entry in respect of the missives for the property was st November 2008 . That the defender is in breach of his obligations in terms of the missives in respect that he failed to make payment of the purchase price on or after the date of entry. THEREFORE, on the motion of both parties, assigns 26 th January 2011 at 10 30am at the Sheriff Court, 27 Chambers Street, Edinburgh, as a diet to determine further procedure and meantime reserves all questions of expenses.

Introduction

- [1] The pursuers are engaged in the development and sale of dwelling houses. They were previously known as Mansecourt Limited. The defender is a business man. He is now chief executive of Consensus Capital. This action concerns missives relating to heritable subjects known as 5, 8 and 9 Belford Lodge, Sunbury Street , Edinburgh ("the property").

- [2] The missives comprise formal letters dated 12 th May and 9 th and 13 th November, all 2006, in respect of plots 8 and 9; 31 st January and two letters dated 7 th February, all 2007, in respect of plot 5; and in respect of all plots, letters dated 1 st and 8 th May, 13 th and 19 th August all 2008 (which together I shall refer to as "the missives"). The purchase price for plots 8 and 9 was £1,321,500. The defender paid a non-refundable deposit of £20,000. The purchase price for plot 5 was £750,000. A further non-refundable deposit was paid. It was agreed that the three plots should be consolidated into one townhouse which required amendment to the design and layout of the building. The missive letters of 2008 provided for the amendment of the earlier missives to include a quantity of works including what was described as "specific works" to be carried out in accordance with a schedule attached to the missives. The value of the specific works was set at £950, 836. The total sum was thus a figure in excess of £3 million. From the evidence of Mr Gregor (pages 5-6) Gregor Properties Limited was the main contractor for the development and the agent of the pursuers who were the heritable proprietors of the property. It was not clear to me from the evidence whether the majority shareholding in Gregor Properties Limited was held by Mr Gregor himself or by the pursuers but I do not regard it as being of importance.
- [3] The proof which I heard in this matter concerns the averments of the parties set out in paragraphs 1 to 6 of the record only. Rather than prescribing a fixed date, the missives contain a mechanism for establishing a date of entry. The mechanism relates to what is described as "practical completion". In short, the pursuers say that they achieved practical completion and that a person they say was the agent of the defender, Scott Rutherford, agreed that practical completion had occurred. The defender denies that practical completion was achieved and that Mr Rutherford had any authority to agree that practical completion had been achieved. He also puts forward other reasons why he denies that he has any liability pursuant to the missives. The pursuers seek declarator in terms of the first two craves of the initial writ that the relevant date of entry was 21 st November 2008 and that the defender is in breach of his obligations in failing to make payment of the purchase price on or after the date of entry.
- [4] I heard evidence from seven witnesses: for the pursuers, Christopher Beasley; James Whitworth; Manus Gregor; and Fraser Swalwell; for the defender, the defender himself; Scott Rutherford; and Ross Kennedy. Mr Beasley was employed by the pursuers as Commercial Manager. He left that employment towards the end of October 2008. Mr Whitworth was employed by the pursuers as a project manager, and in particular, in relation to the development of the property. Mr Gregor is the sole director of the pursuers. Mr Swalwell is employed as an architectural assistant by WYG Planning and Design. He was employed by Farningham McCreadie prior to them being taken over by WYG Planning and Design. I will turn to the status of Mr Rutherford later. Mr Kennedy is a solicitor and a partner in the firm of Messrs Warners, solicitors. The Evidence

- [5] Put broadly, saving issues of interpretation, the principal documents were not in dispute. Before I comment on the individual witnesses, I need to address Mr Howlin's criticism of the way in which evidence was led from certain of the witnesses. Put shortly, he submitted that certain witnesses were led by reference to the documents put to them without any explanation as to what the words in the documents meant. In some cases all they did was to assent to what was in the document. I have to say that it did seem to me that there was tendency by both counsel to rely heavily on the documents rather than on what the witnesses had to say of the document and the surrounding circumstances. If it is a valid criticism then I have to say it seems to me that it applies in both directions. I have reached my conclusions on the basis of the evidence I did hear and the relevant documents. In relation to the witnesses I have no difficulty in accepting Mr Beasley as a credible and reliable witness. His evidence was given in a straightforward manner. Although Mr Whitworth struck me from time to time as being a little relaxed in his attention to detail I can accept his evidence on crucial matters as credible and reliable. I have no difficulty in accepting Mr Smalwell. His evidence was not challenged. I also accept Mr Kennedy as a credible and reliable witness doing his best to assist the court. Indeed I go as far as to say he struck me as a careful and prudent practitioner. Where there is a conflict between his evidence and the evidence of other witnesses for the defender I prefer that of Mr Kennedy. I have carefully considered the evidence of Mr Gregor and the way in which he gave his evidence in the witness box. I have come to the conclusion that I accept him as a credible and reliable witness. In relation to the defender there are parts of his evidence consistent with other evidence which I can accept but for reasons which I shall later explain I am unable to accept him as being an entirely credible and reliable witness. As for Mr Rutherford, I find it difficult to accept his evidence unless supported by other evidence in the case. I say that on the basis of his demeanour in the witness box and what follows. Even allowing for the abscess from which he was suffering, he presented as an uncomfortable witness.
- [6] It is clear from the evidence, and was undisputed, that the work on the property involved the expenditure of considerable sums of money and the installation of items well above what might be described as standard. Although the key facts occurred during the period between September and November 2008 there are certain matters of importance which predate that period. The decision to merge the plots into one property meant that substantial work had to be done. Exactly when these works began is not clear from the evidence but I do not think it is of importance. Those parts of the missives specifying the extent of the works were introduced in May 2008. It appears from the evidence that work was being done in 2007. It was the understanding of Mr Beasley, Mr Whitworth and Mr Gregor that the defender was living in Dubai at the material time and was thus not personally available to make day-to-day decisions about the works. Mr Rutherford said that the defender was resident either in Dubai or some other venue (page

- 260) but he did not dispute the defender was absent abroad at the material time. I did not understand the defender to dispute his absence abroad (page 222D and 225E) Both Mr Beasley and Mr Whitworth said that, on a day-to-day basis, they spoke to, and received decisions from, Mr Rutherford as to various works which needed to be done to the property. 5/29/61 , 62, 64 and 65 are examples of "specification confirmation sheets", spoken to in evidence, describing Mr Rutherford as the "source of instruction" and signed by him.
- [7] 5/5 of process contains two emails exchanged between the defender and Mr Gregor. Paragraph 1 of the email dated 13 November 2007 from the defender to Mr Gregor is as follows:- "Following our telephone discussions I write to confirm that Scott Rutherford is authorised on my behalf to instruct you on the alterations/variations for the works on my apartment." The email exchange came about because Mr Beasley was concerned as to the authority which Mr Rutherford had to give instructions for works to be done. Mr Beasley asked Mr Gregor to take the matter up with the defender. Mr Gregor's evidence was to the effect that he did this both on the telephone and by email. It was Mr Gregor's understanding the defender confirmed that Mr Rutherford had authority to act on the defender's behalf and told Mr Beasley and Mr Whitworth accordingly. The defender did not dispute the authority of Mr Rutherford pursuant, but limited to, the email (page 164E). Mr Rutherford was employed by Belgrave Scotland Limited ("Belgrave") a company owned by the defender. It was put to Mr Rutherford that he was employed by Belgrave as "Project Manager". 5/30/5 is a document in which he is so described on at least two occasions. When this was put to him I detected only a grudging acceptance that he was so described (page 332B). Mr Rutherford explained the title of project manager on the basis that he was "not a professional project manager" (page 332C). The defender accepted the description of Mr Rutherford as "project manager" and that Mr Rutherford was assisting in the managing of the project at the property (page 178B-C). Then there is the evidence of Mr Kennedy. Mr Kennedy knew of Mr Rutherford from other dealings Mr Kennedy had had with the defender. He described Mr Rutherford as being "the technical person" working for the defender dealing with such things as planning permission, building warrants and contractors (page 440C). It did not surprise Mr Kennedy that there was evidence to the effect that Mr Rutherford was on site, having discussions with people, being asked about variations and seeking and giving instructions (page 441A). Mr Rutherford accepted that he was employed by the defender as his project manager in relation to projects at Dick Place and Grange Loan (page 335C-D). Mr Beasley's state of mind was that Mr Rutherford was the project manager for the defender (see his email dated th October 2008 (5/14) to the Royal Bank of Scotland plc). Mr Clark relied on the issue of project manager as an adminicle of evidence as to Mr Rutherford's authority, rather than as evidence of reliance by the pursuers upon the description of Mr Rutherford as project manager as such. There was a suggestion that Mr Rutherford regularly sought instructions from the defender by telephone and had to exit the property to speak to the defender because he was having difficulty in obtaining a mobile phone signal at Belford Road . The evidence on this was vague. It is not of such a quality and quantity to lead me to the conclusion that Mr Rutherford constantly sought instructions from the defender or to

displace the evidence of the pursuers' witnesses as to their dealings with Mr Rutherford. There is also some evidence from Mr Gregor that, on one occasion, he spoke to the defender personally in relation to the painting of a staircase because he was unhappy with the view expressed by Mr Rutherford (page 63C) as to the work to be done on the staircase. I do not regard this single event as being of significance. I conclude that Mr Rutherford was the defender's project manager, inter alia, in relation to the property.

