OUTER HOUSE, COURT OF SESSION

[2017] CSOH 152

CA13/17

OPINION OF LORD TYRE

In the cause

TMW PRAMERICA PROPERTY INVESTMENT GmbH

Pursuer

against

GLASGOW CITY COUNCIL

Defender

Pursuer: Howie QC; Brodies LLP
Defender: Currie QC; Pinsent Masons LLP

13 December 2017

Introduction

[1] By missives dated 21 December 2011, the defender agreed to sell to the pursuer a new building in Bothwell Street, Glasgow. The building consisted of office premises and had been constructed in 2009. The sale was completed on 5 January 2012. It was known to both parties that the building had a number of defects, and the missives made detailed provision for rectification of those defects, and for retention by the purchaser (ie the pursuer) of part of the purchase price pending such rectification. The works required were set out in a table of 23 items, and were categorised as either priority or non-priority works. Each of these two categories was assigned a long-stop date, at which time the relevant part

of the retention would become payable to the pursuer unless a substantive start to the remedial works had been made. In the latter eventuality, the defender's entitlement to continue the works was extended to "the Deferred Long Stop Date", being such further period of time after the relevant long stop date as the parties might agree as being reasonable to permit the remainder of the works to be completed. In the absence of agreement, determination of the Deferred Long Stop Date was to be referred to an independent expert.

[2] The works were not completed by the long stop dates. The parties did not agree on the further time that was reasonable to permit the remainder of the works to be completed, and in 2015 the matter was referred to an independent expert. On 3 July 2015 the independent expert issued his decision and note of reasons. For present purposes the significant feature of the independent expert's decision is that he identified Deferred Long Stop Dates for each of the items in the table individually, ie 23 in all.

[3] In the present action, the pursuer seeks to enforce its entitlement under the missives in accordance with the independent expert's decision, seeking (i) declarator that it is entitled to have sums held in a solicitors' joint bank account in respect of the retention paid over to it, and (ii) decree ordaining the defender to consent to the release of those sums. The defender maintains that the independent expert's determination is vitiated by error of law and falls to be reduced, with the consequence that the sums sued for are not due to be paid over to the pursuer. A further issue has arisen between the parties in relation to the proper interpretation of a term of the missives entitling the pursuer to recover from the defender certain professional costs incurred by it; I deal with this issue briefly at the end of this opinion.

Contract terms

[4] The terms of the parties' contract concerning the retention were set out in part 10 of a schedule to the missives. They are of some complexity. (In this opinion I shall use capitalisation only for those defined terms whose definition is of significance in the parties' dispute.) Paragraph 2 provided that on the date of entry, that part of the completion payment representing the retention (a specified sum) was to be retained by the defender's solicitors and paid into a joint account, to be held there on trust with the purchaser's solicitors for the purposes set out in the schedule.

[5] Paragraph 3.1 required the defender to use all reasonable endeavours either (a) to procure that the Remedial Works were carried out by pursuing its remedies under collateral warranties, or (b) to carry out and complete the Remedial Works itself, as soon as reasonably practicable after the date of entry, and in any event to "use reasonable endeavours to have done so by the relevant Long Stop Date". "Remedial Works" were defined in paragraph 1.13 as follows:

> "… all (a) investigations, (b) testing, (c) obtaining of any retrospective relaxations or approvals that the works in question are (and will during the following [sic] the carrying out of all relevant works be) compliant with building control and other regulations in force at the time the works in question were originally carried out (d) works, and (e) retrieval of information or procurement of replacement documentation which is in each case necessary to remedy each of the issues (insofar as same existed as at the Date of Entry) identified in the table which forms Part 16 of the Schedule …"

[6] The table in Schedule 16 listed 23 "groups" of remedial work. These 23 groups were variously referred to in the missives as "issues" or "items"; I shall use the word "item" to refer to them. The 23 items were allocated to one of four "Packages", being respectively the Elevation Package (items 1 to 8), the Roof Package (items 9 to 15), the Services & Internal Package (items 16 to 22) and the Information Package (item 23). Within each package

