OUTER HOUSE, COURT OF SESSION

[2017] CSOH 120

CA236/14

OPINION OF LORD DOHERTY

In the cause

MARIN SUBSEA LTD

Pursuers

against

EDS & T&T HOLDINGS AS

Defenders

Pursuers: Thomson; Shepherd & Wedderburn
Defenders: MacGregor; Wright Johnston & Mackenzie LLP

14 September 2017

Introduction

[1] The pursuers and the defenders entered into a Share Purchase Agreement ("the SPA") and a Memorandum of Understanding, both dated 11 December 2013. In terms of the SPA the pursuers purchased from the defenders the entire shareholdings in two companies, AGR Seabed Intervention Limited ("ASIL") and AGR SET Limited ("ASET"). The consideration was a completion payment of £600,000 (subject to certain adjustment). The assets of the companies were set out in sections A and B of Part 5 of the Schedule to the SPA. Part A listed items of equipment. Part B listed three patents, one of which was GB 2359103 BTE 80. In terms of clause 7 and Part 3 of the Schedule the defenders warranted certain

matters. Each party had the benefit of independent legal advice. The transaction was completed on 16 December 2013.

[2] In this commercial action the pursuers maintain that the defenders have breached several of the warranties in the SPA. They advance warranty claims in respect of those breaches.

[3] I heard a preliminary Proof Before Answer which focussed on two issues:

(i) the correct interpretation of the contract with particular reference to clause 7.4 and to paragraph 2.6 in Part 3 of the Schedule;

(ii) whether disclosures in the Data Room relating to Patent GB 2359103 BTE 80 qualified the warranty in para 6, Part 3 of the Schedule (and if so, to what effect).

The parties entered into an extensive Joint Minute of Admissions (No 53 of Process). The pursuers called two witnesses, George Stroud (Chief Executive Officer of the Marin Group) and Gary Ebbrell (an oil and gas industry expert witness). The defenders also called two witnesses, Lasse Nergaard (a former employee of the defenders) and Paul Betteridge (formerly Vice President of ASIL and managing director of AGR Subsea Limited). Each of the lay witnesses prepared signed witness statements and these were treated as the main part of their evidence-in-chief. Similarly, Mr Ebbrell prepared a report (6/30 of Process) which he adopted as the main part of his evidence-in-chief.

The SPA

[4] The SPA provided:

"1. INTERPRETATION

1.1 In this Agreement and the Schedule, the following expressions shall have the following meanings:-

…

'the Assets' means the assets of the Companies as set out in section A and B of Part 5 of the Schedule (but expressly excluding the Excluded Assets);

…

'Companies' means together ASIL and ASET and the term 'Company' shall mean either of them;

…

'Data Room' means the documentation, matters and information disclosed and exhibited to the Purchaser prior to the Completion and included on two identical flash drives (USB) one of which is delivered to, and accepted by, the Purchaser immediately before Completion;

…

'Warranties' means the representations and warranties set out in Clause 7 and Part 3 of the Schedule;

'Warranty Claim' means any claim for a breach of any of the Warranties other than the Title Warranties;

…

1.3 In this Agreement, unless the context otherwise requires:-

…

1.3.2 the headings are inserted for convenience only and shall not affect the construction of this Agreement;

…

1.3.14 The *eiusdem generis* rule of construction or any other rule of law analogous thereto shall not apply to the construction of this Agreement and accordingly general words introduced by the word 'other' or such like expression shall not be given a restrictive meaning by reason of the fact that they are preceded by words indicating a particular class of acts, matters or things and general words shall not be given a restrictive meaning by reason of the fact that they are followed by particular examples intended to be embraced by the general words.

…

7. WARRANTIES

7.1 The Vendor warrants and represents to the Purchaser that each of the Warranties is true and accurate and not misleading as at the date of Completion, and acknowledges that the Purchaser has entered into this Agreement in reliance upon the terms of the Warranties. The Warranties (other than the Title Warranties) are subject only to, and qualified by, the matters fairly disclosed (with sufficient details to identify the nature and scope of the matter disclosed) in the Data Room.

7.2 Each of the Warranties shall be construed as a separate Warranty and (save as expressly provided to the contrary) shall not be limited or restricted by reference to or inference from the terms of any other Warranty or any other term of this Agreement.