- [8] By email dated 19th September 2008 (5/12) Mr Beasley notified Mr Hunter, the solicitor for the pursuers, and a partner of VMH, as to the pursuers' position on practical completion saying:- "In accordance with the missive agreements, detailed within Warners letter dated 01 May 2008, please notify Mark Emlick via Warners that we intend to inspect the property with a view to obtaining practical completion on Friday 3rd October 2008. [] notice is therefore the ten working days notice as defined within the agreement." The email was copied to Mr Gregor, Mr Whitworth and Mr Rutherford. Mr Beasley was clear in his mind that the property was practically complete. The pursuers were keen to settle and obtain the purchase price. Mr Rutherford said that, although the email was copied to him, he did not open it (pages 268E and 342C). The reference in the email to "ten working days" is a reference to the provisions of clause 3 of the missives. The defender accepted that he had seen and read the email (page 167A) but he said it was his understanding of the email that the meeting was one of several and that the purpose of the meeting was to deal with the progress of the works (page 167/8). I shall return to the status of this email later.
- [9] The next piece of evidence is an email from Mr Kennedy to Mr Rutherford dated 19th September 2008 (5/77) and timed at 14:45. The email says:- "Subject: Belford - Inspection meeting 3 October... Scott
- as discussed here are copies of the missives with the schedule of works and the missive sets out the procedure for the inspection and buyer notifying defects (must be done immediately otherwise you are deemed to accept) - makes sense to get a building surveyor to come with you to the meeting to make up a report of matters needed to be done so it's seen as impartial. Have told developers lawyers that you can't do Friday 3 October and instead should be Monday and that you will speak to them to organise." Mr Kennedy was clear in his evidence that, as the email says, he spoke to Mr Rutherford (page 482B). It is also clear that Mr Kennedy sent to Mr Rutherford a copy of the missives because the missives set out the standard against which the works were to be measured. Mr Kennedy told Mr Rutherford what he needed to know about the missives (page 486E) which I took to include the issue of the achievement and consequences of practical completion. Mr Kennedy said that he advised Mr Rutherford to have a surveyor with him (page 487A). Mr Kennedy also confirmed he had sent a copy of his email to Mr Rutherford to the defender. Mr Rutherford's evidence as to whether he opened his email and read it is that he was not sure (page 353A-B) but seemed to think he had not seen it (page 353D). He was also clear he had no interest in the missives and did not read them (page 356A-B). He seemed to think that he had been contacted by phone by the defender's personal assistant Julia Wallace about the property

being inspected and that there should be someone with him to inspect the property (page 357B-D). When asked about that part of the email which refers to him being unavailable on rd October 2008 to attend a meeting, Mr Rutherford thought it did "not necessarily" mean that he had read the email (page 361A). The defender said he did not remember having received the email but when asked whether he knew of the proposal for the meeting on rd October 2008 he replied "there (sic) could well have been" (page 112D). He did accept that the document laid out the procedure to be followed to prevent a deemed acceptance of practical completion (page 187D-E). I accept Mr Kennedy's evidence. It also seems to me more probable than not that the defender received and read a copy of the email, as did Mr Rutherford.

- [10] At 14:52 , also on th September 2008 , (5/13) Mr Kennedy sent an email to Mr Hunter, copied to Mr Rutherford and the defender, in the following terms:- "Gordon - Scott Rutherford will attend the inspection meeting to determine if practical completion should take place in terms of the missives (copies attached) - he is not available on Friday but has suggested Monday - Scott will most likely bring a professional building surveyor with him to the meeting. He will contact your clients to arrange the appropriate time for the meeting. Scott has mentioned that he does not think the property is anywhere near the stage of being practically complete so queries whether the inspection meeting should be held at all at this stage. That is however for the clients to sort out directly but you can let me know if there is to be any change to the meeting." There is no dispute that, as required by the missives, the relevant certificates from Zurich Insurance and the relevant local authority had been produced. In examination-in-chief, Mr Rutherford said he had seen the email of 29 th September 2008 sent by Mr Kennedy to Mr Hunter before but only "last year" in the context of other litigation (page 272D). In cross-examination, he seemed less clear (page 346A). Mr Rutherford was asked about his general practice in opening emails. He stated that he would look at emails on a weekly basis and open those addressed to him; if it was addressed to someone else but copied to him he would not necessary open the email (page 342). He said he would open emails from Mr Whitworth and Peter La Greca because they were involved in the project (page 344). There was no significant evidence as to who Mr La Greca was and what he did, other than he was an employee of the pursuers. So far as the email of 29 th September was concerned (from Mr Kennedy to Mr Hunter) although Mr Rutherford did not concede he had read it, he seemed to think that Mr Kennedy had spoken to Julia Wallace, the defender's personal assistant as to his availability and that Julia Wallace had spoken to him first (page 345A). Mr Rutherford also said that the email meant he was going to the meeting, not to determine if practical completion had been achieved, but whether the house was ready which he said he considered it was not (page 355D). Again, he said that at no time had he ever read the missives. The defender accepted that he did receive the email of 29 th September and that he had read it (page 113E). His evidence appeared to be that he thought that it referred to what was yet another meeting. He said his state of mind at the time was to the effect that the property was not complete and that Mr Rutherford had no authority from him to agree anything in relation to practical completion. He did however accept that the

meeting was to take place "in terms of the missives" (pages 163C and 170E). I conclude Mr Rutherford did receive and read a copy of the email before "last year".

- [11] In any event, a meeting on site did take place on th October 2008 (not 3 rd October) to determine if practical completion had taken place. In attendance were Mr Gregor, Mr Beasley, the defender and Mr Rutherford. Another meeting was arranged for th October 2008 . Accordingly to Mr Beasley, the defender was generally very happy with the state of the building and that a formal completion inspection was to take place a few days later. Mr Beasley accepted in cross-examination that, in terms of the missives, the agreement of the defender that practical completion had taken place was not strictly necessary. However, in his opinion it was "best practice" to secure the defender's agreement. Mr Gregor was clear in his evidence that the defender was "delighted" with the work. He specifically recalled the defender asking for a change in one of the wash hand basins (page 16C). 5/14 is a copy of an email dated 6 th October sent by Mr Beasley to the Royal Bank of Scotland plc, the pursuers' bankers, stating that that the defender was generally "very happy with the property" and that a formal completion meeting had been arranged for th October 2008 . The defender recalled, albeit not clearly, being present at the meeting on th October (page 193D). He did not recall saying he was generally very happy (page 193/4). The purpose of the meeting of 6 th October was to determine if practical completion had been achieved and that at that meeting the defender stated that he was happy with the state of the property. The defender was not present at the meeting on th October 2008 . The defender was asked about the meeting on th October 2008 : "That was a meeting which had a particular status under the missives is that right? - If that's what the lawyers describe it as" (page 195D-E). Mr Rutherford was present at the meeting on 8 th October. He said (and I accept) that Scott Stevens, from Savills, was at the meeting (page 366A-C). Mr Stevens was a surveyor employed by Savills. It was thought that Mr Stevens would produce a list of items which needed completion (see the email from Mr Kennedy to Mr Hunter copied to Mr Rutherford and the defender quoted below). It was also clear that Mr Kennedy knew the contractual significance of practical completion. On 9 th October (5/15) Mr Kennedy wrote to Mr Hunter sending copies of the email to Mr Rutherford, the defender and the defender's personal assistant. "I understand from Scott Rutherford that he attended the Practical Completion meeting yesterday Wednesday 8 th October; our client does not agree that PC has taken place - I believe Scott Stevens of Savills building survey department is to prepare a list of items which need to be dealt with before PC can be held to have taken place and we are due this list on Monday. In terms of the missives a statement requires to be given by the buyer to the seller within five working days of the date of inspection so by my calculations that needs to be with you by close of business on Tuesday next week [Scott please note timescale - important] (emphasis in the email) For the moment, our client does not agree that settlement is due until PC has properly taken place in terms of the missives."