(except the Information Package) there were items specified as Priority Work, and other items not so specified. For each item the table included a figure in a column headed "Total" (although the figure for most but not all of the non-priority items was Nil), and a figure in a column headed "200%" which in all cases was double the Total. The sum of the figures in the column headed "200%" was equal to the retention. Within each Package, the figures in the columns headed Total and 200% were added up to give a figure called the "Sub-Total". Each of the figures in the column headed "Total" for Priority Works was defined in paragraph 1.4 as an "Individual Sum".

[7] Paragraph 3.1 also permitted the defender, prior to carrying out any particular item of Remedial Works, to request the consent of the pursuer not to carry out or procure the carrying out of Remedial Works (or a part thereof) in whole or in part. If the pursuer in exercise of its discretion agreed to the request, then the defender would "forfeit the Retention (or in the case of not carrying out or not procuring the carrying out of part of the Remedial Works, that part of the Retention relating to the appropriate Package and/or Individual Sum)".

[8] Paragraph 5 dealt with releases of funds from the joint account. The starting point, set out in paragraph 5.1, was that on "the relevant Long Stop Date", the defender's right to carry out and complete "the relevant Remedial Works" would cease, along with any right of access to the building. "Long Stop Date" was defined in paragraph 1.6 as follows:

> "… (i) for Priority Works the date which is ten months after Completion and (ii) for all other Remedial Works the date which is twenty four months after Completion as such date is extended (a) by a reasonable period or periods (to be agreed by the parties failing such agreement to be determined by an Independent Expert in accordance with the provisions of this Part 10 to allow for the works in question to be carried out in a season or during a time that is most appropriate having regard to the nature of the works in questions [sic] and (b) pursuant to the provisions of this Part of the Schedule."

By the end of the debate it was, as I understood it, common ground that there were initially two Long Stop Dates: one for Priority Works and one for other works. The defender's position was that there could only ever be two Long Stop Dates; the pursuer contended that the number could increase to a theoretical maximum of 23, if extensions were agreed or determined in accordance with the definition above. I shall return to this issue later. What in fact happened was that the Long Stop Date in respect of Priority Works was extended by agreement to 14 February 2014. There was no extension in respect of other works, for which the Long Stop Date remained 5 January 2014.

[9] Paragraph 5.2 dealt with the situation where all of the items in a Package were timeously completed by the defender. In that eventuality the defender was entitled to payment of the Sub-Total in the "200%" column, ie the full retention for that Package. In addition, paragraph 5.4 provided that where the defender timeously completed an item of Priority Works, it was entitled to receive the Individual Sum in respect of that item (ie half the retention for that item alone).

[10] Paragraph 5.3 dealt with the situation where all of the items in a Package were not completed by the defender by the Long Stop Date (or by a later date referred to as the "Cut-Off Date; see below). In that eventuality, the pursuer was entitled to payment of the full retention for that Package (under deduction, presumably, of any Individual Sum previously paid to the defender under paragraph 5.4). This entitlement was, however, subject *inter alia* to the provision that lies at the heart of the current dispute, namely paragraph 5.2.1, which stated:

> "Where at the Long Stop Date the Seller has made a substantive start to carry out, and are continuing in a meaningful way to carry out, any Remedial Works (either by way of works commencing on site, a building contract having been let, the relevant statutory consent applications having been lodged) their entitlement to carry out those particular works shall continue until the Deferred Long Stop Date and their

> entitlement to claim the Retention in respect of such works shall continue appropriately. If those works are not completed by the Deferred Long Stop Date the Seller's entitlement to complete those Remedial Works shall cease along with any right of access to the Property."

