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Laura Macgregor

Lorna Richardson

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FORMATION

***Donald v Booth* [2026] CSIH 35; 2026 SLT 735**

Binding oral agreement on the function/purpose of a later standard security

The Sheriff Appeal Court decision in this case was covered in last year's Update. The Inner House refused an appeal, as described below.

Facts

A property developer and a sequestrated landowner had agreed that a company, owned equally by them, would carry out development of a site (Caldonia) that was owned by the landowner but vested in his trustee in sequestration. They agreed that the property developer would pay the trustee £1,150,000 in exchange for the release of the site. The trustee refused the request to transfer title to the company, and would only relinquish his interest so that title reverted to the landowner. It was agreed that the trustee would transfer title to the landowner, and that the landowner would then transfer title to the company.

To protect the property developer's position for the short time during which the landowner would hold title, before it was transferred to the company, the parties agreed that the landowner would grant a standard security over the site to the property developer. The landowner claimed to have agreed to that arrangement on the basis of the property developer's agent's representation that the security would not be registered, and would be destroyed once the land was conveyed to the company.

The property developer made payment to the trustee, who relinquished the title. The landowner granted the standard security in favour of the property developer and a disposition in favour of the company. The property developer then lost interest in the development and refused to co-operate in the registration of the disposition. He sought to enforce the standard security. The landowner resisted this, and raised sheriff court proceedings to ordain the property developer to grant discharge of the security.

Sheriff Court Decision

The landowner raised an action for production and reduction of the security by reason of misrepresentation or alternatively discharge, for an order ordaining registration of the disposition in the company's favour and ordaining the property developer to pay LBTT. The sheriff found that there had been no misrepresentation, but ordered discharge of the security, registration of the disposition, payment of LBTT and other orders. Crucially, he found that the parties had reached a binding oral agreement, prior to the execution of the security that the security would be relied on only in the event of a supervening circumstance preventing the landowner transferring the title to the site to the company. The sheriff also found that there was an implied term that the security would be discharged upon title being transferred to the company, and that the landowner had relied upon that agreement.

Sheriff Appeal Court Decision

The Sheriff Appeal Court dismissed the appeal. It held that the sheriff's finding that a binding oral agreement was justified on the evidence, as was his finding that the parties had agreed that the security was no more than a temporary device to protect the property developer. Nor was there any principle which prevented a prior agreement being given precedence over a subsequent written security. The Sheriff Appeal Court referred to a principle that a party could not rely upon its own breach of contract to obtain a benefit under the contract. The court also confirmed that there was no requirement that the oral agreement be embodied in writing given that it fell under ss1(3) and 1(4) of the Requirements of Writing (Scotland) Act 1995 (the statutory personal bar provisions). The sheriff did not err in implying a term that the standard security would be discharged once the disposition had been registered, given that the term was required in order to give the oral agreement business efficacy.

Appeal to the Inner House

Dismissing the appeal, the Inner House acknowledged the general supersession rule that a formal deed relating to land superseded a prior contract. There was, however, no sound reason for extending that rule to the modern relationship between a loan agreement and a standard security. In this case, there was no question of supersession, the standard security having been granted in implement of the prior arrangement and subject to its express and implied terms. Whilst an oral agreement that a standard security would be discharged was unenforceable, that agreement could become enforceable through the operation of s1(3) and 1(4) of the Requirements of Writing (Scotland) Act 1995. This would be the case if one party

to the contract had acted in reliance on it with the knowledge and acquiescence of the other party, and as a result of so acting that party had been affected to a material extent, and would be adversely affected if the other party was able to withdraw from the bargain. The requirements of these sections were satisfied in this case. Finally, an obligation to discharge the standard security upon transfer of the land to the company was an inevitable inference from the parties' agreement. The oral agreement contained an implied term that the security would be discharged once title passed to the company. The Inner House indicated that this term was obviously necessary to prevent the agreement being legally incoherent – were it otherwise the security would cover a property no longer held by the landowner and for a debt which was never his but that of the company.

Analysis by the Inner House

Was the standard security subject to the prior oral agreement?

Lord Malcolm, delivering the opinion of the court, referred to the leading case *RTS Ltd v Molkerei Alois Muller GmbH & Co KG*[1] as authority to the effect that the test for a binding agreement was an objective one.[2] Counsel for the property developer had sought to argue that a new agreement separate to the original agreement had been entered into, and that the standard security was referable to that new agreement. The Inner House disagreed. The standard security only made sense in the context of the joint venture as a whole.[3] Lord Malcolm added:

> It is well established that recognition that further details of an agreement are required does not necessarily postpone a binding contract in the meantime, especially if, as here, it is executed by payment of a large sum by one of the parties and the purchase of a property by the other.[4]

As already noted, the Inner House acknowledged the general rule of supersession, which dictates that a disposition supersedes the terms of a prior contract. Lord Malcolm referred to a case on similar facts to the present, *Societe Generale SA v Lloyds TSB Bank plc and anor.*[5] The court in that case had referred to observations of Viscount Cave in *Claddagh Steamship*

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[1] [2010] 1 WLR 753.
[2] Para [23].
[3] Para [25].
[4] Ibid.
[5] Unreported, 17 September 1999.

Co v Steven & Co that it was competent to prove "that the actual contract between the parties was not embodied or intended to be embodied in the formal document, but that the latter was a mere piece of machinery obtained as subsidiary to and for the purpose of the verbal and only real agreement".[6] In an obiter comment, the court had recognised that it was possible for the parties to agree that a prior agreement should be given effect notwithstanding the terms of a subsequent security.[7]

Lord Malcolm also referred to *Hambros Bank Ltd v Lloyds Bank plc,*[8] in which it had been recognised that, if the creditor was not entitled to require repayment because of the personal rights and obligations between the parties, the security did not take precedence. "That personal right does not appear on the face of the record but will have legal effect by way of personal objection to prevent the creditor standing upon the existing recorded deed".[9]

Drawing on these authorities, Lord Malcolm observed: "In the present case there can be no question of supersession. The parties' agreement envisaged the creation of the standard security over Caldonia and the limited part it was to play".[10] It had been observed in *Societe Generale* that there was no sound reason for extending the supersession rule to the modern relationship between a loan agreement and a standard security, the latter being "ancillary to the former which was intended to, and did, define the primary obligations of the parties".[11] This was a statement with which the Inner House agreed.[12] Lord Malcolm summed up on this point:

> It is clear that with regard to the joint venture to develop Caldonia, the standard security did not replace or overrule all that had gone before. On the contrary, it was granted in implement of the prior arrangement and was subject to its terms, both express and implied. The proposition that only an express provision therein could take effect seems unprincipled. In any event the limited purpose of the security was part of

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[6] 1919 SC (HL) 132 at 137.
[7] Para [30].
[8] 1999 SLT 49.
[9] *Hambros Bank Ltd v Lloyds Bank plc* 1999 SLT 49 at 53.
[10] Para [32].
[11] Unreported, 17 September 1999.
[12] Para [32].

> the terms of the oral agreement; the only implication concerns the obligation to grant a discharge.[13]

Requirements of Writing (Scotland) Act 1995

The court noted that, in terms of s1(2)(a) of the 1995 Act, formal writing was required for the valid constitution of, amongst other things, a contract providing for the extinction of a real right in land.[14] This meant that, on its own, an oral agreement that a standard security will be discharged is unenforceable. This would not apply however if s1(3) and (4) applied, namely:

> …if (a) one of the parties to the contract has acted in reliance on it with the knowledge and acquiescence of the other party, (b) as a result of so acting that party has been affected to a material extent, and (c) they would be adversely affected if the other party was able to withdraw from the bargain.[15]

Finding that the requirements of these sections had been met on the facts, the sheriff had referred to the landowner granting the security; accepting the funds from the property developer; and acquiring Caldonia for a price well above the highest valuation of the land, all with the knowledge and acquiescence of the property developer. If the latter had been entitled to withdraw, the landowner would remain the owner of the land with all the liabilities that that involved; would owe the property developer £930,000 and would be personally liable for any shortfall arising from the sale of Caldonia after the calling up.[16] Despite arguments by counsel for the property developer that these actions were neutral, the Inner House had "no difficulty understanding the sheriff's decision. Mr Booth's [the landowner's] actings were clearly referable to the joint venture agreement, which includes both its express and implied terms".[17] The Inner House saw no reason to interfere with the sheriff's findings on this point.

Implied Term as to Discharge of the Standard Security

Counsel for the property developer had argued that the implied term left him unsecured, and questioned why he should be happy with that. The Inner House answered "…happy or

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[13] Para [33].
[14] Para [34].
[15] Para [34].
[16] Para [35].
[17] Para [37].

otherwise, it flows from the terms of the agreed project. He took the risk".[18] Lord Malcolm explained:

> As the Sheriff Appeal Court observed, the implied term was obviously necessary to prevent the agreement being legally incoherent. Were it otherwise, the security would cover property no longer held by Mr Booth and for a debt which was never his, but that of the company. We agree with the sheriff that an obligation to discharge the standard security in the current circumstances was an inevitable inference from the parties' agreement. Any and all of the various tests laid down over the years for the implication of a contractual term in a commercial contract listed by Lord Neuberger of Abbotsbury in *Marks & Spencer plc v BNP Paribas Securities Services* [2015] UKSC 72, [2016] AC 742 at paragraphs 16-20 are met.[19]

Discussion

This case is useful for several reasons. It reminds us that the supersession rule which applies to dispositions delivered in implement of prior contracts does not apply to the modern relationship between a loan agreement and a standard security. It also provides a good illustration of the fact that, in Scots law, the courts are willing to make a finding that an oral contract exists, provided that sufficient evidence of the way in which that contract was formed and its terms are available. Lack of writing can be "cured" by ss1(3) and (4) of the Requirements of Writing (Scotland) Act 1995. Finally, it confirms the rules on implied terms in fact, namely that a term will be implied on the basis of necessity to make a contract work, or as was stated here, to make the contract legally coherent rather than incoherent.

The case also provides a lesson, if one were required, on the pressing need to make sure that contracts contain all the details of what is to transpire in different factual scenarios. What was required here was a written contract making clear the purpose of the standard security, and what would happen to it once the disposition had been delivered and registered. Here, where there was no such written contract, an oral contract sufficed to protect the landowner. It is, however, always preferable to have matters set out clearly in a written agreement and not be forced to seek to prove the terms of an oral agreement, or rely on ss1(3) and (4) of the Act.

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[18] Para [40].
[19] Para [40].

INCORPORATION OF TERMS AND CONDITIONS

MS Amlin Marine NV v King Trader Ltd and ors [2025] EWCA Civ 1387; [2026] KB 315

Incorporation of terms and conditions

In this decision, the Court of Appeal analyse the "onerous clause doctrine", namely the rule that where a particularly onerous or unusual term of a contract is contained in standard terms, and the other party does not know about that term, it will not bind the other party unless the party seeking to rely on it shows that it has reasonably and properly been brought to the other party's attention. The decision suggests that the threshold required to show that the clause is onerous or unusual is a high one, particularly where the clause is in a commercial contract between parties of roughly equal bargaining power.

Facts

This dispute related to a marine insurance policy taken out by the charterer of a vessel. The clause at the centre of the dispute was a "pay first" clause, namely a clause providing that the insurer would not have to indemnify the charterer of any legal liability unless the charterer had first discharged such liability itself. During the period of the insurance the vessel ran aground in the Solomon Islands. The owner of the vessel and the P&I club obtained an arbitration award against the charterer, but the charterer could not pay the award because it had become insolvent. In proceedings brought by the insurer, the judge held that the insurer could enforce the pay first clause against the charterer and against the owner and P&I club (in whom the charterer's rights under the policy had been vested on its insolvency). The owner and the P&I club appealed, contending that the pay first clause should not be given effect because (i) it was in conflict with the insuring clause and (ii) it was an onerous or unusual clause that had not been brought fairly and reasonably to the charterer's attention. Only the second of these legal issues will be considered here.

Decision

In the Court of Appeal, Sir Geoffrey Vos delivered the main decision, Singh LJ and Males LJ agreeing. Dismissing the appeal, Sir Geoffrey indicated that where the onerous clause doctrine applied, the clause was not to be regarded as incorporated into the contract, although suggesting that it might be more accurate to state that the clause would have no effect. Both the question of how onerous or unusual the clause needed to be and the question of what amounted to fair and reasonable notice were questions of fact and degree to be decided taking

into account all the circumstances of the case in question. The Court indicated that a high threshold was required to show that the clause was onerous or unusual in the first place, particularly when the clause was in a commercial contract between parties of broadly equal bargaining power, in which the court should be slow to intervene.

In this case, the pay first clause was neither onerous, despite having a serious and significant effect in the event of the charterer's insolvency, nor unusual, pay first clauses being commonly deployed in marine insurance generally. Accordingly, the insurer was able to enforce the pay first clause against the charterer, and, following the charterer's insolvency, against the owner and the P&I club. The insurer was therefore not liable to indemnify the charterer against its liability under the award and had no liability to the owner or the P&I club.

Counsel for the owner and the Club had suggested in submissions that there was a sliding scale as to the degree of notice that was required to be given before the term was to be held to have effect as being incorporated in the contract.[20] He had argued that the pay first clause was "harsh, extremely unfair, onerous and commercially unreasonable", adding that "on the sliding scale of unfairness, the pay first clause was said to be at the top end".[21]
Sir Geoffrey identified elements of the onerous clause doctrine as follows:

(i) The party burdened by it was not actually aware of the clause in question; and
(ii) That the party relying upon it had not done all that was fairly and reasonably sufficient to bring the clause to the attention of the other party.[22]

He added that the doctrine is "all about notice" and that it was not likely

> "…to have any application to purely commercial transactions in financial markets such as insurance, where the party relying on the doctrine is represented by professional agents, whose duties will presumably include explaining the meaning and effect of the contracts it concludes for its principal, the insured."[23]

[20] Para 65.
[21] Para 67.
[22] Para 69, citing *Chitty on Contracts*, 35th edn, (2023) vol 1 paras 16-010 to 16-012.
[23] Para 69.

Sir Geoffrey provided a useful review of the leading cases, including *J Spurling Ltd v Bradshaw,*[24] *Thornton v Shoe Lane Parking Ltd*,[25] *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd,*[26] *Goodlife Foods Ltd v Hall Fire Protection Ltd,*[27] *Bates v Post Office (No 3)*[28] *and Blu-Sky Solutions Ltd v Be Caring Ltd.*[29]

In *Spurling,* Denning LJ had memorably used the idea of a "red hand" to express this principle, in the context of a dispute relating to an exclusion clause. He stated:

> I quite agree that the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.[30]

His review of the authorities revealed inconsistent views on the effect on the clause where it falls foul of the rule. In *Interfoto,* Dillon LJ had suggested that the clause did not become part of the contract, whereas Bingham LJ held that the borrower in the case was relieved of liability. Interestingly, in *Interfoto,* Bingham also likened the effect of this rule with good faith in civilian legal systems.[31]

Also notable in this review of authorities is a statement from Judge Waksman to the effect that "[m]uch will depend on the context. It might be said that if in very common use it is less likely properly to be regarded as onerous especially between two commercial parties since that is the business in which they knowingly operate".[32]

Fraser J in *Bates* had also suggested that the more onerous and unusual a clause is, the greater notice must be given to the other party.[33]

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[24] [1956] 1 WLR 461.
[25] [1971] 2 QB 163.
[26] [1989] QB 433.
[27] (2018) 178 Con LR 1.
[28] [2019] EWHC 606 (QB).
[29] [2022] 2 All ER (Comm) 254.
[30] [1956] 1 WLR 461 at 466.
[31] [1989] QB 433 at 445.
[32] [2012] EWHC 2213 (TCC), approved by Coulson LJ in *Goodlife.*
[33] [2019] EWHC 606 (QB) at para 978.

At the end of his review of the authorities, Sir Geoffrey concluded that the phrase "red hand rule" was unfortunate and should not be perpetuated.[34] He preferred to describe the principle as the "onerous clause doctrine".[35] He confirmed that it can apply to both consumer and commercial contracts.[36] Many of the authorities indicate that the doctrine is unlikely to have any application in commercial contracts where the parties are of broadly equal bargaining power and where the challenged clauses in question are common form or usual terms regularly encountered in the business.[37]

Despite Bingham's differing view, noted above, Sir Geoffrey indicated that, where the doctrine applies, the clause is not to be regarded as incorporated in the contract, or "more accurately, as having effect".[38]

Sir Geoffrey's statement of the doctrine was as follows:

> …where a particularly onerous or unusual term of a contract (an onerous clause) is contained in one party's standard terms, and where the other contracting party does not actually know of that term, it will not bind the other contracting party unless the party seeking to rely upon it shows that the clause in question (whether individually or as part of the standard terms) was fairly and reasonably brought to the other contracting party's attention.[39]

He noted that some of the authorities do suggest that a sliding scale applies so that the more onerous a clause, the more notice is required to make it effective.[40] In his view, this is not the law. The position is, rather, that the degree of onerousness, and what amounts to fair and reasonable notice, are questions of fact and degree, taking into account all the circumstances of the case.[41] He finished his analysis of the law by emphasising the high threshold required to show that a clause is onerous or unusual, particularly in a commercial context.[42]

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[34] Para 83.
[35] Para 83.
[36] Para 84.
[37] Para 84.
[38] Para 85.
[39] Para 86.
[40] Para 87.
[41] Para 87.
[42] Para 88.

Applying these principles to the case, Sir Geoffrey indicated that the judge at first instance had been right to conclude that the pay first clause was not onerous or unusual.[43] The clause was not unusual, being commonly deployed by both P&I clubs and in marine insurance generally. [44] The clause in this case did not meet the high threshold needed to be classified as unusual to engage the onerous clause doctrine.[45] Although the clause did have a serious and significant effect, it did not reach the high threshold required to make it an onerous clause, and thus to engage the onerous clause doctrine.[46] Not every burdensome clause was onerous.[47] Whilst it had been argued that the clause was hidden away in the contract, he suggested that a broker should have drawn the Insured's attention to it. He added "I would venture to suggest that the onerous clause doctrine could never be applicable in any normal case which a party has its own professional broker or adviser acting for it in the transaction".[48] He suggested that this was a commercial contract between parties of broadly equal bargaining power, in which the court should be slow to intervene.[49]

Males LJ, although agreeing with Sir Geoffrey, added some very short comments about the rationale of the doctrine, as follows:

> …the rationale … is that the party seeking to escape from the effect of the clause was not aware of it and should not reasonably have been aware of it because it was not fairly and reasonably brought to his attention. It is therefore concerned with the kind of contract which a reasonable party would not be expected to read carefully from beginning to end. It is difficult to see how this doctrine could ever apply to a contract of marine insurance in which the insured was represented, as will usually be the case, by specialist brokers who can be expected to familiarise themselves with the terms available in the market. If the proposed policy contains a clause which can genuinely be regarded as unusual or unreasonable, it would be the brokers' duty to draw that clause to the insured's attention.[50]

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[43] Para 89.
[44] Para 90.
[45] Para 90.
[46] Para 91.
[47] Para 91(i).
[48] Para 91(ii).
[49] Para 91(iv).
[50] Para 101.

He also noted that pay first clauses in marine liability policies remain prevalent, and therefore that it could be safely assumed that the market understands their effect but is content to contract on such terms.[51] Parties could, in his view, seek a quotation for a policy which did not include such a term, although that would likely impact upon the premium to be paid.[52]

[51] Para 102.
[52] Para 102.

INTERPRETATION

***Providence Building Services Ltd v Hexagon Housing Association Ltd* [2026] 1 WLR 538**
Interpretation of JCT Design and Build Contract 2016

Facts

The parties had entered into a contract in February 2019 for the construction of a number of buildings in London. The contract incorporated the JCT Design and Build Standard Form Contract 2016[53] as amended by the parties.

In November 2022 the contractor issued a notice of specified default in terms of cl 8.9.1 for non-payment of a payment notice. The employer paid the sum due within the 28 day period provided for in cl 8.9. In April 2023 the employer failed to pay a further payment notice. The contractor purported to terminate the contract in terms of cl 8.9.4 (see below) referring back to the earlier notice of specified default and relying on this second non-payment as a repetition of the specified default. The employer paid the sums due, disputed the contactor's termination notice and asserted that the contractor in purporting to terminate was in repudiatory breach, which breach the employer accepted.

Clause 8.9 provided:

> 3. If a specified notice of default… continues for 28 days from the receipt of a notice under clause 8.9.1… the Contractor may on, or within 21 days from, the expiry of that 28 day period by a further notice to the Employer terminate the Contractor's employment under this Contract.
> 4. If the Contractor for any reason does not give the further notice referred to in clause 8.9.3, but (whether previously repeated or not):
> 1. the Employer repeats a specified default; ….
> then, upon or within 28 days after such repetition, the Contractor mat by notice to the Employer terminate the Contractor's employment under this Contract.

[53] The court noted there was now a new edition of that contract, published in 2024, but the termination provision in dispute in this case was unchanged in the new edition.

The question for the court was whether the contractor could terminate under cl 8.9.4 in a case where a right to give the further notice referred to in cl 8.9.3 had never previously accrued (because the employer had complied with the default notice).

Decision

Lord Burrows delivered an opinion, with which the other members of the court agreed. He began by noting that interpretation of contract was a question of law.[54] He went on to say that,

> The modern approach in English law to contractual interpretation is to ascertain the meaning of the words used by applying an objective and contextual approach. As was said by Lord Hoffmann in his seminal speech in *Investors Compensation Scheme*… the aim of contractual interpretation is to ascertain "the meaning which [the contract] would convey to a reasonable person having all the [relevant] background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."[55]

Lord Burrows observed that Lord Hoffmann has also explained that business or commercial common sense might also be relevant. In contrast, declarations of subjective intentions of the parties and, for reasons of practical policy, previous negotiations could not be used in determining what the contractual language meant.[56]

He noted that in *Arnold v Britton*[57] the Supreme Court had clarified that the words used by the parties were of primary importance so that one had to be careful to avoid placing too much weight on commercial common sense (or purpose) at the expense of the words used. One had to be astute not to rewrite the contact so as to protect one of the parties from a bad bargain.[58] He then referred to *Wood v Capita Insurance Services Ltd*[59] in which the Supreme Court had pointed out that contractual interpretation involved an iterative process by which

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[54] Para 1, citing *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724. In *Arbitration Application No 2 of 2026* Lord Sandison noted that this was as a result of historical quirk in English law and that in Scots law, particularly now that background circumstances were recognised as potentially highly pertinent to questions of contractual construction, the true construction of a document was a mixed question of fact and law.
[55] Para 21.
[56] Para 21.
[57] [2015] AC 1619.
[58] Para 22.
[59] [2017] AC 1173.

each suggested interpretation was checked against the provisions of the contract and its commercial consequences were investigated.[60]

Lord Burrows stated that explanatory notes to a contract might be admissible evidence as an aid to interpretation.[61]

He went on to say,

> the admissible background context may include past decisions of the courts on, and practice in relation to, clauses in an earlier version of the standard form. For example, it may be clear that the standard form has been amended so as to depart from a decision of a court. In *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd,* a case dealing with a JCT standard form, Lord Hoffmann said…. "It is also important to have regard to the course of earlier judicial authority and practice on the construction of similar contracts. The evolution of standard forms is often the result of interaction between the draftsmen and the courts and the efforts of the draftsmen cannot properly be understood without reference to the meaning which the judges have given to the language used by his predecessors."[62]

Before noting however the general position that the courts discouraged what has been termed an "archaeology of the forms".[63] A very clear statement of the position has been set out by Moore-Bick LJ in *Seadrill Management Services Ltd v OAO Gazprom,* where an analogy had been drawn with the non-admissibility of previous drafts of contracts,

> In cases where it is possible to identify with a degree of confidence the reason for an amendment to a standard form, for example, where a change has been made to respond to the effect of a particular decision of the courts, a change in legislation or a widely publicised event, that may be appropriate. Such cases are usually well known in the industry and are often documented in the trade press. Both parties are therefore likely to be aware of them. I am doubtful, however, whether it is legitimate simply to

[60] Para 23.
[61] Para 24, citing Lewison, *The Interpretation of Contracts,* 8th ed (2024) paras 3.38-3.42.
[62] Para 26.
[63] Para 28, citing *Polestar Maritime Ltd v YHM Shipping Co Ltd (The Rewa)* [2012] 2 All ER (Comm) 447.