- [12] Mr Rutherford said that although he did not recall whether he had opened the email (page 365A-C) he did not dispute Mr Kennedy had accurately reported what he had told him, including that the defender did not agree that practical completion had taken place (page 367A-C). I do not have a note of the defender being asked whether he had seen this email. By emails between Mr Kennedy and Mr Stevens dated 10 th and 13 th October (5/76/1), copied to the defender and Mr Rutherford, it was clear that Mr Stevens could not "...snag" a property with which we have had no involvement until this very late stage in construction/fit out". The email from Mr Kennedy to Mr Stevens shows a clear awareness of the contractual mechanism and, in particular, the need to "go back within five working days of the inspection meeting". Again Mr Rutherford was unable to say if he had opened this email. All the witnesses were agreed that whatever took place on 6 th and 8 th October there was no practical completion. Mr Beasley's evidence was to the effect that a further meeting in relation to practical completion was arranged for 13 th October (5/16) but did not take place. He emailed the defender directly on th October 2008 (5/16) in the following terms:- "Mark We agreed with Scott last Wednesday that we would meet to carry out a Final Practical Completion meeting yesterday, th October 2008 at 4pm with Scott and his Surveyor present. Scott mentioned in passing to our Agent on Site that his Surveyor was not available but has not returned any of my phone calls regarding arranging a further meeting. Obviously we are keen to get this property handed over and as you may be aware have already forwarded the Temporary Habitation Certificate and Zurich Cover Note over to your Solicitors. Please could you ask Scott to contact me to rearrange Monday's meeting". Given that the email has a direct invitation to the defender to ask Mr Rutherford to contact Mr Beasley to carry out a "final practical completion meeting" the defender was asked about his knowledge of his email. He accepted that he did receive the email and that he read it (page 198C). He said he did not recall contacting Mr Rutherford to speak to Mr Beasley to arrange a final practical completion meeting but he did concede it was probable that he would have done what he was asked to do (page 200E). I conclude that he did arrange the meeting. Mr Rutherford said he had no recollection of having been contacted by the defender about the meeting (page 372C) but he did not dispute that he went. The meeting was arranged for th October at 2pm (5/17). There are emails dated 20 th October (5/76/2) confirming the date of the practical completion meeting on 20 th October.
- [13] The meeting arranged for th October took place. In attendance were Mr Beasley, Mr Whitworth, Mr Rutherford and Mr Swalwell. That meeting resulted in Mr Beasley issuing a document dated th October 2008 and headed "Certificate of Practical Completion" (5/74). As far as the pursuers were concerned, and in particular Mr Beasley, the property was practically complete. There were a number of items he described as "snagging" which the pursuers would be able to complete within 14 days. The Practical Completion Certificate which he prepared and signed had annexed to it a document on Gregor Properties Limited notepaper headed "8, 9 and 5 outstanding works". Mr Whitworth's evidence was to the effect that a list of outstanding matters was agreed between himself and Mr Rutherford. Mr Swalwell said he was asked by Mr Rutherford to attend and help put together a snagging list.

He said he had no knowledge of the certificate. He described the meeting as involving a tour of the building in which Mr Rutherford pointed out matters to be done, all of which were recorded. Mr Swalwell described small items of finishing . He duly prepared a list of snagging items which he sent by letter dated st October (5/72) addressed to Mr Rutherford. Again, as far as Mr Beasley was concerned, the items to be done were not major. By letter st October (5/18) Mr Hunter wrote to Mr Kennedy telling him that practical completion had been achieved and enclosing a copy of the certificate. The letter went on to say that "a list of outstanding works" was agreed and that these would be attended to immediately by the pursuer. He went on to identify the date of entry as being th October 2008 . The letter was sent by fax and post. Mr Kennedy emailed the defender on st October (5/76/4) referring to the correspondence from Mr Hunter. In his evidence in chief Mr Rutherford suggested that he had not received a copy of the certificate of practical completion at the time (page 288A). However, in cross-examination he conceded that he must have seen it (page 376D). Such a concession was inevitable given the terms of 5/76/6, an email sent by Mr Rutherford to Mr Kennedy on the evening of st October which makes express reference to the certificate of practical completion. He could not have written the email without having sight of the certificate. It is also clear from that detailed email that Mr Rutherford had a clear idea of what needed to be done for the property to be completed. The defender accepted he received the email from Mr Kennedy and replied asking Mr Kennedy to ring him to find out "exactly where I stand with this one and the best way to deal with matters given the circumstances". Exactly what he meant by this was not explored in evidence. I note that this email, sent by the defender and dated st October 2008 (5/76/5), is headed "Re Belford - Fax from VMH re practical completion". In cross-examination the defender said (page 203B-D) his main concern was whether the work was complete. There is no detailed evidence as to what instructions he gave to Mr Kennedy but he did accept that the letter Mr Kennedy sent to Mr Hunter dated 24 th October 2008 (6/12) was sent on his instruction (page 204B-C). That letter is headed "Notice Under Clause 3.2...". That is an express reference to clause 3.2 of the missives. The letter disputes that practical completion has occurred and that a certificate could have been issued by the pursuers. Annexed to the letter are three schedules setting out works to be completed. One schedule contains the material in the letter from Mr Swalwell dated 21 st October (5/72). Another contains the material annexed to the Certificate of Practical Completion. Mr Hunter replied by letter dated 31 st October 2008 (6/9) purporting to reject the letter challenging whether practical completion had taken place and giving reasons why. The letter stated that settlement should have taken place and that interest on the purchase price was now running. Put broadly, the evidence from the pursuers' witnesses is that they proceeded to undertake the works which they accepted were outstanding at the meeting on th October 2008 . I accept that evidence.

- [14] The next stage is a meeting at the property which took place between Mr Whitworth and Mr Rutherford. Precisely how this meeting came about is not clear from the evidence. The meeting took place on site and resulted in a document which appears variously amongst the productions, one of which is 5/6. The document is dated 13 th and th November . It is agreed

that the meeting itself took place on 11th November. The document was prepared by Mr Whitworth. It is written on Gregor Properties Limited note paper and is in the following terms:- "Further to today's site meeting, we confirm that all points have been addressed and as such, practical completion can now be issued. All snagging is noted on Sheets dated 12th November 2008". It is then signed on behalf of Gregor Properties Limited by Mr Whitworth. It is signed "for and on behalf Client (sic)" by Mr Rutherford.

- [15] Mr Rutherford's evidence as to how he came to sign the document is somewhat confused. In examination-in-chief he said that he went to the meeting to go through what had been done. "The main reason Mark wanted me there was to speak in regard to extra costs" (page 298). He accepted he had signed the document. He said he dated it 11th November because "he wanted to speak to Mark about it" (page 301). Mr Rutherford said it was agreed that the snagging items on Mr Swalwell's list had been completed but that there were more fundamental things which were not complete (page 304). He went on to say that he spoke to the defender and that the defender "asked me to sign saying the architects snagging was complete" (page 306/7). He also said he had been asked to sign a document that the architects snagging was finished (page 307A). He said the defender replied that that was "okay" because "I think Mark was going to see him that day or the day thereafter" (page 307B). In cross-examination he reiterated that he had signed the document after having checked with the defender (page 329). However, he also accepted that the only reason he had signed the document is because Mr Gregor had refused to travel to meet with the defender in Dubai unless the document was signed (page 330/331). It was not put to the defender that he had had a conversation with Mr Rutherford in these terms. Nor is there any evidence from Mr Gregor to the effect that he refused to go to Dubai without the document first being signed. I am therefore left with Mr Rutherford's evidence. I shall deal with this issue later. There is no evidence to say that at any time Mr Rutherford said to Mr Whitworth that he, Mr Rutherford, had no authority to sign the document. Mr Whitworth's evidence is to the effect that the meeting was to check that outstanding matters set out as at 11th October had been completed. He said that he went around the property with Mr Rutherford who was satisfied that practical completion could proceed. Mr Rutherford then proceeded to sign the document which Mr Whitworth had prepared. He said Mr Whitworth dated the document 11th November 2008 because Mr Rutherford was "superstitious" and did not want to date it 11th November 2008. Whatever his motive, I accept that the meeting took place, that there was a tour of the property and at the end thereof Mr Rutherford signed the document in the terms set out. I should add that there was some, limited, evidence as to the state of the property as at 13th November so far as completion is concerned. The evidence of Mr Whitworth and Mr Gregor was to the effect that the property was complete and that the outstanding matters from 20th October had been attended to. Although he was no longer employed by the pursuers by that time Mr Beasley did not consider that the outstanding matters as at 20th October called for major work. Then there is the fact that Mr Rutherford signed the document itself. Such evidence as to the effectiveness of the Crestron system and so forth was vague and inconclusive. It is also clear from evidence to which I shall refer that the

defender was prepared to move into the property which suggests to me that it was practically complete.

- [16] Thereafter a meeting which took place between Mr Gregor and the defender at the defender's apartment in Dubai on 14th November. Mr Gregor's position is (and I accept) that he had tried to get hold of the defender by telephone on a number of occasions because he believed the property was now complete. He wanted to give the defender some notice of this fact (page 30). The defender said he wanted to discuss with Mr Gregor issues in relation to the final account. There appears to be no email correspondence raising this as an issue. Mr Gregor was on holiday in San Francisco when he received a telephone call from the defender. Mr Gregor said the defender told him he wanted to discuss certain matters with him concerning the property but he did not specify what they were. Mr Gregor agreed to meet the defender. He returned to the United Kingdom and travelled to Dubai on 14th November 2008, meeting with the defender the following day at his apartment. Mr Gregor said he took with him a sheaf of documents including the document signed by Mr Whitworth and Mr Rutherford, a copy of which had been faxed over to him in his hotel. The defender denied that Mr Gregor had any documents with him at all. I find it difficult to believe that Mr Gregor would have gone all the way to Dubai to discuss the property taking with him no documents at all. Mr Gregor expected to discuss the extras to the works which he estimated to amount to £120,000 or thereby. This I took to be extra matters over and above the agreed price for the works set out in the missives. The parties discussed the cost of the works and agreed on a price. Mr Gregor then described the defender as "coming out with a bombshell" (page 32) to the effect that the defender was unable to settle the transaction. Another transaction on which the defender was reliant for funding had fallen through. I did not understand that evidence to be in dispute. Both witnesses agreed that the defender went on to offer an alternative payment structure whereby the defender would offer £1.5 million with the remainder to be paid in the future with the offer of security over property in Dubai owned by the defender. Mr Gregor said he would require this proposal to be put in writing. The defender said he told Mr Gregor Mr Rutherford had no authority to sign anything on his behalf (page 241/2), something Mr Gregor did not accept he had said. I accept Mr Gregor's evidence. The defender said he did not see the letter of 13/14th November until January or February 2009 (page 153). Mr Rutherford said the document had been emailed to him the same day or the day after (page 306D-E). Mr Kennedy had had sight of it before 20th November (page 468). Mr Kennedy was also absolutely clear that he either emailed the defender a copy of the document or discussed its contents with him. That is not surprising given its importance. I conclude the defender knew the contents of the letter of 13/14th November before 20th November and that it is more probable than not that he received a copy of the document before that date.
- [17] On the defender's instructions (page 468) Mr Kennedy sent an email to Mr Hunter on 18th November 2008 in the following terms (5/20):- "Mark called this afternoon and advised the following: · £1,500,000 paid now in exchange for a title to the property [as we all know this is (sic) loan funds from the building society and they must get first and only charge in