The "Deferred Long Stop Date" was defined in paragraph 1.1 as follows:

> "… for Remedial Works to which paragraph 5.3 [parties are agreed that this reference should be to paragraph 5.2] applies, such further period of time after the Long Stop Date as the parties agree (or the Independent Expert determines) as being reasonable to permit the remainder of those works which have been started to be completed".

[11] One further set of provisions requires to be mentioned. Paragraph 3.11 was concerned with Remedial Works which were "Potentially Service Chargeable Items", ie, defects in respect of which liability could potentially be passed on by the defender to a third party such as the contractor or a member of the design team. "Potentially Service Chargeable Items" were defined in paragraph 1.10 as "those Remedial Works identified in the column headed 'Nature' as 'Warranty Recovery/Service Charge Reclaim' in the table which forms Part 16 of the Schedule". Unfortunately in this as in other respects the draftsmanship of the contract demonstrated a lack of attention to detail. There were in fact a number of items in the column headed "Nature" identified as "Warranty Recourse/SCR Repair & Maintenance" and I take those items to be the ones alluded to in paragraph 1.10. The items in question appear in three of the four Packages. Most, but not all, are non-priority items. In terms of paragraph 3.11, the defender was obliged to use all reasonable endeavours to have the relevant third party accept liability for these items, including, where appropriate, taking matters to adjudication and/or raising court action if there was a reasonable prospect of success. If by the Long Stop Date such endeavours had failed to result in third party liability being accepted or determined to exist, the defender's obligations in relation to the relevant item were held to be complete. If on the other hand

such liability was accepted or determined to exist, the defender was obliged to carry out the relevant works. If at the Long Stop Date court or arbitration [*sic*, not adjudication] proceedings were continuing, the Long Stop Date was extended until proceedings were complete and to allow for subsequent completion, within a reasonable time, of the relevant works.

[12] It appears that the "Cut-Off Date" referred to in paragraph 5.3 was a reference to either the Deferred Long Stop Date or a date following an extension in terms of paragraph 3.11.

The question referred to the Independent Expert

[13] It is, as I understand it, common ground that no Remedial Works were completed by either Long Stop Date. It is also, as I understand it, common ground that (with one exception referred to the independent expert but with which this opinion is not concerned), a substantive start was made by the defender to carry out the Remedial Works in respect of all 23 items. The parties could not, however, reach agreement on the amount of time that would be reasonable to permit the remainder of the works to be completed. The matter was accordingly referred, in accordance with paragraph 1.6, to an independent expert. The question referred to the expert for his decision was:

> "What period of time after the Long Stop Date (for each Group Item) that would be reasonable for the remainder of the Remedial Works to be completed (including the carrying out of any investigations) to determine what the Deferred Long Stop Date should be for each Group Item".

Neither party contended that anything turned on the precise wording of the question referred for determination.

The Independent Expert's determination

[14] It is clear from the terms of the expert's decision that he was well aware that the parties were in disagreement as to the proper interpretation of paragraph 5.2.1, read together with the definition of Deferred Long Stop Date. The expert narrated the competing submissions on this issue at paragraphs 3.7 to 3.19. At paragraph 3.20 he concluded:

> "Therefore I can see no impediment in what the Seller asserts with respect to the access rights or the [Long Stop Dates], to a construction which provides that there be 23 separate Group Items, each with its own "relevant" Deferred Long Stop Date. This is what is asserted by the Purchaser, and on the basis of the foregoing analysis, that is also my view."

The expert proceeded to consider each item of the Remedial Works in turn, and provided in each case a decision as to the period of time that would be reasonable for the remainder of the Remedial Works from the relevant Long Stop Date. By this means he determined a Deferred Long Stop Date for each item individually. Some of those dates were in the past as at the date of the expert's decision.

