OUTER HOUSE, COURT OF SESSION

[2022] CSOH 96

CA128/21

OPINION OF LORD CLARK

In the cause

HELEN COLQUHOUN; EDWARD ELWORTHY; IAIN COLQUHOUN; and

HELEN COLQUHOUN as Executor Nominate of the late SHEILA PEARSON

Pursuers

against

CLINICAL RESEARCH SOLUTIONS GmbH and CROMSOURCE SRL

Defenders

Pursuers: Dean of Faculty, Reid; Brodies LLP
Defenders: Johnston KC, Steel; Harper MacLeod LLP

30 December 2022

Introduction

[1] The pursuers owned all of the shares in a company named Pleiad Devices Ltd. In May 2012, the pursuers sold their shares to the defenders under a Share Purchase Agreement ("the SPA"). The amount to be paid by the defenders (referred to as "the consideration") in terms of the SPA comprised two parts: firstly, the "Initial Cash Consideration" ($400,000); and secondly the "Earn Out Consideration" ("EOC"). Put broadly, the EOC is a small percentage of certain monies earned by the company in the three years after the transaction.

[2] A dispute arose about the amount of EOC due. The pursuers were of the view that a greater sum was due than that proposed by the defenders. Under the SPA, the parties were entitled to have an independent expert appointed to determine the full amount of the EOC. The pursuers took that step. In August 2021, the independent expert determined that further sums were to be paid. In this action, the pursuers seek payment of those further sums. The summons was served on 19 October 2021.

[3] The defenders contend that the obligation to make payment of the further sums has been extinguished by the operation of prescription, arguing that obligations to make payment of the various elements of the accrued EOC became enforceable on 30 April 2013, 30 April 2014, 30 April 2015 and 31 March 2016.

[4] The pursuers' position is that the five-year period for prescription did not begin to run until the determination by the independent expert, in August 2021. If that is wrong, the pursuers' position is that the prescriptive period has been interrupted and re-started by various relevant acknowledgements by the defenders that the obligation subsisted. In any event, the second defender is said to be liable because it guaranteed payment under the SPA even if the liability for payment of the EOC had ceased because of prescription.

[5] The case called for a proof before answer. Parties were able to agree, by joint minute, all of the relevant factual matters and as a result no evidence required to be led.

Background

[6] The SPA was entered into on 31 May 2012. For completeness and clarity, the key terms of the SPA are set out in the next section. By way of overview, the following points can be noted.

[7] The pursuers are "the Seller" and the first defender is "the Buyer". The second defender is the parent company of the first defender, referred to in the SPA as "the Parent". The second defender is a party to the SPA in its capacity as, in effect, a guarantor of the Buyer's liabilities (including as set out in clause 24.2 of the SPA, quoted below).

[8] The share capital owned by the pursuers comprised 50,000 shares. Clause 3.1 of the SPA provided that the purchase price for the shares was to be an initial cash consideration of $400,000 together with the EOC. The EOC was payable in respect of the three years beginning on 31 March 2012. The EOC was to be calculated in accordance with Part 8 of the schedule to the SPA. In essence, paragraph 1.1.1 of Part 8 provided that EOC would accrue as 2.5% of all Relevant Sales (as defined) up to and including $3,000,000, plus 5% of all Relevant Sales that exceed $3,000,000, achieved in each of the three years (the "Relevant Years") following the accounts date. The accounts date was defined as 31 March 2012. Relevant Year 1 commenced on 1 April 2012, Relevant Year 2 on 1 April 2013 and Relevant Year on 1 April 2014.

[9] Paragraph 1.1.2 of Part 8 of the schedule confirmed that the EOC accrued as and when the Relevant Sales were entered into but it was only to be payable in accordance with paragraphs 1.1.3, 1.1.4, and 1.1.5. Paragraph 1.1.3 sets out a payment schedule for the EOC, subject to certain other provisions. In relation to Relevant Years 2 and 3, sums were to be paid by certain dates and the final parts of each payment were to be made by 31 March 2016. Paragraph 5 of Part 8 stated that any disputes in relation to the sums due in respect of the EOC were to be referred to an independent expert for determination. Paragraph 5.3 provided that any such determination is final and binding on the parties.

[10] By the end of Relevant Year 3, the parties had been unable to agree on the amount of EOC due in respect of Relevant Years 2 and 3. In 2015, the pursuers sought to audit the

defenders' records, a right allowed under Part 8 of the schedule, for the purposes of verifying the amount of EOC due for each of the Relevant Years. On 19 May 2015, agents for the pursuers wrote to the second defender to give notice of exercising the right to have records made available to the accountant designated by the pursuers. This comprised all accounts, books, papers and records necessary in order to be able to audit, verify or evidence the Relevant Sales or value thereof and the invoices relating thereto for each of the Relevant Years. On 17 June 2015 the pursuers formally engaged KPMG LLP to carry out the audit.

[11] The second defender told the pursuers that the performance of the audit by KPMG was not necessary. The second defender wrote to the agents for the pursuers on 7 August 2015 stating *inter alia* that the Relevant Sales calculation for Relevant Year 1 was a settled subject matter, the amount due having been fully paid. In relation to the calculation for Relevant Year 2, the option was to invoke paragraph 5.1 and for the pursuers to appoint an independent expert. In relation to Relevant Year 3, a certificate vouching the sums due, as required by paragraph 4 of the SPA, would be issued by 31 August 2015. On that date, the second defender sent the pursuers' agents a certificate prepared by Ernst & Young setting out the sum due in respect of Relevant Year 3. Among other things, the second defender stated that if the pursuers agreed on the sums stated, payment would be made without unreasonable delay. The pursuers rejected the Ernst & Young document.

[12] The pursuers brought a commercial action (CA227/15) against the defenders on 7 December 2015. The key point of the action was to seek to recover documentation for the pursuers' own audit exercise by KPMG. On 19 January 2016 the defenders sent an email to the pursuers offering to provide the financial data. The action was settled by a joint minute dated 11 March 2016. The audit exercise was subsequently performed by KPMG. Various correspondence took place about it. Invoices were issued by KPMG in October 2016

and January 2017 in respect of the audit exercise. The defenders paid the sums due by them for the audit exercise on 24 July 2017.