exchange for that payment]. £500,000 has already been advanced at this stage. · balance to be paid within 24 months - balance can be paid off at any time [funds permitting]. · balance carries interest at 2% above BoE base on amount outstanding from time to time. · Final bill/ balance to be agreed? · security for balance - to be provided by Mark over property/ies in Dubai ..." That proposal was rejected by the pursuers' bankers principally because they were not happy to accept foreign security. The next relevant document is that dated th November 2008 (5/21) sent by Mr Kennedy on the defender's instructions to the pursuers' agents. In that letter inter alia it is said that there has been substantial delay in completion of the property; that the value of the property has fallen considerably since missives were concluded; that the defender disputes practical completion has occurred despite "there being a signed letter about that"; the person who signed it had no authority to do so and that practical completion can only be determined by an independent expert. The letter ends by saying that the defender is resident in Dubai and that Warners have no instructions to accept service of any writ.

- [18] What happened next I can deal with briefly. After November Mr Gregor and the defender did discuss resolution of the matter. By letter dated nd December 2008 (5/8) the agents then acting for the pursuers issued an ultimatum to the defender to settle the transaction. The price not having been paid, on th January the agents for the pursuers issued a letter to the defender's agents resiling from the missives (5/9). The property was remarketed. On nd June 2009 the defender offered to purchase the property for £1.6 million (later increased to £1.8 million) on condition that the pursuers agreed to drop all claims against him (5/7/3). The offer was rejected. The property was sold to a Mr Hogg for of £1.7 million a price substantially below the price referred to in the missives. There is no dispute on the evidence that Mr Hogg then transferred the property to the defender (5/50). There is also no real dispute the transaction in favour of Mr Hogg was a device to allow the defender to purchase the property himself. He now resides in it.
- [19] At this point I summarise my conclusions on the evidence. From the outset Mr Rutherford was the agent of the defender. The email of November 2007, and contemporaneous discussions, showed an awareness on the part of the pursuers of the need for them to have a clear idea as to the scope of Mr Rutherford's authority. It is correct to say that, at that point, the more major changes to the project had yet to be pursued. There is clear evidence from the pursuers' witnesses as to the regular exchanges with Mr Rutherford in relation to the works and decisions concerning the property. Mr Rutherford was described as project manager by or on behalf of a company controlled by the defender. Mr Rutherford was keen to play down his role as project manager but I have little doubt he did so because it suited him and the defender's interest to do so. Although accepting his role as project manager in the email of October 2007, the defender sought to play down the role of Mr Rutherford. There was evidence to the effect that Mr Rutherford would assist the defender in relation to his cars and would drive the defender's children to school. It is however a matter of admission in the pleadings that Mr Rutherford was appointed by the defender to represent his interests during the construction of the property (Answer 6) and that Mr Rutherford

"attended the properties as representative(s) of the defender" (Answer 5). All of the above I regard as relevant evidence in considering the conduct of the defender and Mr Rutherford in November 2008. From the middle of September 2008 the pursuers were of the view that the property was practically complete. They wanted their money and it was in their interests to ensure practical completion was achieved. Mr Beasley started the procedure as to practical completion by his email of 5th September (5/12). It contains a clear reference to practical completion. There is repeated reference thereafter in the correspondence to practical completion. Mr Kennedy was well aware of the significance of practical completion in relation to the date of entry and the consequences which would flow if practical completion were achieved. Given the terms of the missives that is no more than I would expect from a careful and prudent solicitor. His email of 29th September was a direct response to Mr Beasley's email. His email to Mr Hunter on the same day makes clear that Mr Rutherford will attend in relation to practical completion. Mr Rutherford and the defender both knew the significance of the meeting. Mr Kennedy discussed the position with Mr Rutherford. Emails were repeatedly sent or copied both to the defender and Mr Rutherford. As for Mr Rutherford's evidence as to when he did and did not read emails I regard it as being wholly incredible. His evidence makes no commercial sense. I find it difficult to see how he could function as a project manager if he applied that policy. Where emails have been recorded as having been copied to an individual I have no reason to conclude that they were not. Mr Rutherford's evidence as to practical completion and his understanding of it was profoundly unsatisfactory. Mr Kennedy was clear that he discussed the subject of the missives with Mr Rutherford and there are repeated references to the significance of practical completion in the email correspondence. I do not accept Mr Rutherford's contention that he had no interest in, or knowledge of, the missives. The defender said he was uncertain as to whether he read certain emails or not. Again, the volume and repetition of the subject matter of the emails makes it quite clear to me that there was repeated reference to practical completion and its significance. In an email to Mr Kennedy (5/76/5) the defender himself referred to practical completion in the heading. The defender and Mr Rutherford said they were more concerned about rising costs and the state of the property. The defender's evidence was that, whereas he was aware that meetings were taking place, he considered these really to be part of many other meetings and simply to do with the state of the property. If that was so I would have expected to see in the correspondence concern expressed in relation thereto. There is little or none. The defender, on sound advice from Mr Kennedy, arranged to have Mr Rutherford accompanied by Mr Smalwell to one of the meetings. Indeed, an earlier attempt was made to instruct Mr Stevens, another building surveyor, to attend. That to me clearly suggests an awareness of the significance of the meeting and the mechanism in the missives. Mr Kennedy repeatedly referred to the need to have something to put to the pursuers so as to challenge the contention that practical completion had been achieved. There were meetings on site on 6th, 8th and 20th October 2008. The defender himself attended the first meeting. I accept the evidence of Mr Gregor and Mr Beasley that the defender said he was happy with the property. There is no evidence at any stage that the defender and Mr Rutherford ever challenged the purpose of any of the

meetings or had some other understanding of their purpose. The contention that these were just part of several meetings to consider progress and that neither the defender or Mr Rutherford knew they related to practical completion, or what that meant, I reject. On any view of the meeting on site on 8 th October, Mr Rutherford had the authority to say that practical completion had not taken place. (see the email 5/15) Mr Kennedy wrote to Mr Hunter on th October invoking the procedure pursuant to clause 3.2 of the missives, challenging the conclusion as to the achievement of practical completion. Mr Kennedy did not write that letter without the defender's instruction. The letter is clearly referable to the practical completion mechanism. To suggest that Mr Kennedy knew the significance of practical completion but his client did not is simply not credible. There is no dispute on the evidence that the meeting of 13 th November took place and that Mr Rutherford signed the document prepared by Mr Whitworth stating that "practical completion could now be issued". The signing of the document needs to be seen in the context of all that had gone before. The proposition that this related to snagging on minor items and yet that major items remained outstanding I reject as plainly absurd. It is difficult to imagine Mr Swalwell noting minor items but ignoring major ones. Mr Whitworth said Mr Rutherford signed it on site having undertaken a tour of the building and checked that the outstanding works already agreed to be done by the pursuers had been completed. I have accepted Mr Whitworth's evidence. It seems to me to make sense in the context of the whole matter. The pursuers wanted their money. It made sense for them to ensure that practical completion had been achieved, whether or not they required the express agreement of the defender. In his evidence Mr Rutherford was anxious to distance himself from the signing of the document because he well knew the significance of what he had signed. He initially denied having received a copy of the practical completion certificate issued on 20 th October until it was put to him that by reference to his email of 21 st October that he must have seen it. He then conceded he had seen it. Similarly, the defender was keen to distance himself from the correspondence and Mr Rutherford's actions because he knew, and knew then, the significance of practical completion. The defender accepted he had been contacted by Mr Beasley in relation to arranging the meeting on 20 th October and that he, the defender, must have done so. I find it difficult to believe he did not know that the purpose of the meeting was to do with practical completion. There is no evidence he told Mr Beasley or anyone else as to any limits to Mr Rutherford's authority. Not until much later was there any suggestion the Mr Rutherford lacked the authority of the defender to do what he did. Mr Rutherford attended not one but several meetings which the defender knew related to practical completion. It is unfortunate that Mr Rutherford's evidence as to who he spoke to before signing the letter of November was not put to the defender or Mr Gregor. Although he was far from clear on other issues he was clear in his evidence that he spoke to the defender about the document before signing it (pages 329-331). The difficulty is Mr Whitworth's evidence is to the effect that Mr Rutherford signed the document when he was on site, at the end of the meeting. There was no opportunity to date it the next day, check with the defender and then sign it. The result is that I am unable to make any finding as to whether Mr Rutherford did speak with the defender before signing the document. I should add it was

put to Mr Rutherford that he had said to Mr La Greca that the defender was not going to proceed with the purchase of the property and was going to wait until the pursuers became insolvent and then purchase the property more cheaply from the bank. Mr Rutherford denied saying this. Although the evidence in support thereof was put in the form of an affidavit from Mr La Greca I make no finding that such a conversation took place. I regard it as being a serious matter and one on which I would require to hear the witness before making a finding.