…

7.4 Notwithstanding any other provision of this Agreement, but without prejudice to the Title Warranties, the Assets are presented and sold (by virtue of the sale of the Sale Shares) on an "as seen basis" where the Purchaser confirms it has inspected and satisfied itself as to the condition, use, safety and fitness for purpose of the Assets (upon which matters the Vendor gives no assurances) and accordingly the express terms and conditions of this Agreement shall apply in place of all warranties, conditions, terms, representations, statements, undertakings and obligations whether expressed or implied by statute, common law, custom, usage or otherwise, all of which are excluded to the fullest extent permitted by law.

…

8. LIMITATION ON CLAIMS

…

8.2 The Vendor shall not be liable for any Warranty Claim if, and to the extent that, the fact, matter, event or circumstance giving rise to such Warranty Claim was fairly disclosed (with sufficient details to identify the nature and scope of the matter disclosed) in the Data Room.

…

13. ENTIRE AGREEMENT

13.1 This Agreement and the documents referred to herein together constitute the entire agreement and understanding between the parties in connection with the sale and purchase of the Sale Shares …

…

SCHEDULE
PART 3 - THE WARRANTIES

1. INFORMATION

The recitals and Parts 1, 2, 5, 6, and 7 of the Schedule to this Agreement are true and accurate and not misleading in all material respects and there is no fact not disclosed which would render any such recitals and Parts 1, 2, 5, 6, and 7 of the Schedule inaccurate or misleading.

…

2.6. Statutory books and registers

(a) The statutory books and registers of the Companies are written up to date and are in the possession or under the control of that Company.

(b) All current books of account of the Companies are written up to date and all such documents and other necessary records, deeds, agreements and documents relating to each Company's affairs are in the possession or under the control of that Company.

…

6. INTELLECTUAL PROPERTY

The Companies are the sole legal and beneficial owner, and where registered, the sole registered proprietor of the intellectual property listed in section B of Part 5 of the Schedule, which is a true and accurate list of all the intellectual property owned by either of the Companies.

The Companies' intellectual property rights are valid, subsisting and enforceable. Nothing has been done or omitted and no circumstances exist whereby any of them may cease to be valid, subsisting and enforceable. In respect of the Companies' registered intellectual property, all renewal fees have been duly paid, all steps required for their maintenance and protection have been taken and there are no grounds upon which any person may be able to seek revocation, cancellation, rectification or modification of any registration.

…"

Memorandum of Understanding

[5] The Memorandum of Understanding (6/23 of Process) entered into between the parties narrated that ASIL had, either on its own behalf or jointly with the pursuers, made proposals in relation to two projects offshore of Indonesia. It provided that should the pursuers or any other member of the Marin Group be engaged to provide certain services for either project prior to 30 June 2015 the defenders would be entitled to share in any profits the pursuers or its related company made; and that each party would use best endeavours to enter into a profit share agreement within ten business days of the award to the member of the Marin Group of the project work.

Patent GB 2359103 BTE 80

[6] Most of the facts concerning patent GB 2359103 BTE 80 were agreed or were uncontentious. It is convenient to set them out first.

[7] On 12 February 2000 Nicholas Sills applied to register an invention patent in the Patent Register. Notification of the grant of patent GB 2359103 BTE 80 was issued on 11 December 2001. The title of the patent was Balanced Thrust Underwater Excavation Apparatus. Following an assignation by Mr Sills to Seavation Ltd, on 31 July 2006 that company was registered in the Patent Register as the proprietor of the patent. The patent fell to be renewed on 12 February 2012, but no application to renew or renewal fee were submitted on that date or during the following six month period. As a result the patent ceased with effect from 12 February 2012. On 23 November 2012 ASIL submitted an application under section 28 (3) of the Patents Act 1977 (on Form 16) for restoration of the patent. On 17 February 2013 the Patents Directorate wrote to ASIL indicating that the Register showed Seavation Limited to be the registered proprietor and explaining that a restoration request could only be made by the registered proprietor. Further correspondence between ASIL and the Directorate ensued. By letter dated 29 August 2013 the Directorate sent ASIL a completed Form 21 for signature with a view to updating the Register and entering ASIL as owner of patent GB 2359103 BTE 80 (and two further patents) in place of Seavation Limited. The letter continued:

> "Once these matters have been concluded the restoration request in respect of GB 2359103 BTE 80 can be dealt with."