[13] KPMG then issued the final report on 29 January 2018 stating that $823,942 was due to the pursuers as EOC. Further correspondence took place between the parties. By email dated 5 July 2018 the defenders' agent indicated that its clients agreed certain sales figures from which the EOC could be calculated. Following the correspondence of June and July 2018 the extent of Relevant Sales in Relevant Years 2 and 3 remained in dispute. The pursuers decided to appoint an independent expert in terms of paragraph 5 of Part 8 for the purpose of resolving the dispute. The expert issued draft terms of engagement by email on 3 April 2019. Revisals to the draft terms of engagement were made on behalf of the defenders.

[14] The parties produced submissions to the expert on the amount of EOC due. Witness statements for the expert to consider were produced by Oriana Zerbini (the second defender's Chief Executive Officer) dated 17 May 2019 and by Nadia Di Mattio (the director of the second defender's legal affairs department) dated 29 May 2019. In June 2019 the defenders agreed to the expert appointing a legal advisor to assist and to give his determination of the proper interpretation of Part 8 of the schedule. It was agreed that the pursuers and the defenders would each be responsible for one-half of the legal advisor's fees. These were paid. At a meeting held in February 2020 the defenders offered to allow a search of their IT systems for data which would assist with the determination of the amount of EOC payable. Research was carried out in due course. The defenders made submissions on the search results in their submissions to the expert, by email dated 30 July 2021. The expert invited comments upon his proposed methodology and comments were given by the defenders.

[15] The expert issued his determination on 19 August 2021, stating that $458,822 in EOC was due to the pursuers, with interest of $106,703. The sums due included $90,304, inclusive of interest, in respect of missing payments and missing sales for Relevant Years 2 and 3, which the parties had previously agreed were due. The pursuers were paid the sum of $90,304 on or around 8 September 2021. The balance of the sum found to be due in the expert determination is $475,321 inclusive of interest. The defenders have refused to pay it, saying the obligation to pay the EOC has prescribed.

Key terms of the SPA

[16] For present purposes, the following terms of the SPA are relevant:

> "SHARE PURCHASE AGREEMENT
> …
>
> 1 Interpretation
> …
>
> 'Earn Out Consideration' — the part of the consideration referred to in clause 3.1.2 which is payable for the Ordinary Shares, as calculated in accordance with Part 8 of the schedule.'
>
> …
>
> 3 Purchase price
>
> 3.1 The Purchase Price for the Sale Shares is
>
> 3.2.1 FOUR HUNDRED THOUSAND DOLLARS ($400,000) ('Initial Cash Consideration') subject to adjustment in accordance with clause 3.3, plus
>
> 3.1.2 the Earn Out Consideration, calculated in accordance with Part 8 of the schedule.
>
> …
>
> 24 Guarantee by the Parent
>
> 24.1 In part consideration of the Sellers entering into this agreement, the Parent, at the request of the Buyer, hereby unconditionally guarantees to the Sellers and

their respective successors, transferees and assignees the due and punctual performance and observance by the Buyer of all the Buyer's obligations and the punctual discharge by the Buyer of all the Buyer's obligations or liabilities to the Sellers contained in or arising under this agreement.

24.2 As an independent and primary obligation, without prejudice to clause 24.1, the Parent hereby unconditionally and irrevocably agrees to indemnify and keep indemnified the Sellers against all and any losses, costs, claims, liabilities, damages, demands and expenses suffered or incurred by the Sellers arising from failure of the Buyer to comply with any of its obligations or discharge any of its obligations or liabilities under this agreement or arising from rescission of this agreement or by reason of the Buyer not being at any time, or ceasing to be, liable in respect of the obligations and liabilities purported to be assumed by it in accordance with the express terms of this agreement.

…

Schedule

…

Part 8

Earn Out Consideration

1 Basis of calculation

1.1 The Earn Out Consideration in respect of the Ordinary and/or B Ordinary Shares will be calculated as follows:-

1.1.1 Two point five percent (2.5%) of all Relevant Sales (as defined in paragraph 2.1 below) up and including to $3,000,000 plus five percent (5%) of all Relevant Sales (as defined in paragraph 2.1 below) that exceed $3,000,000 arising within each year following the Accounts Date ('Relevant Year') provided that the Relevant Sales were entered into, received or concluded in the period running from the Accounts Date to the third anniversary of the Accounts Date ('Reference Period').

1.1.2 The Earn Out Consideration shall accrue as and when each of the Relevant Sales are entered into, received or concluded on the full value of the Relevant Sales (irrespective of the date on which those are invoiced), but shall only be payable in accordance with paragraphs 1.1.3, 1.1.4 and 1.1.5 below.

1.1.3 Subject to paragraph 1.1.4 and 1.1.5 below, any Earn Out Consideration which has accrued pursuant to paragraph 1.1.2 shall be

paid to the Sellers entitled to the same in cash in US dollars (unless otherwise agreed in writing between the Sellers' Representative and the Buyer's Representative) within 1 month or 12 months (as applicable) of the end of each Relevant Year according to the following schedule:

	Payable within one month of the end of Relevant Year	Payable within one month of the end of Relevant Year 2	Payable within one month of the end of Relevant Year 3	Payable within 12 months of the end of Relevant Year 3
Earn Out Consideration accruing within Relevant Year 1	One third	One third	One third	Zero
Earn Out Consideration accruing within Relevant Year 2	Zero	One third	One third	One third
Earn Out Consideration accruing within Relevant Year 3	Zero	Zero	One third	Two thirds

1.1.5 The balance of any accrued Earn Out Consideration which has yet to be paid under paragraph 1.1.3 to the relevant Sellers (whether invoiced or not) shall become immediately due and payable on the earlier of:

1.1.5.1 12 months after the end of the Reference Period;

…

4 Statements, Records and Audit Rights

4.1 No later than the due date for payment of any Earn Out Consideration, the Buyer shall send the Sellers' Representative a certificate prepared by the Buyer's auditors addressed to the Sellers' Representative ('Certificate') which

Certificate shall be signed and dated by the Buyer's or the Parent's auditors and shall set out the detail of how the payment was calculated, including:

4.1.1 details as well as the value of all Relevant Sales which were entered into or received or concluded within the particular Relevant Year;

4.1.2 the amount being in excess of the threshold of Relevant Sales of $3,000,000 in that Relevant Year;

4.1.3 the amount due by way of Earn Out Consideration; and

4.1.4 such other information as reasonably required in order to evidence and reconcile the amount due for payment and the basis of calculation.