- [20] In relation to the meeting in Dubai it is not disputed that the meeting was arranged at the defender's request. It is also not disputed that the defender told Mr Gregor for the first time at the meeting that the defender had insufficient funds to settle the transaction. Very shortly after the meeting, on the defender's instructions, Mr Kennedy wrote to Mr Hunter setting out the offer in terms reflecting what both witnesses say had been offered by the defender at the meeting. As I have said, if there had been concern about the issue of practical completion, or the authority of Mr Rutherford, I would have expected to have seen it in that email. There is no mention of either issue in the email sent by Mr Kennedy nor is there any reference to the alleged unsatisfactory state of the property. Indeed, one might wonder why, if the property was in such a poor state of completion, the defender made an offer on the basis of the purchase price to be paid "now in exchange for a title to the property". It is not until 20 th November, and for the first time, that the matter of Mr Rutherford's authority was raised along with a number of other issues including the fall in the value of property generally.
- [21] I conclude that both the defender and Mr Rutherford knew throughout the period between September and November 2008 that the pursuers wanted to achieve practical completion and what had to be done to prevent it. They knew the purpose of the relevant meetings in October 2008. At no stage was there any attempt to limit the scope of Mr Rutherford's authority. Mr Rutherford knew what he was signing in November 2008. The real issue for the defender was that he was unable to find the money to settle the transaction and that is why he asked to meet Mr Gregor in Dubai . The issue of Mr Rutherford's authority was an afterthought appearing for the first time in the correspondence from Warners dated th November 2008 .
- [22] Some time was taken up in the proof with issues surrounding diligence on the dependence at the instance of the pursuers. In essence they go to the defender's credibility and reliability. I do not understand it to be disputed that during certain interlocutory proceedings (over which I did not preside) the defender caused to have represented to the court that he owned a number of valuable heritable properties in Scotland when in fact, at that time, he was holding executed dispositions transferring his interest therein to certain family members (page 222). His explanation is that he was in the midst of taking advice in relation to tax and divorce issues and did not know at that time whether the transfers would take place. It is also clear (page 231) that the defender also had interests in two other heritable properties in Edinburgh which were never mentioned in any of the interlocutory

proceedings before me. When asked why he made no mention of them the defender replied that he "didn't know he had to" (page 232). Then there is the issue of the defender's directorships of a number of companies. It is unnecessary for me to go into this in detail. It is sufficient to say that there were lodged in process a number of company returns lodged with the Registrar of Companies purporting to record resignations by the defender of his position as a director. The resignations purport to be backdated and some state that, as at December 2009, the defender was resident in Dubai when it was his evidence that as at April 2009 he was resident in the UK. A number of these documents were put to the defender. His explanation for this inconsistency is that a member of his staff "updated" the returns and had done so in error without his knowledge (page 226). He also seemed to suggest that Warners may also have lodged some of the returns (page 226) (something which Mr Kennedy did not accept). According to the defender, he did not authorise the lodging of the documents. Mr Howlin submitted, given there was no positive evidence to contradict the defender's evidence, I could make no positive findings in fact at variance with the defender's evidence. Whereas I make no positive findings in fact on these issues it is not because I accept the defender's evidence. At the point at which interlocutory proceedings did take place before me relating to diligence on the dependence, the dispositions in favour of the family members had been registered together with the company documents showing a permanent address abroad. On any view this presented a different factual position to that put before the court at an earlier stage. Given their content it is hardly surprising they provoked the response from the pursuers that they did. To say the least, I find it surprising that an experienced businessman could allow important public documents such as these to be registered with the Registrar of Companies when the content was, as he maintains, entirely wrong. It was not explained to me how these documents came to be "updated" in such a manner and in particular how an employee could seemingly undertake such a task (including backdating) without the defender's knowledge. Without it being essential to my conclusions, I have to say that I find the defender's position does not reflect well on his credibility. Legal Issues

- [23] As much of argument in this matter turns on the interpretation of parts of the missives it is appropriate that I set out relevant extracts there from:- "Clause 3 provides:- Entry date: The date of entry ("Date of Entry") when the purchase price... and the cost of the Specific Works as above shall be paid shall be the date 7 days after later of (a) the date of the Seller giving a statement confirming that the Works have been completed in accordance with the missives and this letter and confirming that the subjects and the Works have been completed to the standard required as set out in the Missives and this letter... having regard to the luxury nature of the development and the subjects (such date being the "Date of Practical Completion") and such certificate shall be the "Certificate of Practical Completion" (which shall not be issued any earlier than the date when the subjects have received local authority habitation and a Zurich cover note is issued) and (b) the date when the Certificate of Practical Completion shall be deemed to have been properly given under clause 3.2 below. 3.1 The Seller shall give to the Purchaser no less than ten Working Days notice of the date

and time upon which the Seller proposes to carry out the inspection of the works for the purposes of issuing the Certificate of Practical Completion... The Purchaser or the Purchaser's Representative if he is absent from the UK at that time shall be obliged to accompany the Seller in such inspection(s) of the works. The Purchaser or the Purchaser's Representative shall be afforded the opportunity to discuss with the Seller the Seller's proposal to issue the Certificate of Practical Completion and the contents of any list of defects or outstanding matters the Seller proposes to incorporate in such certificate. 3.2 If the Purchaser or his representatives acting reasonably at all times shall not be satisfied that the works have been carried out in accordance with the provisions of the Missives and this letter such that Practical Completion shall not have occurred (notwithstanding the issuing of the Certificate of Practical Completion) then within 5 working days after the date of the inspection the Purchaser shall give notice to the Seller specifying in what respects the Certificate of Practical Completion ought not to have been issued and what works the Purchaser considers requires to be carried out in order reach the stage when the Certificate of Practical Completion ought to be issued. The Seller shall use his reasonable endeavours to procure the carrying out of such works, and on completion of those works the Purchaser will be deemed to have accepted the Certificate of Practical Completion subject to the terms clause 5 below". Clause 5 is headed "Dispute Resolution". Clause 5.1 provides:- "If there is any dispute in relation to matters referred to in this letter such as the standard of workmanship, what works are to be carried out, the nature, extent, quantity or quality of same or defects liability or snagging or release of the retention all such matters shall be determined by the Independent Expert".

[24] Clause 3.2 proceeds upon the basis that the seller first gives the purchaser 10 working days notice of the date and time upon which the seller proposes to carry out the inspection of the works for the purposes of issuing the certificate of practical completion. The purchaser, or his representative if he is absent from the UK, is obliged to accompany the seller in the inspection. Read short, clause 3.2 provides that if a purchaser or his representative are not satisfied that the works have been carried out such that practical completion should not have occurred then the purchaser shall give notice to the seller within 5 working days in what respect the certificate of practical completion should not have been issued and what works are necessary to reach this stage when the certificate of practical completion ought to have been issued. The seller is then to carry out the works and on completion the purchaser will be deemed to have accepted the certificate of practical completion but subject to the dispute resolution procedure in clause 5.

[25] In my opinion, the letter from Mr Beasley dated 11 September 2008 (5/12) was notice of inspection pursuant to clause 3.1. Mr Howlin submitted that the notice provision was "iterative" in the sense that, if there was what I will call a practical completion meeting which did not lead to the issue of a certificate, then further notice pursuant to clause 3.1 was required. No such notice had been given in relation to the meeting on 20 October. Accordingly, the certificate issued on 20 October was of no contractual effect. As Mr Clark pointed out, this point arose only in submissions and was never put to any witness. The

pursuers would have had an answer to it by way of evidence and arguments of personal bar and waiver. In any event, the parties themselves acted as if it were a valid certificate. The letter from Warners dated 24 th October 2008 (6/12) proceeded upon that basis, containing an express reference to clause 3.2 which could only be invoked on the basis that there was a valid certificate in the first place. In my opinion, the arguments of the pursuers are correct. The evidence is that further meetings after the initial meeting on 6 th October were a matter of agreement. At no stage was it ever suggested either on record or in the evidence that what took place failed to comply with clause 3.1 in relation to notice thereof. I may add I see no commercial sense in reading the clause as Mr Howlin suggested. There is nothing in the wording of the clause to require a separate notice for each meeting.