By letter dated 16 September 2013 ASIL responded to the Directorate indicating *inter alia*:

> "As requested we have pleasure in returning duly signed Form 21 …
>
> We confirm that the correct address for AGR Seabed Intervention Ltd is …:
> AGR Seabed Intervention Ltd
> Union Plaza
> 1Union Wynd
> Aberdeen
> AB10 1SL"

All of these matters were disclosed in the Data Room.

[8] On 16 December 2013, immediately following Completion, ASIL's registered office was changed from Union Plaza to Marin House, Castlepark Industrial Estate, Ellon. ASIL has not had either its registered office or a place of business at Union Plaza since that time. No-one informed the Patents Directorate of this change until after 25 March 2015. The address for service for ASIL noted in the Patent Register in respect of all three patents remained Union Plaza.

[9] By letter dated 9 October 2014 addressed to ASIL at Union Plaza the Patents Directorate indicated that ASIL's application for restoration was allowed subject to payment of the outstanding renewal fees for the thirteenth, fourteenth and fifteenth years of the patent (totalling £890), and that payment should be made by 9 December 2014. By letter addressed to ASIL at the same address dated 18 December 2014 the Directorate noted that the fees had not been paid and advised that an extension of a further two months to pay could be sought in writing. Neither letter was forwarded from Union Plaza to ASIL. In a decision dated 25 February 2015 the Comptroller refused the application for restoration. The decision indicated that any appeal must be lodged within 28 days. The decision was sent under cover of a letter of the same date addressed to ASIL at Union Plaza. That letter was forwarded from Union Plaza to ASIL, but it was not received by it until after the expiry of the 28 day appeal period. Thereafter ASIL pursued an appeal to the High Court of Justice, Chancery Division against the Comptroller's refusal to restore the patent. The appeal was refused by Nugee J on 19 November 2015.

The Other Evidence

[10] Mr Stroud explained that the pursuers provide personnel and equipment for sub-sea work. They specialise in design development and the provision of mass flow excavation,

clay cutting, and jet sled technology. They undertake a wide range of projects in shallow inshore and deep water offshore locations.

[11] Mr Stroud was involved in negotiating and entering into the SPA. His understanding at that time had been that ASIL and ASET had, in or around 2012, taken over the business and assets of AGR Subsea Limited. The pursuers had known that ASIL and ASET had not traded for over a year and did not have any active projects, but that the companies had been working hard to try to win a number of contracts in the oil and gas sector. The defenders had wanted the opportunity to share the benefit of such work by ASIL, ASET and AGR Subsea Limited. Accordingly the parties had entered into the Memorandum of Understanding at the same time as the SPA. The Memorandum envisaged profit sharing in the event of any companies in the Marin Group obtaining work on either of two specified projects. Mr Stroud indicated that the pursuers could not credibly bid for either project without having the complete tender documentation and the bid documents submitted by ASIL and ASET, and that it would be essential to be able to use assets listed in the SPA if the Marin Group won the work. He deponed that throughout the world the oil and gas industry was heavily regulated from a health and safety perspective. In order for equipment to be used offshore it was critical that its origin and its track record could be vouched. That involved origin certificates for each component of equipment, test certificates, purchase invoices, documentation showing the projects it had been used on, maintenance records and the like. It was essential and was standard practice in the oil and gas industry. Without the relevant documentation the equipment could not be used. Everyone involved in the oil and gas industry knew that.

[12] Mr Stroud had seen the equipment in about September 2013. Many items were in a much poorer condition than he had expected. Significant repair and servicing would be needed before the equipment could be used. Some items would have to be scrapped.

[13] Mr Stroud stated that the pursuers' understanding at the time of the SPA was that the defenders had taken the administrative steps which were necessary to restore the GB 2359103 BTE 80 patent. The pursuers had not believed there was any serious issue with the validity of that patent. That was why the defenders were able to give the warranty they did. He recalled that a patent renewal document had been mistakenly sent by the Patents Directorate to Mr Sills. Mr Stroud had passed this on to Mr Betteridge in about August 2013. Mr Stroud's recollection was that Mr Betteridge had told him that "the outstanding fee would be paid".