Review by the court of the decision of an expert

[15] It is well settled, in principle, that where parties have agreed to be bound by the decision of an expert, that decision cannot be challenged in the courts unless the expert has departed from the instructions given to him in a material respect: see eg *Jones* v *Sherwood Computer Services plc* [1992] 1 WLR 277. Where, however, a determination is dependent upon the proper interpretation of a contractual provision, an expert who misinterprets the contract has not done what he was asked to do. His interpretation is therefore open for review by the court: see *Mercury Communications Ltd* v *Director General of Telecommunications* [1996] 1 WLR 48 (HL), Lord Slynn of Hadley at 58-9. In the present case it was not contended on behalf of the pursuer that the expert's decision to determine a Deferred Long

Stop Date for each of the 23 items individually was beyond the scope of review by the court. I need not therefore address the general principle further.

Argument for the defender

[16] On behalf of the defender it was submitted that the schedule provided a coherent scheme for Priority Works and other works, and for Packages which included works in both categories. The seller (ie the defender) was to work towards completing Priority Works by their Long Stop Date and other works by theirs. There was neither provision nor need for a Long Stop Date for each individual item. It was reasonable to proceed on the basis that this underlying scheme was maintained when fixing Deferred Long Stop Dates. The reference in paragraph 5.2.1 to having made a substantive start to carrying out "any" Remedial Works indicated that if the seller had started works which were continuing at the Long Stop Date (for either category), then it was entitled to a Deferred Long Stop Date in respect of "those particular works", ie in respect of Priority Works or other works, as the case might be. Use of the singular "the date" in the definition of Long Stop Date in paragraph 1.6 and "the Deferred Long Stop Date" in the final sentence of paragraph 5.2.1 were further indications that only one such date was envisaged for each category of works. The reference in the latter sentence to rights of access ceasing mirrored a similar expression in paragraph 5.1 in relation to a Long Stop Date: in each case there were two possible dates, not 23. If there was a separate Long Stop Date for each item, one would expect to see that in the definition. Significantly, paragraph 5.2.1 made no mention of individual items. The underlying purpose of the scheme was to withhold full payment of the retention until all of the items in the Package in question had been completed.

[17] As to the question whether a Deferred Long Stop Date could have been fixed as a date prior to the date of the experts' decision, the language of the scheme was more naturally read as prospective. On the pursuer's construction, the defender would have had to carry out work against an awareness that if any of it was done after the date eventually fixed as the Deferred Long Stop Date, this would not allow release of the retention. That interpretation was commercially unsustainable. The defender would not have had any completion date to target and the pursuer would obtain an unreasonable windfall. The better construction was that the defender was to be given a date that could then be used to programme the remaining works.

Argument for the pursuer

[18] On behalf of the pursuer it was submitted that the purpose of the definition of Deferred Long Stop Date was to provide an objectively ascertainable period that was reasonable to complete works already started. Although there were two Long Stop Dates at the outset, there could in the end be as many as 23. Properly construed, the definition of Long Stop Date (and in particular the reference to extension for "a reasonable period or periods") did not provide for consecutive extensions of the same period, but rather different periods of extension for individual items of Remedial Works. What the expert had been asked to do was to fix a reasonable time to complete each item, assessed as at the Long Stop Date. The Deferred Long Stop Date was therefore, for each item, the Long Stop Date plus a reasonable period to permit works already under way to be completed. That was what the expert had determined. The reference in paragraphs 5.2.1 to "any Remedial Works" indicated that there were more than two Long Stop Dates and Deferred Long Stop Dates: if there were only two, the expression used would have been "either". The definition of

Remedial Works in paragraph 1.13, and in particular the words "in each case necessary to remedy each of the issues", suggested that the items had to be considered individually.

[19] It followed from the foregoing that it was possible for the Deferred Long Stop Date fixed by the expert to be a date in the past, provided only that it could not be earlier than the Long Stop Date for the item in question. The date of the expert's decision had no relevance to the fixing of a reasonable period for works to be completed. The production of the expert's decision could be delayed for reasons unconnected with the works: for example, if the expert fell ill, or if his decision was set aside and a fresh decision had to be issued. There was no commercial reason not to fix a date in the past.