> compare the earlier and later versions of the contract form of the assumption that e parties consciously intended to achieve a particular result by adopting the later version. Such an exercise is not wholly removed from that of referring to drafts produced during the course of negotiations, which are not a proper aid to construction.[64]

He then observed that courts and commentators had sometimes considered whether industry-wide standard form contracts might be subject to different principles of interpretation than normal. He quoted from *Chitty on Contracts* that,

> In the case of a contract which is intended for standard use throughout a particular industry or market, the court is more likely to focus its attention on the background generally known to participants in the industry or the market and not on the background known to, or the understandings of, the individual parties to the particular transaction.[65]

which he readily accepted to be correct, in that an industry-wide standard form contract should generally be interpreted consistently for all contracting parties using that form and, subject to bespoke amendments, that interpretation was unlikely to be contradicted by the objective intentions of the particular contracting parties.[66] Nevertheless, the established approach, based on the objective intentions of the contracting parties in the relevant context, should still be applied in interpreting industry-wide standard form contracts. It was not a departure to say that, where parties had chosen an industry-wide standard form, it could generally be taken that their objective intentions in the relevant context were that their respective rights and obligations should be consistent with those of other parties using the same form and should reflect the objective intentions of those who had drawn up that standard form agreement.[67]

The court considered that the correct interpretation of cl 8.9.4 was that the contractor could not terminate where the right to issue the termination notice, following the notice of default,

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[64] [2011] 1 All ER (Comm) 1077 at para 17.
[65] 36th ed (2025), para 16-061.
[66] Para 30.
[67] Para 31.

had never accrued. This was the natural meaning of the words in cl 8.9.4, which Lord Burrows described as being "parasitic" on cl 8.9.3. The language made clear that the contractor had to have accrued the right to terminate under 8.9.3 before cl 8.9.4 applied ie, of was only if the employer had failed to cure any earlier specified default within 28 days that the contractor could terminate for the repetition of a specified default.[68] That meaning was also supported by producing a rational and less extreme outcome than an interpretation which allowed the contractor to terminate simply because an earlier notice of default had been issued but remedied. It was only where the breach went uncured for 28 days and was in that sense particularly serious, that the contractor could terminate for a further late payment.[69]

Discussion

While the case will be of most interest to construction lawyers the case provides a useful analysis of the approach to the interpretation of contracts generally, and to standard form contracts in particular. Lord Burrows makes reference to both *Arnold v Britton* and *Wood v Capita,* which clearly remain the key points of reference on the general principles of interpretation.

The court deals with the doubt expressed as to whether a different approach should be taken to interpreting industry-wide standard form contracts and comes to the view that it should not. While account may be taken of what might be termed a "widened factual matrix", which includes explanatory notes to the contract and previous court decisions on, and practice in relation to, clauses in an earlier version of the standard form, this is on the basis that the parties at the time of contracting intend that their rights and obligations under the standard form contract to reflect those of other parties using the standard form contract. It may also be observed that established meanings and changes made to standard form contracts will or should be known to the parties at the time of contracting in the same way that the state of the law or a market are relevant context in interpreting contracts generally.

While the Supreme Court spent quite some time setting out the approach to interpreting standard form contracts the court ultimately decided the issue before it without reference to explanatory notes or decisions as to the meaning of the disputed provision but instead focused

[68] Para 32.
[69] Para 34.

on the words used, their interaction with other clauses of the contract before considering whether the meaning indicated by that textual analysis was commercially sensible.

***Great Asia Maritime Ltd v Orion Shipping and Trading LLC* [2026] 1 WLR 3576**
Interpretation of standard form contracts and effect of using express termination clause on right to damages

Facts

The parties had entered into a contract on the Norwegian Saleform 2012[70] in terms of which Orion agreed to sell and Great Asia to buy a second-hand vessel. Clause 14 of the contract provided that the buyer could cancel the contract if the seller was not ready to validly complete legal transfer by the Cancelling Date. The clause further provided that if the seller was not ready to transfer it had to make due compensation to the buyer for the buyer's loss and for all expenses together with interest if the failure was due to the seller's proven negligence and that this was due whether or not the buyer cancelled the agreement.

The vessel was not ready for delivery by the Cancellation Date. The buyer applied to arrest the vessel as security for it claim of US$5m. During initial arbitration the arbitrators found that this arrestment was a cancellation by the buyer.

The seller disputed that loss of bargain damages – that is loss of a bargain consequent on contract termination[71] - was available on the wording of clause 14. It argued that its breach had not caused the buyer's loss, that had been caused by the buyer's decision to terminate the contract in terms of cl 14, and without the seller's breach, triggering the right to cancel, being a repudiatory breach.

Decision

Lords Hamblen and Burrows delivered an opinion, with which the other members of the bench agreed. They began by referring to Lord Burrows' opinion in *Providence Building Services Ltd v Hexagon Housing Association Ltd*[72] in which he stated,

[70] The most commonly used standard form contract for the sale of second-hand vessels.
[71] Para 20.
[72] [2026] 1 WLR 538, a note on which appears in this section of the Update.

> The modern approach in English law to contractual interpretation is to ascertain the meaning of the words used by applying an objective and contextual approach. As was said by Lord Hoffmann in his seminal speech in *Investors Compensation Scheme…* the aim of contractual interpretation is to ascertain "the meaning which [the contract] would convey to a reasonable person having all the [relevant] background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."[73]

They further noted that in *Providence* the Supreme Court had addressed the proper approach to interpreting an industry wide standard form contract. While recognising that the general position was that an examination of what had been termed the "archaeology of forms" was to be discouraged Lord Burrows had also said,

> the admissible background context may include past decisions of the courts on, and practice in relation to, clauses in an earlier version of the standard form. For example, it may be clear that the standard form has been amended so as to depart from a decision of a court. In *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd,* a case dealing with a JCT standard form, Lord Hoffmann said…. "It is also important to have regard to the course of earlier judicial authority and practice on the construction of similar contracts. The evolution of standard forms is often the result of interaction between the draftsmen and the courts and the efforts of the draftsmen cannot properly be understood without reference to the meaning which the judges have given to the language used by his predecessors."[74]

Lords Hamblen and Burrows then started their analysis of cl 14 by focusing on the language used,[75] coming to the view that "loss" was general and unqualified and that loss of a bargain was a type of loss.[76] "Loss" was wide enough to cover loss in fact suffered by the buyer as a result of the cancellation, there being no good reason for reading some further limitation to the loss recoverable. Indeed, unless "loss" included loss of bargain it was unclear what loss

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[73] *Providence*, para 21.
[74] *Ibid,* para 26.
[75] *Great Asia,* para 24.
[76] *Ibid.*

would be covered in the event of cancellation. They came to the view that "loss" in cl 14 included the loss of bargain suffered by the buyer as a result of cancellation of the contract of sale.[77]

They then went on to consider wider contextual matters which supported that conclusion, including the fact that cl 13, dealing with buyer's default, "loss" included loss of bargain, finding that it would be "very surprising" if cl 14 did not also do so. As a matter of "contractual symmetry" it would be surprising if such damages were recoverable under cl 13 but not cl 14.[78] They then noted that in the event of the buyer cancelling and claiming compensation under cl 14 the situation was, or was akin to, non- delivery under a contract for the sale of goods where, in terms of section 51(3) of the Sale of Goods Act 1979 the normal measure of loss was loss of bargain damages. That was relevant context for what "loss" in cl 14 meant.[79]

The Supreme Court then went on to consider past decisions on the clause and established meanings, finding that a number of cases had considered loss of bargain damages to be recoverable. Indeed, following such decisions there had been no attempt to amend the standard form to remove the right to claim loss of bargain damages. If anything, changes that had been made had resulted in the measure of recoverable loss being extended.[80] The court noted that where a contract was based on a standard form it recognised the desirability of certainty and was reluctant to disturb an established construction,[81] noting that when parties decide to use an industry-wide standard form they are taken to know that the standard terms might have established meanings and to be content to contract on that basis. That was the meaning that would be conveyed to a reasonable person in the position of the parties at the time of contracting.[82] The established meaning of cl 14 was that loss of bargain was a "loss".[83]

Their Lordships then commented that their conclusion was also supported when regard was had to the commercial consequences of the rival interpretations, it being well established that

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[77] Ibid.
[78] Ibid, paras 26 – 28.
[79] Ibid, para 29.
[80] Ibid, paras 31 – 39.
[81] Ibid, paras 40 – 44.
[82] Ibid, para 45.
[83] Ibid, para 46.

such consequences might be an aid to interpretation.[84] Where the market had risen and the buyer cancelled, the question arose as to which of the parties should benefit from the rise in value. For the seller to be allowed to reap the benefit of its negligence and default by keeping the vessel with its increased value was an uncommercial outcome; it being far more commercial for the innocent buyer to be compensated from the increase in value from which it would have benefited had there been compliance with the readiness obligation.[85]

The court then went on to consider the seller's argument that loss of bargain damages were not payable where the contract had been terminated using an express termination provision and where the breach was not repudiatory. The seller relied on the decision of the Court of Appeal in *Financings Ltd v Baldock.*[86] The Supreme Court noted that that decision had been subject to some criticism but that this was not an appropriate case to reconsider it. As such the Supreme Court assumed that *Financings* was good law, leaving it for another more suitable case to determine whether that decision should be reconsidered. Here the court was concerned to determine whether there was a causation explanation of *Financings* as argued by the seller.[87] The argument was that where there is a repudiatory breach the law recognises that breach as sufficient to terminate the contract, and when termination occurs, the breach causes the loss of the bargain, however, if the right to terminate arose by some contractual provision, the innocent party's reliance on that provision caused the loss of the bargain, not the breach. The Supreme Court noted the immediate difficulty with the causation argument was that it was clear that a repudiatory breach was of no effect unless and until it was accepted by the innocent party as terminating the contract. The repudiatory breach itself did not destroy the bargain, quoting Asquith LJ's famous words, "An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind".[88] There appeared to be no distinction, in terms of causation, between an innocent party accepting a repudiatory breach and the innocent party choosing to terminate under an express termination clause. If the effective cause of the loss of bargain was the innocent party's choice to terminate that was the position under an express termination provision and where

[84] Ibid, para 47 with reference to *Wood v Capita* [2017] AC 1173 in which Lord Hodge had noted that in the iterative process each suggested interpretation was checked against the provisions of the contract and it commercial consequences investigated.
[85] Ibid, paras 48-50.
[86] [1963] 2 QB 104.
[87] *Great Asia*, para 55.
[88] *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417 at 421.

that party choose to terminate for a repudiatory breach.[89] Furthermore the court was not concerned with a "bare" termination provision but with an express termination provision with an express compensation provision setting out what was to happen on the right to terminate being used.[90] The court came to the view that subject to there being clear words to the contrary there was no good reason to interpret an express compensation provision as incorporating the *Financings'* causation principle.[91]

Finally, the court considered the seller's argument that clear words were required to confer on the buyer a claim for loss of bargain damages which were not available at common law (the breach not being repudiatory and thus not causing the loss, the decision to terminate being the cause of the loss). The court considered the uncontroversial and well-established principle that clear words are required if a clause is to be interpreted as taking away or excluding a party's rights or remedies.[92] But this was the converse of that situation – where the buyer was alleging that cl 14 provided them with additional rights to those available at common law. The court rejected the seller's submission that the "clear words" principle applied equally to that converse situation, noting that taking away rights or remedies was significantly different to conferring rights or remedies. It was not inherently unlikely that a party intended to confer on the other rights additional to those available at common law.[93] With reference to comments made by Lord Sumption in *Bunge v Nidera*[94] the court noted that clear words would be needed if an express damages clause were to override the compensatory principle by providing for compensation where there had been no loss at all but that was not the position here where the buyer had suffered a loss.[95]

The Supreme Court therefore found that cl 14 of the Saleform 2012 contract allowed the buyer to claim damages for loss of bargain where the contract was lawfully cancelled in terms of that clause.

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[89] *Great Asia,* para 65.
[90] Ibid, para 68.
[91] Ibid, para 70.
[92] Ibid, paras 74 – 80.
[93] Ibid, para 84 - 93. The court distinguished the case at hand from *Novasen SA v Alimenta SA* [2013] EWHC 345 (Comm) and *Spar Shipping AS v Grand China Logistics Holding (Group) co Ltd (The Spar Capella)* [2015] 1 All ER (Comm) 879, where Popplewell J, at first instance, had stated that clear language was needed to confer a right to damages where there had been termination under an express termination clause.
[94] [2015] UKSC 43.
[95] *Great Asia*, para 95.

Discussion

As with *Providence Building Services* this case will be of most interest to those dealing with the sale and purchase of vessels using the standard form under consideration by the court, although again the case provides a useful analysis of the approach to the interpretation of contracts generally, and to standard form contracts in particular. We see the Supreme Court consider first of all the language of the clause in dispute before considering how it sits within the contract, and its interaction with other clauses of the contract, before consideration is given to the background against which the contract was entered into, and finally, the commercial consequences of the rival interpretations being taken into account. This is in line with the approach of the Supreme Court in *Arnold v Britton*[96] and *Wood v Capita.*[97]

While, in general, prior drafts of a contract are not admissible in interpreting a contract[98] that is not the case with standard form contracts. This is because the meaning ascribed to the standard form contract or earlier drafts by the courts are part of the background – which will or ought to be known by the parties when contracting. However, and as was also stated in *Providence Building Services,* there are limits to the use of earlier drafts such that simply looking at differences between previous versions of a contract – the "archaeology of forms" - is not useful to the interpretive exercise – it is the interaction of court decisions to changes to the standard form contract that are of use. In this case significantly more attention was paid to prior decisions of the court on the meaning of cl 14 than in *Providence* where the Supreme Court did not consider any prior decisions as to meaning of the clause in dispute in the JCT contract, despite noting they were admissible evidence.

It is clear from the decision that utilising an express termination clause where there is also an express compensation provision dealing with losses where the right to terminate is utilised, means that the party in breach cannot argue that loss of bargain damages are unavailable on the basis that the trigger for the termination clause was not a repudiatory breach. The Supreme Court also clearly suggests, albeit *obiter*, that the cause of the loss is the same – the innocent party's choice – whether they elect to use the express provision or to accept the repudiatory breach to bring the contract to an end. While there are some differences between

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[96] [2015] UKSC 36.
[97] [2017] AC 1173.
[98] *Prenn v Simmonds* [1971] 1 WLR 1381; *Chartbrook Ltd and Anr v Persimmon Homes Ltd and Anr* [2009] UKHL 38; [2009] 1 AC 1101.

Scots and English law on rescission for breach[99] there is no reason why this analysis would not also apply in Scots law.[100]

***Nicol's Worsteds Ltd v HLT Stakis Operator Ltd* [2026] CSIH 43**
Terminal repairing obligations

Facts
The reclaimer was the landlord and the respondent the tenant in terms of a sub-lease of the Grosvenor Hilton Hotel in Glasgow. The sub-lease had come to an end and the dispute was about the extent of the respondent's liability for wants or repair and decoration.

Clause 3.5.1 of the sub-lease provided that the tenant had to

> To keep the Hotel in good and substantial repair and condition and …..Provided that:
> (a) ….nothing herein shall require the Tenant to deliver up the Hotel in a better state of repair and condition than that evidenced by the Schedule of Condition.

Clause 3.5.4.2 provided that the tenant accepted the hotel in its current condition. Clause 3.19.1 obliged the respondent to yield up the hotel at the end of the sub-lease in a state and condition consistent with it having duly complied with its covenants and obligations under the sub-lease, with the proviso that nothing contained in cl 3.19.1 required the tenant to deliver up the hotel in a state and condition better than that evidenced by the schedule of condition.

No authenticated copy of the schedule of condition was available when the sub-lease expired. The reclaimer raised a commercial action against the respondent. During investigations the respondent uncovered a report prepared by Robert Brown Associates with details on the condition of a number of Hilton Hotels including the Glasgow hotel. The respondent also

[99] Some of which are explored in L Richardson, "Rescission for breach of contract in Scots law" 2026 Jur Rev 1.
[100] Although it may be said that there need be no acceptance of the repudiation in Scots law, that the repudiation along with non-performance entitles the innocent party to rescind for material breach – but that is a choice which the innocent party has – see Richardson, ibid.

found two VHS videos which showed some details of the condition of some parts of the Glasgow hotel.

The reclaimer sought declarator that the report and video footage did not constitute the schedule of condition referred to in the sub-lease and that it should not be taken into account when considering the respondent's repairing obligations. The reclaimer sought over £8m in damages for the respondent's alleged breaches of the sub-lease, including cost of works, professional fees and loss of income when the hotel would need to be closed for works to be undertaken.

Decision

The Lord President (Pentland) delivered the opinion of the court. He began by noting that the parties were agreed that the hotel had to be yielded up in a condition of good and substantial repair. The dispute was whether it had to be handed back to the landlord in a state of good repair judged objectively as at the date of expiry of the sub-lease or in no better condition than as at its commencement.

The Lord President noted that the well-established general principles applicable to contractual construction had been summarised in *Ashtead Plant Hire v Granton Central Developments*[101] with there being no need to set them out again. The court's aim was to determine what the parties meant by the language used by ascertaining what a reasonable person would have understood them to mean.[102] The interpretation of a repairing obligation in a commercial lease was subject to those general rules of interpretation.[103] Given each case had to turn on its own provisions previous case law, in which different provisions were considered, was of limited assistance. However, there were two authorities of some interest in to this case. He went on to consider *McCall's Entertainments v South Ayrshire Council (No 2)*[104] in which Lord Hamilton had held that the tenant, having accepted the premises as being in good condition, did not require the tenant to improve them, given their obligation to yield up the premises in "no less good a condition than their present condition". The fact that the schedule of condition had not been completed did not affect that. The Lord President then

[101] [2020] CSIH 2, 2020 SC 244.
[102] *Nicol's Worsted,* para 47 with reference to *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900.
[103] Ibid, with reference to *@SIPP Pension Trs v Insight Travel Services* [2015] CSIH 91, 2016 SC 243.
[104] 1998 SLT 1421.

referred to *@SIPP Pension Trs v Insight Travel Services*[105] in which the Inner House held that the language of the repairing obligation obliged the tenant to put the subjects into good condition and return them in that state at lease end. Lord Pentland noted that the failure to append a schedule of condition to the lease or otherwise record its condition at commencement had weighed heavily against limiting the repairing obligation to the condition at lease commencement.[106]

In relation to this sub-lease the Lord President considered it clear that the parties intended to record the condition of the hotel at the commencement of the sub-lease.[107] Insofar as that condition was recorded in a schedule of condition that would constitute evidence of condition at commencement. There was, however, nothing to suggest that such a schedule was intended to be a comprehensive and exclusive source of evidence of the hotel's condition.[108] The fact that the contents of the schedule of condition (here he appears to be referring to the report and the videos) were limited in scope could not detract from the clear import of the contractual provisions. There was nothing to suggest that the parties had intended there to be two radically different standards of repair at lease expiry, one for the items covered in the schedule of condition and a markedly different standard for items not so covered.[109] He considered it important that the contractual provisions referred to the tenant not being required to deliver up the hotel in a condition better than that *evidenced* by the Schedule of Condition. This, he considered, implied that the Schedule of Condition was intended to be *a* source of evidence of the hotel's condition, not *the* exclusive source. There was no reason that the state of repair at commencement could not be shown by any evidence apt to shed light on that issue.[110] While it might be a significant task to obtain such evidence that was "nothing to the point", such difficulties having no bearing on the parties' intentions when the sub-lease was entered into.[111]

Furthermore, it was notable that the sub-lease did not impose any obligation on the tenant to replace, renew, reinstate or rebuild the hotel. As the court had noted in´*@SIPP* the absence of

[105] [2015] CSIH 91, 2016 SC 243.
[106] *Nicol's Worsted*, paras 48 – 50.
[107] Ibid, para 51.
[108] Ibid.
[109] Ibid, para 52.
[110] Ibid, para 54.
[111] Ibid, para 55.

such language might be significant in supporting the conclusion that the tenant's obligation was limited by reference to the hotel's condition at commencement.[112]

The reclaiming motion was refused, with the action remitted back to the commercial judge for further procedure.

Discussion

This case is likely to be of most interest to those working in the field of commercial leasing. The message must surely be, as it has always been, to ensure that if the repairing obligation is to be limited that a schedule of condition is completed and included in the lease or clearly identified (as where videos or other media are used) and stored so as able to be found during the life of, and at the end of, the lease.

There have been a number of cases where the lack of a schedule of condition and its effect on the tenant's repairing obligation have been considered by the courts. Not all of the authorities go in the same direction.[113] It is suggested that the outcome of this case is correct – the parties had intended to limit the tenant's repairing obligation and that was the case despite no schedule of condition being appended to the sub-lease. The tenant would no doubt have some difficulty in proving the condition at lease commencement without the schedule but what evidence it could obtain was relevant to determining the matter.