[14] In terms of the joint minute it was agreed that the oil and gas industry is a global industry; that it is heavily regulated *inter alia* for health and safety reasons; that the Provision and Use of Work Equipment Regulations 1998 ("PUWER") and, in respect of lifting equipment, the Lifting Operations and Lifting Equipment Regulations 1998 ("LOLER") apply throughout the United Kingdom, including in respect of offshore activities in UK territorial water and on the UK continental shelf; and that equipment used in the offshore oil and gas industry in those locations has to comply with the requirements of PUWER and LOLER.

[15] Mr Ebbrell had extensive experience of the assessment of work equipment and of the oil and gas industry. He explained the consequences of the application of PUWER and LOLER in UK offshore locations. He confirmed that in almost all other jurisdictions where there is an offshore oil and gas industry there are similar regulatory requirements; and that, in fact, in order to facilitate the use and movement of equipment worldwide, industry

practice tends to require compliance with PUWER and LOLER wherever equipment is used. His evidence was that the regulatory requirements in the oil and gas sector had the result that in order for equipment to be able to be used it was necessary to have documentation vouching its origin, design and manufacture and its subsequent track record (including its use, and repair and maintenance). Without such documentation it would not be possible to use the equipment. That was the position throughout the world other than in a few places where there was civil unrest, where he was aware of undocumented equipment being used. Anyone operating in the oil and gas sector would know that (and would have known that at the time of the SPA being concluded). While independent certification bodies existed, they would require to see much of such documentation in order to certify equipment. Where a document such as the original design of a simple component had been lost it might be possible in some cases to obtain a replacement or retrospective documentation from the manufacturer if the component's unique manufacturer's serial number was available. However, where equipment was comprised of multiple components retrospective certification was very unlikely to be feasible.

[16] Mr Nergaard indicated that in 2012 "certain assets" of AGR Subsea Limited were transferred to ASIL and ASET. At that time AGR Subsea Limited was dormant. He and Mr Betteridge represented the defenders in the negotiations which led to the SPA. His evidence was that both the pursuers and the defenders knew that significant repair work would be needed if the equipment was to be used in an offshore environment. Both parties were aware that Mr Stroud of the pursuers considered that many items would require to be scrapped. Both parties were aware that only limited warranties were being given in relation to the assets of ASIL and ASET. Mr Nergaard accepted that for the equipment to be used offshore in the oil and gas industry in any jurisdiction where the pursuers, ASIL or ASET

would be likely to be soliciting business, documentation relating to the equipment would be necessary. He agreed that there would have been no point in the pursuers buying the shares in ASIL and ASET if the equipment could not be made capable of being used. The value in the companies was in their equipment and their intellectual property. The Memorandum of Understanding had been an "agreement to agree" a future profit share for the defenders if any Marin Group company was awarded a role in either of the two projects in Indonesia.

[17] Mr Betteridge claimed that at the time of the SPA he had no knowledge of what the pursuers proposed to do with ASIL and ASET or their assets. He was unaware if they proposed to use any of their equipment. As far as the defenders were concerned it was simply a share sale. There was no warranty that the equipment could be used lawfully and safely in the oil and gas industry. The share sale proceeded on the basis that the companies' assets were presented and "sold" on an "as seen basis". The Memorandum of Understanding was a gentleman's agreement. Both parties had been aware that the equipment had been idle, storage had been poor, and it would have needed significant servicing and repair before it could be used. Both parties were aware that Mr Stroud considered that many items were beyond economic repair. However, the Calder pumps and the Claycutter had been in good condition, and Mr Betteridge had thought that those items of equipment would be used in the oil and gas industry. The pursuers had been keen to add them to their portfolio because they would give them a competitive edge when quoting against other companies that did not have such equipment. Mr Betteridge accepted that in order for equipment to be used in the oil and gas industry it was necessary to have documentation demonstrating that it was designed and built to the applicable standards, but in his view that was not the defenders' concern. The companies' equipment had been presented and "sold" on an "as seen basis". In his experience a full track record was only demanded if (and after) a serious incident had occurred. He

accepted that if requested it would have to be exhibited, but in his experience it was not asked for in every case. He agreed that if original documentation was not available retrospective certification was very unlikely to be a feasible option with much of the equipment, especially the more complicated equipment.