…

4.4 The Buyer shall (on reasonable notice) make available to the Sellers' Representative or any accountant designated by the Sellers' Representative all its accounts, books, papers and records in order to be able to audit, verify or evidence the Relevant Sales or value thereof and the invoices

…

5 Disputes

In the event of a dispute between the Buyer and the Sellers or the Sellers' Representative as to the content of the Certificate or any sums due in respect of the Earn Out Payment, then the matter shall be referred to the Independent Expert for determination on the application of any the Buyer or the Sellers' Representative, for determination by an Independent Expert. The following terms of reference shall apply:

…

5.2 the Independent Expert shall act as an expert (and not as an arbiter) in making any such determination which shall (save for manifest error) be final and binding on the parties;…"

The issues

[17] The following three issues arise for consideration:

(i) Did the independent expert's determination create an independent and binding obligation to make payment, and, if not, was the obligation to make payment conditional upon that determination?

(ii) Has the obligation to pay been the subject of "relevant acknowledgment" by the first defender in terms of the Prescription and Limitation (Scotland) Act 1973?

(iii) If prescription has operated on the first defender's primary obligation to pay the EOC, is the second defender separately obliged to make payment in terms of clause 24.2 of the SPA?

Issue 1: Did the independent expert's determination create an independent and binding obligation to make payment, and, if not, was the obligation to make payment conditional upon that determination?

Submissions

Submissions for the pursuers

[18] The final and binding decision of the expert was a stand-alone obligation and could only be enforced once he had issued his determination. It created a clear mechanism to determine what was due and until that was been determined nothing was due. An action raised before determination would have been premature. This was a commercially sensible result, similar to that reached in *Scottish Equitable* v *Miller Construction* 2002 SCLR 10, Lord Prosser at 19-20. "Final and binding" was considered by the Supreme Court in *Aspect Contracts* v *Higgins Construction* [2015] 1 WLR 2961, where it was held that when the adjudicator produces a binding decision the limitation period starts to run with his decision (Lord Mance at [14]). The word "binding" creates an obligation to comply, something that is

enforceable: *Jim Ennis Construction* v *Premier Asphalt* [2009] EWHC 1906 (TCC), HHJ Stephen Davies at [16].

[19] The obligation can only start to run when the determination is issued: Freedman and Farrell, *Kendall on Expert Determination* (5th ed, 2015), at 12.2-2; *Royal Norwegian Government* v *Constant & Constant* [1960] 2 Lloyds Rep 431, Diplock LJ at 443; *McPhail* v *Cunninghame DC* 1983 SC 246, Lord Kincraig at 253; *City of Glasgow DC* v *Excess Insurance Co Ltd (No 2)* 1990 SLT 225, Lord Mayfield at 228C. The case law indicated that where a third party is required to certify what is due, that binding certificate creates a separate obligation. Parties agreed when it is to be enforceable, by agreeing to be bound by something.

[20] The Dean of Faculty went on to submit that viewing the contract terms as creating a condition precedent may be a different way of looking at the same question. Paragraph 1 of Part 8 of the schedule must be read as being conditional upon the determination of the sum due by the independent expert in terms of paragraph 5. In consequence, and notwithstanding the dates set out in paragraph 1, no obligation to make payment arose until the completion of the expert determination in August 2021. Where a payment was due on demand, the use of "on demand" was a condition precedent and the obligation was enforceable only when the way has been cleared to enforce it: *Royal Bank of Scotland* v *Brown* 1982 SC 89, Lord Justice-Clerk (Wheatley) at 100.

[21] It was inconceivable that any decree would have been granted by any court until the independent expert had determined the amount due. In *Costain Building and Civil Engineering* v *Scottish Rugby Union* 1993 SC 650, Lord President Hope (at 653), dealing with a decision which would be final and binding, noted from Erskine, *An Institute of the Law of Scotland* (8th ed) III, 1, 3 that an obligation is conditional or contingent if its enforceability depends upon an event which may or may not happen. In *Stewart Milne Group Limited* v

Anderson [2017] CSOH 94, Lord Tyre (at [8} and [13]) explained that seeking payment for a future or conditional debt was premature. In *Henry Boot Construction* v *Alstom Combined Cycles* [2005] 1 WLR 3850 Dyson LJ held (at [28]) that the amount certified is due because that is the amount assessed as due for payment as a consequence of the issue of the certificate, and it was not due for payment at an earlier time. In the present case the defenders accepted that an action for payment would have been premature but say there could have been a declarator. But it was impossible to say what would have been the terms of the declarator sought.

Submissions for the defenders

[22] Senior counsel for the defenders, Mr Johnston KC, argued that while the actual amount to be paid is conditional upon that determination by the expert, on the wording of the contract the obligation itself is not. The cases relied upon by the pursuers were all about procedures to be carried out before sums became due. Here the sums were due in accordance with paragraph 1.1.3. So the sums did not become payable only when the expert has made his determination. For example, he was not involved with the sums due in respect of Relevant Year 1. His role is to sort out disputes but he is not integral to when payment falls due.

[23] On the use of "final and binding" in paragraph 5 of Part 8, what is binding is a determination about *quantum*. In relation to whether this construction is commercially sensible, it was patently not the case that the pursuers' construction is clear and certain. It created nothing but uncertainty. On their approach, the contractual date for prescription is one date if there is no dispute and another date if there is a dispute. The point at which the underlying obligation is extinguished thus becomes blurred. That ran contrary to legal

certainty, which is the objective of prescription: *David T Morrison* v *ICL Plastics Ltd* 2014 SCLR 711, Lord Reed at [26].