- [26] There is nothing in clause 3 which specifies the form a certificate of practical completion should take. Mr Howlin submitted there was no valid certificate because the certificate issued by the pursuers does not contain the statement required by clause 3. He submitted that the certificate should contain the words that "the works have been completed in accordance with the missives and the letter of st May 2008 ". Again, no notice of this point appears in the pleadings, nor is it something which has ever featured in the correspondence, or for that matter, to any extent in the evidence. In any event, the parties proceeded upon the basis that the certificate was valid (see for example the letter of th October 2008-6/12). In my opinion, on a fair reading of the document (5/19) it does contain sufficient to qualify as a valid certificate of practical completion. There is a reference to the missives and that practical completion of the three plots has occurred. I do not see that it is necessary to repeat verbatim the words in clause 3.
- [27] I turn now to the provisions of clause 5. Clearly the provisions of the clause encompass disputes as to the works and to the standard of workmanship. The provisions of those parts of clause 5 not quoted above provide that the decision of the independent expert shall be final and binding and that any decision requires to be given by him within 15 days of his appointment. Put shortly, the argument for the defender is that there was a dispute as to whether the works had been completed in accordance with the missives - see the letter from Warners (6/12) and the reply from the pursuers' solicitors dated st October 2008 (6/9). That dispute has never been resolved between the parties themselves or pursuant to clause 5.5. Nor has the matter been determined by an independent expert because neither party referred the matter to the expert. The provisions in clause 5 are mandatory ("shall be referred") and this obligation is an obligation imposed on both parties. It was not subject to limit of time. It follows that the question as to whether the certificate of practical completion was properly issued has never been determined, therefore the date for payment has not yet come. Furthermore, there is no room for the matter to be determined by the court. I cannot accept this argument. It seems to me to fly in the face of any sensible commercial construction of the clause. The clause provides a mechanism to resolve disputes and that requires one party, or both, to invoke its terms. If it is not invoked by either then the parties proceed accordingly. Furthermore, as Mr Clark correctly submitted it must always be open to parties to agree to resolve any dispute between them without relying on the clause. That is

what it would appear Mr Gregor and the defender sought to do after November 2008. If clause 5 is mandatory it would follow that they could not do so. I do not regard that as being a correct construction of the clause. Put another way, if Mr Howlin is correct in his construction of the clause then it is tantamount to making clause 5 a condition precedent to the exercise of relevant rights pursuant to the contract and that I do not think is a correct.

[28] One matter upon which both counsel did agree is that there is no contractual provision in clause 3 which obliges the defender to agree that practical completion has taken place in the sense that there is a contractual mechanism for him to do so. The defender was entitled to notice of the meeting, obliged to attend or send a representative, and entitled to make representations. He had the right, in effect, to challenge the certificate but there is no mechanism for him to agree, or to be obliged to agree the terms of the certificate of practical completion. In that sense, any agreement as to completion is, strictly, something which exists outwith the terms of the contract itself. In Mr Clark's submission, the parties were free at any time to agree that the works had been done. The certificate of practical completion had been issued on 20th October which provoked a response by letter dated 24th October. The latter only made sense if a valid certificate had been issued. In Mr Clark's submission if there was agreement that the works had been completed then that would attract the deeming provision in clause 3.2. The purchaser is thus not insisting on his clause 3.2 notice. Mr Howlin submitted that in issuing the letter of 24th October the defender stated in what respect the property was not complete and was acting reasonably in relation thereto. The works had not been completed, or not to the relevant standard, and therefore deemed acceptance had never been reached. Even if deemed acceptance had been reached it was subject to the provisions of clause 5. It seems to me that it was open to the parties to agree that practical completion has taken place and to do so even if the purchaser has issued a notice pursuant to clause 3.2. Just because there is no contractual mechanism allowing for the parties to agree that practical completion has taken place does not prevent them from agreeing that it has taken place. For reasons which follow, I conclude that the parties did indeed reach agreement as to practical completion. So far as the deeming provision is concerned I agree with Mr Clark that it cannot be the case that the purchaser can issue a notice challenging practical completion then do nothing further. If the seller has done the works required, in the absence of something further, there must come a point when practical completion is deemed to have occurred. However, on the facts of this case I do not think it is necessary to express a concluded view on this issue.

[29] I now turn to the issue of the authority of Mr Rutherford. I will set out the arguments of counsel as they relate to the factual material before I deal with the legal issues.

[30] For the pursuers, Mr Clark submitted that Mr Rutherford had both the actual and ostensible authority of the defender in relation to achieving practical completion. Actual authority could be actual or implied. The missives require the parties to attend an inspection meeting. The purchaser may send a representative. The missives allow for parties to reach the view that there are no defects or to have further meetings to decide if certain defects or

outstanding matters have been resolved. Parties may determine at a meeting that practical completion has occurred. At the time of the meeting on 13 th November, the pursuers were aware that Mr Rutherford was an agent of the defender. There can be no doubt that Mr Rutherford had some actual authority, the only issue was its extent. The email from the defender dated th November 2007 (5/5) makes that clear. Mr Rutherford was a project manager employed by or on behalf of the defender. In the email from Mr Kennedy in September 2008, copied to the defender and Mr Rutherford (without demur from either), it was represented to the pursuers that Mr Rutherford would attend the meeting to determine if practical completion should take place in terms of the missives. That email was capable of conferring actual authority on Mr Rutherford. To the knowledge of the defender, Mr Rutherford attended the meeting. Mr Rutherford had decided on 8 th and 20 th October that works were outstanding and that practical completion was disputed. All of the foregoing was known to the pursuers. The defender admits in answer 5 of the Record that Mr Rutherford was his representative at the meeting on th October . He was also the defender's representative on a meeting on 8 th October and 13 th November. It was open to Mr Rutherford not (or no longer) to express any disagreement with the issuing of the certificate. The email of th September 2008 (5/13) expressly stated "Scott Rutherford will attend the inspection meeting to determine if practical completion should take place in terms of the missives...". If his authority was limited to list the defects or outstanding matters the email would not have said what it did. In Mr Clark's submission Mr Rutherford accepted in cross-examination that he had actual authority to determine whether practical completion had been achieved. Mr Rutherford had told Mr Kennedy on st October 2008 that a number of matters required to be attended to before there could be practical completion. He must be taken to have meant the expression "practical completion" in that document to have the same meaning as the document he signed in November (5/6). It would make no sense for him to insist that minor matters be completed whilst leaving more major ones outstanding. The decision by Mr Rutherford on th November 2008 was pursuant to his actual authority. He did have the actual authority to which he himself spoke and he had actual authority pursuant to the email of th September (5/13). The defender instructed the email, did not object to its terms and was sent a copy of it. Put another way the defender, through Mr Kennedy, was telling other people, including Mr Rutherford himself, what he is authorised to do at a meeting. The words of the email should be given their ordinary natural meaning. They are not restricted to the contractual mechanism contained within the missives but extend to deciding that practical completion had been achieved.

- [31] Mr Clark also submitted that if Mr Rutherford did not have actual authority then he had ostensible authority to determine whether practical completion should take place. The defender had already appointed Mr Rutherford as agent; he had given him the designation "Project Manager"; he acknowledged that meetings to determine practical completion had been held and were to be held; the defender had allowed Mr Rutherford to attend the meetings and act as his representative; he knew Mr Rutherford had made decisions at meetings on 8 th and 20 th October that practical completion was disputed. There was a

representation that Mr Rutherford had authority to bind the defender as to whether practical completion had been achieved. That representation could be relied upon by the pursuers.

- [32] For the defender, Mr Howlin submitted that there was no evidence that Mr Rutherford had actual authority which is capable of constituting the conferral of actual authority. The only evidence as to the conferring of such authority is that of Mr Rutherford and the defender but each repeatedly gave firm evidence denying the conferring of such authority. They are the only witnesses who could know. The only two items which could be said to be candidates are the email of th November (5/5) and the email from Mr Kennedy on th September 2008 (5/13). The former is limited to "alterations/variatioins". At that point the contractual mechanism (introduced in 2008) relating to practical completion did not even exist. The email from Mr Kennedy merely recites facts and does not purport to confer any authority to Mr Rutherford.
- [33] In relation to ostensible authority and personal bar, the defender has never held out Mr Rutherford as having authority to agree on his behalf that practical completion could occur. Mr Howlin repeated his submissions in relation to the email of th November . In relation to the email of th September 2008 (5/13), that neither held out nor purported to hold out Mr Rutherford as having any authority. The email addressed to the pursuers' agent was inherently ambiguous. It could mean that Mr Rutherford would attend the meeting in order that he might determine if practical completion should take place or that the meeting he would attend was a meeting to determine whether practical completion should take place. The correct meaning was that there was to be a meeting "in terms of the missives" pursuant to clause 3.1. There is no room for an interpretation to the effect that whether practical completion should take place is something to be "determined" by the purchaser or his representative. Given that this was an email between solicitors involved in drafting missives there was no room for the suggestion that Mr Rutherford's purpose or task in attending a meeting was to determine if practical completion should take place in terms of the missives. Nor does the email purport to confer on Mr Rutherford any authority to enter any agreement outwith the terms of the missives. There is also no evidence from the pursuers' witnesses that they understood Mr Rutherford to have any authority to making the agreement outwith the missives. There was nothing about the course of dealing between Mr Rutherford and the pursuers' team which constitutes a holding out of Mr Rutherford by the defender as having the power to agree at any meeting concerning that practical completion should proceed. The evidence of Mr Rutherford, the defender, Mr Beasley and Mr Whitworth was all to the effect that on important or expensive items Mr Rutherford would seek the defender's instructions and relay those to the pursuers. Given the extent of the financial obligation, following the issue of the certificate, there was nothing in the previous dealings to suggest that Mr Rutherford had suddenly become empowered to make such a decision without reference to the defender. Given the performance of Mr Rutherford in the witness box it was inherently improbable that the defender could entrust to him decisions which would have such a major consequence for the defender. (The same applies in relation to the conferring of actual authority). In relation to the document of th November 2008 it

was signed "for and on behalf of Gregor Properties" and not the pursuers. The evidence from Mr Gregor as to Gregor Properties Limited being the agent of the pursuers was vague. There was only vague evidence from Mr Gregor as to the scope of the agency of Gregor Properties Limited and less so as to whether it could "determine" practical completion. The pursuers had not pled any agency. The document is, at best, an agreement (assent) to the existence of a fact. It is not an agreement of a contractual nature. At best the document amounts to a representation by Mr Rutherford that he agrees that "practical completion can now be issued". As it is a representation, the defender is entitled to depart from it unless he is personally barred from doing so. The pursuers have not acted to their detriment in relying upon the document signed on 13th November or upon any ostensible authority of Mr Rutherford. On 14th November Warners sent an email to the pursuers' agent stating unequivocally that Mr Rutherford had no authority to sign the document. The pursuers were thus on notice from that date that Mr Rutherford's authority was being denied. The pursuers therefore could not have acted from that date on the basis that he did possess such authority. If they did so their reliance was not reasonable. Any reliance must thus have occurred between 13th and 14th November 2008. The earlier element of purported reliance was the active instruction the pursuers' solicitors. There is no evidence that occurred before 13th November. In any event, instructing solicitors is either for the purpose of seeking advice or giving instructions, and in neither case is detriment involved.