Decision: Interpretation of Deferred Long Stop Date

[20] The schedule to the missives could undoubtedly have been drafted with greater care and clarity. The number of obvious cross-referencing and other errors in it does not inspire confidence that it can be read literally as expressing the parties' common intention. I bear in mind, however, the well-known guidance on contractual interpretation provided by Lord Clarke in *Rainy Sky SA* v *Kookmin Bank* [2011] 1 WLR 2900 at paragraph 21:

> "The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

I bear in mind also the warning given by Lord Neuberger in *Arnold* v *Britton* [2015] AC 1619 at paragraphs 19 and 20:

> "19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made…
>
> 20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed…"

[21] In reaching a view on what the reasonable person described by Lord Clarke would have understood the parties to these missives to have meant, I take as my starting point the significance and meaning attributed therein to the Long Stop Date, leaving aside for the moment any deferrals or extensions of time. In agreement with parties' submissions, it seems to me to be reasonably clear from the definition in paragraph 1.6 that there were, at the time when the contract was entered into, two Long Stop Dates: one in respect of Priority Works and one in respect of other works. Those were very important dates: in terms of paragraph 5, they determined which of the parties was to become entitled to that part of the retention referable to one or other category of works. If all of the items in a Package were timeously completed, the retention was released to the defender; if not, it was released to the pursuer. The operation of paragraph 5 in the context of two Long Stop Dates is, however, rather obscure. Paragraphs 5.2 and 5.3 suggest that the whole of the Sub-Total for each Package was to be released at the same time to the defender or the pursuer (as the case may be) regardless of the division within the Package into Priority Works and other works. On the other hand, paragraph 5.1 refers to the defender's right to complete "the relevant Remedial Works" ceasing on "the relevant Long Stop Date", suggesting that the parties'

entitlements in respect of Priority Works and other works had to be considered separately. This apparent conflict can be removed if one reads the word "relevant" into paragraphs 5.2 and 5.3, so that for example, paragraph 5.3 is read as applying "where all of the relevant items in a Package of Remedial Works are not completed by the Seller by the relevant Long Stop Date".

[22] On this reading, the defender's payment entitlement would have been as follows:

- On completion of a particular Priority Works item before the Priority Works Long Stop Date (initially 5 November 2012), 50% of the retention in respect of that item;
- On completion of all of the Priority Works items in a Package before 5 November 2012, the balance of the retention in respect of those works; and
- On completion of all other items in a Package before the non-priority works Long Stop Date (5 January 2014), the retention in respect of those works.

Failure by the defender to complete all of the Priority Works in a Package prior to 5 November 2012 would have entitled the pursuer to receipt of the balance of the retention in respect of those works, but not the retention in respect of non-priority works in that Package. Failure by the defender to complete the non-priority works by 5 January 2014 would have entitled the pursuer to receipt of the balance of the retention in respect of those works. It might be thought that there is something curious about the defender being entitled to complete – and receive the retention in respect of – non-priority items in a Package after having failed to complete the Priority Works in that Package; it seems to me, however, that that is what was agreed.

[23] Interpretation becomes more complicated when one takes into account the various provisions allowing deferral or extension of time. Dealing firstly with the definition of

"Long Stop Date" in paragraph 1.6, I reject the pursuer's submission that this envisaged a possible increase in the number of Long Stop Dates up to a maximum of 23. In my opinion the definition provides no support for allocating a Long Stop Date to a particular item of works. I agree with the submission on behalf of the defender that it accords with commercial common sense to read the words "a reasonable period or periods" as allowing for more than one extension of time in respect of the same category of works (ie Priority Works or other works). The reference to "the works in question" is similarly a reference to one or other of those categories. My principal reason for preferring this interpretation is that it preserves intact the system of payment entitlements described above, which depended upon there being a specific date at which to ascertain whether or not all of the Priority Works or other works (as the case might be) in a Package had been completed. If there were to be several Long Stop Dates for completion of Priority Works and/or other works, the payment system would become unworkable.