[24] On the matter of condition precedent, similar reasons for rejecting the pursuers' position existed. The requirements for payment are set out in terms of paragraph 1 of Part 8 and depend on a certificate under paragraph 4. It would not be premature to raise an action prior to the independent expert's determination. Protective proceedings can be raised if the process of referral to an independent expert does not interrupt prescription. Practitioners are well-aware that it will often be necessary to raise protective proceedings. That would be quite normal in the circumstances of the present case, adopting the same parallel approach as in cases sisted to go to arbitration. The declarator could be that the defenders are under an obligation to make payment to the pursuer in accordance with the determination being made by the independent expert. Raising such an action within the five-year period would prevent prescription.

[25] The present case involved a bespoke form of contract rather than, for example, an underlying statutory scheme involving adjudication. The cases relied upon by the pursuers, in which it was held that the right to payment arose when it was certified or determined, were based on the specific contract terms, which could not be equated with the present case. Here, paragraph 1 sets out when payment is due and the independent expert comes into the dispute only if there is one and under paragraph 5. In the cases cited there was nothing at an earlier stage that gave rise to liability. There was a procedure to be gone through before payment fell due, quite different from the situation here. For example, in *Costain Building and Civil Engineering* v *Scottish Rugby Union*, rights and obligations were heavily dependent upon decisions taken by the engineer, whereas in the present case the independent expert is not involved in that manner at all. *Stewart Milne Group Limited* v *Anderson* involved an

obligation being dependent upon a certificate or statement, not the case here. *Royal Bank of Scotland* v *Brown* was really about what is meant by "on demand". In *Henry Boot Construction* v *Alstom Combined Cycles* there was no fixed price to be paid and the amounts due depended upon ascertainment, again quite different from this case. There is an elementary distinction between existence of obligation and its quantification, only the latter of which, in this case, the contract gives to the expert.

Decision and reasons on Issue 1

The contractual terms

[26] Resolving this issue depends upon the proper interpretation of the contract. The starting date for the prescriptive period is the date when the obligation becomes enforceable. Here, the obligation is to pay the EOC. There can be no real doubt that the EOC means the whole of the EOC. The fundamental issue is whether or not there was an enforceable obligation to pay the EOC as a consequence of the wording of paragraphs 1.1.2 – 1.1.5, even though the actual sum due (if any) had not been determined by the expert. I have taken the well-established standard approach to construction of contract terms, based upon the authorities referred to *Paterson* v *Angelline (Scotland) Limited* [2022] CSIH 33, Lord President (Carloway), at [32].

[27] Paragraph 1.1.2 sets out when the EOC shall accrue, but then states that it "shall only be payable in accordance with paragraphs 1.1.3, 1.1.4 and 1.1.5 below". Paragraph 1.1.3 states that any EOC which has accrued pursuant to paragraph 1.1.2 "shall be paid … within 1 month or 12 months (as applicable) of the end of each Relevant Year" according to the schedule. Paragraph 1.1.4 has no relevance here, but paragraph 1.1.5 states that the balance of any accrued EOC "shall become immediately due and payable" by a specified date, here

12 months after the end of the Reference Period. The central point, for present purposes, is that dates when the EOC sums "shall be paid" or "shall become immediately due and payable" are stated.

[28] Paragraph 4 refers to the certificate prepared by the Buyer's auditors, which explains how the EOC sum was calculated, having to be sent to the seller's representatives "no later than the due date for payment of any [EOC}". Apart from what is stated in paragraphs 1.1.2 and 1.1.3, there is no other reference to "the due date" and in particular paragraph 5 makes no reference to when payment is to be made.

[29] Paragraph 5 then deals with disputes "as to the content of the Certificate or any sums due in respect of the [EOC}". The wording of paragraph 5 is not particularly well-written (it includes a reference to "Earn Out Payment" rather than "Earn Out Consideration" and it omits a word, such as "of" after "application of any" and it repeats the words "for determination"). But for present purposes, it is the reference to a dispute about "any sums due" that is relevant.

Determination by the independent expert: a free-standing obligation?

[30] It is quite clear that the certificate prepared by the auditor in terms of paragraph 4 identifies the "amount due by way of [EOC}". It is therefore plain, beyond peradventure, that the accrued EOC, which shall be paid or be immediately due and payable, should be the full accrued EOC. That will, of course, result in payment of only the certified sum, which may be wrongly calculated. The correct amount of EOC due may come to be determined by the independent expert, but in the meantime, even if the true figure due remains in dispute, the obligation becomes enforceable and thus the clock for prescription begins to tick.

[31] The terms of Part 8 of the schedule are designed to resolve payment of the relevant EOC amounts, within a reasonably short period. The provisions create a means by which the pursuers can obtain their own advice about the full amount of EOC due in the relevant period. Thus, no later than the due date for payment of any EOC the pursuers are to be given the certificate by the auditor, along with such other information as is reasonably required to evidence and reconcile the amount due for payment and the basis for calculation. They are to be given quarterly statements of Relevant Sales, no later than 30 days after the end of each calendar quarter. The Buyer, on reasonable notice, must make available "all its accounts, books, papers and records" in order for the Seller to be able to audit, verify or evidence the sales. Any shortfall in payment is to be promptly remitted and interest is added. If a dispute remains and the independent expert is appointed, the expert can seek such other information as considered appropriate and is to reach his decision with 45 days. Accordingly, if the dates upon which the obligation to pay the EOC are as stated in paragraphs 1.1.3 and 1.1.5, there is no material prejudice to the pursuers in relation to the prescription period commencing at that time. Any issues are capable of early resolution thereafter.