[34] On behalf of the pursuers I was referred to the following authorities:- Bowstead and Reynolds on Agency (it was not clear to which edition I was referred); Freeman and Lockyer v Buckhurst Park Properties (Mangal) Limited [1964] 2QB 480; Dornier GmbH v Cannon 1991 SC 311; First Energy (UK) Limited v HIB

[1993] 2 Lloyds Law Reports 194; R & D Construction Group Limited v Hallam Land Management Limited 16th September 2009 Lord Hodge (unreported); Cleveland Manufacturing Company Limited v Muslim Commercial Bank Limited [1981] 2 Lloyds Law Reports 6; Polish Steamship Company v AJ Williams Fuels (Overseas Sales) Limited ("The Suwalki") [1989] 1 Lloyds Law Reports 511; Arctic Shipping Co Limited v Mobilia AB ("The Tatra") [1990] 2 Lloyds Law Reports 51; Reid and Blackie, Personal Bar. For the defender I was referred to:- Stair Memorial Encyclopaedia, Agency; Halsbury's Laws of England Volume 16(2), Estoppel; Gatty v MacLaine 1921 SC(HL) 1; Norfolk County Council v Secretary of State for the Environment [1973] 1 WLR 1400; Bank of Scotland v Brunswick Developments Limited 1997 SC 226.

[35] So far as actual authority is concerned there is no difference between the parties. Such authority may be express or implied and implied authority may arise from a course of dealing between the parties and the circumstances of the case (Bowstead para 3-003). As Diplock LJ said in Freeman (at page 502) actual authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are party. To this agreement the contractor (here the pursuers) may be a complete stranger and be totally ignorant of the existence of any authority on the part of the agent.

- [36] It is on the issue of ostensible authority that a sharp difference emerges between the parties.
- [37] For the defender, Mr Howlin relied on paragraph 76 of the Stair Memorial Encyclopaedia which provides, by reference to the Bank of Scotland v Brunswick Developments Ltd, that ostensible authority is a form of personal bar. As a type of personal bar its successful use depends upon proof of each of four elements: (1) the principal, through representation or conduct; (2) induced the third party to believe that the agent was authorised; (3) the third party relied upon this representation; and (4) the third party has suffered loss through this reliance. The author goes on to say that the principal is thereafter personally barred from denying the existence of the agent's authority and, in effect, will be bound by the contract should the third party raise an action against the principal. Other than a reference to Steyn LJ in First Energy ("the reasonable expectations of honest men must be protected" - an authority relied upon by the pursuers) the author does not cite any authority in support of the four elements. In Mr Howlin's submission the elements of personal bar are clear. Reference was made to the speech of Lord Birkenhead LC in Gatty v MacLaine at page 7. In the present case there was no reliance or detriment suffered by the pursuers. The case of Norfolk County Council made clear that in estoppel there must be detriment suffered. Here, Warners had written to the pursuers after 14 November 2008 making clear Scott Rutherford had no authority to sign the document. Any acting by the pursuers after the date of the dispatch of Warners letter was thus wholly immaterial for the purposes of personal bar. Mr Howlin referred to paragraph 1076 of Halsbury's Law's of England in relation to estoppel by representation. It contained elements similar to the dicta of Lord Birkenhead. That supported the submission that detriment, as referred to in Norfolk County Council, was one of the relevant factors.
- [38] I need only concentrate on Mr Clark's reply to Mr Howlin for a statement of his position. Of the four elements referred to in Stair, no authority is cited in support of the proposition that there must have been loss suffered by the third party through reliance. Mr Clark had already referred to the dicta of Steyn LJ on which he relied. Paragraph 76 of the Stair Memorial Encyclopaedia went on to say that where ostensible authority is an issue the onus of proof lies on the defender to show that the agent was not authorised. The dicta of the Lord President in Bank of Scotland v Brunswick Developments Ltd only referred to two ingredients, namely a holding out and the transacting by the third party. The Lord President, referring to the arguments of counsel, said that ostensible authority is "built upon" estoppel or personal bar. It did not equate to saying that all the elements of personal bar, whatever they may be, must apply. When one looks at Freeman there was only a reference to representation and reliance. The Bank of Scotland case does not say there has to be a loss based upon reliance. Mr Clark then referred to page 372 of Bowstead which discusses a number of English authorities, some of which, following an analogy with estoppel by representation, require that there be actings to the detriment of a third party. Others, however, merely speak of alteration of position or acting on the faith of the representation. Mr Clark referred to Cleveland Manufacture, Polish Steamship and Arctic Shipping which supported his position. Mr Clark sought to distinguish the case of Norfolk County Council

which did not involve ostensible authority and referred to "honest mistake". Mr Clark then referred to chapter 13 of Reid and Blackie and in particular paragraphs 13-04, 13-05, 13-09 and 13-10. He expressly adopted those parts contained in paragraphs 13-05 and 13-10. Once the pursuer has established a general representation then the onus shifts to the defender to show there is some limitation of the agent's authority. That requires to be established on the balance of probabilities. Paragraph 13-11 deals with prejudice somewhat briefly describing it as "self evident". If prejudice was relevant then it could still be made out in this case. Scott Rutherford did have certain authority. That was clear from the history of the transaction. He was held out as a project manager. He attended the meetings on the 8 th and 20 th October. He made decisions at those meetings. The email 5/13 is further background. The parties were seeking to agree that practical completion had been completed, as indeed it was (5/6). For the defender to say that he was not bound by the document in November, notwithstanding his conduct and his email, self evidently does amount to "prejudice". The prejudice is that practical completion was therefore not reached. There need be no train of consequences. If one follows the analysis contained in Freeman then prejudice is not necessary but in the event that it was, prejudice is still established. Furthermore, when one looks at the passage in paragraph 13-13 ostensible authority is not entirely co-extensive with personal bar.

- [39] From the arguments of counsel, it is clear that there is an issue as to what are the relevant tests to establish ostensible authority and indeed, whether ostensible authority is a part of the law of agency with its own rules, or whether it is truly an aspect of the law of personal bar and subject to the rules of personal bar whatever they may be. In his initial submission, Mr Clark did advance a separate argument as to personal bar but, ultimately, I did not understand him to rely thereupon to any material extent. In seeking to identify the true substance of the rule as to ostensible authority, whatever its origins may have been, the judgment of Diplock LJ in Freeman is one that is repeatedly referred to in the authorities and textbooks, both in England and Scotland . Diplock LJ recognised the pragmatic rather than the logical development of the rule and referred to its historical development in England (page 502). He went on to restate the rule "upon a rational basis" (page 503). Diplock LJ was clear that the rule "operates as an estoppel". The same can be said for the judgments of Willmer and Pearson LJ (pages 494 and 499). The case itself related to the rule as it applies to the operation of limited liability companies. Much of the law on that issue was said to be confusing (page 502). It also related to the ostensible authority of an agent to enter into a contract on behalf of his principal. Be that as it may, the relevant dicta of Diplock LJ have been cited with approval in Scotland in the cases of Dornier GmbH and also Bank of Scotland v Brunswick Developments Ltd . I also mention, although do not rely upon, the opinion of Lord Jauncey in British Shoe Company Limited v Double M Shah Limited 1980 SC 311 to similar effect. In my opinion, in saying the rule was "built upon" the doctrine which is known as estoppel in English law and as personal bar in Scots Law, Lord President Rodger was doing no more than recording the agreed position of parties before him (page 234) rather than setting out an analysis of the law.