[24] The foregoing interpretation is also consistent with the provisions of paragraph 3.11 which extended the Long Stop Date where court or arbitration proceedings were continuing in respect of any Potentially Service Chargeable Items. Although references in paragraph 3.11 to "the relevant item of Remedial Works" and "the relevant works" are clearly to individual items of Remedial Works, the final sentence provided for extension of "the Long Stop Date" and did not make provision for extension only in respect of an individual item. Again this would have allowed the scheme for release of the retention to remain intact and to operate as parties had planned. I note in passing that this interpretation is also consistent with paragraph 3.12.1 which dealt with extension of the Long Stop Date because of delay arising from force majeure or the act or default of the pursuer.

[25] My finding that, on a proper construction of the missives, there could only ever be two Long Stop Dates does not lead inexorably to a conclusion that there were only two Deferred Long Stop Dates. That, however, is the view that I have reached. Turning next to paragraph 5.3, which introduced the expression "the Cut-Off Date", it is notable that this is defined as the Long Stop Date "or, such later date identified in paragraphs 3.11 or [5.2] above". If, as I have found, paragraph 3.11 provided for extension of each Long Stop Date to a single later date, it is consistent to construe the reference to a later date identified in paragraph 5.2 in the same way, ie to a single Deferred Long Stop Date in respect of each of the two categories of works. If there could have been up to 23 Deferred Long Stop Dates, there could equally have been 23 Cut-Off Dates, and the same difficulty would arise in fixing the date at which it had to be ascertained whether or not all of the items (in one category of Remedial Works or the other) in a Package had been completed.

[26] Against that background, I turn to paragraph 5.2.1 itself. I acknowledge that the expressions "any Remedial Works" and "those particular works" are capable of supporting the pursuer's construction, ie that it is necessary to consider each item individually. They are also, however, in my view, capable of referring to Remedial Works or works within one or other of the two categories. That would be consistent (i) with the references in paragraph 5.1 to "relevant" Remedial Works, and (ii) with the use of the singular "such later date" in paragraph 5.3. The same would apply to the expressions "those works" and "those Remedial Works" in the last sentence of paragraph 5.2.1: properly construed, that sentence provided that if one or other category of Remedial Works (ie Priority Works or other works) had not been completed by the relevant Deferred Long Stop Date, then the defender's entitlement to complete that category of Remedial Works would cease.

[27] It is worth noting that neither paragraph 5.2.1 nor the definition of Deferred Long Stop Date in paragraph 1.1 made any direct reference to Packages. Read together, they provided for agreement – or determination – of a reasonable period of time after each of the two Long Stop Dates for the whole of the Remedial Works in each category to be completed. That left open the possibility that the works in some but not all of the Packages would be timeously completed, as regards one or other category or both, but it also gave the defender the opportunity to programme works with a view to avoiding missing either deferred deadline.

[28] I turn now to the question whether the Deferred Long Stop Date for either category of works could be determined to be a date in the past. On the face of it, the language of paragraph 1.1 suggests not: the definition referred to the period of time after the Long Stop Date agreed or determined to be "reasonable to permit the remainder of those works which have been started to be completed". It appears to have been looking forward to completion, and not backward to a period that would have been reasonable, viewed as at the Long Stop Date, to achieve completion of the works. Paragraph 5.2.1 was, similarly, in prospective terms, stating that the defender's entitlement to carry out works "shall continue" until the Deferred Long Stop Date, as opposed to, for example, stating that that entitlement shall have continued until that date. I agree with the submission on behalf of the defender that the primary purpose of providing for a Deferred Long Stop Date was to try to ensure that works on which the defender had made a substantial start at the Long Stop Date could be programmed to completion within a reasonable time, rather than, as the pursuer submitted, to provide a detailed mechanism for distributing the retention in the event of failure by the defender timeously to complete all 23 items.