Of more general interest – the Inner House mentions the principles of contractual interpretation generally, and does so with reference to *Arshtead Central Developments*. In that case a very prominent role was given to commercial common sense in the interpretive exercise, an issue on which there has been some controversy, particularly in Scots law, over the last decade or so. This sits in conflict with the preceding Inner House decision on interpretation, *Rocep-Lusol Holdings Ltd v Lindal Dispenser GmbH*[114] in which the court made exclusive reference to the Supreme Court decision of *Wood v Capita.*[115] While Lord Doherty delivered the opinion of the court in *Rocep-Lusol* the other members of the bench were the Lord President (Pentland) and Lord Ericht, also on the bench in *Nicol's Worsteds.* In

[112] Ibid, para 56.
[113] See the discussion of the relevant authorities in D Garrity and L Richardson, *Dilapidations and Service Charge* (2019), 46-48, to which may be added *Archyield Ltd v Network Rail Infrastructure Ltd* [2024] LTS 6.
[114] 2025 SC 411. This case appeared in last year's Update.
[115] [2017] AC 1173.

last year's Update we posited that the reference to *Wood* was perhaps indicative of a new direction on interpretation in the Scottish courts under Lord President Pentland, with Scots law aligning with English law in this area, in which contractual language and background context were both used in the interpretive exercise, the influence of each depending on whether the contract was complex, sophisticated and drafted by professionals or not, with commercial common sense having more of a background role. Yet, while the Inner House in *Nicol's Worsted* did not spend much time on the general principles of interpretation it is, we suggest, notable that it was by reference to *Ashtead*. What this means for the development of the law in this area remains to be seen.

***Scottish Ministers v Leggat; Scottish Ministers v Griffin* [2026] CSOH 9**
Interpreting standard form contract for student dentistry bursary

Facts
These cases had been transferred from the sheriff court to the Court of Session as test cases from a much larger number of cases in dependence at sheriff court level, regarding the proper interpretation of a standard form contract entered into between students on undergraduate dentistry courses and the Scottish Ministers for the provision of a bursary of £4,000 per year of the course. The grant of the bursary was conditional on the student undertaking to perform a certain amount of NHS work for a period after graduating.

The Ministers argued that many dentists who had entered into these contracts had not fulfilled the conditions of the bursary and sought repayment of some of the sums defrayed. While the bursary scheme had closed to new entrants in 2018 there were approximately 1,300 dentists who had participated in it, for whom the correct interpretation was relevant to their obligations.

The bursary contract entered between students and the Ministers provided, *inter alia*,

> …. 2(b) the undergraduate agrees to commit to a period of up to 5 years work in the NHS in Scotland following graduation.

> 3. The undergraduate accepts that the bursary is provided by the Scottish Ministers on the basis that they comply with the following:
> (a) the undergraduate agrees to carry out a total of 5 years dental work in Scotland (or the relevant agreed part time equivalent agreed in advance with the Scottish Ministers)…. The undergraduate agrees that if the bursary is only claimed for 3 years, 2 years or 1 year their reckonable years of dental work in Scotland will be 4 years, 3 years and 2 years respectively, as defined above.
> (b) the period of employment must begin within one calendar year of graduation
> (c) the undergraduate's NHS earnings will represent not less than 80% of their total earnings (hereinafter called the "agreed commitment")…
> 14. If the undergraduate fails to complete the agreed commitment by their own volition the undergraduate will be required to repay the dental bursary.

There were a number of issues between the parties as to the correct construction of the contract and, thus, whether the defenders had complied with the "agreed commitment".

Decision

Lord Sandison began by noting that the exercise in contractual construction in this case was rather unusual in some respects. The contract had not been the subject of any negotiation, it being offered to the students on a take it or leave it basis.[116] The context in which the contracts were entered into were thus clear but that context yielded much less than might usually have been expected by way of assistance in the exercise of construction. The basic purpose of the contract – the provision of financial assistance in return for a commitment to NHS dentistry - could be discerned as a matter of generality but was not sufficiently clear to assist in providing answers to many of the questions of construction that arose.[117] Lord Sandison observed that while both parties relied heavily on non-contractual material, namely the terms of the Student Awards Agency for Scotland's website and the terms of the application form for the bursary, those could only represent a source of information as to the background reasonably available to the parties at the time of contracting. It could not amount

[116] It might be noted that very many contracts are standard form contracts offered on a take it or leave it basis, although many of the cases litigated on interpretation have involved negotiated contracts.
[117] Para 57.

to further,[118] let alone different, contractual terms.[119] Those factors placed a somewhat greater than usual premium on the words used in the contract, and on considering the practical results of the rival interpretations, with a correspondingly lesser – but not immaterial – emphasis on the "normally potent" considerations of context and purpose in the particular circumstances surrounding the contractual arrangements.[120]

Meaning of "earnings"

Considering the primary meaning of earnings as being the monetary fruit of one's own labour Lord Sandison found that "earnings" meant money generated by the dentists themselves and not, for example, by hygienists.[121]

Meaning of "NHS earnings"

Lord Sandison came to the view that it could not mean only earnings actually received from the NHS given the general requirement for patients to make financial contributions to NHS dental work. The defenders had argued that "NHS earnings" included all sums paid by patients registered for NHS work regardless of whether the work done was partially paid for by the NHS or was private treatment. While a dentist could not direct whether an NHS patient would opt for NHS work or private work that did not furnish a sufficiently weighty ground to displace the meaning that the language of the contract pointed to, with Lord Sandison commenting that the fact a contracting party might find himself failing to meet a contractual requirement, despite his best efforts, was not a particularly unusual outcome in contract law. He considered that the defenders' interpretation produced an anomalous result, which was not so with the Ministers' construction that "NHS earnings" meant earnings generated by the dentist in the treatment of NHS patients for which the NHS paid for some of the treatment in accordance with the Statement of Dental Remuneration.[122]

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[118] It is not clear from the case report whether the contract contained an entire agreement clause. If not, further terms could be held to exist – see s1 Contract (Scotland) Act 1997.
[119] Para 58.
[120] Para 59.
[121] Para 60.
[122] Para 62.

Period over which 80% requirement to be met

One issue was whether this figure had to be met each year or in aggregate over the commitment period. Lord Sandison noted that the contract was silent on this matter. Drawing on the terms of the application form he found that it was to be met each year.[123]

A further issue was whether the commitment period was a continuous period or whether the condition could be met by a combination of shorter periods over a longer stretch of time. To answer this issue Lord Sandison considered the practical results of the competing interpretations, concluding that it was a continuous period but that periods of justified absence would not be taken into account in determining whether the 80% threshold had been met, drawing on cl 14 which referred to the student failing to complete the agreed commitment by their own volition.[124]

Net or gross earnings

While again the contract was silent Lord Sandison found that gross earnings should be used to determine whether the 80% requirement had been met, reasoning that it was difficult to see why the parties would have contemplated the calculation to have been affected by factors such as revenue sharing within a practice or the financial efficiency of the running of the practice.[125]

Extent of repayment

While the contract expressly dealt with the repayment in certain circumstances cl 14 provided that if the student failed to complete the agreed commitment by their own volition they had to repay "the dental bursary". Parties agreed that wording on the SAAS website at the time the contracts were entered into, which stated that a student would have to repay a portion of the bursary which depended on how much of the tie-in period the student had complied with, formed part of the admissible background. Lord Sandison thus found that the dentists were obliged to repay such proportion of the whole bursary received as corresponded with the number of years in the commitment period when the threshold was not met out of the whole.[126]

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[123] Para 63.
[124] Paras 64 – 67.
[125] Para 68.
[126] Para 69.

More generally, Lord Sandison noted that it had not been necessary in coming to his view on the various issues in the case to take account of the contra proferentem principle. There was no doubt that the Ministers were the proferentes. He expressed his agreement with Lord Burrows in *Nigeria v JP Morgan Chase Bank NA*[127] to the extent that it might well be the case that the modern mechanisms of contractual construction will often indicate the meaning to be ascribed to potentially ambiguous terms without requiring the use of such an expedient of last resort as the contra proferentem principle represents.[128] Nonetheless, if it was permissible to have regard to what might be called "situational" circumstances surrounding a contract's execution (ie circumstances pertaining to how the contract was drawn up and executed), as had been held to be the case in *Wood v Capita* on whether the contract has been professionally drawn up, then it was difficult to see as a matter of principle why the circumstance that the contract was entirely the product of one party and left simply for acceptance or rejection by the other should not be capable of being a relevant consideration in its construction, at the very least in cases where rights which the party offered the contract would otherwise enjoy might or might not be excluded or circumscribed by an ambivalent provision. He commented, "One might therefore say that reports of the *contra proferentem* principle's death have been at least somewhat exaggerated; it is simply living more quietly in a new landscape and working on rather less ambitious projects."[129]

Finally, there were matters of prescription, with Lord Sandison holding that if, in year one the dentist did not meet the 80% threshold the obligation to repay arose at the end of year one, such that many claims the Ministers had against the dentists had prescribed.[130]

Discussion

The case is a stark reminder of the need for care in drafting, especially in a standard form contract which will be entered into on numerous occasions with various counterparties. It seems baffling that terms so critical to the agreement between the parties, such as "NHS earnings", were not defined.

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[127] [2019] EWHC 347 (Comm).
[128] Para 71.
[129] Para 72.
[130] Prescription was dealt with in paras 73 – 78.

Lord Sandison's comments on the correct approach to interpretation are of note – in this case the language played a more important role than it might normally have done given the limited use of particular context or purpose in entering the contract. This is at odds with the approach south of the border, seen in the last 12 months in the Supreme Court in both *Providence Building Services Ltd v Hexagon Housing Association Ltd*[131] and *Great Asia Maritime Ltd v Orion Shipping and Trading LLC*[132] where the words used were important in the analysis and the first issue investigated by the court. The background against which the contract was entered into, as well as its purpose are important factors in the "iterative" process of interpreting a disputed provision, but it seems to be going too far to suggest that these factors are "normally potent" given the guidance provided on the approach to the interpretive exercise in both *Arnold v Britton* and *Wood v Capita Insurance.*

While Lord Sandison's *obiter* comments on the contra proferentem principle at first glance appear to conflict to some extent with what has been said in England, it is suggested that are not so far apart. In *Triple Point Technology Inc v PTT Public Company Limited,* in which the Supreme Court was considering the meaning of an exclusion clause, Lord Leggatt commented that the principle was steadily losing its last vestiges of independent authority and was being subsumed within the wider "Gilbert-Ash"[133] principle, [134] which is to the effect that parties are not taken to have given up important legal rights or remedies without clear wording to that effect.[135] Lord Sandison considered the fact that the contract was drafted by one party and presented to the other for acceptance, with no negotiation of terms, as part of the relevant background circumstances that might influence the interpretation of a contractual provision at least in cases where the question concerned whether rights a party would otherwise enjoy might or might not be excluded or circumscribed by the disputed provision(s). On his analysis the contra proferentem principle is being subsumed into the factual matrix rather than playing an independent role in the interpretive exercise, and indeed, he considers it may be particularly relevant to the exclusion or limitation of rights or remedies.

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[131] [2026] 1 WLR 538. A note on this case appears in this section of the Update.
[132] [2026] 1 WLR 3576. A note on this case also appears in this section of the Update.
[133] *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689.
[134] 2021] UKSC 29; [2021] AC 1148 at para 111.
[135] *The Hut Group Ltd v Nobahar-Cookson and Anr* [2016] EWCA Civ 128; [2016] 1 CLC 573 per Briggs LJ at para 18; and *Triple Point Technology Inc v PTT Public Company Limited* [2021] UKSC 29; [2021] AC 1148 per Lord Leggatt at para 111, referred to with approval in *Gilchrist v Govan Dental Centre and Anr* [2024] SC GLA 5 and *Hansen v Close Invoice Finance Ltd* [2024] CSOH 78.

Kulkarni v Gwent Holdings Ltd **[2025] EWCA Civ 1206**

Interpretation of deemed transfer provision of shareholders' agreement

Facts

The appellant and first respondent were shareholders of the second respondent company. They were in dispute in relation to the consequences of admitted breaches of the shareholders' agreement (SHA) by the first respondent. There were a number of issues between the parties. This note deals with those aspects of the case likely to be most widely relevant, namely those concerning the correct interpretation of the compulsory transfer of shares provision in the SHA. This was found in cl 7.1 which provided,

> A Shareholder is deemed to have served a Transfer Notice under clause 6.4 immediately before any of the following events:…
> (d) The Shareholder committing a material or persistent breach of this agreement which, if capable of remedy, has not been so remedied within 10 Business Days of notice to remedy the breach being served by the Board (acting with Shareholder Consent).

The SHA further provided that,

> if the Seller is deemed to have given a Transfer Notice as a result of clause 7.1(d), the Transfer Price shall be restricted to a maximum of the lower of the subscription price paid in respect of each Sale Share, including any share premium, and the Fair Value of each such Sale Share;

Decision

The first issue for determination was whether a notice to remedy was needed before the shareholder in breach was deemed to have given a transfer notice. The appellant argued that where a shareholder had committed a material or persistent breach, he would be deemed to have served a transfer notice unless (a) the breach was remediable; (b) the board had served a notice to remedy and (c) it was remedied on or before the expiry of 10 business days. In the absence of such a notice, the appellant argued, remediation was irrelevant.

Newey LJ, with whom the other members of the bench agreed, considered that a notice was needed, upholding the decision at first instance. He observed that it would have been odd if the parties had intended a shareholder who had committed a material or persistent breach but remedied it promptly to be in a less good position than one who undertook no remediation until after he had been served with a notice to remedy. The appellant's construction rendered much of cl 7.1(d) more or less redundant.[136] Furthermore, far from confirming that a deemed transfer notice could cease to have effect if the breach was remedied following service of a notice to remedy, cl 6.7 of the SHA provided that a deemed transfer notice could not be withdrawn. Had the parties intended a deemed transfer notice could take effect but then be negated by service of a notice and remediation they could have been expected to have limited the time within which such a notice could be served and no such time limit had been specified in the SHA.[137] Finally, it was significant that a deemed transfer notice allowed the other shareholder to compel the shareholder in breach to transfer his shares and to do so on potentially disadvantageous terms. This suggested that the court should be slow to adopt a wide interpretation of cl 7.1. He considered remarks by Arden LJ in *Re Coroin Ltd* to be relevant,

> [the clauses] set out circumstances in which members may lose the right to their shares. They are, therefore, expropriatory in nature. Given the ambiguity in the meaning of the phrase "becomes enforceable" the court should in my judgement prefer the narrower meaning. This approach is consistent with the earlier decisions of this court in construing articles of association of a company restricting the transfer of shares laid down in: *Re Smith and Fawcett Ltd* [1942] Ch 304 at 306 and *Greenhalgh v Mallard* [1943] 2 All ER 234 at 237.[138]

A further issue for determination was whether, given certain of the breaches by the first respondent were repudiatory, this rendered them irremediable in terms of cl 7.1(d). Following a review of the authorities[139] Newey LJ, again upholding the decision at first instance, held that a repudiatory breach of the SHA was not necessarily incapable of remedy for the purpose

[136] Paras 48 – 50.
[137] Para 51.
[138] [2013] EWCA Civ 781 at para 65.
[139] Paras 59 – 75.

of cl 7.1(d). He considered that had parties intended they could have stated that a repudiatory breach was to be considered irremediable but they had not done so.[140] Newey LJ drew a distinction between the position at common law and under a contractual provision like cl 7.1(d). He noted that *Bournemouth University Higher Education Corp v Buckland*[141] had not been concerned with a contractual provision, but the position at common law and was authority for the proposition that once a repudiatory breach occurred it could not be cured by the contract breaker. That decision cast no light on the meaning of whether a breach was capable of remedy within the meaning of a contractual provision.[142] Newey LJ was of the view that the case law showed that, when determining whether a breach was "capable of remedy" within the meaning of a contractual provision or a comparable statutory one, a practical rather than technical approach was normally adopted, in which common law rules had no place.[143]

Discussion

The case will be of interest primarily to those involved in drafting or advising on deemed transfer provisions in corporate contracts or articles of association. Of note is the court's view that as the limit on the sums to be paid for the shares on the deemed transfer were disadvantageous to the shareholder in breach the clause should not be given a wide interpretation.

On the question of whether a repudiatory breach is capable of remedy the court distinguishes the position under a contractual provision and at common law, noting that *Bournemouth v Buckland* held that a repudiatory breach at common law could not be remedied. This is not the position at common law in Scotland. It has been suggested that the ability to remedy a breach is a factor, but not a decisive factor, in assessing whether a breach is material. The fact that a breach is remediable does not prevent it from being a material breach, entitling the innocent party to rescind, especially where the cost involved in remedying the breach is a large proportion of the contract sum or it would otherwise be difficult or take some time to remedy.[144] Furthermore, it has been held that the innocent party's right to rescind can be lost

[140] Paras 76 – 77.
[141] [2010] EWCA Civ 121.
[142] Para 78.
[143] Para 79.
[144] L Richardson, "Rescission for breach of contract in Scots law" 2026 Jur Rev 1.

if the party in breach tenders conforming performance before rescission is intimated to him,[145] indicating that a material breach is remediable.

While this difference in the common law should be borne in mind, what needs to be considered, in either jurisdiction, is not just what the express contractual provisions on breach state but how they interact with the position at common law, in other words drafters need to be cognisant of the common law backdrop against which they are drafting express provision on the consequences of breach.

***Westfield Park Ltd v Harworth Estates Investments Ltd* [2025] EWCA Civ 1374**
Interpretation of deferred consideration clause and rectification of contract

Facts
The parties had entered into a contract for the sale of land, used as a holiday park, by the respondent to the appellant. In terms of the contract the appellant had to pay £2.6m and covenanted to pay the Released Land Payment on terms set out in a schedule to the contract. This was to take account of the fact that part of the land comprised a Zone of Influence, an area designated by the Coal Authority of 27m centred on each of two mine shafts within the property over which no buildings could be constructed. The schedule provided that the respondent had requested the size of the Zone of Influence be reduced by the Coal Authority, that if prior to the longstop date (12 months from the date of the contract) the Coal Authority confirmed in writing that the Zone of Influence was reduced the respondent would provide written evidence thereof to the appellant and the Released Land Value would be calculated at a rate of £88.96m2 or part thereof. The schedule provided for payment to be made within 30 days of written demand or determination of the Released Land Value in the event of dispute. The schedule went on to provide that the appellant would not locate any caravans or erect any temporary or permanent buildings or park any vehicles within the Zone of Influence.

Following discussions between geoscience consultants for the respondent and the Coal Authority the Authority stated in writing that the calculated zone of influence where temporary structures (ie static caravans) could not be placed could be reduced from 27m to

[145] *Grovebury Management Ltd v McLaren* 1997 SLT 1083.

3.66m. The reduced zone of influence only applied to the siting of static caravans and did not include permanent structures. On that basis the respondent sought payment of the Released Land Value. The appellant refused to pay on the basis that, having corresponded with the Coal Authority itself, it had been confirmed that there was only one zone of influence, which remained at a radius of 27m, with the Coal Authority referring to the 3.66m radius as an "exclusion zone" over which no development could take place including the placement of static caravans, temporary or permanent buildings. Beyond that exclusion zone the placement of static caravans was possible but no permanent structures or buildings could be constructed in the 27m radius.

The issue was whether the deferred payment was due, on a proper construction of the schedule to the contract. The judge at first instance held that the Released Land Payment was due.

Decision

Interpretation

Asplin LJ delivered an opinion with which the other members of the court agreed. She began by noting that there was no need to set out the principles of interpretation in any detail as they were well known and had been fully explained by Lord Neuberger in *Arnold v Britton*[146] and Lord Hodge in *Wood v Capita Insurance.*[147] She referred to Lord Neuberger's comments that the meaning of the relevant words had to be assessed in light of

> (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contract], (iii) the overall purpose of the clause and the [contract] itself, (iv) the facts and circumstances known to or assumed by the parties at the time the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intention.[148]

She noted it was also important to keep in mind what Lord Hodge had said in *Wood,*

[146] [2015] UKSC 36.
[147] [2017] UKSC 24.
[148] [2015] UKSC 36 at para 15.

> Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is most consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of competing constructions the court must consider the quality of the drafting of the clause… and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest… Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.[149]

She also referred to *Network Rail Infrastructure Ltd v ABC Electrification Ltd* in which Carr LJ has said,

> Having identified the natural and ordinary meaning of the word "default" in the Contract (both alone and in its immediate context of cl 1(1)(j)(iii)), I turn to consider the wider context,… As the authorities identify, any contractual clause, however clear, is not to be read in a vacuum. Its meaning has to be assessed in the light not only of its natural and ordinary meaning but also any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executed and commercial common sense…[150]

Asplin LJ noted that the relevant principles had also recently been summarised by the Supreme Court in *Sara & Hossein Holdings Ltd v Blacks Outdoor Retail Ltd* in which Lord Hamblen had said,

> (1) The contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.

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[149] [2017] UKSC 24 at para 11.
[150] [2020] EWCA Civ 1645 at para 41.

(2) The court must consider the contract as a whole and, depending on the nature, formality and quality of the drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning.
(3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implication and consequences investigated.[151]

Finally, she referred to *Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-Rata CLO 2 BV* where Lewison LJ had said,

> I do not therefore agree.. that commercial considerations have no part to play in deciding whether a particular interpretation is or is not ambiguous. Moreover, to say that ambiguity or unambiguity is the governing factor may be to miss the point. As Lord Sumption observed in *Stans Souci Ltd v VRL Services Ltd* [2012] UKPC 6 at [14]:
>
> > It is generally unhelpful to look for an "ambiguity", if by that is meant an expression capable of more than one meaning simply as a matter of language. True linguistic ambiguities are comparatively rare. The real issue is whether the meaning of the language is open to question. There are many reasons why it may be open to question, which are not limited to cases of ambiguity.[152]

Asplin LJ was of the view that the judge at first instance had failed to apply the well-known principles of construction. He had not begun his task by seeking to determine objectively the natural and ordinary meaning of the words used both alone and in their immediate context or then proceed to consider them: a) in light of the other relevant provisions of the contract, b) the overall purpose of the disputed provision and the contract, c) in the light of the facts and circumstances known or assumed by the parties at the time of contracting, and d) taking account of commercial common sense. While the judge had rejected what he considered to be the schedule's plain meaning he had not set that out or considered it in context at all.[153] She noted that the judge appeared to have been influenced by the parties' agents' negotiations prior to executing the contract. He had come to the view that a plain reading of the schedule

[151] [2023] UKSC 2 at para 29.
[152] [2014] EWCA Civ 984 at para 36.
[153] Para 39.

would defy commercial common sense, which was the basis for him adopting a purposive approach to interpretation.[154] For her, the reasonable reader with all the relevant background knowledge reasonably available to the parties in entering the contract would have understood the language to mean what it said, which was that it referred to a reduction in the Zone of Influence or a release of that zone,[155] not a permission for a particular use within such a zone.[156] As such the Coal Authority's letter had not triggered the obligation in relation to the Released Land Value and the buyer's appeal was allowed.[157]

Rectification

The Court had been asked to consider whether the contract should be rectified if the appeal was allowed.