[18] Mr Betteridge said that to the best of his recollection there had been no communication between him and Mr Stroud about renewal of a patent. He commented that August 2013 was four years ago. It was put to him in cross-examination that Mr Stroud's recollection on the point might be right or his recollection on the point might be right. His response was "That's fair."

Submissions

[19] Counsel for the pursuers submitted that on a proper construction of paragraph 2.6 (b) of Part 3 of the Schedule the words "other necessary records, deeds, agreements and documents relating to each Company's affairs" were wide enough to include records necessary for the companies' equipment to be used in the offshore oil and gas industry. The words used were of very wide and general import. That was the ordinary and natural reading. It was also the reading which accorded better with commercial common sense. At the time of contracting reasonable people in the position of the parties would have been in no doubt that the equipment was of no real value unless it could be used in the offshore oil and gas industry, and that it was envisaged that it would be so used. The terms of the contemporaneous Memorandum of Understanding supported that conclusion. The factual and commercial context of the SPA was that its principal purpose was for the pursuers to acquire ownership of the companies' equipment and intellectual property. There was no good basis for giving the expression a narrower meaning. Counsel reminded the court that

the headings in the SPA required to be ignored when construing the contract (clause 1.3.2); and that the expression was not to be given a restrictive meaning by reason of the preceding part of paragraph 2.6 (b) (clause 1.3.14).

[20] While it was trite that the expression fell to be construed having regard to the terms of the contract as a whole, it was not cut down by clause 7.4. Properly construed, the first half of clause 7.4 was concerned with the physical characteristics and condition of the equipment and matters capable of ascertainment on inspection. It made clear that the defenders gave no assurances as regards the condition, use, safety and fitness for purpose of the equipment, but that was a different matter from the warranty that necessary records were in the possession or control of the companies.

[21] If, contrary to the pursuers' submission, the expression was capable of more than one meaning, the meaning contended for by the pursuers was at the very least a possible reading. Having regard to the surrounding circumstances at the time of contracting, it was the meaning which accorded with commercial common sense. It would have made no sense at all for a purchaser to have acquired all the shares in the companies if the equipment could not be used in the offshore oil and gas industry because of the absence of necessary documentation.

[22] Reference was made to the following authorities on the interpretation of contracts: *Investors Compensation Scheme Ltd* v *West Bromwich Building Society (No 1)* [1998] 1 WLR 896, per Lord Hoffman at pp 912-3; *Jumbo King Ltd* v *Faithful Properties* (1999) HKCFAR 279, per Lord Hoffman at paragraph 59; *Rainy Sky SA* v *Koomin Bank* [2011] 1 WLR 2900, per Lord Clark of Stone-cum-Ebony JSC at paragraphs 14, 21; *L Batley Pet Products Ltd* v *North Lanarkshire Council* 2014 SC (UKSC) 174, per Lord Hodge JSC at paragraph 18; *Arnold* v *Britton* [2015] AC 1619, per Lord Neuberger PSC at paragraphs 14-15 and 17-23; *@Sipp*

Pension Trustees v *Insight Travel Services Limited* 2016 SC 243; *Wood* v *Capita Insurance Services Ltd* [2017] 2 WLR 1095, per Lord Hodge JSC at paragraphs 8-15; *Hoe International Limited* v *Andersen* [2017] CSIH 9, per the Opinion of the Court delivered by Lord Drummond Young at paragraphs 18-21 and 23-26.

[23] The pursuers accepted that the Data Room contained documentation (7/1 - 7/7 of process) relating to patent GB 2359103 BTE 80. The documentation showed that the patent had lapsed with effect from 12 February 2012 because of failure to pay the renewal fee: but it also showed that an application in terms of section 28(3) of the Patents Act 1977 for restoration of the patent had been submitted by ASIL, and that as at 16 September 2013 ASIL appeared to have complied with the Directorate's requirements for having ASIL noted as the proprietor of all three patents (and thus removed an impediment to the restoration request being dealt with). In those circumstances, while the warranty in paragraph 6 of Part 3 was qualified to the extent of the disclosure, the import of the disclosure was that, although the patent had lapsed in February 2012, the steps necessary to obtain restoration had been taken. That was the extent of the qualification of the warranty.

[24] Counsel for the defenders submitted that both the pursuers and the defenders had been commercially sophisticated individuals and both had employed solicitors to draft the SPA. In those circumstances the primary focus should be on a textual analysis.