[29] It seems to me to be implicit in the definition of Deferred Long Stop Date that the dates agreed or determined would be such as to allow a reasonable opportunity to complete the category of works in question. That may indicate that at the time of the contract the parties contemplated that any agreement or expert determination as to a Deferred Long Stop Date would take place before, or perhaps shortly after, the corresponding Long Stop Date. But, as senior counsel for the pursuer pointed out, that was not necessarily the case. If the matter required to be referred to an expert for determination, that could lead to significant delay if, for example, the expert was unable to deliver his determination due to illness or death, and another expert had to be chosen, or if the expert's determination were to be set aside by the court so that another determination had to be given. Those considerations, it was submitted, indicated strongly that the parties had envisaged that one or more of the periods determined by the expert could have come to an end prior to the date of his determination.

[30] In my opinion the difficulties described by the pursuer arise only if one begins by assuming that the reasonable period for completion of works must start at the Long Stop Date. But that assumption is not necessarily justified by the wording of the definition. In particular, the words "such period of time after the Long Stop Date" do not necessarily mean "such period of time beginning on the Long Stop Date" but could also mean "such period of time after (but not before) the Long Stop Date". I consider that the latter interpretation accords best with the prospective language of the remainder of the definition and of paragraph 5.2.1, and with commercial common sense. It follows that, in my opinion, the parties provided in the contract for the expert's assessment of a reasonable period to be made looking forward at the time of the determination. Although that might, in the circumstances suggested by the pursuer, result in a very considerable time elapsing before

the Deferred Long Stop Date is reached, that in my opinion is what the parties agreed by the terms which they used.

Disposal: Independent Expert's Determination

[31] For these reasons, I hold that the independent expert erred in law in fixing separate Deferred Long Stop Dates for each of the 23 items. In that regard, he failed to answer the question that was referred to him for determination. The consequences would appear to be that his decision must be reduced, and that the pursuer is not entitled to the remedies it seeks in the present action based upon the determination. However, as agreed at the hearing, I shall put the case out by order to hear parties' submissions on further procedure.

The Costs Issue

[32] Paragraph 4.7 of part 10 of the schedule provided as follows:

> "The reasonable and proper costs of the Purchaser in employing (i) the Purchaser's Representative; and (ii) any legal or other appropriate professionals in discharging its responsibilities under this Part of the Schedule shall be borne by the Seller, and where not reimbursed directly, may be deducted by the Purchaser from any sums to be released to the Seller under this Part of the Schedule…"

The pursuer was, however, to be liable for its own costs in connection with (i) work done in connection with the drafting and negotiation of the missives (other than a sum of £33,000 which the defender agreed to contribute); and (ii) any dispute (where the costs would be in the award of the independent expert). The reference in paragraph 4.7 to the "Purchaser's Representative" was to a person whom the pursuer was entitled to appoint to act on its behalf for the purposes of part 10 of the schedule. In the event of such appointment and intimation thereof to the defender, the defender was authorised to deal with the representative as the pursuer's agent. The pursuer and the Purchaser's Representative were

entitled to monitor the carrying out of Remedial Works and to attend all on-site meetings, but not to issue instructions directly to the contractor or the professional team.

[33] The pursuer avers that it has incurred costs of some £565,000 to its legal advisers in discharging its responsibilities under part 10 of the schedule. A table, together with supporting invoices and time sheets, has been lodged to explain how this sum is calculated. The defender accepts its obligation in principle, but avers that many of the costs claimed do not relate to discharging responsibilities and are accordingly not recoverable from it. The defender further avers that it has sought to agree with the pursuer a method of identifying work that does or does not fall within paragraph 4.7, and that the claim is premature.