Asplin LJ noted that the Supreme Court had addressed the requirements for rectification in *Tyne and Wear Passenger Transport Executive (trading as Nexus) v National Union of Rail, Maritime and Transport Workers & Anr*[158] in which the court had considered the basis for rectification, the need for outward accord and the relationship with the construction of the contract. The Supreme Court had noted that it was important to remember that with rectification what was being rectified was not a mistake in the transaction itself but in the way in which the transaction had been expressed in writing.[159] Furthermore, the Supreme Court, with reference to *Joscelyne v Nissen*[160] had noted that the claim need not be based on a prior legally enforceable contract, but that a common intention of the parties continuing when the contract was made was sufficient provided there had been an outward expression of accord. The Supreme Court had noted that doubt had been cast in this area by *obiter* comments in *Chartbrook Ltd v Persimmon Homes Ltd*[161] which had suggested that an objective test should be applied in identifying the prior intention. The position had been clarified by the Court of Appeal in *FSHC Group Holdings Ltd v GLAS Trust Corpn Ltd*[162] where it had been held that parties needed to have the same actual intention for rectification to be granted. There had to be an outward expression of accord, meaning that, as a result of the communications between

[154] Para 40.
[155] Para 43.
[156] Para 46.
[157] Paras 46 – 47.
[158] [2024] UKSC 37.
[159] Ibid, para 26.
[160] [1970] 2 QB 86.
[161] [2009] AC 1101.
[162] [202] Ch 365.

the parties, they understood each other to share that intention. The Supreme Court in *Tyne and Wear* had also noted that the relevant test for rectification, unlike interpretation, was subjective, depending on the parties' state of mind.[163]

In this case Asplin LJ came to the view that there was insufficient evidence on what was said to have been the parties' common intention and, as such, declined to order rectification.[164]

Discussion

With this decision we see the ways in which the principles of interpretation set down in *Arnold v Britton* and *Wood v Capita* are used south of the border. The judgement at first instance was criticised because those principles had not been followed. The language had to be considered in the context of the clause and the contract, taking account of the purpose of both the clause and the contract and the background known or available to the parties at the time of formation. When that was done the result was not commercially unreasonable. One wonders whether the same decision would be reached in Scotland given the ongoing question of emphasis between language, context and commercial common sense in interpreting contracts.[165]

While rectification in English law is an equitable remedy, it is available in Scots law under s8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. As noted above in England the prior common intention, where it is said to be found in a non-legally binding prior agreement, is assessed on a subjective basis, although there needs to be an outward expression of accord. In Scotland whether an objective or subjective basis should be utilised has been the subject of some doubt. In *Briggs of Burton plc v Doosan Babcock Ltd*[166] Lord Tyre, influenced by the Court of Appeal in *FSHC,* considered that a subjective approach should be taken where the shared common intention was said to arise from a non-binding antecedent agreement, albeit that subjective intent had to have been communicated to the other party, which appears to be, or at least be close to, what in English law is termed the outward expression of accord. Yet in *Paterson v Angelline (Scotland) Ltd*[167] the Inner House

[163] [2024] UKSC 37 paras 26 – 33.
[164] *Westfield*, para 56.
[165] This is discussed in the note on *Nicol's Worsteds Ltd v HLT Stakis Operator Ltd* [2026] CSIH 43 included in this part of the Update.
[166] [2020] CSOH 100. For comment see L Richardson, "An objective or subjective approach to rectification of documents in Scots law?" (2021) 25 Edin LR 220.
[167] [2022] CSIH 33.

indicated, without reference to the conflicting views in the Scottish authorities (which had been rehearsed in *Briggs of Burton*) that an objective approach should be taken. Most recently, Lord Turnbull in *Drysdale v Purvis,*[168] drawing on Lord Hodge's observations in *Patersons of Greenoakhill v Biffa Waste Services Ltd*[169] adopted an objective approach, albeit noting that the evidence also permitted the same conclusion to be drawn on a subjective basis.[170]

It is suggested that the use of objective and subjective in this context is unhelpful and what the court is being asked to determine when considering whether the parties held a continuing common intention is what did each party think and whether that thinking had been communicated to the other. This was the approach taken by Lord Tyre in *Briggs of Burton,* which does not seem to differ from an objective approach if we understand that as asking what the reasonable person, knowing what the parties knew (including what they had communicated to each other as to their intention), would consider their continuing common intention to be when the document of which rectification is sought was entered into.

[168] [2022] CSOH 66.
[169] 2013 SLT 729. For comment see L Richardson, "When interpretation is not enough: rectification of contracts" 2014, 18(1) Edin LR, 125.
[170] [2022] CSOH 66, para 80.

THIRD PARTIES

Forthwell Ltd v Pontegadea UK Ltd [2026] UKSC 33

Transferred loss

We discussed the Inner House decision in last year's Update. This is the first Scottish case on transferred loss to have reached the Supreme Court and, despite the parties having settled shortly before the hearing in May 2026, the Court, sitting in Glasgow, heard parties' submissions on the basis that the case raised a point of law of general public importance where authoritative guidance was desirable. The case is therefore very significant in our understanding of the transferred loss doctrine in Scots law.

Facts

Forthwell was the tenant and Pontegadea the landlord of premises in Glasgow. A wholly owned subsidiary of Forthwell, Lynnet Leisure (Rogano) Ltd, had traded from the premises as the Rogano restaurant. In late 2020 and early 2021 substantial damage was caused to the premises as a result of flooding / water ingress. Forthwell claimed that due to a breach of Pontegadea's obligation to carry out remedial works and a failure to maintain the common parts of the property in terms of the lease Lynnet had been unable to trade from the premises, resulting in lost profits for that company.

The issue for determination by the Supreme Court was whether Forthwell could recover losses said to be caused not to it, but to its subsidiary who was not a party to the lease. The legal issue – whether A can sue the party with whom it is in a contract, B, for losses sustained by another, C, due to a breach of contract by B – is often referred to as a case involving transferred loss or a legal black hole.

Decisions in the Lower Courts

At first instance Lord Braid found that such a claim was competent, drawing on Lord Drummond Young's *obiter* comments in *McLaren Murdoch & Hamilton v The Abercromby Motor Group,*[171] that such a claim was available as a matter of public policy to deal with the problem of a legal black hole (where a breach of contract could not be compensated due to

[171] 2003 SCLR 323.

title to sue vesting in one party with the loss suffered by another) where it would be unjust to allow a loss to go uncompensated. While noting that this was different to the position in English law Lord Braid did not consider anything that had been said by either the Supreme Court in *Swynson Ltd v Lowick Rose LLP (in liquidation)*[172] or the Court of Appeal in *BV Nederlandse Industrie Van Eiprodukten v Rembrandt Enterprises Inc*[173] indicated that Lord Drummond Young's analysis was incorrect.

On appeal the Inner House decided, by a majority (Lord Malcolm dissenting), that the transferred loss doctrine was not available as a matter of legal policy, but depended on the intention of the parties at the time of contract formation and whether they had contemplated that their contract would benefit a third party. As Forthwell's case was not on the basis that the parties to the lease had intended to benefit a third party, such as Lynnet, its transferred loss claim failed. The Lord President, Lord Carloway, went further, questioning whether there was any basis for a transferred loss doctrine in Scots law at all.

Supreme Court Decision

The opinion was delivered by Lord Doherty, with whom all other members of the bench agreed. He began by noting that Forthwell's claim was not advanced on the narrow ground of the so-called *Albazero*[174] exception as it had been developed and applied in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martins Property Corpn Ltd v Sir Robert McAlpine Ltd*[175] and subsequent cases. Under this ground a contracting party could recover a third party's loss caused by a breach of contract relating to property where the contracting parties had contemplated that the proprietary interest would be transferred to a third party or, where it was otherwise contemplated that loss in respect of the property might be suffered by the third party,[176] as long as the contractual arrangements did not provide the third party with a direct remedy against the party in breach.[177] Despite suggestions to the contrary by Lord Clyde in *Alfred McAlpine Construction Ltd v Panatown Ltd,*[178] Lord Drummond Young in *McLaren Murdoch*[179] and Lady Smith in *Marquess of Aberdeen and Temair v Messrs Turcan*

[172] [2017] UKSC 32.
[173] [2019] EWCA Civ 596.
[174] *Albacruz v Albazero ("The Albazero")* 1977] AC 774.
[175] [1994] 1 AC 85.
[176] A ground beyond the transfer of property has sometimes been referred to as the broad ground, not to be confused with the broader ground, discussed below.
[177] *Forthwell,* para 14.
[178] [2001] 1 AC 518.
[179] 2003 SCLR 323.

Connell[180] this narrow ground exception to the rule that a party can only sue to recover its own loss was a rule of implication based on the intention of the parties rather than a rule of law.[181]

Neither was Forthwell's case advanced on the broader ground posited by Lord Griffiths in *St Martins*[182] and favoured by Lord Millett in *Panatown,*[183] the essence of which is that a person with no proprietary interest in a property who contracts for work or services to be performed in relation to it, eg a husband instructing work to a house belonging to his wife, that person has a "performance" or "expectation" interest in the contract being performed. On breach, that person suffers loss because he has not received what he contracted for, and because to put the property into the state it ought to be in, he would have to incur further expense.[184]

He then went on to analyse Lord Clyde's proffered solution in *Panatown* to the problem of the legal black hole, which he preferred to the broader ground, namely that,

> a more realistic and practical solution is to permit the contracting party to recover damages for the loss which he and a third party has suffered, being duly accountable to them in respect of their actual loss, than to construct a theoretical loss in law on the part of the contracting party, for which he may be under no duty to account to anyone since it is to be seen as his own loss.[185]

Lord Clyde had gone on to reason that to avoid a legal black hole the law should deem the innocent party to be claiming on his own behalf and on behalf of any others who had suffered loss. The third party might not be able to compel the innocent party to sue, however, that was unlikely to be a problem in family situations or companies within the same group. If the contracting parties had agreed what the third party's remedy should be, there was no scope for a transferred loss claim.[186]

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[180] [2008] CSOH 183.
[181] *Forthwell,* para 14 with reference to Lord Sumption at para 14 and Lord Neuberger at paras 103-105 in *Swynson* [2017] UKSC 32.
[182] [1994] 1 AC 85.
[183] [2001] 1 AC 518.
[184] *Forthwell*, para 15.
[185] *Panatown* at 535.
[186] Ibid at 535 – 536.

Lord Doherty noted that no other members of the court in *Panatown* had expressed concurrence with Lord Clyde's solution and it was inconsistent with the reasoning of the other judges in the majority.[187]

He then went on to consider recent English cases on transferred loss. He referred to Lord Sumption's comments in *Swynson* that it was important to remember that the principle of transferred loss, in either the narrower or broader form, was an exception to a fundamental principle of the law of obligations and in relation to which all of the modern case law emphasised it was driven by legal necessity. As such, it was an essential feature that the recognition of a right in the contracting party to recover the third party's loss should be necessary to give effect to the object of the transaction and to avoid a legal black hole in which in the anticipated course of events the only party entitled to recover would be different from the only party that could be treated as having suffered a loss.[188] Lord Doherty went on to note that in *Swynson* the court had considered that there was much to be said for the broader ground but it had not been necessary to decide that point.[189]

Lord Doherty again noted that Lord Clyde's solution to the problem of the legal black hole had not been endorsed by any other members of the Appellate Committee in *Panatown* and that none of the judgements in *Swynson* or Coulson LJ's judgement in *BV Nederlandse* provided any support for it. The solution was inconsistent with the requirement in English law that it should have been in the parties' contemplation at the time of contracting that the contract was intended to benefit the third party or, at least, persons in the same position as the third party. It was therefore very clear that Lord Clyde's solution did not represent the law of England and Wales.[190]

He then went on to consider the Scottish Outer House cases on transferred loss. He referred to Lord Drummond Young's *obiter* comments in *McLaren Murdoch* that "in a well-regulated legal universe legal black holes should not exist…."[191] and,

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[187] *Forthwell*, para 24.
[188] *Swynson*, para 15.
[189] *Forthwell*, para 29.
[190] Ibid, para 31.
[191] *McLaren Murdoch,* para 33.

> In the absence of any remedy using the jus quaesitum tertio, Lord Clyde concluded in a passage that sums up the views of the majority of the House of Lords, that the best solution was: "to permit the contracting party to recover damages for the loss which he and a third party has suffered, being duly accountable to them in respect of their actual loss… The solution is required for the law will not tolerate a loss caused by a breach of contract to go uncompensated through an absence of privity between the party suffering the loss and the party causing it. In such a case, to avoid the legal black hole, the law will deem the innocent party to be claiming on behalf of himself and any others who have suffered loss. It does not matter that he is not the owner of the property affected, nor that he has not himself suffered any economic loss. He sues for all the loss which has been sustained and is accountable to the others to the extent of their particular losses….If there is an anxiety lest the exception would permit an employer to receive excessive damages, that should be set at rest by the recognition of the basic requirement for reasonableness which underlies the quantification of an award of damages."[192]

Lord Drummond Young had gone on to explain why he considered the broader ground not to accord with the underlying principles of Scots contract law – essentially that a performance interest was insufficient to entitle a contracting party to substantial damages in the event of failure to perform, the person having suffered the substantial loss was the third party. He had then stated,

> Scots law should adopt the same general rule as applied by the majority of the House of Lords in [*Panatown*], as described by Lord Clyde [in the paragraph quoted above]. In effect the rule comes to this: if a breach of contract occurs, causing loss that can be measured in financial terms, the party who is not in breach may recover substantial damages even if that loss has been sustained by a person other than the contracting party, however, the contracting party must sue on behalf of that other, and must accordingly account to that other for the damages recovered. The right to raise an action in this way is deemed by law to exist in any case where the loss resulting from the breach of contract occurs to a person other than the contracting party. It should not in my view be based on the intention of the parties; the right is rather conferred as a

[192] Ibid, para 38.

> matter of general legal policy, to ensure that if a loss results from a breach of contract damages can be recovered from the party responsible for the breach.[193]

Lord Doherty noted that Lord Drummond Young was "plainly" incorrect to describe Lord Clyde's solution as the view of the majority in *Panatown* as none of the other judges had agreed with it. As such the basis on which Lord Drummond Young adopted Lord Clyde's solution was erroneous.[194] Furthermore, Lord Clyde's and Lord Drummond Young's view that the basis for any exception was a rule of law rather than implication based on the intention of the parties was not the majority view in *Panatown* and was also contrary to the guidance given by the Supreme Court in *Swynson.*[195]

Lord Doherty then briefly considered the Outer House cases decided after *McLaren Murdoch,* namely *Marquess of Aberdeen*[196] and *Axon Well*[197] by noting that in both of those cases the contentious issue was whether the transferred loss claim was excluded because of the existence of other remedies rather than the basis of a transferred loss claim itself.[198]

He considered that the errors in Lord Clyde's solution and Lord Drummond Young's reliance on it in *McLaren Murdoch* were reason enough to reject Lord Drummond Young's suggested solution for Scots law. There were, however, further compelling reasons in that the proposed solution constituted too wide and too indefinite an exception to the general rule that a party can only recover damages in respect of their own loss, making reference to Lord Neuberger's comment in *Swynson* that the principle should only apply in defined and limited circumstances.[199] It would be too wide as it would allow recovery in circumstances where the involvement of a person such as the third party was not within the contemplation of the parties at the time of contracting, which would likely produce unforeseen consequences for the party in breach who was unlikely to have arranged their affairs, for instance insurance, on the basis that such a liability might arise.[200] It was too indefinite because the limits of its applicability were vague. Lord Clyde had not defined limits, but had simply noted that the

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[193] *Ibid*, para 42.
[194] *Forthwell*, para 36.
[195] *Ibid*, para 37.
[196] [2008] CSOH 183.
[197] [2015] CSOH 4.
[198] *Fothwell*, para 38.
[199] *Swynson,* para 102, cited in *Forthwell* at para 39.
[200] *Forthwell*, para 40.

problem was most likely to arise in a family group or group of companies. Forthwell had argued before the Supreme Court that a third party would require to have a material interest in the performance of the relevant obligation but Lord Doherty was unconvinced that that would provide a clear, robust and workable solution.[201]

Lord Doherty noted that in some cases third parties might be able to rely on the Contracts (Third Party Rights) (Scotland) Act 2017 and that legal black holes occur in a relatively small number of cases. In some cases, the narrow ground will be available. It might also be possible that in some the broader ground could be available. In the whole circumstances there was not a cogent case for the exception to the general rule argued for by Forthwell on the basis of Lord Clyde and Lord Drummond Young's proposed solution.[202] He went on that he did not consider this an unjust outcome – Forthwell and Lynnet had chosen to organise their affairs as they did and had no reason to believe that the ordinary consequences associated with their separate legal personalities would not apply. The lease prohibited sub-letting and the parting with possession of the premises such that it seemed that Lynnet's licence was in breach of the lease.[203]

Lord Doherty went on to address Lord President Carloway's doubts about any transferred loss doctrine forming part of Scots law by noting that the *Albazero* exception is as much a part of Scots law, as it is of English law.[204]

Finally, Lord Doherty noted that, as the court had in *Swynson,* he felt there was much to be said for the broader ground but that it was unnecessary to consider this point in this case. Furthermore, he did not consider it a suitable case to decide whether the broader ground formed part of the law of England or Scotland since both parties had proceeded throughout the action on the basis that Forthwell's transferred loss claim did not satisfy the requirements of the broader ground thus neither the Supreme Court or the courts below had had the benefit of developed submissions on the matter.[205]

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[201] Ibid, para 41.
[202] Ibid, para 42.
[203] Ibid, para 43.
[204] Ibid, para 46.
[205] Ibid, para 47.

Discussion

In some respects, the decision is welcome. It provides clarity that a transferred loss claim in Scots law is available on the same basis as in English law – with reference to the intention of the parties at the time of formation rather than as a matter of legal policy. The Supreme Court came to this view on the basis that Lord Clyde's suggested solution in *Panatown* had been erroneously regarded as representing the views of the majority in that case by Lord Drummond Young in his *obiter* comments in *McLaren Murdoch.*

The Supreme Court was also keen to ensure that any exception to the general rule that a party is only entitled to sue to recover its own loss be kept within very narrow limits. By focusing on the contracting parties' intention, it seems that a transferred loss claim will be available in very rare circumstances in Scots law given the availability of a third party right where the contracting parties intend to benefit C[206] – the difference appears to be whether A and B intend C to have a right to enforce the contract herself.[207]

Lord Doherty noted that legal black holes occur in a relatively small number of cases.[208] However one wonders if that is, in fact, the position. It may be the case for well advised corporate entities but as Lord Sumption has noted "the distinct legal personality of companies has been a fundamental feature of English commercial law for a century and a half, but that has never stopped businessmen from treating their companies as indistinguishable from themselves."[209] The same might also be said in relation to group companies, especially if the same individuals are directors and shareholders in each of them. A fortiori the distinction is unlikely to be well understood, if at all, by lay persons conducting their personal affairs, perhaps taking the example mentioned by Lord Doherty of a husband instructing works to a property owned by his wife. There may be many more instances of legal black holes than ever make it to court, never mind into reported decisions. The failure to consider this and related policy considerations – such as those mentioned by Lord Drummond Young in *McLaren Murdoch* on the injustice of allowing a loss to go uncompensated and Lord Malcolm in his dissenting judgement in the Inner House about permitting the party in breach

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[206] Such intention is capable of being implied – see s 2(3) of the Contract (Third Party Rights) (Scotland) Act 2017.
[207] See section 1(1)(b) of the Contract (Third Party Rights) (Scotland) Act 2017.
[208][208] With reference to the SLC's *Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach and Penalty Clauses* (Scot Law Com 252, 2018), para 18.57.
[209] *Swynson,* para 1.

to act with impunity where a transferred loss claim is unavailable, with this resulting in a "windfall benefit" for this "undeserving" party[210] - seems a missed opportunity to fully consider the issue for Scots law. Concerns about the width and definitiveness of the exception to the rule that a party may only sue for its own loss seems somewhat misplaced. If the loss is transferred it is a loss that could have been suffered by A as a result of B's breach which just happens to have been suffered by C rather than A. The loss is not increased. There is not additional loss for which B is liable. It is simply holding B responsible for the consequences of B's breach of contract, which would have to be proved together with causation and remoteness limiting the damages available. Indeed, given that a transferred loss claim has to be raised by A to recover C's loss any defences or claims which B has against A could be pled to defeat or meet A's claim. Issues about managing business risk including insurance are not obviously affected – the risk and the extent of the risk is factored in – it just so happens that damages are paid to C, albeit even then they are routed to C via A who is said to have a duty to account to C for them. It is not immediately obvious why permitting a transferred loss claim as a matter of legal policy, where C has no other route to recovery should not be available. There may, of course, be reasons not to permit the claim where, as in *Forthwell* the "innocent" party and third party may have set up their affairs to defeat a prohibition on sub-letting in the lease. The same consideration might arise where allowing A to recover C's loss would cut across a prohibition on assignation in the contract between A and B.[211] But these are reasons not to permit a transferred loss claim in such instances rather than not to permit such claims as a matter of legal policy. It seems a missed opportunity for these matters not to have found their way into the Supreme Court's decision.

The Supreme Court in *obiter* comments discussed the broader ground in positive terms, as it had in *Swynson.* Before considering this in more detail it is perhaps useful to say a word on terminology used in this area. In *Forthwell* Lord Doherty referred to the "narrow ground" as either where the parties contemplated that a proprietary interest would pass from A to C or where it was otherwise contemplated that loss in respect of property might be suffered by the third party (but without requiring the transfer of property). The label "broader ground" was

[210] *Forthwell Ltd v Pontegadea UK Ltd* [2024] CSIH 38 at para 59.
[211] In *St Martins* [1994] 1 AC 85 the House of Lords allowed the transferred loss claim despite the prohibition on assignment in the JCB building contract. In that case there was no suggestion that A and C had acted so as to deliberately cut across the prohibition on assignment in the building contract between A and B ie the transfer of the proprietary interest was not in breach of prohibition on assignment. Indeed, the reason for permitting the claim was that A and B must have contemplated that the property held by A, and on which work was carried out by B, would likely be transferred to third parties.

used to refer to the position posited by Lord Griffiths in *St Martins,* which the Supreme Court explained as being in essence where a party having no proprietary interest in a property instructs work to it (as in a spouse instructing work to property owned by the other), in which case the person instructing the work has a performance or expectation interest in the contract being performed and, if breached, suffers a loss in not getting what he contracted for. In the Inner House the label "narrow ground" was used for the situation where property was transferred from A to C and "broader ground" where A and B contemplated a benefit to C or a known objective of the contract was to benefit C. It is hopefully clear that both of these situations come within "narrow ground" as that term is used by the Supreme Court. It is unhelpful that in relation to what is already a fairly complex area of law the same terms are used to mean different things, particularly at different levels of decision in the same case.

In relation to the approving comments in the recent Supreme Court regarding the broader ground we may find that claims start to come before the courts where if A cannot sue for C's loss it nonetheless sues for its own loss, in terms of having not received the expected performance under the contract. Quite how that will be quantified remains to be seen.[212]

[212] Lord Doherty in *Forthwell* notes A's loss is A having to incur further expense to put C's property into the state it ought to have been in if B had not breached the contract. It may, however, be said that different bases for measuring loss can be considered – such as cost of cure and diminution in value where a breach of contract affects property – and these are used as a cross-check against each other. In the situation where A contracts with B for work to C's property the diminution in value is solely C's loss.