[32] Given the clear wording of paragraphs 1.1.2, 1.1.3, 1.1.5 and paragraph 4, and the absence of any wording which could suggest an exception applying when a dispute is referred to the independent expert, the interpretation proposed by the pursuers would involve, in effect, ignoring the wording in the provisions or indeed having by implication to add in the exception mentioned. I am not able to adopt such an approach. There is also a difficulty with the pursuers' proposition in that it means that the date when the obligation is enforceable is that stated in the provisions in paragraph 1 but if there is a dispute then it is another date, when the determination of the independent expert is issued. That would

create material uncertainty. The defenders' position is not itself free from doubts about being commercially sensible, given that it could, if matters cannot be resolved within a period of some years, involve a need for protective proceedings of a somewhat unusual form in order to avoid prescription. But while commercial common sense is a factor, it does not allow me to avoid the plain meaning of the language used. While not of itself a material contributory point for the purposes of construction, I note that interest is to be paid if the payment is later than the specified dates, which fits with the construction that the obligation came into being on the dates stated in paragraph 1.

[33] In light of the language used in Part 8, I reach the conclusion that paragraph 5 is a matter dealing with amount (*quantum)* rather than setting up a further obligation and it does not impinge upon the dates when the obligation became enforceable, as specified in paragraphs 1.1.2, 1.1.3, 1.1.5 and 4. It is therefore not a free-standing obligation to make payment.

Condition precedent?

[34] The question of whether there is a condition precedent for an obligation to make payment also depends upon the construction of the contract terms. Several cases were cited in which the contract terms did indeed create a condition precedent. But that conclusion cannot be reached in the present case. I agree with the submission for the defenders that these authorities involve specific contracts of a different kind, particularly in standard construction terms, whereas on any view the present terms are bespoke. In particular, none of the cases involved a contract set out in the admittedly slightly unusual manner of the terms in this contract. As I have said, the terms, are entirely clear that the obligation arises in accordance with paragraph 1 and there is nothing in paragraph 5, or elsewhere, which

could be construed as creating a condition precedent. I therefore reject this contention for the pursuers.

Protective proceedings

[35] This raises the practical question of whether an action brought prior to the expert's determination (in particular, to interrupt prescription) could have any purpose, when no decree for payment could at that stage be granted. In my view, the need to raise such protective proceedings is somewhat demanding but that is merely a practical method available to the pursuers resulting from the clear wording the parties have chosen. As I have noted, one might reasonably expect any dispute to be resolved by an independent expert well within the five-year period.

Issue 2: Has the obligation to pay been the subject of "relevant acknowledgment" by the first defender in terms of the Prescription and Limitation (Scotland) Act 1973?

Statutory provisions

[36] The 1973 Act states:

> "6 Extinction of obligations by prescriptive periods of five years
>
> (1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years—
>
> …
>
> (b) without the subsistence of the obligation having been relevantly acknowledged,
>
> then as from the expiration of that period the obligation shall be extinguished:
>
> …
>
> 10 Relevant acknowledgment for purposes of sections 6 and 7

> (1) The subsistence of an obligation shall be regarded for the purposes of sections 6 and 8A of this Act as having been relevantly acknowledged if, and only if, either of the following conditions is satisfied, namely —
>
> (a) that there has been such performance by or on behalf of the debtor towards implement of the obligation as clearly indicates that the obligation still subsists;
>
> (b) that there has been made by or on behalf of the debtor to the creditor or his agent an unequivocal written admission clearly acknowledging that the obligation still subsists…"

Conduct said to amount to relevant acknowledgement

[37] I begin by setting out in overview the broad thrust of each side's position, before turning to the submissions on the main individual points and my decisions on them.

[38] The Dean of Faculty submitted that there was relevant acknowledgement in the form of both admissions and conduct. An action raised within five years of relevant acknowledgment will cause prescription to be prevented: *Richardson* v *Quercus* 1999 SC 278, Lord Prosser at 281. It was also made clear in that case and other decisions that words used should be viewed in context rather than in isolation. If a relevant acknowledgment can be derived from the whole context, including circumstances outwith or within the five year period, the obligation has not prescribed: *Cawdor* v *Cawdor* 2007 SC 285, Lord President (Hamilton) at [27].

[39] Senior counsel for the defenders argued that the communications all took place regarding disputed payments. It would fly in the face of reality to say that while strenuously resisting payments claimed by the pursuers the defenders were acknowledging existence of that liability. They were resisting in both respects. What the defenders said or did pre-dated a final determination and so amounted only to an acknowledgment of payment under the contract rather than any additional sum. The pursuers' broad approach

was to rely on the defenders' participation in a contractual dispute resolution process and they say that amounts to relevant acknowledgment, in spite of fact that participation was in order to contest liability to make payment. If they are right no-one could participate in order to contest liability without making a relevant acknowledgment. This was said to press relevant acknowledgment too far, by failing to take proper account of the context, which is that the defenders stance throughout has been to deny liability to the pursuers.

[40] The Dean of Faculty founded on a number of separate features of the conduct of the defenders, said individually or at least collectively to show either performance towards implement of the obligation or an unequivocal written admission that it subsists. The sequence of events that occurred is summarised above in the section headed "Background". I do not intend to set out the detailed points made for the pursuers in full and instead have gathered the key points into six separate grounds, discussed below. I shall deal with these grounds in turn, adopting the following approach.

[41] In relation to section 10(1)(a), "performance" can be something distinct from implementation; if viewed in isolation, an event might be insufficient, but when taken with the context provided by other circumstances it could provide the necessary clear indication: *Agro Invest Overseas* v *Stewart Milne Group* 2020 SCLR 530, Lord Malcolm at [34]. What amounts to "performance" will in every case be a question of fact and degree: *Gibson* v *Carson* 1980 SC 356, Lord Allanbridge at 360. The test must be a fairly high one, since the performance has clearly to indicate that the obligation still subsists: *Huntaven Properties Ltd* v *Hunter Construction (Aberdeen) Ltd* [2017] CSOH 57, Lord Doherty at [99]-[105]. The obligation which is acknowledged must be capable of identification: *Gibson* v *Carson,* at 361.