[25] Counsel for the defenders maintained that, read as a whole, it was plain that paragraph 2.6 (b) was dealing only with records necessary to comply with each company's statutory accounting and company law obligations. That was the ordinary and natural reading of the provision. On the other hand, the pursuers' suggested construction was one which the expression could not bear. Records relating to the origins and track records of individual items of equipment may have been needed if the equipment was to be utilised

offshore in the oil and gas industry, but that was not invariably the case. A warranty that all such documents were in the possession and control of the companies would have been an unusual and onerous obligation for the defenders to have undertaken. Had the objective intention of the parties been that such an obligation be incorporated in the SPA it was much more likely that it would have been the subject of separate, specific provision.

[26] Moreover, the equipment was presented and "sold" on an "as seen basis", with the pursuers having inspected it and satisfied themselves as to its condition, use, safety and fitness for purpose, and with the defenders giving no assurances as to those matters. On a proper construction of clause 7.4 it was clear that it was not just referring to the physical condition of the equipment. The language used contained no such restriction.

[27] Having regard to the terms of the contract as a whole, and all the circumstances which would have been known to or reasonably available to both parties at the time of contracting, it could not be said that the pursuers' construction of paragraph 2.6 (b) accorded more with commercial common sense than the defenders' construction. The equipment had lain idle for a lengthy period and it had not been carefully stored or maintained. It was not true to say that without the documentation desiderated by the pursuers the equipment would be incapable of being used anywhere in the world. It was clear from the terms of the SPA that only limited warranties relating to the companies' assets were being given by the defenders. It followed that the pursuers' averments setting out their suggested construction of paragraph 2.6 (b) were irrelevant.

[28] In addition to the authorities mentioned by counsel for the pursuers, counsel for the defenders referred to *Credential Bath Street Ltd* v *Venture Investment Placement Limited* 2008 Housing LR 2, per Lord Reed at paragraphs 24, 37; and *Bank of Scotland* v *Dunedin Property Investment Co Ltd (No 1)* 1998 SC 657, per Lord President Rodger at pp 661F-H, 665F-G.

[29] So far as patent GB 2359103 BTE 80 was concerned, the correspondence in the Data Room fairly disclosed that the patent had lapsed with effect from 12 February 2012 because of a failure to pay the renewal fee. It also disclosed that an application in terms of section 28 (3) of the Patents Act 1977 for restoration of the patent had been submitted. Since there was no later information in the Data Room indicating that the application for restoration had been determined, the information fairly disclosed was that there was not a valid patent as at the date of Completion. It was neither here nor there whether the recollection of Mr Betteridge or Mr Stroud was correct in relation to there having been the suggested exchange about patent correspondence. Even if Mr Stroud's recollection was correct, the exchange did not affect the parties' rights and obligations vis-a-vis the patent standing the entire agreement clause (clause 13). The lapse of the patent due to non-payment of the renewal fee had been fairly disclosed, and the disclosure qualified the warranty in paragraph 6. Accordingly, the undernoted averment in Article 8 of condescendence was irrelevant and ought not to be admitted to probation:

> "On a fair reading of the correspondence within the dataroom the information within the dataroom did not qualify the warranty given by the Defender."

Decision and Reasons

[30] It was common ground that evidence in relation to the negotiation of the SPA was inadmissible except in so far as it disclosed facts known by, or reasonably available to, both parties at the time of contracting. I also understood it to be uncontentious that passages in the witness statements of Mr Nergaard and Mr Betteridge relating to the subjective intention of the defenders and the meaning and effect of the contract were inadmissible. In his closing submissions counsel for the pursuers insisted on his objection to the latter two matters, and

to the evidence of negotiations except where directed to showing facts known to both parties at the time of contracting. I sustain that objection.

[31] Each of the witnesses who gave evidence appeared to me to be doing his best to assist the court. No issue of credibility arises from their evidence. Except where I indicate otherwise I accept their evidence as reliable on all relevant admissible matters.