CONTRACTUAL CONDITIONS

***King Crude Carriers SA and ors v Ridgebury November LLC and ors* [2025] UKSC 39; [2025] 3 WLR 707**

Contracting party, through breach of contract, acts to prevent purification of a condition

In this Supreme Court case, the court was required to consider whether a Scottish appeal to the House of Lords, *Mackay v Dick,*[213] was authoritative in English law. In deciding that it did not apply in English law, the Court was clear to state that their decision was without prejudice to Scots law. The decision is therefore of limited relevance to Scots law. Fortuitously, a Scottish case has been decided in the last year which engages with the same legal issue (*Murray v Atlas FM Ltd*). *Murray* is analysed immediately below this case note.

Facts

The dispute arose between buyers (the appellants) and sellers (the respondents) under three contracts for the sale of second-hand tanker tonnage in materially identical terms. The parties entered into agreements based on an amended 2012 Norwegian Saleform (the "MOA"). Clause 2 of the MOA obliged the Buyers to lodge a 10% deposit for the purchase price with Holman Fenwick Willan, Greece (HFW) as escrow holders for the Sellers. The Buyers were then to remit the 0% balance of the price to HFW the day before delivery. The escrow accounts were, however, not opened. HFW indicated that the Buyers were in breach of their obligations under Clause 2 to provide the necessary documentation without delay to allow HFW to do so. In two of the sales, the Buyers failed to provide appropriate Know Your Customer information, and in the third, the Buyers failed to sign the Escrow Agreement.

The Sellers sought to claim US$4.94 million, advancing the claim in debt on the grounds that the condition precedent to the obligation to lodge the deposits had been prevented from being fulfilled by reason of the Buyer's breach of clause 2 in failing to supply HFW with the requisite documentation, with the consequence that the Sellers were put in the same position as if the conditions had been fulfilled.

[213] (1881) 8R (HL) 37.

Arbitration and First Instance Decision

The arbitrators held that the Buyers were indeed liable because they could not rely on their own breach of contract preventing the fulfilment of a condition precedent to payment. The amount of the deposits could be, they decided, recovered in debt. The arbitrators relied on an English case which encapsulates the same rule as *Mackay v Dick,* namely, *The Abacha.*[214] The Buyers were granted leave to appeal against the award on the following question of law:

> Where an obligation for payment within a contract is contingent upon the fulfilment by one party of a condition, and that party fails, in breach of contract, to fulfil that condition, is the condition deemed to be fulfilled with the result that the payment sum can be claimed by the other party in debt? Or must the claim be in damages?

Dias J allowed the appeal, holding that the claim did not lie in debt but rather in damages. She granted leave to appeal to the Court of Appeal.

Court of Appeal Decision

The case was heard in the Court of Appeal before Popplewell, Nugee and Falk LJJ. The Seller's appeal was allowed. Popplewell LJ, delivering the main judgment, noted that at least one motivation for the Seller to bring the case in debt was that a damages route might suffer from a no-loss argument. The Court of Appeal found that the Seller's remedy lay in debt and not in damages.

Supreme Court Decision – Summary

The Supreme Court issued its judgment on 12 November 2025, overturning the decision of the Court of Appeal. The court found in favour of the buyers in the dispute. Broadly, the court held that the Scottish appeal to the House of Lords, *Mackay v Dick*[215] is not part of English law. They held on the facts of this dispute that there was no deemed purification of the condition attached to payment of the deposit. The appellant's remedy lay not in an action for debt, as they had argued, but rather an action for damages. This was the appropriate remedy and indeed the only remedy available to the sellers. The court also considered

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[214] *Cie Noga d'Importation et d'Exportation SA v Abacha (No 3)* [2002] CLC 207.
[215] (1881) 8R (HL) 37.

whether the appellants had a relevant action relying on either the rules of interpretation or implication. Both these questions were answered in the negative.

Supreme Court Decision – is *Mackay v Dick* part of English Law?

The leading judgment in the case was given by Lord Hamblen and Lord Burrows, with whom Lords Reed, Hodge and Stephens agreed. Before turning to English law, it is worth highlighting the fact that the court is very careful to say that their judgment is without prejudice to the position in Scotland.[216] *Mackay v Dick* remains part of Scots law and therefore where in Scots law a party to a contract through its own breach prevents purification of a suspensive condition, the condition can be deemed purified. This is an important divergence between Scots and English law.

The Supreme Court Justices reviewed the English case law on whether *Mackay v Dick* applies in English law, and noted mixed results. There are cases which seem to apply it and cases which do not. They then reviewed academic commentary which had commented on the Court of Appeal decision in the case.[217] Again, their response to this commentary was mixed. The commentary had been broadly favourable to the Court of Appeal decision.

Six main reasons were given as to why *Mackay v Dick* should not be followed in English law.[218] The suggestion of deemed purification existed only in the judgment of Lord Watson in *Mackay v Dick.* The first reason was that Lord Watson had not relied on English law in reaching his decision. The second was that English authorities do not "speak with one voice",[219] on the matter, with significant cases going against *Mackay v Dick.* The third reason was the fact that a significant case, *Colley v Overseas Exporters,*[220] goes against the decision in *Mackay v Dick.*

The fourth reason, discussed at some length, was that English law should seek to remove legal fictions. The judgment quotes from Jeremy Bentham who likened legal fictions to "… a

[216] [2025] UKSC 39 at para 1.
[217] [2025] UKSC 39 at paras 56-60.
[218] Para 61 et seq.
[219] Para 63.
[220] [1921] 3 KB 302.

syphilis, which runs in every vein, and carries into every part of the system, the principle of rottenness".[221] The judgment expands upon this point as follows:

> The various formulations or explanations of the *Mackay v Dick* principle of law are all fictional. Rix LJ explicitly recognised this in *Abacha.* The language of there being a deemed performance, or a deemed waiver, or a quasi-estoppel immediately makes that clear. In reality, there has been no performance, and the ingredients of a true waiver or of a true estoppel (eg a representation plus reliance) have not been satisfied. Fictions tend to obscure transparent reasoning and, wherever possible, should be removed.[222]

Explaining the fifth reason, the court referred to the fact that the English law of contract proceeds by reference to the terms of the contract, express and implied, and their proper interpretation, rather than by way of fictional fulfilment of a condition precedent.[223]

> This is consistent with the importance which English law attaches to freedom of contract, and to the application and enforcement of the terms of the bargain which the parties have made. This promotes certainty and predictability, which are important considerations, especially in the commercial law context.[224]

Finally, the sixth reason was that, in their view, the consequences of rejecting *Mackay* did not result in injustice.[225] They identified the fact that a remedy for the appellant exists, and that remedy is damages for breach of contract, and not an action for debt (which had been the route pursued by the appellants in the case). The contract as drafted indicated that the deposit was conditional upon the opening of an escrow account. It need not, of course, have been made conditional. In other words, appropriate drafting would have avoided the situation which had ensued. Thus, having reviewed six reasons, the Supreme Court could see no pressing reason to apply *Mackay v Dick* in English law.

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[221] Quoted at para 66.
[222] Para 66.
[223] Para 67.
[224] Para 67.
[225] Para 68.

Supreme Court Decision – A solution in interpretation or implied terms?

The Supreme Court turned to consider whether the appellants could be successful through the use of the rules of interpretation. The appellants had pointed to a specific rule in interpretation which they argued assisted them, which was the rule that "[a] contract will be interpreted so far as possible in such a manner as not to permit one party to it to take advantage of his own wrong".[226]

Whilst the court was mindful of this rule, they referred again to the conditional nature of the deposit as drafted. The conditional nature of the deposit could have been avoided had the appellants wished to do so.

Nor was the court convinced by the appellants' argument that the contract contained implied terms which covered the problem. Three possible implied terms were considered by the court. The proposed implied terms are not reproduced here.[227] Suffice to say that the appellants sought, through implication, to insert wording into the clauses which covered payment of the deposit referring to the eventuality that the respondents might wrongfully prevent the condition from being purified.

The judgment illustrates the real difficulties which the appellants faced with this argument. The two tests for implication are the business efficacy test (which implies a term if the contract will not work without it) and the officious bystander test (which implies a term if the term is so obvious that it goes without saying). Both tests for implication set a very high bar – terms are implied only exceptionally, and most arguments in favour of implication are ultimately unsuccessful. In the court's view, the wording which the appellants sought to imply was neither necessary to make the contract work, nor so obvious that they went without saying.[228] Again, the court was mindful of the fact that the clause need not have been drafted to make it conditional. The court also noted that arguments on implication should have been raised before the arbitrators at first instance. The arbitrators were the parties best-placed to apply the tests of business efficacy and obviousness.[229]

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[226] The appellants had sought to rely on the expression of this rule in a leading text on interpretation, namely Lewison, *The Law of Interpretation* 8th edn (2023) para 7-108.
[227] The full text of both terms that the appellant argued ought to be implied can be found in the judgment at paras 90-92.
[228] Para 96.
[229] Para 99.

Discussion

Following this decision, it is clear that, in English law, where one contracting party has acted in breach of contract in such a way as to prevent purification of condition, that condition will not be deemed purified. The court confirmed, in addition, that the appellant's only route was to raise an action of damages for breach of contract. Whilst the court is no doubt correct in their observation that this provides the appellant with a remedy, an action for damages in this type of case may come up against the obstacle of "no loss" arguments. Ultimately, a damages action may not be a particularly useful remedy on these facts.

We should also note the court's emphasis of the importance in English law of the terms of the contract, express and implied. The court appeared unwilling to recognise that a solution could be applied which was not part of those express and implied terms of the contract (i.e. a solution which drew on wider rules of law based, for example, on fairness). The court saw no injustice and emphasised the fact that the appellants could have avoided the situation they found themselves in with appropriate drafting.

***Lorraine Murray, Ian James Murray and Stephen Cosh v Atlas FM Ltd* [2026] CSOH 61; 2026 SLT 712**

Impeding or preventing purification leading to deemed purification of a condition

King Crude Carriers SA and ors v Ridgebury November LLC and ors,[230] an English appeal to the Supreme Court, was decided in mid-November last year. The focus of that case was whether there is a rule in English law that, where a party acts to impede or prevent the purification of a condition, that condition is deemed purified. The Supreme Court considered, in *King Crude,* a Scottish appeal to the House of Lords from the late nineteenth century, *Mackay v Dick & Stevenson,*[231] which suggested that such a rule existed. The Supreme Court confirmed that *Mackay* is not authoritative in English law, and that English law contains no rule of deemed purification. The Court was careful to make clear that their decision was without prejudice to the position in the law of Scotland.[232]

[230] [2025] UKSC 39; [2025] 3 WLR 707.
[231] (1881) 8R (HL) 37, and see Laura Macgregor, "*Mackay v Dick & Stevenson:* A Scottish contract case based on unsound authority?" (2026) 30 EdinLR 256.
[232] [2025] UKSC 39 at para 1.

Although the decision in *King Crude* is not binding in Scotland, it left some unresolved questions for Scots law. Given the criticism that the Supreme Court levelled at *Mackay* as an authority, it prompted us to ask whether it is, or indeed should be, authoritative in Scots law. *Murray v Atlas FM Ltd,* the case commented on here, has provided Lord Sandison with a timely opportunity to consider the status of *Mackay* in Scots law and the ambit and content of the rule of deemed purification of conditions. Whilst he confirmed that Scots law does contain such a rule, his judgment illustrates that the application of the rule is a much more complex process. To quote from one of Lord Sandison's earlier decisions on this rule, it is an "ever-so-slightly antiquated principle" which has "uncertain limits".[233]

Facts

The pursuers in the case were former members of a company called Confidia FM Ltd. They sold their shares in that company to the defender in terms of a Share Purchase Agreement (SPA). An initial consideration of £2.15 million was paid. The SPA contemplated further payment of deferred consideration of up to £150,000 and earnout consideration of up to £1.1 million. The first £50,000 of the deferred consideration was to be payable dependent upon the value of the company's net assets at completion of the share sale and purchase transaction in comparison to a particular amount. Both parties were agreed that the value fell below the stipulated amount, and that the first anticipated slice of deferred consideration did not become payable. The second anticipated slice of deferred consideration depended upon the amount of the company's annualised turnover as at 31 January 2024. The parties were in dispute as to whether any of that slice fell to be paid. The pursuers argued that the total amount was due, and the defenders argued that none of it was payable.

In relation to earnout consideration, four potential payments of up to £200,000 and final payment of up to £300,000 were contemplated by the SPA, the actual amounts to be determined by reference to the company's financial performance, measured in specified ways during specified periods. In order to enable the calculation of the second slice of deferred consideration or the earnout consideration, the defender was obliged to supply the pursuers with management accounts in a specific format for each period.

[233] *Beaton v Beaton* [2024] CSOH 41 at para [53].

According to the pursuers, no such management accounts were provided by the defender. They argued that, as a result, the conditionality of the obligation "flies off" and that, as a result, they should be granted an order for payment of the maximum sums payable by way of such consideration. Alternatively, the pursuers sought damages for the same amount for breach of contract. The defender argued, in effect, that from 1 February 2024, their operations were, with the agreement of the pursuers, progressively integrated into the defenders' operations. This included billing, accreditation, and operational management functions. The result of this was that the company no longer had a separate balance sheet or overheads. The defender argued that it had provided the pursuers with sufficient financial information to enable determination of turnover and gross profit as defined in the SPA, and allow an independent verification of what was due by way of deferred consideration and earn out.

The defender also argued that, when it became apparent that no first slice of deferred consideration would be payable, the pursuers agreed that the timing of the provision of the management accounts would be treated flexibly. They pointed to various meetings held with the first pursuer at which she agreed that the format in which the management accounts were being provided were acceptable and sufficient, thus acquiescing in that format. This gave rise the defender argued, to a personal bar argument. The pursuers accepted that an integration exercise had taken place but maintained that it had been carried out without their knowledge or consent.

Decision

Analysis of the Scottish Case Law

Lord Sandison opened his judgment by suggesting that the criticism that the rule in *Mackay* had received in the Supreme Court in *King Crude,* "necessarily calls into question whether it is and should be part of the law of Scotland".[234] He then reviewed the works of the institutional writers on this point, including Erskine's *Institute*[235] and Bell's *Principles*, the latter of which provides "[i]f the debtor, bound under a certain condition, have impeded or prevented the event, it is held as accomplished…"[236] Lord Sandison then explored the Scottish case law on this point, including *Pirie v Pirie*, notable for Lord Justice Clerk's discussion of texts from the Digest, which texts were also analysed by the French author,

[234] Para [22].
[235] 1773, 3,1,6.
[236] 4th edn (1839), para 50.

Pothier.[237] It should be noted that *Pirie* concerned a will, and not a contract. Lord Sandison also noted that the Supreme Court of the Cape of Good Hope had considered the same civilian authorities in *Myburgh & Co v Protecteur Fire Assurance Co.*[238]

Lord Sandison then turned to consider *Mackay*. The action in that case was one for payment of the price of an excavator supplied to Mackay by Dick & Stevenson. The contract provided that Mackay was required to provide a properly opened-up face at a specific railway cutting for a trial of the machine. Mackay refused to make available the facilities required in terms of the contract and refused to accept the machine. Relying on Bell's *Principles*, the Inner House held that the condition "…must be held as fulfilled, because the defender declined to afford the means of a test".[239]

In the House of Lords, Lord Blackburn stated:

> I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.[240]

Lord Sandison noted that Lord Blackburn's decision rested both on recognition of an implied term in the contract that Mackay was obliged to do all that was necessary to facilitate the contractual trial, but also on the view that, properly construed, the contract required him to keep and pay for the machine once it was delivered to him, unless he could demonstrate that it had then failed the trial.[241] Whereas Lord Watson regarded success in the trial as a condition precedent to payment, Lord Blackburn reasoned that there was a condition subsequent in the contract that Mackay did not need to pay if the machine failed at trail, and as that condition subsequent did not occur, he was bound to pay.[242]

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[237] (1873) 11 M 941.
[238] (1878) 8 Buchanan 152 at 157 per De Villiers CJ.
[239] (1880) 7 R 778, per Lord Shand at 787.
[240] (1881) 8R (HL) 37.
[241] Para [34].
[242] Para [34].

Lord Watson also noted that it was the conduct of Mackay which had prevented fulfilment of the condition,[243] and citing Bell's *Principles*, indicated that the condition was to be considered fulfilled.

Lord Sandison then considered later Scottish cases in which *Mackay* had been applied.[244] He noted Gloag's observation:

> When the condition under which an obligation is undertaken is potestative, so that its accomplishment is within the power of the party conditionally liable, it may be held that his implied obligation is not merely to impose no obstacle to accomplishment, but to take active steps to promote it. This is by no means a general rule.[245]

Lord Sandison noted that Gloag did not provide any authority for this statement nor discuss the consequences of non-compliance.[246]

In more recent cases, Mackay had been referred to support the implication of a term of co-operation between contracting parties.[247] In *Credential Bath Street Ltd v Venture Investment Placement Ltd,* Lord Reed observed that Lord Watson's approach was not based on the concept of an implied term, and noted that the principle could not apply to the case before him as the actions complained of were capable of justification.[248] Lord Sandison also referred to a case which he had decided, *Scottish Ministers v Scotland Gas Networks plc,* in which he had not applied the rule because if the condition had been held purified, this would not have answered the question of the defender's pecuniary liability.[249] Lord Sandison again refused to apply the rule in *Beaton v Beaton,* because on a proper construction of the contract, the company's obligation to make payment was not conditional on the sale of the property.[250]

Synthesis of the Scottish Case Law

Lord Sandison concluded that at the end of 2024 there was a principle of Scots law that:

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[243] (1881) 8R (HL) 37 at 45.
[244] *Paterson v McEwan's Trs* (1881) 8 R 646; *Sailing Ship "Blairmore" Company Ltd v Macredie* (1898) 25R (HL) 57; and *Kedie's Trs v Stewart & McDonald Ltd* 1926 SC 1019.
[245] *Contract,* 2nd edn (1929), 279.
[246] Para [49].
[247] *Scottish Power plc v Kvaerner Construction (Regions) Ltd* 1999 SLT 721 at 723.
[248] [2007] CSOH 208; 2008 Hous LR 2 at [61].
[249] [2023] CSOH 77 at para [40].
[250] [2024] CSOH 41 at para [53].

> …although as a general proposition conditions must come to pass before any contractual liability consequent upon their existence can arise, an exception applies where a person with an interest in the condition not coming to pass causes it not to occur, in which case that person cannot use the failure of the condition to come into existence as a reason for failing to perform an obligation which would otherwise be incumbent on him. Such circumstances are regarded as giving rise to a "fraud on the contract" and to provide an equitable reason to depart from the general law.[251]

Lord Sandison identified five further refinements of the principle which appear from the authorities, as follows:

1. A relevant preventative or obstructive act must be direct and done with the intention of preventing the accomplishment of the condition…
2. An act is not relevant if done in the exercise of some right independent of the contract under examination, even if its natural and direct result is the prevention of the coming to pass of the condition…
3. The condition must be the only thing standing in the way of the enforcement of an obligation of an otherwise ascertained or ascertainable nature…
4. It may be unnecessary to have recourse to the principle if the act in question is itself a breach of the contract … but in some circumstances the equities of the situation may call for the consequences of the act to be implement of the obligation dependent on the unfulfilled condition rather than simply keeping the pursuer to a claim in damages for such a breach …
5. Although the principle is a free-standing one in equity … it may be seen as an aspect of the principles of construction properly applicable to the document under consideration … and in any event is not something that may produce a result contrary to its proper construction.[252]

[251] Para [54].
[252] Para [55].

Analysis of *King Crude*

Although noting that the decision in *King Crude* was without prejudice to Scots law, Lord Sandison nevertheless considered the criticisms levelled at the rule by the Supreme Court.[253] Counsel in *Murray* had suggested that *Mackay* had been "fatally undermined" by the Supreme Court's decision. Lord Sandison considered the six main reasons the Supreme Court gave for not following *Mackay* in English law. Identifying the intentions of the parties as a significant factor, he made two linked observations. The first was that the rule gives effect to "what reasonable people in the position of the parties to a contract … would have wanted in the situation which had come to pass had they thought about and expressed a view on the matter".[254] The second was that "…the growth in the possibilities for the implication of contractual terms as the law has developed has undoubtedly enabled all sorts of unconscionable behaviour in the context of contractual relationships to be treated as breaches of contract giving rise to claims for damages rather than for implementation of the relevant contractual term".[255] In the context of this latter point, Lord Sandison seemed to consider the rule as playing a type of residual role, operating where damages would not provide an adequate remedy.[256]

Summing up the position, he observed that the *Mackay* principle is "…too deeply rooted in Scots law to be capable of being blown over by a southerly side wind. It performs a function of some utility, albeit one heavily circumscribed by the limits on its application recognised in the authorities".[257]

Application of the Law to the Facts

Lord Sandison decided, for three main reasons, that the rule could not be applied to the pursuers in this case, at least at the stage of a debate.[258] Firstly, there was no basis to consider that the defender's failure to provide accounts was done with the direct intention of preventing the accomplishment of the condition, as opposed to simply being a consequence of a corporate reorganisation carried out for other, perfectly proper commercial reasons.[259]

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[253] Para [57].
[254] Para [64].
[255] Para [65].
[256] Para [65].
[257] Para [67].
[258] Para [67].
[259] Para [68].

Secondly, the defender's failures to provide the management accounts were breaches of contract which were capable of sounding in damages.[260] In other words, damages could appropriately compensate the losses caused "without the need for equitable supplement".[261] Thirdly, the failure to supply the accounts did not result in a situation whereby the sums truly due to the pursuers by way of second slice deferred consideration and earnout consideration were indicated.[262] The pursuers could have argued (taking what Lord Sandison called the Lord Watson line) that the true construction of the contract was that they were entitled to the consideration unless the management accounts were provided and showed otherwise.[263] Instead, they chose to argue that the provision of the accounts was a condition precedent to the defender's liability to pay such consideration. In other words, applying *Mackay* would not help ascertain the sums the defender was liable to pay.

Outcome

Lord Sandison not having been asked by the defender to refuse probation to any averments, or to repel any plea, he permitted the case to go to proof before answer. He indicated, nevertheless, that the difficulties attending the pursuers' attempt to rely on *Mackay* were likely to "prove insuperable even after proof".[264]

He also refused the pursuers' request to refuse probation to the averments concerning breach of contract for two reasons.[265] Firstly, the defenders had offered to prove that the financial information that it did supply was sufficient to enable the assessment exercise contemplated by the contract to be carried out.[266] Secondly, there remained scope for argument about the consequences of the reorganisation on the question of what was required to be provided as financial information under the contract.[267]

The pursuers' submissions relating to personal bar are not analysed here.

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[260] Para [69].
[261] Ibid.
[262] Para [70].
[263] Ibid.
[264] Para [71].
[265] Para [72].
[266] Ibid.
[267] Para [73].