[42] In relation to section 10(1)(b), the admission must acknowledge unequivocally that the obligation still subsists. Whether an admission is unequivocal or makes clear

acknowledgment will always be a question of interpretation in particular circumstances: see Johnston, *Prescription and Limitation* (2nd ed), at paragraph 5.80. The purpose for which the alleged admission was made is relevant. Moreover, the alleged admission must be read in the context of the whole communications between the parties: *Cawdor* v *Cawdor,* Lord President (Hamilton) at [27]; *Richardson* v *Quercus Ltd*, Lord Prosser at 283-4.

Ground 1

[43] The first ground founds upon a letter from the defenders to the pursuers' solicitors, dated 23 July 2015. The context is that the pursuers were saying, having seen the certificate prepared by the Buyer's auditors under paragraph 4 of Part 8 of the schedule, that a further audit on the pursuers' behalf was needed. The defenders stated in the letter that agreement on the Relevant Year 2 EOC had not been achieved because the pursuers disputed the Relevant Sales concerning two projects. The letter stated that it gave: "confirmation of the Buyer's will to perform its contractual obligations in good faith …" It added that the Buyer had already made payment for certain Relevant Sales and said that if agreement could not be reached:

> "the remaining alternative is to invoke application of Clause 5.1 to the SPA, which is, the appointment of an Independent Expert in order to reasonably and duly settle the entire subject matter."

The Dean of Faculty submitted that it was simply impossible to read that letter as anything other than a clear acceptance of the contractual obligation which the defenders said they will perform in good faith.

[44] Senior counsel for the defenders argued that this letter does not meet the test of requiring to be sufficiently specific and being linked to the obligation the pursuers intend to

enforce. It was a communication about a disputed payment amount and in any event it occurred more than five years before the present action was raised.

[45] In my opinion, the express reference to confirmation of the "will to perform its contractual obligations" must include the obligation to make payment of the full amount of EOC that is due. Coupled with the reference to appointing the independent expert "in order to reasonably and duly settle the entire subject matter" this constitutes an unequivocal written admission clearly acknowledging that the obligation still subsists at that point in time. The letter related to the obligation in relation to Relevant Year 2, but the words in which it was expressed embraced the obligation in its wider terms. While its timing is over five-years before the present action was raised, it nonetheless interrupted and re-started the prescriptive period on 23 July 2015.

Ground 2

[46] The second ground relates to the action (CA227/15) brought by the pursuers against the defenders on 7 December 2015. The summons in the action sought orders compelling the defenders to disclose records in terms of paragraph 4 of Part 8 of the schedule in order to allow the pursuers' auditor to determine the amount of Relevant Sales in Relevant Years 2 and 3. Defences were lodged at the beginning of 2016 and, it was argued for the pursuers, in Answers 3 and 4 there was an unequivocal admission that EOC was payable, that being stated twice. While this happened at the beginning of 2016 it again was said to start a new *quinquennium* and, moreover, everything thereafter viewed in context required to be understood against the backdrop of this clear admission. There was also an email sent from the defenders' agents to the pursuers' agents on 19 January 2016 offering to provide financial data "of the kind which is likely to be of assistance to your clients' accountant in

assessing the earn-out calculations". Further, the action was settled in terms of a joint minute (dated 11 March 2016) in terms of which the parties moved the court to grant decree ordaining the defenders to implement their audit obligations.

[47] The Dean of Faculty argued that, in addition to the answers, the email and the execution of that joint minute satisfied the test of performance towards implement of the obligation to pay the full amount of the EOC and amounted to a clear admission that EOC was payable. There could be no reason to accept decree *ad facto praestandum* if EOC was not payable. The only purpose was to allow the audit and verification of relevant sales and the only point of auditing relevant sales was to determine the EOC.

[48] Mr Johnston KC for the defenders submitted that the answers in the defences did no more than respond to the averments for the pursuers, admitting the terms of the contract rather than admitting any present liability to make payment. The action was not about payment at all, nor was what was said in the email. The action concerned recovery of documents and the basis upon which it proceeded was the defenders being obliged by paragraph 4 of Part 8 of the schedule to provide the information. Any obligation acknowledged was the obligation to provide records. The joint minute in the proceedings for recovery of documents was on 11 March 2016 and so at a time when the *quinquennium* had not started. The court interponed authority on 18 March 2016, again outwith the five year period. It was said that these events could not save the obligations the pursuers seek to enforce here.

[49] I am not persuaded that this ground meets the requirements in section 10 of the 1973 Act. In particular, I respectfully agree with the analysis of the statutory provisions by Lord Doherty in *Huntaven Properties Ltd* v *Hunter Construction (Aberdeen) Ltd* and the approach he adopted (at [100]) that performance towards implement must be clearly

referable to the particular obligation the subsistence of which is said to be clearly indicated (under reference to *Richardson* v *Quercus Ltd* and *Gibson* v *Carson*). That approach must, *a fortiori*, apply to an unequivocal written admission. The previous action here concerned obtaining accounts, books, papers, invoices and records to allow the audit and verification of the existence and value of Relevant Sales. The defenders' admissions included that the EOC was payable under the SPA and how it was to be calculated, but these were solely in the context of the obligation to provide the information rather than that liability to make payment still existed. The same reasoning applies in respect of the email and the joint minute. Their content does not amount to performance towards implement or an unequivocal written admission clearly acknowledging that the obligation to make payment of the EOC still subsists.

Ground 3

[50] Reference was then made on behalf of the pursuers to the fact that, following the conclusion of action CA227/15, KPMG carried out an audit on behalf of the pursuers in respect of the Relevant Sales information. The purpose of this audit (realised ultimately in a report of 29 January 2018) was to calculate the EOC payments due. This commenced on 5 April 2016 and included a visit to the second defender's premises in July 2016. The exercise necessarily proceeded on the basis of the defenders' cooperation and provision of access to their records and systems. The provision of documents continued until 3 February 2017. A letter from the defenders' solicitor, in February 2017, when the pursuers were seeking all the documents to allow KPMG to work out the EOC, stated that they were supplied. A calculation of the EOC due was produced by KPMG upon which the defenders provided comments in November and December 2016. The defenders paid invoices issued

by KPMG (for "review of Earn Out Consideration") in connection with the audit in July 2017. The entire process of engaging with KPMG and paying KPMG's invoices was said by the Dean of Faculty to amount to performance by the debtor towards implement of the obligation.