[32] Paragraph 2.6 (b) requires to be construed having regard to its documentary, factual and commercial context. The documentary context is provided by the whole terms of the SPA and by the contemporaneous Memorandum of Understanding. The factual and commercial context included the following matters. ASIL and ASET had obtained the equipment from AGR Subsea Limited. The last major contracts where the equipment had been used had been prior to that transfer; but thereafter ASIL and ASET had used some of the equipment in the offshore oil and gas industry, and they had tendered to use the equipment in further projects in the future. At the time of contracting both parties had been aware that the equipment had been idle for upwards of a year, that storage had been poor, and that the equipment would have needed significant servicing and repair if it was to be used. Both parties had been aware that the pursuers planned to have at least some of the items of specialist equipment - such as the Calder pumps, the Seavator and the Claycutter - available for use in the offshore oil and gas industry. The parties - and anyone in the industry appraised of the facts at the time of contracting - would have known that the equipment would have no real value if it could not be used in the industry because of the absence of the appropriate documentation. Anyone involved in the offshore oil and gas industry in December 2013 - including the parties - would have known that, if the equipment was to be used in that industry in any jurisdiction where the companies such as ASIL and ASET might wish to do business, documentation verifying its origin and its track record since manufacture would be required; and that the need for such

documentation arose from the need to satisfy regulatory requirements and industry practice. Retrospective reconstruction of documentation, by eg returning to manufacturers and employing independent verifiers, was not a practicable alternative. Ultimately I understood Mr Betteridge to accept all these matters: but whether that is so or not I find the evidence of the other witnesses in relation to them persuasive.

[33] In construing paragraph 2.6 (b) the starting point is the language used. The warranty in the second part of that subparagraph is not an unqualified warranty that all records relating to each company's affairs are in the possession of or under the control of the defenders. The warranty is given only in respect of "necessary" records etc. The obvious question is, "Necessary for what purpose or purposes?"

[34] The pursuers say necessary records etc. has a wide ambit and that it includes those records needed to demonstrate the origins and track records of the companies' equipment to enable its use in the offshore oil and gas industry. The defenders say that, read as a whole, it is plain that paragraph 2.6 (b) is dealing only with records necessary to comply with the companies' statutory accounting and company law obligations. They say that that reading sits comfortably with the terms of clause 7.4; whereas, by contrast, the pursuers' suggested construction does not.

[35] I agree with the pursuers that on an ordinary and natural reading the language of the relevant part of paragraph 2.6 (b) has a wide ambit. I think the ordinary and natural meaning of the phrase is such records etc relating to the company's affairs as companies engaged in such affairs would reasonably consider it necessary to retain for the company's purposes. As already noted, part of the factual and commercial context was that the companies' affairs involved using the equipment in the offshore oil and gas industry in the past, with proposed use of them in that industry in the future. In those circumstances

documentation vouching the equipment's origins and track record appears to me to fall within the scope of the warranty in paragraph 2.6 (b). I am not persuaded that construing the provision in the way the pursuers suggest involves the defenders having assumed an unusual and unduly onerous obligation. Where the whole shareholding of a company is acquired it is not uncommon for the seller to warrant that important records of the company are in the company's possession or under its control.

[36] I am doubtful whether the defenders' suggested construction is a possible construction of paragraph 2.6 (b). It involves reading in a limitation which the parties did not express. Even if, contrary to my view, it is an available reading, in my opinion the construction I favour is the more ordinary and natural reading. I think it is also the construction which accords better with business common sense. It would make no sense for a purchaser to have bought the shares if the companies could not use the equipment in the offshore oil and gas industry because of an absence of necessary documentation.

[37] In reaching my conclusions I have had regard to the whole terms of the SPA, including clause 7.4. The clause may conveniently be split in two. The second part ("and accordingly …permitted by law") provides that the express terms of the SPA are to apply in place of all warranties etc expressed or implied by statute, common law, custom, usage or otherwise in so far as the law permits their exclusion. No issue in relation to that part of the clause arises. The first part of the clause provides that "the Assets" are presented and "sold" on an "as seen basis" where the purchaser confirms it has inspected and satisfied itself as to the condition, use, safety and fitness for purpose of "the Assets" (upon which matters the defenders gave no assurances). It seems clear that the references to "the Assets" in the first part of the clause ought not to be interpreted as references to the defined term. The context suggests that the only sensible meaning of the words is the equipment in section A of Part 5