Discussion

Lord Sandison's review of the case law illustrates that this rule has been applied many times in Scots law. This being the case, it would not have been open to him to decide that it did not form part of Scots law. Having said that, it is concerning to see the emphasis that Lord Sandison placed on *Pirie v Pirie*[268] – a case which concerned a will rather than a contract. The current author has argued elsewhere that this whole area is notable for the application of ideas drawn from succession law which are probably not appropriate in contractual (and commercial) settings.[269]

Now that we have confirmation that this rule is part of Scots law, should we be concerned about that fact? Perhaps our concerns on this point might be allayed if we focus on the limitations which Lords Sandison placed on the rule. He characterised it very much as an equitable idea, with a residual role to play. According to him, it will not be applied where damages would provide an adequate remedy. Its ambit must therefore be relatively limited.

Added to that is the fact that the rule may, in many cases, be unworkable. This case provides a nice illustration of this point. To hold the condition in this case deemed purified would not have resolved issues between the parties. It would not have provided a financial figure which would have allowed for the calculation of damages. It is suggested that in many cases deemed purification may simply be unhelpful.

Mackay has, as noted here, been used as authority for two different propositions. The first is the duty of contractual parties to co-operate. That is a sensible rule, which is particularly useful in a legal system like Scots law where there is no developed idea of contractual good faith. The second is the idea of deemed purification discussed here. That is, it is suggested, a much more controversial idea, which is probably unnecessary or unworkable in many contract cases. The Scottish Law Commission could perhaps be persuaded to consider the rule, and either repeal it or produce a more workable and sensible version of the rule. If that is not possible, one might hope that the rule might wither on the vine.

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[268] (1873) 11 M 941.

[269] Laura Macgregor, "*Mackay v Dick & Stevenson:* A Scottish contract case based on unsound authority?" (2026) 30 EdinLR 256.

MISREPRESENTATION

McAteer v Chyla [2026] SAC (Civ) 12; [2026] SLT (SAC) 106

Fraudulent Misrepresentation: requirements in pleadings relating to reduction and *restitutio in integrum*

This Sheriff Appeal Court decision provides useful guidance on the procedural requirements for proving misrepresentation, including where the onus of proof lies. The main interest of the case lies in the Court's analysis of *resitutio in integrum*. The decision reflects the more recent judicial view that this requirement need not mean that the parties have to be returned to the positions they were in before the contract had been entered into in *all* respects. Rather, the court is able to award a financial sum instead, taking into account what is fair in the circumstances of the case.

Facts

The dispute in this case related to a Share Purchase Agreement (SPA) to allow the purchase of the share capital in Nicol Valentine Ltd, entered into by the pursuer, his wife and the defender. Although the SPA anticipated that different instalments of the price would be paid, only an initial payment and a first instalment was paid. The defender raised an action in his own name alone, because sums payable to his wife had not yet fallen due. The defender argued both that he had rescinded the SPA (by way of a letter from his solicitor to the pursuer's solicitor) and that it should be reduced because he had been induced to enter into it by fraud and misrepresentation by the pursuer and his wife. Those misrepresentations related to the true profitability of the company, which he claimed was inflated by virtue of the inclusion of income from a flooring business, the position in relation to VAT liabilities, and the prospects of the company securing a lucrative contract to provide chauffeuring services to an energy company which were placed at "99% certain". Before the sheriff, the defender conceded that he could not insist on his plea-in-law relating to misrepresentation because the pursuer's wife was not party to the action. The sheriff held that there was insufficient specification on the basis of rescission, and of how *restitutio in integrum*, a condition for rescission of a voidable contract, could be effected.[270]

[270] The sheriff used unusual terminology here, it being more common to describe a contract as being reduced for misrepresentation rather than rescinded.

An appeal was heard by Sheriff Principal Wade, and Appeal Sheriffs O'Carroll and Nicholson. Refusing the appeal, the Court found that the sheriff had been correct to find that the material terms of a letter, which formed the basis of the defender's pleas relating to rescission, had not been averred or incorporated into the pleadings. The Court also held that the onus was on the defender, who sought reduction of the SPA, to aver with sufficient clarity how restitution could be achieved, in order to give the pursuer fair notice of the evidence which the defender intended to lead in support of his proposition that either precise restoration was possible, or that an adequate compensatory remedy could be involved instead. Where the route to restitution was unclear and would require to be explored at proof, averments providing fair notice of the potential means by which it could be achieved were essential.

In the judgment, it was stated that the parties were agreed that for a contract to be reduced on the grounds of misrepresentation, *restitutio in integrum* must be "substantially possible".[271] Unfortunately, the only averment which related to *restitutio in integrum* stated "Parties are capable of being placed in the position they were prior to the SPA being entered into".[272] The sheriff had held that this averment was insufficient to give fair notice as to how *restitutio* could be effected. He said so particularly given the nature of the arrangements which had taken place following the SPA, and which had involved the sale of a car owned by the respondent, and two cars owned by the company, to a third party in satisfaction of the first payment and the first instalment of the second payment due by the appellant to the respondent.

The court drew guidance from a decision of Lady Wolffe, *Somerville v 1051 GWR Ltd*.[273] In this case, she referred to the leading House of Lords case of *Spence v Crawford,*[274] in which she suggested that the court took a "pragmatic approach" to *restitutio in integrum*, as part of an exercise of its discretion in the context of an equitable jurisdiction.[275] She observed that it is often the defender who complains of the impossibility of *restitutio* and therefore that the defender has the onus of pleading and proving the state of affairs. As a result, the party who

[271] Relying on Gloag and Henderson, *The Law of Scotland* paras 7-02 – 7-04.
[272] Para [33].
[273] [2019] CSOH 61.
[274] 1939 SC (HL) 52; 1939 SLT 305.
[275] *Somerville v 1051 GWR Ltd* [2019] CSOH 61 para [37].

resists reduction and argues that *restitutio in integrum* is not possible must put this issue in his pleadings.[276]

The Court interpreted Lady Wolffe's statement as providing that it was for the party who asserts a position to aver and prove it. Applying the law to this case, this meant that it was for the appellant who sought reduction to aver with sufficient clarity how restitution could be achieved and whether it be by return of the cars or by virtue of some form of equitable compensation. They continued:

> It may be difficult in every case to be precise about how restitution is to be achieved. That is the nature of the equitable remedy but in our view, in order to give the respondent fair notice of the evidence which the appellant intends to lead in support of his proposition that either precise restoration is possible or that an adequate compensatory remedy could be invoked instead, sufficient averments have to be placed on record to enable him to lead evidence in support of that position (since he has put it in issue) and to allow the other party, in this case the respondent to make averments in response. That is particularly so where as in this case the steps taken by the parties subsequent to the making of the impugned contract materially alter their factual position and the means of restitution are not obvious.[277]

The Court noted the difference between this case and *Somerville*, given that in this case it was the appellant who had the onus of proving the ingredients essential to the remedy sought.[278] They explained:

> Restitutio in integrum is an essential ingredient of the remedy of reduction. That is a remedy which may only be granted if it is possible to restore the parties precisely or substantially to their pre contractual position or an equitable alternative can be achieved. In the instant case the means by which restitution could be achieved is not obvious from the factual matrix outlined elsewhere in the pleadings. In our view the appellant ought to have averred at least in broad terms what he offers to prove could

[276] *Somerville v 1051 GWR Ltd* [2019] CSOH 61, para [38].
[277] Para [37].
[278] Para [38].

> or should happen to the shares in the company, the money that changed hands and how the issue of the vehicles would be dealt with.[279]

They concluded "… we agree that in the circumstances, where the route to restitution is far from clear and would require to be explored at proof, averments providing fair notice of the potential means by which this could be achieved are essential. This ground of appeal is therefore refused".[280]

Although it was unnecessary for the Court to consider the averments relating to the misrepresentation, the Court nevertheless did so. The sheriff had found the averments regarding the inclusion of the revenue from a flooring business sufficient for inquiry at proof, but had found the other averments regarding VAT liability and the likelihood of acquiring a chauffeuring contract as falling short of the high standard required when pleading fraudulent misrepresentation. On this point the Court agreed with the sheriff's approach.

***Well-fed Scotland CIC v Serco Ltd and Serco Group plc* [2026] CSOH 100**

Fraudulent Misrepresentation – Procedural Requirements and Impact of Entire Agreement Clause

This decision arises from a debate which took place before Lord Sandison in the Outer House. The pursuers in the case were party litigants, assisted by a lay representative. This created particular problems in a misrepresentation case, where there was a need to aver facts as part of the process of proving that the individual requirements of a case had been met (for example, inducement and reliance). Lord Sandison ultimately decided that the pursuer's averments had passed the test of relevancy, and the case proceeded to proof.

The contribution of the case to our understanding of the procedural requirements of a case of fraudulent misrepresentation is relatively limited, given the nature of the pursuer's pleadings. It is perhaps more useful for Lord Sandison's analysis of Clauses 11 and 12 of a Confidentiality Agreement, which were clearly designed to limit or exclude the ability of a contracting party to rely on representations.

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[279] Para [38].
[280] Para [39].

Facts

The pursuer had previously operated a community catering enterprise funding food-related social programmes. The defender had, the pursuer argued, initiated and sustained an engagement with it, in the course of which they extracted some of the pursuer's intellectual property, on the basis that the defenders intended to enter into a contractual relationship or relationships with the pursuer, the truth being that the defenders had no such intention.

In March 2023, an employee of the first defender had emailed the pursuer, describing a potential catering opportunity at the former RAF Scampton location in connection with the Home Office Asylum Accommodation and Support Contract operated by the defender, and obtained from the pursuer a quote for a daily per capita catering provision. No contract is claimed to have been entered into at that time, but over the next 26 months, the pursuers averred that the defenders repeatedly represented to the pursuer that large-scale catering contracts for government-sponsored work were likely to be entered into, and that in that connection a commercial relationship between the parties was in place. The pursuers engaged a consultant, Mr Howell, on the introduction of the defenders, and the consultant caused the pursuer to incur various other kinds of expenditure on the basis that it was necessary to secure the contemplated contracts from the defenders.

The pursuer also claimed that intellectual property which it had developed over years of trading, including its recipe database, its allergen matrix, its nutritional and product specification sheets and its menu specifications and rotations, were at the request of the defenders given to the defenders.

Once the pursuer became dissatisfied with the way in which events were unfolding, the pursuer claimed that it was induced to engage (at its own cost) with the defenders' ethics process (called "Speak Up"). The pursuer claimed that, whilst it was represented that its concerns would be investigated in a thorough, fair, balanced and transparent manner, these representations were false.

The pursuer claimed that, as a consequence of these events, it became insolvent and had to cease its food production operations and make additional staff that it had hired redundant. It advanced heads of loss in respect of the cost of the conversion of its production to frozen

food to satisfy the defenders' anticipated requirements; together with the cost of various other alterations to its modes of working; mobilisation costs; the amount of the consultancy fees it paid to Mr Howell; the cost of the redundancy of the additional workforce; various costs arising out of the loss of its business as a going concern; and the value of the intellectual property it transmitted to the defenders. The pursuer sought an award of damages from the defenders, jointly and severally, in the amount of £5,250,000.

Decision

Procedural Requirements in Misrepresentation

As already noted, Lord Sandison commented on the difficulty faced by the court where one of the parties to the litigation is a party litigant, which difficulties were often exacerbated because of the use of AI.[281] Noting that such parties were not entitled to "any greater indulgence in complying with the procedural requirements", Lord Sandison nevertheless explained:

> …[S]ince unrepresented litigants may, in all good faith and despite their best efforts, find it very difficult to express themselves with the precision and concision reasonably to be expected from those enjoying suitable representation, care must be taken to look to the substance of the legal tests to be applied and not to be distracted by the form in which pleadings drafted by unqualified persons are often presented. Statements of case drawn by such persons tend more than usually to superfluity, over-complexity, inaccurate use of legal terms, or the pleading of evidence (though these are vices from which even professionally drafted pleadings are not universally immune). The proper task of the court is to do its best to look through these infelicities and, assuming that at least a basic level of comprehensibility is met, to ask itself the usual substantive questions which arise at debate: is fair notice of the case which it is sought to make given, and, if so, is that case bound in point of law to fail?[282]

The defenders accepted that whether a particular statement amounts to a fraudulent misrepresentation is a question of fact and degree.[283] Lord Sandison also emphasised the

[281] Para [53].
[282] Para [53].
[283] Para [55].

importance of the context within which the statement was made in "identifying its true nature".[284] He suggested that it would only be in rare cases that a claim of misrepresentation could be dismissed on the basis of pleadings alone, without evidence being heard.[285] Early in his judgment, he indicated that this was not one of those rare cases.[286]

Lord Sandison confirmed that statements of opinion can potentially constitute fraudulent misrepresentations if they are not the truly held opinions of those who express them.[287] Whether a statement is mere puff or *verba jactantia* (boastful or bragging words) are issues which can only be determined once the statements have been put into their factual context.[288] He commented:

> This is an example of the wider point that any attempt to isolate individual statements from the much broader connected sequence of events of which they formed part with a view to attacking their relevancy in one way or another is, at least in a case where the sort of involved, inter-dependent and developing scenario alleged here is concerned, not an exercise that can sensibly be undertaken at this relatively abstract stage of the proceedings.[289]

Another example was the statements which the defenders allegedly made seeking to discourage the pursuer from investing in freezing equipment that it would need to service the potential contract. The effect that communication would have on the mind of a reasonable person, as one negative comment potentially amongst many positive comments, was a matter for consideration at proof.[290]

Lord Sandison also considered an issue raised in the defenders' pleadings, which was that any contract would be dependent upon decisions to be taken by the UK government. Contrary to the defenders' arguments on this point, the government's role as decision-maker was not fatal to a case of fraudulent misrepresentation.[291] He also suggested that it was important that no

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[284] Para [55].
[285] Para [55].
[286] Para [55].
[287] Para [56].
[288] Para [57].
[289] Para [57].
[290] Para [57].
[291] Para [56].

element of the claim related to profit, but rather to the cost to the pursuer of putting itself into a position in which it could perform contracts.[292]

Confidentiality Agreement – Entire Agreement Clause

Lord Sandison turned to the impact of a Confidentiality Agreement which had been entered into by the parties. Clause 11 stated:

No Offer to Enter into Further Agreement: Neither
11.1.1 the entry into this Agreement;
11.1.2 the disclosure or receipt of Confidential Information; nor
11.1.3 the carrying on of any discussions or negotiations about a possible transaction,
will constitute or imply any other offer, representation, commitment or promise by either of the Parties to enter into any further agreement, or the development or supply of any product or service to which the Confidential Information relates.

Clause 12.10, **Entire Agreement**, stated:

> This Agreement constitutes the whole agreement between the Parties relating to its subject matter and supersedes and replaces all prior communications, representations (other than fraudulent misrepresentations), warranties, stipulations, undertakings and agreements whether oral or written between the Parties.

He reviewed decided cases on the role of fraud in contract, including *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank,* in which Lord Bingham had described fraud as "unravelling all".[293] Lord Bingham and Lord Hoffmann both referred to the assumption that a co-contractor will behave honestly. Noting the public policy principle that "fraud undoes everything", Lord Sandison concluded that Clause 11 was not a bar to the pursuer's fraudulent misrepresentation claim.[294] Although Clause 12 did not engage the same public policy considerations as were engaged by Clause 11, as a matter of contractual construction it reinforced the conclusion that the Confidentiality Agreement was not intended

[292] Para [58].
[293] [2003] UKHL 6; [2003] 1 CLC 358, para [15]
[294] Para [62].

to cover a situation in which it is alleged that one or other party has engaged in fraudulent misrepresentation.[295]

Further Heads of Loss

The part of the pursuer's pleadings which appeared to suggest a claim for breach of confidence, was in Lord Sandison's view, actually a head of loss in the fraudulent misrepresentation case.[296] This related to the cost to the pursuer of compiling the material embodying its intellectual property which it then passed to the defenders. This claim was "unexceptional".[297] The pursuer's enrichment claim relating to material passed to the defenders was also potentially relevant, and potentially available if the claim for fraudulent misrepresentation failed.[298] Also potentially relevant was the pursuer's costs in participating in the Speak Up process.

Discussion

As already noted, the value of this case probably lies in the analysis of the contractual clauses seeking to limit a contracting party's right to claim misrepresentation. One issue not raised in the case, as far as we can tell from the report, is worth commenting on here. The factual scenario in this case is characteristic of cases of pre-contractual liability, treated as legally relevant in many Continental European countries. In, for example, French, German and Dutch law, a party may have a claim for damages where it has been "led on" by representations that a contract will be put in place. Most of these systems permit recovery of reliance expenditure, such as the pursuer suffered here, Dutch law being a notable exception where loss of profit damages can (exceptionally) be obtained.

Scots law contains a concept known as Melville Monument liability, established in *Walker v Milne.*[299] It is probably inaccurate to describe this as an example of recognition of pre-contractual liability because the Scottish concept is extremely narrow, operating only where there is an actual agreement which is not enforceable because it is informally constituted.[300]

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[295] Para [63].
[296] Para [64].
[297] Para [64].
[298] Para [64].
[299] (1823) 2S 379. See also *Dawson International plc v Coats Paton* 1988 SLT 854 and *Khaliq v Londis Holdings Ltd* [2010] CSIH 13; 2010 SC 432, the latter commented on by Martin Hogg and Hector MacQueen in "Melville Monument Liability: Some Doubtful Dicta" (2010) EdinLR 451.
[300] WW McBryde, *The Law of Contract in Scotland,* 3rd edn (2007) para 5-60.

The remedy which it provides is not damages, but reimbursement of expenditure.[301] It is not available where the pursuer already has an action for misrepresentation.[302] In this case, the parties do not appear to have reached agreement, nor reached the stage of drafting or contemplating execution of a written contract. This being the case, the pursuer is unlikely to be able to rely on Melville Monument liability. It is nevertheless interesting to note that other European systems are more likely to award damages in this type of situation, and that Scots law is much more limited in this respect.

[301] Ibid.
[302] Ibid.

BREACH OF CONTRACT AND DAMAGES

William Campbell Recycling Ltd v Scottish Society for the Prevention of Cruelty to Animals [2026] CSOH 90

Implied Terms, Ultimatum Procedure and Notices

This decision from Lord Lake in the Outer House contains useful analysis of a contractual clause (clause 6.3) providing the parties with a right to terminate the contract by notice and the way in which a notice under that clause was drafted. It is of particular interest because of Lord Lake's conclusion that, because the possible consequences of service of the notice were drastic, strict compliance with the terms of clause 6.3 was required. Thus, a failure to refer to a type of breach by the pursuer in the notice was fatal to the defender's right to rely on that breach.

Facts

The dispute concerns an agreement entered into between the parties for the provision of waste management services at various sites operated around Scotland. The contract between the parties to the dispute was dated 2021, and followed on from similar contracts entered into in the past. Services were provided in different ways. At times, the pursuer acted as an agent, forming a contract on the defender's behalf between the defender and Veolia. At other times, the pursuer entered into direct contracts with subcontractors to provide services.

From 2022, the relationship between the parties deteriorated. From December 2023, the defender sought details from the pursuer of its risk assessments and procedures regarding safety in respect of the performance of the contract services in and around the sites. The parties passed matters into the hands of their respective solicitors.

In February 2024, the defenders' solicitors sent a letter to the solicitors for the pursuers, with the heading "Waste Services Contracts: Ultimatum Letter". The letter referred to clause 6.3 of the contract, which provided:

> 6.3 Either party shall have the right to terminate the contract forthwith if the other is in default of any material obligation in this Contract and such breach has not been remedied within 30 days of a request being made by the party not in default.

The Ultimatum provided:

> On behalf of SSPCA, we hereby intimate that we consider that WCR is in default of its obligations under the contract, for the reasons set out below. We hereby require that default to be remedied within 30 days of this request, in the manner set out below. In the event of the default not being remedied, we hereby intimate that SSPCA will consider itself immediately thereafter to be entitled to terminate the contract under said Clause 6.3.

The letter also explained that the pursuer had sought information from the defender to enable it to assess health, safety and environmental risks arising from the performance of the services. It enclosed a further copy of the defender's Health and Safety questionnaire and required that it be filled out for each site serviced by the defender. It referred to statutory obligations incumbent on the defender and said that it was not possible for them to achieve compliance with these without the information sought. The letter indicated that in not providing the information, the pursuer was in breach of an implied term that it would carry out its services in a way that does not place the defender in breach of the law.

Whilst disputing the existence of any such obligation, the pursuer nevertheless compiled information in response to the letter. The file being too large to email, the information was sent by DX. The defender stated that the letter and documents were received by them on 27 March 2024. On 21 March, the solicitors for the defenders had sent a letter to the pursuers' solicitors purporting to terminate the contract. The dispute between the parties therefore concerned whether the defender was entitled to terminate the contract by that letter, or whether the letter itself was a repudiatory breach of contract which entitled the pursuer to terminate the agreement and seek damages.

Decision

The defenders had argued that the contract contained an implied term, either at law or in fact, that pursuers would carry out its services in a way which did not place the defenders in breach of the law. Lord Lake decided that these averments passed the test of relevancy. He explained:

> I doubt whether it could be said that such a condition arises in all contracts for services as the letter states, but, having regard to averments that of necessity the services are performed on the defender's premises and require use of large vehicles, it is possible that there is an obligation that the services must be carried out in a way that would not result in the defender breaching the averred statutory duties.[303]

Reviewing the authorities on implication in fact, he emphasised in particular part of Lord Neuberger's judgment in *Marks & Spencer plc v BNP Paribas Securities Services.*[304] Paraphrasing Lord Neuberger's approach, Lord Lake explained:

> He then goes on to state that he considers that the requirements of business necessity and obviousness are alternatives and that, when considering business necessity, the test is not one of "absolute necessity" but is that in the absence of the term "the contract would lack commercial or practical coherence". Formulated in that way, the test of business efficacy is capable of being met on the averred facts. The defender offers to prove that if they are not given the information they seek, performance of the works would involve them in unlawful activity and, in that situation, it could be said that the contract would lack commercial or practical coherence.[305]

Lord Lake also indicated that the defender's arguments relating to an obligation on the pursuer to co-operate with the defender also passed the test of relevancy.[306]

The pursuer had argued that there had been a failure by the defender in the ultimatum properly to identify the obligation which had been breached.[307] In particular, the defender referred to statements by Popplewell J in *QOGT Inc v International Oil & Gas Technology Ltd*,[308] adopted by Lord Doherty in *Oil States Industries (UK) Ltd v Lagan Building Contractors Ltd*[309] describing notices under a contract:

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[303] Para [10].
[304] [2015] UKSC 72; [2016] AC 742, para 21.
[305] Para [11].
[306] Para [12].
[307] Relying on *Lombard North Central plc v European Skyjets Ltd EWHC 679 (QB)* paras [63] – [66].
[308] [2014] EWHC 1628 (Comm).
[309] [2018] CSOH 22.