[51] Senior counsel for the defenders argued that much of what occurred in the engagement with KPMG took place more than five years before these proceedings. In addition, KPMG were concerned with analysing matters under the action seeking production. The joint minute obliged the defenders to cooperate with KPMG and concerned an action which does not involve payment. It concerned the KPMG audit. As to the searching of the IT system, it was not disputed that the defenders consented to search but this was in the context of disputing liability.

[52] In my view, the defenders' position is in large measure correct, but I do not accept it on one significant point. It is correct that the engagement with KPMG concerned assessment of the amount rather than performance towards implementation of the obligation to make payment. However, in late 2016 KPMG gave the defenders a document referring to "under reported sales", contrasting the figures reported in the Earn Out certificate and the higher figures KPMG had identified from the sales data. The document states that the defenders had acknowledged, by email, two of these wrongly understated amounts. The second defenders inserted their response in a column in the document, saying "OK" for four out of the five under reported sales. Also, by email dated 28 December 2016 the defenders referred to "the eligible amount" for one of projects in Relevant Year 3, for the purposes of calculating the EOC. This email, along with other correspondence in November and December 2016 and the document issued by KMPG and confirmed by the defenders, made it clear that sums previously due but unpaid were expressly admitted by the defenders as due

to be paid. That was an unequivocal written admission clearly acknowledging that the obligation to make payment of the EOC still subsists.

Ground 4

[53] The Dean of Faculty next submitted that, following production of the KPMG report, the defenders' agents indicated by emails of 5 and 20 July 2018 that certain sales figures were agreed for the purposes of EOC with others "in dispute". The email of 5 July 2018 referred to Missing Sales and said "My clients agree the figures Yr 2 $19520; Yr 3 $9260; and Yr 3 $3362". The email concluded "If we are having a meaningful dialogue, it may be premature to launch into the formal dispute resolution process …". The email of 20 July 2018 advanced various arguments on the quantification of the EOC, none of which, it was submitted, would make any sense if the obligation to pay the EOC did not then endure. These emails were marked "without prejudice". A marking of "without prejudice", was however argued to be ineffective where the correspondence, taken in the whole context of the dealings between the parties, is of sufficient substance to constitute a relevant acknowledgement for the purposes of section 10(1): *Richardson* v *Quercus*, Lord Prosser at 283-4; *Bradford and Bingley* v *Rashid* [2006] 1 WLR 2066, Lord Hope at [34]-[35].

[54] On behalf of the defenders, it was submitted that the relevant context is that both emails were sent in seeking to negotiate in a dispute and they both advanced reasons why payments were not due. Neither in context or content did they amount to relevant acknowledgment. The first one was explaining what is in dispute and why that was so. Rather than pick out a sentence saying there was acknowledgment of liability to make payment, one had to understand the context in which the communications passed. The context here is what is in dispute and for which it is said no payment is due. The next email

was again in the context where matters are in dispute and it spelled out some things which can be agreed. There was a contesting of liability to make the payments claimed. The emails, when read in context, were said to show that the defenders did not accept liability. Moreover, applying proper principles, the whole point of the words "without prejudice" was that if those negotiations are unsuccessful a party cannot be held to what is said in negotiating.

[55] The main element of the communications for present purpose is the email dated 5 July 2018. It accepted the missing sales figures, which, as discussed below, gave rise to a further EOC amount of $1,561, not yet paid. This constitutes an express acknowledgement that the obligation to pay the full EOC subsisted. Even when sent "without prejudice" the cases cited make clear that, when read in the context of the earlier admissions, the use of "without prejudice" does not preclude this letter from consideration. As is noted in discussing ground 6 below, the point was in any event openly ventilated in later submissions to the independent expert stating that on 5 July 2018 the defenders' agent confirmed the missing sales figures. This email went further than merely proposing a resolution and as a matter of fact it was an unequivocal written admission and hence a relevant acknowledgement.

[56] However, I find the other exchanges between the parties to be in the context of, and expressly stating to be about, seeking to negotiate a resolution of the dispute. The other exchanges were not unequivocal written admissions, when they appear to have been advanced in order to seek a compromise. I do not view these other exchanges as being of sufficient substance to constitute a relevant acknowledgment for the purposes of section 10(1).

Ground 5

[57] Next, the pursuers relied upon the events concerning the independent expert. His appointment on 17 December 2018 was consented to by the defenders. The purpose of the appointment was to determine the amount of EOC due in respect of the disputed projects. His terms of appointment ended with a docquet, requiring to be signed by both parties, stating "I confirm that the contents of this letter are in accordance with my understanding of your terms of appointment". That docquet was signed on behalf of the defenders on 24 April 2019. The signature of that docquet was argued to amount to an unequivocal written admission clearly acknowledging that the obligation still subsists, because the entire point of the appointment was to determine the amount of EOC that required to be paid by the defenders. *Esto* that was not so, the appointment was said to be performance by or on behalf of the debtor towards implement of the obligation. The defenders paid his fees.

[58] The Dean of Faculty also referred to the fact that the pursuers made detailed written submissions to the independent expert and the defenders responded in May 2019. The response was argued to be clearly an admission, stating the obligation to pay EOC and what was agreed. In an email on 3 November 2020, the defenders' solicitor answered "Yes" to the independent expert's question as to whether "the allocation of the Earn out for each relevant year is in line with paragraph 1.1.3 of Part 8 of the SPA". This was claimed to be a further affirmation that EOC is payable with parties disputing its *quantum*. The whole submission process was said to have proceeded on the assumption that EOC is payable. This, it was argued, could be seen also in the witness statements lodged before the independent expert. Looked at against the whole backdrop, these communications were said to continue the theme that the EOC is payable.