- [40] If one looks at the authorities to which I was referred I do not think it can be said that much time is spent in analysing the components of the rule. In *Cleveland v Muslim Bank*, Robert Goff J referred to representation and reliance (page 650). In "*The Suwalki*" Steyn J commented that it was unnecessary to enter into the academic debate whether in relation to ostensible authority "one is dealing with a "true" estoppel". He referred to the rule as comprising a relevant representation made by the principal and the plaintiff entering into a contract on the faith of that representation. I do not think the "*The Tatra*" is of much assistance because, in that case, the plaintiffs specifically introduced a plea of estoppel. First Energy is of some relevance because it was in the course of his judgment Steyn LJ stated that there is a theme running through the law of contract that the reasonable expectations of honest men should be protected (a passage cited with approval by Lord Hodge in the case of *R&D Construction Group Ltd* at paragraph 39). Ostensible authority was an issue and found to apply. The particular aspect of ostensible authority under consideration in that case is not relevant here but all three members of the Court of Appeal were at pains to point out that, in upholding a finding of ostensible authority, to do otherwise would defeat the reasonable expectations of the parties (Steyn LJ 204; Evans LJ page 207; Nourse LJ at 208).
- [41] In resolving the issues in this case it is helpful to go back to the particular formulation used by Diplock LJ in enunciating what has come to be regarded both in England and Scotland as the classic exposition of the rule (at page 503). "An "apparent" or "ostensible" authority,... is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel (my emphasis) preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract." What Diplock LJ did was to set out the nature of the issue which required a solution. The key passage is "operates as an estoppel". Usually a bar (or estoppel) relates to the exercise of a right a person subject to the plea of bar would otherwise have. An example of that is *Gatty v Maclaine*. In that case the parties had entered into a detailed contractual relationship relating to the payment of money and the granting of security in relation thereto. The issue there was whether the acceptance of one late payment, against the background of certain correspondence, was sufficient to amount to a bar to the exercise of one party's contractual rights. It was held that it did not. Mr Howlin relied upon the well known passage from the speech of Lord Birkenhead LC as to the components of estoppel. In my opinion, it is important to note that Diplock LJ used the words "as an estoppel", no doubt one reason why in "*The Suwalki*" Steyn J asked whether ostensible authority is a "true" estoppel at all. In my opinion, it is one thing to say something is similar to an estoppel or bar

but it is quite another to say all the varied rules and application of bar apply with equal force to ostensible authority. Furthermore, I do not think it is correct, or helpful, to attempt to determine the true content of the law of ostensible authority in Scotland by reference to whatever may be, at any given time, the law of estoppel in England . As has been said estoppel has many variants and a wholly different background to personal bar in Scotland . As I understand it the problem at issue is as follows. Put in very general terms, the principal does, or permits to be done, something which causes the third party to believe that the agent has authority to act on his behalf. The third party acts in that belief. The third party seeks to exercise his rights relying upon what he and the agent have done. The third party takes action against the principal. The principal seeks to disown the actions of the agent. The law prevents the principal from doing so. To do otherwise would be unfair. The mechanism by which that is done is to say the principal is barred from doing so. Bar acts against the operation of a right which, in this case, is the repudiation of the agent's act. I confess I have some difficulty in seeing how the model I have outlined sits easily with the particular formulation of bar outlined by Lord Birkenhead LC. It seems to me that the issue in *Gatty v MacLaine* was different. The facts of that case make clear that it had nothing to do with the law of agency or ostensible authority. In ostensible authority, it is not really a case of the principal seeking to exercise a positive right. The law seeks to prevent the principal from disowning his agent. In my opinion, the two key elements identified by Diplock LJ as to the rule of ostensible authority in the law of agency are representation and reliance. Such a conclusion is in accordance with the authorities on ostensible authority to which I was referred. I have already distinguished *Gatty v MacLaine*. Put another way, because ostensible authority operates as an estoppel (or bar) does not mean that it is subject to one particular formulation of personal bar which operates in a different context.

- [42] If I am wrong in relation to ostensible authority as a part of the law of agency and it is truly a matter of personal bar only it is appropriate I should consider that aspect also. I turn now to the passages referred to in *Reid and Blackie* . (I note in passing, the observations made by the learned authors at paragraph 13-13 to which Mr Clark referred, to the effect that there are now some doubts as to whether in English law ostensible authority is truly based upon estoppel at all.) Under the heading of "apparent authority" the authors say, at paragraph 13.01:- "In the law of agency the most frequently encountered application of personal bar relates to apparent or ostensible authority. Personal bar as applied in this context is merely a specific instance of the more general doctrine. Under that doctrine two requirements must be met. In the first place, the person barred (in the present context, the putative principal) must act in a manner which implies that another is acting as his or her agent, and which therefore is inconsistent of a later denial of agency. In the second place, if the person barred were to assert his or her right (the right to repudiate the putative agency) there would be unfairness to another person (the third party who has entered into dealings with the putative agent).

- [43] The elements of inconsistent conduct and unfairness are cardinal to the author's lucid analysis of the law of personal bar. It is a conclusion extracted from the many authorities referred to by them. These are more extensively set out in paragraph 2.03 at page 30. As the authors point out, the case law on the subject of personal bar is extensive and, it has to be said, somewhat confusing. Also, personal bar is not an exact replica of estoppel (paragraph 13.14). (That is another reason why I am reluctant to use estoppel as the basis for determining this issue.) It is a more general concept and does not find its articulation in any one specific judicial decision. I respectfully endorse the careful analysis of the law of personal bar by the authors in relation to the issue before me. The inconsistent conduct comprises a representation as to the agent's authority, coupled with its later repudiation. In terms of unfairness the authors say "there must be an element of unfairness in the event that the putative principal repudiates the existence of the agency". In the context of agency, unfairness is found in reliance by, and potential prejudice to, the third party. On the topic of prejudice, it is said that in most cases it is self-evident that the third party would suffer prejudice were the principal to be permitted to deny the agent's authority. Therefore, it is not the prejudice flowing from the representation itself, in any temporal sense, but prejudice flowing from permitting the principal the right to deny the agent's authority. That seems to me to be an answer to Mr Howlin's reliance upon Norfolk County Council .
- [44] I turn now to the application of the foregoing tests to the evidence in this case. The bulk of the authorities to which I was referred relate to the authority of an agent to enter into a contract. In the present case the issue is the performance of obligations pursuant to an existing contract. Neither counsel suggested that makes any difference to the matter in issue. As to actual authority, as Diplock LJ commented, actual authority is conferred as between agent and principal. Both the defender and Mr Rutherford now say, or appear to say, that no such authority was conferred. I have to say that I have some difficulty in accepting Mr Clark's submission that Mr Rutherford accepted in evidence that he did have authority from the defender. It is another example of his evidence being unclear. However, I do not think that is necessarily the end of the matter. Otherwise it would be open to an agent and principal agree between themselves that a certain state of affairs did not exist when on the evidence they did. In my opinion it is open to the court to reach its own conclusion on the basis of the facts admitted or proved. In the present case it is accepted that Mr Rutherford was the agent of the defender. On any view, he already had certain actual authority. So much is established by the evidence surrounding the email of November 2007 and also the defender's admissions on record to which I have also referred. He was also the defender's project manager. There were also regular dealings between Mr Rutherford and the pursuers' witnesses. Then there are the events and correspondence between September and November 2008 including the emails of 29 th September. I do not intend to rehearse them all again. It is sufficient to say that Mr Rutherford was described as attending the meeting relating to practical completion. He was there as a representative of the defender. There was a representation to that effect and such representation continued. It makes sense in the context of the commercial relationship between the parties. He attended not one but

several meetings in October and one in November. On one occasion he accompanied the defender. He also made decisions that practical completion had not been achieved. Mr Rutherford and the defender both knew the significance of practical completion and the mechanism set out on the missives both to achieve it and to challenge it. At no stage was there any attempt to limit Mr Rutherford's authority. If he had actual authority to determine that practical completion had not taken place it is hard to say that he did not have authority to say that it had. All of the foregoing needs to be seen in the commercial context of the relationship between the parties. In my opinion, on a proper analysis of the evidence Mr Rutherford did have the defender's actual implied authority to sign the November document.

[45] In the event that I am wrong in that conclusion I also hold that Mr Rutherford had the ostensible authority of the defender to sign the November document. As to the factual basis I adopt what I have said in relation to the issue of actual authority. I hold that there was both a representation to the effect that Mr Rutherford was the defender's agent and that the pursuers relied thereon. In reaching that conclusion I do not consider it is correct to pick out the evidence relating to one particular point. One looks at the whole commercial relationship and all that took place over the relevant period, and including the period between September and November 2008. Put shortly, throughout that, and earlier periods, Mr Rutherford was the agent of the defender. Both the pursuers and the defender acted on the strength of his authority at various times. At the meeting between Mr Whitworth and Mr Rutherford the pursuers clearly did rely on Mr Rutherford's authority and were entitled to do so. What the defender now seeks to do is to disown Mr Rutherford's actings and that is something he is not entitled to do. Furthermore, if one approaches the issue from the perspective of inconsistent conduct and unfairness in the sense advanced by Blackie and Reid one reaches the same conclusion. I also add that, if prejudice is a relevant issue, the prejudice is the disowning of Mr Rutherford's acts by the defender, not prejudice immediately following 13 th November. I also accept the proposition that once representation and reliance are established the onus of proof shifts to the defender to establish, on a balance of probabilities, that Mr Rutherford was not authorised by him to act as he did. The defender has not discharged that onus but I do not consider that, on the facts of this case, onus is of importance.

[46] It follows from all of what I have said that Mr Rutherford was acting as the agent of the defender when he signed the document in November

2008. Such agreement as to practical completion means that there was a date of entry and that the pursuers are entitled to succeed on this branch of their case. At the request of both parties I shall put the matter out by order in order to pronounce the appropriate interlocutor to give effect to these findings. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotSC/2011/9.html>

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/scot/cases/ScotSC/2011/>

CASE PAGE <https://chat.esheria.ai/case-law/scotland/gregor-homes-ltd-v-emlick-2011-scotsc-9-11-january-2011>

Prepared on 28 October 2026 · Esheria