> Its purpose is to enable the recipient to understand what contractual right is being relied upon, and what he is alleged to have done wrong, with sufficient clarity that he can assess the validity of the notice and take such steps as are open to him to remedy the alleged breach … the notice must be sufficiently clear to enable a reasonable recipient (that is to say one having all the background knowledge reasonably available to the recipient at the time of the notice) to understand the contractual basis for the notice and the nature of the breach which is alleged to have occurred, so as to be able to assess the validity of the notice and take such steps as are open to him to remedy the alleged breach.[310]

The defender submitted that the notices here passed that test. They made it readily apparent that the defender required that the pursuer provide a completed questionnaire, and that if they did not, the defender would consider the pursuer to be in breach of contract.

Having indicated that an obligation to identify the obligation breached was not to be implied generally as a matter of common law, Lord Lake proceeded to consider whether the terms of the particular agreement had the effect of imposing such an obligation. Clause 6.3 referred to a request to the other party if they are in default of an obligation. "As the request must be to remedy the breach, it follows that the breach must be identified. That in turn requires that the obligation said to have been breached is identified".[311] Interestingly, Lord Lake indicated that this was not a term implied in fact under *Marks & Spencer,* but rather what was described by Lord Wilberforce in *Liverpool City Council v Irwin* in his fourth category, namely establishing what the contract is.[312]

Lord Lake then moved to consider the operation of the ultimatum as a notice, in other words, whether it was sufficiently clear and unambiguous as to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate. The pursuer relied on *HOE International* to argue that the more drastic the consequences, the greater the need for strict compliance,[313] and that the purpose of the notice is to give the recipient a chance to put right its failure. Both of these propositions were in Lord Lake's view correct. If remedial

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[310] [2014] EWHC 1628 (Comm) at paras 112 and 113.
[311] Para [17].
[312] [1977] AC 239 at 254.
[313] *HOE International Ltd v Andersen* 2017 SC 313, per Lord Drummond Young.

action was not taken, the defender would be entitled to terminate a contract which would otherwise endure until at least 2038, an effect which could be described as drastic, and which therefore necessitated a strict approach.[314] Under Clause 6.3, a request to remedy a breach should identify the obligation said to be breached.

> This was done in respect of the obligation not to put the defender in breach of its statutory obligations but not in respect of the obligation to co-operate with the defender. Taking the required strict approach, the letter is therefore not effective in relation to the latter obligation.[315]

Although the defender had argued that the pursuer had breached its obligations of mutuality by serving the notice whilst in breach, Lord Lake indicated that it would only be possible to determine whether this obligation had been breached after consideration of the facts.[316] Lord Lake refused the pursuer's motion to grant decree de plano and decided that the case be put out by Order to enable the parties to address him on how effect should be given to his opinion and what further procedure there should be.

***Skyros Maritime Corp v Hapag-Lloyd AG* [2025] EWCA (Civ) 1529; [2026] Bus LR 1188**
Damages: relevance of facts or intentions of the owner of a ship, where the ship was re-delivered to the owner by the charterer late in breach of contract
This shipping case contributes to our understanding of the calculation of damages for breach of contract. It focusses on the possible impact one contracting party's intentions with regard to an asset in its ownership might have on the calculation of damages where a hirer breaches a hire agreement by returning the asset late.

The Court of Appeal held that the owner's plan to sell two ships was not relevant for the calculation of damages for breach of contract under a charterparty for the ship, where the charterer had returned the ship late in breach of contract. Damages were calculated by reference to the difference between the market rate and the charter rate under the charterparty, even though the owners could not have re-chartered the ship had there been no breach of contract.

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[314] Para [19].
[315] Para [20].
[316] Para [22].

Facts

The owners of two container vessels chartered them on long-term charterparties. The charterers redelivered both vessels late, in breach of contract. They continued to pay hire at the rates in the charterparties during the period of the overrun. The market rate for chartering similar vessels had, however, increased during the overrun period. The owners commenced arbitration proceedings, claiming the difference between the market rate and the charter rate. This was notwithstanding that they had entered into a contract to sell both ships. They therefore could not have taken advantage of the higher market rate even if there had been no breach.

The arbitral tribunal determined that there had been an implied request by the charterer for services outside the scope of the charterparty and an implied agreement to pay for them at the current market rate. Alternatively, the owners were entitled to user damages consisting of the difference between the market rate and the charter rate during the overrun. On appeal, the judge held that there was no scope for damages assessed by reference to the difference between the market and the charter rates during the overrun because the owners had lost the opportunity to take advantage of the market rate as a result of the contract to sell the ships.

Decision

The Court of Appeal overturned the judge's decision, finding that it was well established that where the market rate at the redelivery date exceeded the charter rate, damages for the overrun were assessed by reference to the difference between those rates for the period of the overrun. The owner's right to damages did not depend upon whether it would in fact have entered into a new charter at the market rate during the overrun. The particular arrangements which the owner had made in relation to the ships were *res inter alios acta* i.e. a collateral matter disregarded by the law for the purpose of assessing damages. If it were otherwise, a charterer would not know the extent of its liability without investigating whether the owner had arranged for the future use of the vessel, and there would be an incentive in every case to raise an arbitration in the hope that something would turn up in disclosure. The owners were entitled to damages in the normal measure.

Judgments in the Court of Appeal

The main judgment in this case was delivered by Males LJ, Coulson and Andrews LJJ agreeing. Males LJ began his judgment by saying:

> It has been clear for over a century that in the event of late redelivery under a time charter where the market has risen above the contract rate since the date of the charterparty, the shipowner is entitled to recover damages in respect of the overrun period consisting of the difference between the market rate and the contract rate.[317]

This was supported by a "formidable line of authority"[318] the earliest of which was decided in the early twentieth century.[319] The rule had high level recent support, in the form of Lord Hoffmann's judgment in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas),* a highly significant shipping case which focussed on remoteness.[320] Males LJ also quoted from leading textbooks which also confirmed that this was the rule.[321] He found it "striking" that none of the cases or textbooks suggested that the owner's entitlement to damages should depend on whether in fact he would have entered the market to conclude a new fixture on the date that the vessel ought to have been redelivered.[322]

Males LJ also explored other possible intentions that the owner might have in relation to the ship which did not include concluding a new fixture on the latest date when the vessel ought to have been redelivered:

> It may be convenient to have the vessel dry docked for repairs or periodic survey, or to carry out a positioning voyage at the owner's own expense with a view to more favourable employment thereafter. Or the owner may have committed to sell the vessel, as in the present case, either because it has decided to exit the ship-owning business or in order to purchase a new vessel for the future. In any of these events, which are commonplace and foreseeable, damages for the overrun period assessed by reference to the market rate at the latest contractual redelivery date will not reflect the

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[317] Para 32.
[318] Para 33.
[319] Para 32.
[320] [2008] Bus LR 1395.
[321] *Scrutton on Charterparties* 25th edn (2024) para 17-003; *Time Charters* 7th edn (2014); *Carver on Charterparties* 3rd edn (2024), referred to in this judgment at paras 34 to 36.
[322] Para 37.

> owner's actual loss. But again, it has not been suggested that these possibilities should affect the owner's right to recover damages in accordance with the normal measure.[323]

Summing up on this point, he suggested that the late delivery had taken away from the owner the opportunity of another fixture at the market rate, but whether it would or could have done so was *res inter alios acta,* which he expressed using modern terminology as "a collateral matter disregarded by the law for the purpose of assessing damages".[324]

Males LJ then quoted from Lord Hoffmann's significant judgment in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*.[325] He did so in order to illustrate the general rule to be applied in this case and to illustrate the fact that the owner's particular intentions with regard to the ship are disregarded by the law for the purpose of calculating damages.[326] *The Achilleas* was a case which focussed on remoteness, however. Males LJ made it clear that the main issue in this particular case was the idea of *res inter alios acta* and not remoteness. He quoted from an article by Treitel which illustrated that one must first ask what the injured party has lost, before proceeding to analyse how much of that loss can be recovered in damages.[327] Only the second question is a question of remoteness.

Res inter alios acta works to disregard some aspects of the claimant's actual financial position for the purpose of assessing damages.[328]

> Such matters are regarded as collateral, or res inter alios acta, because they arise independently of the circumstances giving rise to the loss, and are ignored in determining the damages to which the claimant is entitled. This is so regardless of whether the effect of disregarding such matters is to increase or decrease the loss which the law determines the claimant to have suffered.

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[323] Para 38.
[324] Para 39.
[325] [2008] Bus LR 1395.
[326] Para 42.
[327] Para 46, discussing GH Treitel, "Damages for breach of warranty of quality" (1997) LQR 188.
[328] Para 47.

These principles could be applied to the facts of the present case. The arrangements which the owner had for the ships after redelivery arose independently of the circumstances giving rise to the breach and were therefore ignored by the law for the purposes of assessing damages.[329]

Males LJ identified some important policy reasons which justified the law's approach to these questions.

> In my opinion this is a beneficial outcome which promotes certainty in commercial dealings, and enables accounts to be closed and disputes settled with a minimum of complication and expense. If it were otherwise, a charterer could never know the extent of its liability without investigating what the owner had arranged for the future use of the vessel, and there would be an incentive to take every case to an arbitration in the hope that something would turn up on disclosure.[330]

He rejected any suggestion that this might result in a windfall by quoting from a case in which Scrutton LJ had stated that the rules of English law do not always provide exact indemnity,[331] and another in which legal certainty was emphasised.[332]

Males LJ indicated that he had reached his decision by applying normal compensatory principles, and did not, as a result, need to consider the arguments raised before him in relation to user damages. He nevertheless proceeded to consider those arguments, and in particular the leading modern authority, *One Step (Support) Ltd v Morris-Garner*.[333] User damages are available where there has been an invasion of the claimant's right to property, including intangible property, but no pecuniary loss or physical damage to the property in question.[334] He concluded on this point that the principle of user damages should not be extended to a novel situation like this situation.[335]

The case was remitted back to the arbitrators to assess the damages to which the owners are entitled for the overrun period. Those damages were, he indicated, to be assessed on the basis

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[329] Para 49.
[330] Para 50.
[331] *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11 at 25.
[332] *The London Corp* [1935] P 70 per Greer LJ at 78.
[333] [2019] AC 649.
[334] Para 52.
[335] Para 56.

that the owners are entitled to recover the difference between the market rate and the contract rate. The arbitrators would have to determine the market rate.[336]

Discussion

This is an interesting and possibly controversial decision. Some might consider that the owners of the ship, who had no intention of rechartering the ship once it was redelivered to them, obtained a windfall by being compensated by reference to market rates. Clearly, however, this reflects the rule established in case law and commentary. Males LJ's arguments drawing on certainty and practicality are also very persuasive. To find otherwise would over-complicate the law of damages.

An interesting question is whether this approach is limited to charterparties, or the law of shipping. Although the cases and published sources discussed in the case do relate to the law of shipping, there is no indication in the case that this is a principle which is limited to that factual context. Similar arguments might arise at the end of a commercial lease, where there is a need to calculate the landlord's entitlement to a dilapidations payment. Are the landlords' plans in relation to the premises, in other words, whether the landlord proposes to re-let, or refurbish, relevant to the calculation of the dilapidations payment? Certainly, it might be worth citing this high-level English case in a Scottish case on dilapidations.

[336] Para 60.

UNILATERAL OBLIGATIONS

Kirkwood Homes Ltd v Cameron **[2026] CSOH 88**
Option contained in contract, variation of the option

Facts
The pursuer in this case is a developer of residential property. The defender is the owner of an area of land known as Conveth Mains, a large farm north of Laurencekirk. On 1 December 2008, the parties entered into missives which included an option in the pursuer's favour. The missives related to a specific area of land at the farm, extending to 328.22 acres ("the option area"). The missives provided that the pursuer could take an option or options over any part of the option area during a 10 year period beginning with the conclusion of the missives, but only after the pursuer had obtained planning permission in detail and other relevant development consents.

In 2014, the pursuer submitted an application for planning consent, and the Council confirmed that it was minded to grant it, subject to the parties entering into an agreement under s75 of the Town and Country Planning (Scotland) Act 1997. The missives obliged the defender, upon reasonable request by the pursuer, to enter into a planning agreement with the Council. On 12 December 2016, the pursuer undertook to restrict its rights under the missives such that they could only be exercised on one occasion, and then only in respect of an area of land that comprised not less than the whole of the site, or such other area as the parties might agree. This undertaking was in writing. The s75 agreement having been entered into, full planning permission was granted on 23 December 2016.

On 28 November 2018 (i.e. shortly before the expiry of the option period), by written notice issued to the defender, the pursuer sought to exercise its option rights over an area of land that was *smaller* than the site. Over the next three months the parties were in discussion regarding the valuation of the land to which the notice related. However, on 13 March 2019, the defender advised the pursuer that, in the absence of any agreement allowing the pursuer to call for the sale of any area of land smaller than the site, he would be treating the notice as being not in conformity with the undertaking and therefore invalid. As a result, the pursuer wrote to the defender, holding him to be in repudiatory breach of contract. The pursuer accepted the repudiation, and sued the defender in damages. The option period having

expired, the pursuer claimed that it had lost the opportunity to realise the development potential of the land, and sought to recover over £5 million from the defender.

Decision

The dispute came before Lord Harrower in the Outer House. He noted that the parties were in agreement both that the undertaking did not vary the missives,[337] and that the undertaking contained a promise binding the pursuer.[338] Lord Harrower made an opaque statement at the beginning of his judgment, as follows:

> Parties were in agreement that the undertaking did not vary the missives. However, in his pleadings, the defender averred that the "practical effect" of the undertaking was to vary the missives, or at least the pursuer's rights under the missives, and I have come to the conclusion that this analysis is correct.[339]

Lord Harrower made no further comment on how, in legal terms, this "practical effect" had been achieved. He stated:

> But in my view, and contrary to the position apparently being adopted by the pursuer, the effect of such a promise was to restrict the manner in which the pursuer might validly or effectively exercise its option under the missives. Put differently, it extinguished whatever rights the pursuer had under the missives to exercise its option in any manner other than as set out in the undertaking.[340]

Lord Harrower explained that the option, created by the missives, could be exercised unilaterally by the pursuer, and as such, it could also be unilaterally restricted or extinguished by the pursuer without the need for the parties to enter into any variation of the missives.[341] Nevertheless, the "practical effect" of any unilateral exercise of the pursuer's powers would be to vary the pursuer's rights under the missives. Whilst he accepted that a unilateral

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[337] Para [7].
[338] Para [8].
[339] Para [7].
[340] Para [8].
[341] Para [9].

promise cannot vary a bilateral contract, he suggested that this argument was "beside the point".[342]

Lord Harrower dismissed the action.

Discussion

It is difficult to understand Lord Harrower's reasoning in this case. Although there are several references to the "practical effect" of the pursuer's communications, there is no real explanation of the way in which the pursuer's rights were varied in legal terms. Lord Harrower noted that the pursuer's option was exercisable by the pursuer alone. He then noted that the pursuer's option, which could be exercised unilaterally, could also be restricted or extinguished unilaterally, notably *without* the need to vary the missives.

It is, of course, true that the missives created a right for the pursuer which could be exercised unilaterally. Simply because the pursuer possessed a contractual right which could be exercised unilaterally, does not mean that the pursuer could vary or extinguish that right unilaterally. As a right created by contract, it could only be varied or amended by both parties.

It may be that Lord Harrower was relying on personal bar in making this decision. Following that reasoning, the pursuer having stated in the undertaking that he would only exercise the option under certain conditions, he could not later depart from that position. That could amount to the type of inconsistent conduct which lies at the heart of personal bar. Lord Harrower does refer to personal bar or waiver, this seems to be in the context of considering whether the defender had waived the pursuer's breach. There is no suggestion that the pursuer is, in Lord Harrower's view, prevented from relying on the terms of the options as drafted in the missives by its own inconsistent conduct (which would be indicative of the pursuer being personally barred from exercising its rights).

We are left to conclude that the essence of Lord Harrower's decision is that rights which exist under a contract but which can be exercised unilaterally, can also be amended or excluded

[342] Para [9].

unilaterally, a position which is, it is suggested, difficult to agree with. We understand that an appeal in this case is pending.

NOTICES

***The Renaissance Club at Archerfield LLP v BVB Sureties Ltd* [2026] CSOH 67**
Validity of demand issued under performance bond

Facts
The pursuer sought payment of c£1.25m from the defender under a performance bond. The defender claimed that the notice demanding payment did not comply with the requirements of the bond in that (a) it failed to specify each factual matter said to have given rise to a breach of contract by the contractor and each provision of the contract said to have been breached; (b) it alluded to the existence of failures on the part of the contractor to perform the contract which went beyond those specified in the demand; and (c) that the signatory of the demand on the pursuer's behalf has been wrongly designed.

The bond provided that the demand had to be in the form set out in an appendix and that it needed to state (1) that the contractor had failed to perform the contract; (2) in what respects it had so failed; (3) that as a result of such failure, the amount claimed was due to the pursuer; and (4) the amount demanded. It further provided that the defender would accept such demand as conclusive evidence for the purposes of the bond that the amount claimed was due.

The form in the appendix stated *inter alia:* The Contractor has failed to perform the Contract in accordance with its terms and conditions in the following respects: [INSERT BRIEF DETAILS OF THE BREACH]….

[SIGNATURE]
[Director OR Company Secretary] of the Beneficiary

The demand letter had been sent on the pursuer's notepaper. It set out the contractor had carried out defective work in breach of its contractual obligations and that those obligations included but were not limited to carrying out and completing the work in a proper and workmanlike manner; adequately protecting all types and parts of the works; providing constant management and supervision of the works, and co-ordinating the works. It went on to state that breaches included but were not limited certain provisions of the contract between

the pursuer and contractor. It then noted that those breaches had resulted in the pursuer incurring loss in having to instruct others to undertake remedial works. The demand then set out 18 bullet points with specific instances of claimed defective works. Before stating the sum due and demanding the more limited sum due under the bond. The demand had been signed by a designated partner[343] of the LLP with the words "General Partner" added after his signature.

Decision

Lord Sandison began by noting that the approach to performance bonds had grown out of the law as it had developed in relation to letters of credit. Bonds were a variation of that species of bargain which usefully functioned by imposing on the granter of the bond an absolute obligation to pay in accordance with its terms, irrespective of any dispute between the parties as to the underlying contract the bond related to, unless there was a clear fraud or forgery of which the granter was aware.[344] *South Lanarkshire Council v Coface*[345] had confirmed that the construction of performance bonds was governed by the same principles that applied to constructions of contracts in general, which was the so-called objective and contextual approach described most recently by the UK Supreme Court in *Providence Building Society v Hexagon Housing Association Ltd.*[346] He was of the view that "no delicate exercise of construction" was required to conclude that the bond fell into the category of bond payable merely against the presentation of documents meeting the criteria required by the bond.[347] The four matters of substance identified in the bond represented part of the formal and technical requirements for a valid demand.[348]

He went on to note that it was in relation to requirements of that kind that the notion of "strict compliance" was often said to apply, referring to Lord Sumner's observations in *Equitable Trust Co of New York v Dawson Partners Ltd* that "there is no room for documents which are almost the same, or which will do just as well."[349] There were, however, two fundamental issues which attended the deployment of such a notion. The first was that the doctrine of

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[343] Presumably he was a designated member under s 8 of the Limited Liability Partnerships Act 2000.
[344] Para 27, citing *Hamzeh Malas & Sons v British Imex Industries* [1958] 2 QB 127 and *Edward Owen Engineering Ltd v Balrclays Bank International Ltd* [1978] QB 159.
[345] [2016] CSIH 15.
[346] [2016] UKSC 1. A note on that case appears in the Interpretation section of this Update.
[347] Para 28.
[348] Para 29, citing *Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd* [1997] AC 749.
[349] [1927] 27 Lloyd's LR 49 at 52.

strict compliance did not necessarily apply, at least to the fullest extent possible, to every performance bond but depended on the construction of the bond.[350] While certain reasons had been suggested in *Coface* as to why strict compliance might presumptively be required, Lord Sandison noted that those reasons were essentially concerned with protecting the bond issuer in a question with the party in security of whose obligations it had granted the bond. In the case before him the nature of any rights of recourse the issuer had against the contractor were unknown, and importantly, were not said to have been known to the parties when the bond was entered into. He noted his agreement with the observations in *IE Contractors v Looyds Bank plc*[351] that the fact that one construction of the bond would produce a result desirable or salutary to the interests of its issuer but not necessarily to those of the beneficiary of the bond was not a sufficient reason to adopt that construction. He observed that in *Siporex Trade SA v Banque Indosuez*[352] Hirst J had accepted a submission that, unlike the established position regarding letters of credit, precise wording in a demand under a bond was generally not essential, provided there was no ambiguity and no risk of the issuer being misled, confused or otherwise prejudiced.[353] He agreed with the summary of the situation set out in *Coface* that some degree of strictness was required.[354]

The second issue was that it might not be clear what strict compliance entailed. Lord Sandison noted that in assessing the compliance of a unilateral notice supposedly given in terms of a contractual power the law usually applied the reasonable recipient test, which involved asking whether the substance of the notice was sufficiently clear and unambiguous as to leave the reasonable recipient, exercising common sense in the context, in no doubt about the nature of the message being conveyed, ignoring immaterial errors that would not have misled him. It did not require an absolute clarity or absence of any possible ambiguity.[355] With the possible exception that the focus in the context of a demand under a performance bond ought to be more on the terms of the document itself rather than on the background circumstances against which it was issued, the test was effectively the one applied in *Siporex* and was sufficiently exacting as to be capable, as a matter of principle, of

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[350] Para 30, citing *IE Contractors Ltd v Lloyd's Bank plc* [1990] 2 Lloyd's LR 496.
[351] Para 30.
[352] [1986] Lloyd's LR 146.
[353] Para 30.
[354] *Ibid.*
[355] Para 31, citing *Delta Vale Properties Ltd v Mills* [1990] 1 WLR 445; *Carradine Properties Ltd v Aslam* [1976] 1 WLR 442; and *Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd* [1997] AC 749.

being applied in determining whether the substance of a demand issued under a bond adequately conveyed the message which the terms of the bond required it to convey.[356]

In this case it was apparent that the bond contemplated some degree of latitude in both the form and content of the demand. The form in the appendix was plainly not one in which a particular form of wording, and only those words, had to be used. At various points, most notably in requiring the insertion of "brief details of the breach" the form envisaged, indeed required, some material to be supplied at the will of the beneficiary.[357] He did not agree with the defender that each factual matter said to have given rise to a breach and each clause said to have been breached had to be stated. It was clear that only factual matters which commercially sensible parties might have been taken to have intended should be included. These were matters that were said to give rise to the breaches of contract identified in the demand as productive of losses in respect of which the bond was being called upon, rather than matters which might amount to further and different breaches not said to have resulted in such losses. The pursuer had no interest in having to give such details and the defender, likewise, had no interest in hearing about anything that was not being made the subject of the claim against it. That construction fitted with the context and purpose of the arrangement between the parties, given the bond was limited to c £1.25m.[358]