of the Schedule (rather than the assets in both section A and section B). It was agreed that the pursuers had inspected the equipment and satisfied themselves as to its condition, use, safety and fitness for purpose, and that the defenders gave no assurances on those matters. I accept that on a proper construction of this part of the clause the pursuers are to be taken to have satisfied themselves as to those matters in so far as it was possible to do so by inspection of the equipment. However, since such inspection could not inform the pursuers whether the companies had the necessary documentation or not, in my opinion that matter did not fall within the purview of the matters upon which the pursuers confirmed they were satisfied by virtue of the inspection. Accordingly, I see no inconsistency between clause 7.4 and the interpretation of paragraph 2.6 (b) which I favour. In my view the provisions deal with different matters. Moreover, it is readily understandable that reasonable contracting parties in the position of the parties here would be content with paragraph 2.6 (b) making such provision. They would be aware that unless the necessary records were in the possession or control of the companies it would not be a matter that the purchaser would be in a position to remedy: and that without the records the equipment would be of no real value to it.

[38] I turn then to the para 6 warranties and the Data Room disclosure. I am inclined to accept that there was indeed an exchange of some sort between Mr Stroud and Mr Betteridge in about August 2013. However, I am not satisfied that the exchange was of any significance. Mr Stroud's evidence was that a renewal notice had been sent in error by the Patents Directorate to Mr Sills, and that Mr Stroud had passed it on to Mr Betteridge. Mr Stroud did not say in terms that the notice related to patent GB 2359103 BTE 80 (as opposed to one of the other patents), and I think it highly unlikely that it did. In August 2013 patent GB 2359103 BTE 80 had been a lapsed patent for over a year. There would have been no reason for the

Directorate to send a renewal notice. No fee was due in respect of the lapsed patent. On the other hand, the other patents had not lapsed. They would have had to have been renewed annually.

[39] In my opinion, fairly read, the Data Room disclosure relating to patent GB 2359103 BTE 80 informed the pursuers that the patent had lapsed with effect from 12 February 2012 because of failure to pay the renewal fee due on that date. It also informed them that as at mid-September 2013 the patent had not been restored, but that an application for its restoration had been submitted by ASIL and that an impediment to the application being dealt with had been addressed by the return of the duly completed Form 21. It follows in my view that, at the very least, the information in the Data Room fairly disclosed to the pursuers what the position had been between those dates: and that the defenders did not warrant that the renewal fee due on 12 February 2012 had been paid when it fell due, nor did they warrant that the patent was valid, subsisting and enforceable etc between 12 February 2012 and mid-September 2013. Fairly read, did the disclosure do more than that? The crucial question, it seems to me, is whether the information fairly disclosed what the position was three months later (at the date of the SPA and at the date of Completion). The warranties in paragraph 6 were matters which the defenders warranted were true and accurate and not misleading as at the date of Completion (clause 7.1). It did not inevitably follow from the facts that the patent remained lapsed as at mid-September 2013 with an application for restoration outstanding, that the position would be bound to be the same at the date of Completion. In the intervening period the restoration application might have been determined, with a grant or refusal of restoration. However, the context was that the Data Room could be updated until the delivery of the USB flash drive at Completion, but that there was no material relating to the patent after mid-September 2013. Had the

restoration application been determined in the interim, but documentation vouching that determination not been included in the Data Room, the patent information which had been included would have been misleading. It would not have fairly disclosed the current status of the restoration application. In my opinion an objective reader of the patent information in the Data Room would have reasonably inferred that it told the whole story, and he would have concluded that it represented the position at the date of Completion. Accordingly, in my view, the defenders fairly disclosed that at that time the patent had lapsed but that an application for its restoration had been made and was outstanding. It follows that the warranties in paragraph 6 were qualified by, and subject to, that disclosure. In the result, so far as patent GB 2359103 BTE 80 was concerned, the principal effect was that, rather than warrant that the patent was valid, subsisting and enforceable, the defenders warranted that at the date of Completion ASIL had an outstanding application for restoration of the patent.

[40] Finally, I record that during the course of his submissions counsel for the pursuers made brief reference to clause 19. I do not propose to comment on the submission. The proper construction of clause 19 and its possible application in the circumstances of the present case were not matters which formed part of the subject-matter of the Preliminary Proof. It would be wrong to express a view on them before the issues are fully explored with the benefit of any relevant evidence and more fully developed submissions.

Disposal

[41] Counsel requested that I issue my Opinion and put the case out By Order to discuss the terms of an appropriate interlocutor to give effect to my decision. I shall accede to that request.