[34] In its submissions for the purposes of the debate, the defender set out what it considered to be the responsibilities of the pursuer under part 10 of the schedule, as follows:

- release of the retention from the joint account (paragraph 2.3);
- responding to requests from the defender not to carry out any Remedial Works and forfeiting the relevant retention (paragraph 3.1.2);
- approving any inspection, testing, investigations or measurements in order to precisely define the scope of the Remedial Works (paragraph 3.2);
- approving any contractor other than the original design and build contractor (paragraph 3.4);
- agreeing a method statement and programme for any Remedial Works (paragraph 3.8.1);
- entering into a name borrowing agreement (paragraph 3.12);
- inspecting any completed Remedial Works and giving reasons where it was considered that those works were not complete (paragraph 4.4); and

- certain obligations in relation to a disposal by the pursuer of its interest in the property prior to completion of the Remedial Works (paragraph 6).

Many of the narrative entries in the invoices, it was submitted, demonstrated that the defender was claiming costs that did not relate to the above "responsibilities". In particular, many related to costs incurred to the pursuer's legal and technical representatives in "looking over the shoulder" of the defender and its legal and technical representatives for negotiating acceptable remedial works proposals from the original design and build contractor. These were not recoverable. Paragraph 3.2 expressly provided for the benefit of any report to be relied on by both the defender and the pursuer. All of the technical experts instructed by the defender had provided duty of care letters in favour of the pursuer in connection with their services. In any event, the claims required to be vouched before payment, and the defender remained willing to discuss which work did or did not fall within paragraph 4.7.

[35] On behalf of the pursuer it was submitted that paragraph 4.7 clearly contemplated that the pursuer would employ its own advisers, including legal advisers. It was not obliged to rely upon another person's report. The range of recoverable costs was wide: it covered, for example, attending meetings on behalf of the pursuer. Paragraph 4.7 should be read as covering whatever the schedule anticipated that the pursuer would have to do, or might do. The claim was not irrelevant.

[36] There are obviously matters in relation to the pursuer's claim that cannot be resolved without proof. At this stage, the best the court can do is to provide guidance as to the proper interpretation of paragraph 4.7, in order that parties may apply that guidance in identifying which of the costs claimed by the pursuer are recoverable from the defender. If

the guidance is not sufficient to resolve it, the issue will have to come back to the court for proof before answer.

Decision: Costs Issue

[37] Despite the semi-colon that appears after the words "the Purchaser's Representative" in paragraph 4.7, I read the qualifying words "in discharging its responsibilities under this Part of the Schedule" as applying both to the Purchaser's Representative and to "any legal or other appropriate professionals". This seems, however, to be largely immaterial for present purposes because the claim is made for costs incurred to the pursuer's legal advisers in the capacity of legal professionals and not as the Purchaser's Representative. In my opinion, content has to be given to the phrase "in discharging its responsibilities" under part 10. The insertion of this qualification indicates that it was not intended by the parties that the pursuer should be entitled to recover all of its legal expenses in connection with the retention and Remedial Works. While it is apparent that the pursuer would be likely to require to instruct its own legal advisers with regard to the carrying out of the Remedial Works, I do not accept that its entitlement under paragraph 4.7 is wide enough to cover the cost of everything that those legal advisers would or might do in order to advance or protect the pursuer's interests. Implicit in the phrase "discharging its responsibilities" is a requirement that these be responsibilities to the other party to the contract, and not simply furtherance of the pursuer's own interests. The right of recovery of costs incurred to the pursuer's legal professionals is accordingly, in my opinion, restricted in the manner suggested by the defender.

[38] As regards identification of the pursuer's responsibilities, I agree that the cost of all of the items in the defender's list (above) would be included. To that list of responsibilities I

would add permitting the defender and its contractors a non-exclusive licence, in terms of paragraph 3.3, to enter and remain upon the property for the purpose of carrying out the Remedial Works, inspections etc. There may be others that I have not noticed; I suggest that this be the subject of further discussion between parties in the light of the views that I have expressed.

Disposal

[39] As already mentioned, I shall put the case out by order to hear submissions on further procedure.