Lord Sandison then moved on to the argument that additional information provided in the demand resulted in it failing to comply with the requirements of the bond. He considered that the approach taken by the Court of Appeal in *Ex parte Stanford, in re Barber*[359] was instructive, in which the majority had held that the simplicity or prolixity, brevity or length of the additional material were too vague and uncertain to form acceptable criteria for determining whether there had been conformity. Rather the question was whether the document, in that case a bill of sale, departed from the prescribed form in any substantial or material respect. The Court of Appeal had observed that there would be such a departure if, and only if, any divergence was calculated to give the bill a different legal consequence or effect, either greater or smaller, than that which would attach to it if it had been drawn in the specified form, or if it departed from the form in a manner calculated to mislead those whom

[356] Para 31.
[357] Para 32.
[358] Para 33.
[359] (1886) 17 QB 259.

the use of the form was intended to protect.[360] For Lord Sandison the judgement represented a logical and useful analysis of what it meant to be in conformity, including strict conformity, with the form. Divergence from the form by providing additional information was substantial if it was material, and it was material if it would have as a natural consequence a different legal effect from that produced if the additional information was absent or where it would naturally lead to its recipient being misled about some matter of significance for that effect.[361] The fact that the pursuer had provided information on how the alleged failures of the contractor had resulted in a sum due to it was, said Lord Sandison, a paradigm example of the provision of additional material which was not productive of a different legal effect,[362] nor was the pursuer's allusion in the demand that the contractor had done more wrong than the aspects of the work which were the subject of specific complaint in the demand.[363] As to whether the presence of the additional information was apt to mislead the defender Lord Sandison considered that the enquiry envisaged by *Ex parte Stanford* was in all material regards an early expression of what was now the reasonable recipient test. As to which Lord Steyn had said in *Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd*,

> In determining the meaning of the language of… unilateral contractual notices, the law…generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language…. Such notices, even if they entail the exercise of important options, are habitually drafted by commercial men rather than lawyers. It would be a disservice to commercial practice to classify such notices as technical documents and to require them to be interpreted that way.[364]

Applying those observations Lord Sandison found that the fact the demand unnecessarily described defective work said to have resulted from the contractor's failures did not mean that the provision of that information would naturally have mislead the recipient of the

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[360] Para 34.
[361] Para 35.
[362] Para 37.
[363] Para 38.
[364] [1997] AC 749 at 771A-D.

demand about some matter of any significance as to its legal effect. As to the allusion to other unspecified breaches, he considered that a commercially reasonable person reading the demand would have concluded that the pursuer was saying that the specified breaches had resulted in it suffering loss in consequence in the amount of £1.8m and that, as that sum exceeded the amount guaranteed (of £1.25m), it was unnecessary to say anything further. He went on to note that an unreasonable reader, positively searching for specious reasons to deny liability might seize on what was said to construct an argument about the presence of an ambiguity more theoretical than real, but that was not the standard of construction to be applied. Strictness did not equate to absolute clarity or an absolute absence of any possible ambiguity. As such he found that the requirements of the bond as to the matters of substance which the demand had to assert in order to be valid had been met.[365]

As to the designation of the signatory of the demand, Lord Sandison did not agree with the parties that some description of the capacity of the person signing the demand was needed to comply with the formal requirements. The form appended to the bond plainly contemplated that the beneficiary would be an incorporation, unable to execute documents in its own name, such an entity requiring to act in that connection through officers or other authorised personnel who, in addition to signing their names, require to indicate their relationship to the entity on the face of the document to show they are signing on its behalf. But some entities, such as certain types of partnership, where documents could be signed in the name of the partnership itself whether with or without an explanation of the identity and capacity of the person adhibiting the firm's name. The bare indication in the form attached to the bond as to what was expected by way of signature in one set of circumstances (albeit probably the most common) could not form a sound basis for what was essentially speculation as to what the formal requirements were supposed to be in a variety of other possibilities.[366] The only reasonable function of the signature was to indicate that the demand had been issued on behalf of the beneficiary of the bond and, viewed reasonably, that was what it bore to say.[367] Lord Sandison noted that the demand had been issued on the pursuer's headed notepaper which stated its name, address, telephone number, company number and VAT number. It also provided details of a bank account in the pursuer's name and was signed by Mr Sarvadi as "General Partner". Lord Sandison was of the view that if a reasonable person were to be

[365] Para 39.
[366] Para 41.
[367] Para 42.

shown the demand and asked by whom it appeared to have been sent, that person would not only unhesitatingly answer that it was sent by Mr Sarvadi on behalf of the pursuer, but would be left wondering why the question had been asked.[368] The fact that, as a technical matter of law, an LLP has no general partner would not lead that person to suppose that the demand had not been sent on behalf of the pursuer. If that person were to think about the issue in isolation, which he doubted, he would focus on the noun and not the qualifying adjective in the description of Mr Sarvadi's position. As the defender had no reason to suspect, let alone believe, that the demand had not been properly issued on behalf of the pursuer it was obliged to take it at face value as having been sent on its behalf; the nature of the signing block provided no reason to resist the demand for payment.[369]

Discussion

The validity of notices issued under contracts generally, and, in particular under performance bonds, has arisen on a number of occasions before the courts in the last decade.[370] While there is reference to the need for strict compliance regarding a demand under a performance bond that does not, based on this decision, appear to differ much, if at all, from the reasonable recipient test used to determine the validity of contractual notices more generally. One wonders therefore whether there remains any merit in continuing to refer to a need for strict compliance with the requirements of a bond. It certainly seems unhelpful to say that some degree of strictness is required – that does not in any way assist in determining whether or not a demand under a bond is valid.

In relation to the signature, the demand had been signed by a member of the LLP.[371] Yet it purported to be signed by a "general partner". As the defender had pointed out there is no such role within an LLP.[372] While the addition of "general partner" to his signature suggested that Mr Sarvadi was not signing the demand in a personal but in a representative capacity[373]

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[368] Para 43.
[369] Ibid.
[370] See e.g. *Hoe International Ltd v Anderson* 2017 SC 313; *Hinston and others v Craigellen Assets Ltd* [2022] STO 35. There were a number of cases regarding performance bonds in the wake of the collapse of the Scottish Coal Co Ltd e.g. *Coface* and *East Ayrshire Council v Zurich Ins plc* [2014] CSOH 102.
[371] Indeed, it seems that Mr Sarvadi was a designed member of the LLP in terms of s 8 of the Limited Liability Partnerships Act 2000; see para 3 of the decision.
[372] General partners being a feature of limited partnerships under the Limited Partnerships Act 1907.
[373] Although not the difficulty in rebutting the presumption that someone signing a written document is personally bound and the decision in *Brebner v Henderson* 1925 SC 643, that merely adding "director" or

that capacity was set out incorrectly – he was a designed member of the LLP, not a general partner of it. On the face of the demand, it was therefore not obviously signed by the beneficiary of the bond. The fact that the appendix to the bond, setting out the form of the demand, assumed the beneficiary was a company creates difficulties. Those drafting bonds might take this into account, perhaps most easily achieved by specifying that the demand is to be signed by the beneficiary but not setting out any details in a "signing block", thus leaving it for the beneficiary to validly sign the demand depending on which type of corporate entity it is.

Lord Sandison notes that performance bonds are to be interpreted using the same principles as apply in construing contracts in general, making reference to the "objective and contextual" approach set out in *Providence Building Society v Hexagon Housing Association Ltd.*[374] As mentioned in the note on that case (found in the Interpretation section of this Update) the Supreme Court did make reference to Lord Hoffmann's famous and oft-quoted statement that the aim of contractual interpretation is to ascertain the meaning which the provision would convey to a reasonable person, having all the relevant background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contracting, the Supreme Court also made reference to the decisions of *Arnold v Britton*[375] and *Wood v Capita Insurance Services Ltd*[376] on the importance of the contractual language. So, while it is not incorrect to describe the approach in *Providence* as objective and contextual there is perhaps something of an omission in not acknowledging the fact that the decision in *Providence* also emphasised the importance of the language of the contract.

"secretary" to a signature was merely descriptive and was not enough to show that the signature was for and on behalf of the company of which the signatories held those roles.

[374] [2016] UKSC 1.

[375] [2015] AC 1619.

[376] [2017] AC 1173.

***Earl of Seafield v Leith* [2026] SLC 10**

Validity of statutory notice under s12 Agricultural Holdings (Scotland) Act 1991

It may seem somewhat strange to find a decision of the Land Court on the effectiveness of a statutory notice in a Contract Update, however, the case considers decisions of the Inner House, as well as the Lord Sandison's decision in *The Renaissance Club at Archerfield,*[377] a note on which appears immediately above, on the validity of contractual notices hence its inclusion.

Facts

The applicant was the landlord and the respondent the niece of the former tenant of a holding in Buckie, to whom the interest in the tenancy purported to pass on the death of her uncle. Without going into too many details of the provisions under the Agricultural Holdings (Scotland) Act 1991, the respondent was required to serve notice on the landlord under section 12(1) of the Act of her acquisition of the tenant's interest in the agricultural holding. The issue for the court, at debate, was the validity of that notice, which had been addressed to "Seafield Estates Office" rather than to the Earl of Seafield as landlord.[378]

Decision

The court[379] began by noting that in *Ben Cleuch Estates Ltd v Scottish Enterprise*[380] the Inner House had rejected the proposition that a notice directed to the wrong legal entity could nevertheless be effective. In *Balgray Ltd v Hodgson*[381] the Inner House had emphasised the importance of the addressee and the need for certainty in the law relating to notices. The court did not demur from those authorities. Actual knowledge on the part of the landlord did not cure a failure to comply with the statutory requirement for notice to the landlord.[382] However, the respondent had averred, thus offering to prove, that the landlord and his predecessors had, for many years, conducted business relating to the holding under the descriptions "The Earl of Seafield's Estate" and "Seafield Estate". Assuming that was true, the question was whether the designation used in the notice was capable of identifying the landlord. That depended on the factual context the respondent offered to prove.[383] The court

[377] [2026] CSOH 67.
[378] Para 39.
[379] Comprising Lord Duthie and Tom Campbell.
[380] 2008 SC 252.
[381] [2016] CSIH 55.
[382] Para 34.
[383] Para 36.

did not consider *Ben Cleuch* or *Balgray* to preclude that inquiry. Both those cases established that notice had to be given to the correct recipient but not whether particular words were capable of identifying him in circumstances where the meaning and significance of the words used were in dispute.[384]

The court went on to note that in *Hoe International Ltd v Andersen*[385] regard could be had to how a reasonable recipient would understand the notice in its objective context.[386] On the fact that the notice had been addressed to the "Seafield Estates Office" rather than to the "Seafield Estate" the court opined that the presence of additional or superfluous words would not necessarily invalidate an otherwise effective notice, where the notice continued to identify the relevant party, achieved its statutory purpose and was not capable of causing practical prejudice.[387] With reference to Lord Sandison's decision in *The Renaissance Club at Archerfield* the court commented that the principle *superflua non nocent* might apply in the context of formal notices and that additional wording did not invalidate a notice unless it materially altered its legal effect or was capable of misleading the recipient as to a matter of significance. The court did not regard those authorities as having departed from the principles stated in *Ben Cleuch, Balgray* or *Hoe* as they addressed a different question.[388]

As such, the court determined that it could not be said at debate that the respondent's case as to the validity of her notice had to necessarily fail. If the respondent succeeded in proving that "Seafield Estate" was a recognised designation of the landlord and that a reasonable recipient would have understood the imperfectly phrased notice as nonetheless identifying the applicant, it could not be said, at this stage in proceedings, that the additional phrase "s Office" deprived the notice of that character.[389] Finally, the court opined that questions concerning identification of the recipient and the objective meaning of the notice might not always be wholly distinct, and the designation used could not be divorced from the objective context in which that designation was said to have been used and understood.[390]

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[384] Para 37.
[385] [2017] CSIH 9.
[386] Para 38.
[387] Para 40, citing *EE Ltd v Alloa Football & Athletic Club Ltd,* Lands Tribunal for Scotland, 15 May 2024.
[388] Para 40.
[389] *Ibid.* The respondent's case on personal bar and waiver also proceeded to proof before answer: paras 42 – 44.
[390] *Ibid.*

Discussion

With this decision we again see what might be considered a somewhat lenient approach to the validity of a notice. The notice was fairly clearly addressed to premises, not a legal person. As such, it seems difficult to say that the notice was addressed to the landlord. Yet the court, distinguishing the case from *Ben Cleuch* and *Balgray,* considered that the objective context surrounding the giving of the notice was relevant to the question of whether the designation was valid. The reasonable recipient makes a further appearance, leading one to wonder whether this is essentially now the only real test when considering the validity of notices. Which does seem to depart from the somewhat stricter approach evident in cases such as *Ben Cleuch* and *Balgray* (albeit the issue in those cases was the different one of a notice to the wrong person) where the need for certainty was emphasised. It appears that what was said in *Hoe* has altered the landscape in relation to notices, creating more flexibility. In *Earl of Seafield* the respondent had a case on personal bar and waiver. It may be the case that the way in which the landlord had designed or identified itself played a part in how the respondent addressed her notice, but that seems to be more correctly determined on these alternative lines than to find that a notice addressed to a place, rather than a person was valid notice to the person of the landlord.

STATUTORY DEVELOPMENTS

Contract (Formation and Remedies) (Scotland) Act 2026

The Act was passed on 3 March 2026. We await details of the SSI which will bring it into force. The Act is in two parts – Part 1 deals with matters surrounding contract formation and Part 2 deals with aspects of the law of remedies.

Part 1 – Formation

General Themes

This part of the Act is designed to restate existing Scots law on formation of contract (the only major change being the abolition of the postal rule). It provides default rules, in other words the contracting parties have the freedom to contract out of these rules

What is a contract and how is it formed?

A contract is formed where there is agreement, but there does not have to be agreement on all terms (section 2(2)). The agreement may be determined from statements and conduct (section 2(4)).

The parties must intend the agreement to have legal effect (section 2(1)(a)); it must have the essential characteristics of a contract of the kind in question (section 2(1)(b)(i)) and it must have sufficient content (section 2(1)(b)(ii)).

An acceptance with terms which differ from the offer continues to 'kill' the offer and act as a counter-offer (see references to 'unqualified assent' to an offer in section 7 and sections 8(1) and 8(2))).

Even where the essentials are agreed, a party can specify that there is a particular matter which must be agreed before there is a binding contract (section 2(3)).

When does a communication take effect under the new Act?

The postal rule is abolished (section 14). This creates difference between Scots and English law, although parties often contract out of it anyway.

Section 13 covers communication. It makes provision for when notification (of an offer, acceptance, counter-offer, withdrawal, revocation, rejection or declaration) takes effect. Notification takes effect when it reaches the party to whom it is addressed (section 13(1)). 'Reaches': a communication reaches a person when it is made available to her in such circumstances as make it reasonable to expect the person to be able to obtain access to it without undue delay (section 13(3)).

Examples of reaching - section 13(4)): when it is delivered to that person, that person's place of business, or where a person does not have a place of business or the notification does not relate to a business matter, to the person's habitual residence. Where notification is transmitted by electronic means, it reaches that person when it becomes available to be accessed by that person.

Can one accept an offer by conduct? Where a contract is formed through acceptance by unnotified conduct, when is that contract formed?
An offer can be accepted by conduct (reflecting the existing law (section 2(4)). This is an exception to the general rule that acceptance must reach the offeror.

The pre-existing law was unclear on when a contract is formed where acceptance occurs through unnotified acts of the offeree – *Carlill v The Carbolic Smokeball Company*.[391] Is acceptance the point when the conduct begins, or when performance concludes? (*Daulia Ltd v Four Millbank Nominees Ltd and Anor*).[392] Now see section 3(2) – the contract is formed when the offeree begins to perform the act(s) in question.

Can an offer lapse on fundamental change of circumstance?
Yes, reflecting existing law in *Macrae v Edinburgh & District Tramways.*[393] Section 6 covers the situation where an offer has been issued, but before formation something happens to either the offeror or offeree (one party dies, becomes incompetent or enters insolvency). Section 6 – an offer lapses on a fundamental change of circumstance such that it can no longer be accepted. Note, this applies to offers only, and not contracts or other obligations, which will continue to bind an estate when someone dies.

[391] [1893] 1 QB 256.
[392] [1978] Ch 231 at 239 per Goff LJ
[393] (1885) 13R 265 per LP Inglis at 269.

Fundamental change of circumstance includes (under section 6(2)) death or one of the parties becoming incapable of making any decision as to whether to form the contract (as 'incapable' is defined in s1(6) of the Adults with Incapacity (Scotland) Act 2000).

Under section 6(4), the offer does not lapse when either the offeror or the offeree enters insolvency (sequestration, trust deed granted, voluntary arrangement or debt payment programme approved, winding up, receiver appointed or administration).

Part 2 – Remedies

As with part 1 the provisions in this part are essentially default rules that apply unless the parties have agreed otherwise on the matters dealt with in this part.[394]

Mutuality

Section 17 deals with mutuality of contract and provides that if both parties are in breach of contract they may nonetheless sue on the contract. This removes doubt about the ability of a party in breach to raise proceedings based on the contract.[395] A party, despite her breach, can sue the other provided the latter's breach occurred before the contract is lawfully terminated for the former's breach.[396] A party cannot, be virtue of this section, require the other party to the contract to perform an obligation performance of which falls due after a contract is rescinded or to perform when he is lawfully withholding performance by way of retention.[397]

Return of benefits received

Sections 18 – 21 provide a new contractual remedy[398] – return of benefits received following rescission, i.e. restitution following rescission. This remedy can be utilised where a contract is rescinded and at the time of rescission a party has performed obligations under the contract and has not received *the full reciprocal performance* from the other party.[399] If that is the case B, the recipient of full performance, must return the benefit to A provided A returns to B any benefit of the performance A has received from B,[400] albeit this will not be full

[394] Section 16.
[395] See the discussion in WW McBryde, *The Law of Contract in Scotland,* (3rd ed, 2007) paras 20-48 – 20-52.
[396] Section 17(2).
[397] Section 17(3).
[398] Although Lord Tyre's *obiter* comments in *Stork Technical Services (RBS) Ltd v Ross's Executor* 2015 SLT 160 suggested there was such a remedy in contract law.
[399] Section 18(2).
[400] Section 18(4).

performance given restitution only applies where performance has not been fully reciprocated. Where the benefit received is a sum of money the amount received should be repaid.[401] If it is not money but is transferrable by the recipient it must be transferred back unless it would be unreasonable or impracticable to do so, in which case the value of the benefit is to be paid by B to A.[402] Where the benefit is not money and is not transferrable the return is by B paying A either the value of the benefit or, if the benefit has been disposed of by B for an amount greater than its value, that higher amount.[403] Section 18(8) provides that the return of a benefit requires the return of the (natural or civil) fruits of that benefit.

Section 19 sets out rules to determine the value of a benefit, including the time by reference to which that assessment is to be made – the time of performance by A of the obligation resulting in the benefit to B. Section 20 makes provision for B to pay compensation to A where the benefit is transferred back to A but has reduced in value as a result of a change in its condition from the time B received it to it being returned to A. Finally, section 21 provides for B to pay A a reasonable amount for any use B has made of the benefit, except to the extent that compensation would be payable under section 20.[404] The section also provides that if B made improvements to the benefit but has to return it to A under section 18, B has a right to payment for the value of the improvement provided A could readily obtain that increased value by dealing with the benefit, unless making the improvement was a breach of contract by B or B made it when he knew or ought to have known that the benefit would have to be returned to A.[405]

Retention

Sections 22 – 25 were added at stage 2 as the Bill passed through the parliamentary process and deal with retention based on mutuality of contract, with the aim of clarifying areas of law related to this remedy that were uncertain and to make changes where the law was thought to be unsatisfactory.[406] Section 22 provides that A can retain performance of his obligations under the contract either (a) following breach by B of a counterpart obligation; (b) in anticipation of a breach of a counterpart obligation by B or (c) in relation to a subsisting

[401] Section 18(5).
[402] Section 18(6).
[403] Section 18(7).
[404] Section 21(1).
[405] Section 21(2).
[406] As to which see L Richardson, "The scope and limits of the right to retain contractual performance" (2018) Jur Rev 209.

obligation when A ends the contract as a result of B's breach or anticipatory breach.[407] Section 21(2) clarifies that the contractual obligations of each party are presumed to be counterparts unless it can be shown that the parties did not intend the obligations to be counterparts, and that counterpart obligations can be contained within separate contracts provided they form part of the same transaction. For A to be able to retain, the breach by B need not be material unless A is retaining in respect of an anticipatory breach.[408] Section 22(4) and (5) provide that the effect of A retaining performance must not be clearly disproportionate to the effects of B's (anticipatory) breach and that A can retain part of an obligation he is due to perform so that the effect of retention is not clearly disproportionate. It is for B to show that the effect of A's retention of performance is clearly disproportionate to the effect of her breach.[409] Section 21(6) clarifies that A can exercise his right to retain until B has either performed his counterpart obligation or paid damages in lieu thereof[410] and section 24(2) provides that in proceedings for breach of contract retention is a defence to a claim of failure to perform obligations.

Section 23 requires A to notify B where he is retaining as a result of anticipatory breach either before he retains or as soon as reasonably practicable following A retaining his performance. Section 25 makes clear that the provisions on retention in sections 21-24 do not affect the law in related areas, such as lien; set-off, netting or closing out; compensation; anticipatory breach generally; equitable / special retention or any other circumstances in which the right to retain or abate obligations are conferred. Furthermore, the provisions on retention are without prejudice to the common law power of the court to refuse to allow a party to retain his performance where it is or would be inequitable.[411]

Contributory Negligence

The final section in this part deals with the current uncertainty in Scots law[412] on whether an award of damages can be reduced where a party suffers loss partly due to breach of contract

[407] Section 21(1).
[408] Section 22(3).
[409] Section 24.
[410] Clarifying that retention is available even where a breach has occurred in the past and is unlikely to be repeated, contrary to the position adopted by Lord Drummond Young (with whom Lord Eassie agreed) in *McNeill v Aberdeen City Council* 2014 SC 335, a stance that was difficult to reconcile with the decision of the Supreme Court in *Inveresk plc v Tullis Russell Papermakers Ltd* 2010 SC (UKSC) 106.
[411] Section 25(b).
[412] As to which, see HL MacQueen, *MacQueen and Thomson's Contract Law in Scotland* (6th ed, 2024), paras 7.44 – 7.47.

by another and partly through her own fault where the breach of contract is not also recoverable in delict. Section 26 amends the Law Reform (Contributory Negligence) Act 1945 so that "fault" in section 5 of that Act should be construed as including a breach of contract. As such, once this section comes into force a party defending a claim can argue that any sum due by it to the pursuer should be reduced to such extent as the court thinks just and equitable taking into account the pursuer's share of responsibility for her loss.

In this respect, Scots law will differ from English law where it has been held that the provisions of the 1945 Act[413] are only available to a defendant where the breach of contract also consists of negligence on her part.[414]

[413] The Act makes separate provision for Scotland – see section 5 of the 1945 Act.
[414] See the discussion in the Court of Appeal in *Forsikringsaktieselkapet Vesta v Butcher (No 1)* [1989] AC 852 and *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214.

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