[59] Mr Johnston KC, on behalf of the defenders, argued that the letter agreeing to the appointment of the independent expert, signed on behalf of the defenders, simply showed that they engaged in order to put their arguments as to why no payments were due. The pursuers appeared to argue that denying liability to make certain payments is an admission of liability in principle, which is incorrect. The defenders denied liability to pay the pursuers anything. Agreeing the methodology to be used was not an acknowledgment clearly indicating a liability to make payment. The witness statements for the defenders dealt with the sums in dispute and referred to what was due rather than an acknowledgment of a liability which subsists. The reference was about the past. There was no admission here of a subsisting obligation to make payment.

[60] In my opinion, engaging in the process set forth in paragraph 5 of Part 8 to the schedule to appoint the independent expert was in fact about a separate obligation under the SPA with which the defenders required to comply. It cannot be said that in so doing they either performed towards implementation of the obligation to pay the EOC or made any unequivocal written admission clearly acknowledging that this obligation still subsists. In engaging in this discrete process, referring to EOC being payable was no more than acknowledging the terms of the contract, with which the defenders were saying they had complied. The reference in the email of 3 November 2020 to paragraph 1.1.3 was again about the means of calculation set out there rather than the obligation to pay.

[61] However, in these communications with the independent expert there was an admission by the defenders of a sum being due under paragraph 1 of Part 8. The first pursuer made written submissions to the independent expert on 3 May 2019. These submissions referred (at 3.1) to "Missing Payments of Earn Out" comprising $48,185 for Relevant Year 2 and $31,569 for Relevant Year 3 (giving a total of $79,755). The written

submissions also referred (at 3.2) to "Missing Sales for the Relevant Years 2 and 3", with an Earn Out value of $1,561. The pursuers' submissions to the independent expert noted that on 5 July 2018 the defenders' agent confirmed the missing sales figure. In their written submissions in response, on 10 May 2019, the defenders agreed to these figures and stated that the second defender did offer and attempt to pay the amount of $49,325.38 on 9 December 2014 in respect of Relevant Year 2 but the first pursuer rejected the bank payment. These parts of the defenders' submissions on 10 May 2019, stating their acceptance that a sum is due under the EOC, must constitute a relevant acknowledgment of the subsistence of that obligation.

Ground 6

[62] The next point for the pursuers is that while the defenders disputed the amount, they did not, as noted above, dispute that payment was due and indeed the defenders made a part-payment. The Dean of Faculty referred to the leading textbook Johnston, *Prescription and Limitation* (2nd ed) at 5.69 (the author being senior counsel for the defenders) and argued that it supported the proposition that part-payment would be relevant acknowledgement.

[63] Mr Johnston KC submitted that in some cases a part-payment could be a relevant acknowledgment of liability to the whole (eg paying part of a loan, or interest on it) which indicates subsistence of the obligation. But, he argued, it is not necessarily appropriate for that analysis to apply to every case of part-payment. To meet the statutory test of relevant acknowledgment there has to be a clear indication of a subsisting liability. The defenders conceded liability only as regards one element of the claim. They denied other liability and as a matter of common sense it could not be said that they acknowledged liability to pay the disputed amount. When looking at relevant acknowledgment in a contract of this kind, with

payments made up of different strands, it was argued that it makes no sense to say you have acknowledged liability for one and therefore that carries through to all. The passage in senior counsel's textbook referred to by the Dean of Faculty was said not to deal with this kind of situation but rather a simpler situation. Here, there was no wider acknowledgement other than that the specific sum was due under paragraph 1.1.3.

[64] The first defender paid the sum of $90,304 to the pursers on 9 September 2021, explained by email as comprising "the Missing Payments ($79,755) and Missing Sales ($1560) figures from the IE's decision plus interest of $8989 calculated at the rates as per the Decision". In relation to the first issue in this case (the findings of the independent expert), senior counsel for the defenders distinguished the obligation to pay the EOC from the question of its *quantum*. However, on this second issue of relevant acknowledgment he recognised that payment of some of the *quantum* must have been made under the obligation. The actual payment on 9 September 2021 is therefore also part-performance, and an admission, of the subsisting obligation. It can clearly be connected with the debt.

Conclusions on issue 2

[65] Drawing these various strands together, and proceeding on the basis that what has to be relevantly acknowledged is the underlying obligation and not just its *quantum*, I have found there to be several instances when relevant acknowledgements were made. If all that the defenders had done was to say that the previous payments had been made and there was no further payment due then there would have been no such conduct or admission. However, to actually state that they still needed to pay the EOC under the obligation was an acceptance that it subsists. It is of no consequence that they did not specifically admit that

any further sums found by the independent expert to be due were to be paid by them. They accepted that outstanding sums were due and later paid them.

[66] In short, I reject the defenders' position that accepting liability for one strand of payment does not suffice to constitute a relevant acknowledgement of the obligation. It would not be right to distinguish liability from *quantum* for the purposes of identifying the obligation but then to treat later acknowledgements of sums remaining due under the obligation as only concerning *quantum* and not the obligation itself. The defenders were not able to merely acknowledge the obligation only to the extent that higher sums were due. Rather, they acknowledged the obligation to make payment of the full amount of the EOC, even though they considered that to be less than what the independent expert ultimately determined.

[67] The relevant acknowledgments are identified above, in my decisions on grounds 1, 3, and 6. The key dates of these acknowledgements are 23 July 2015, the period in November and December 2016, 2 July 2018, 10 May 2019 and 9 September 2021. Each of these relevant acknowledgements re-started the prescriptive period.

Issue 3: If prescription has operated on the first defender's primary obligation to pay EOC, is the second defender separately obliged to make payment in terms of clause 24.2 of the SPA?

Submissions

Submissions for the pursuers

[68] The Dean of Faculty submitted that on the hypothesis that prescription operated in respect of the obligation to pay the EOC, this would constitute the first defender "ceasing to be liable" in respect of its obligations under the SPA. Clause 24.2 would be engaged and as

a result the second defender would become solely liable to make payment of the sums in respect of the EOC. No issue of prescription was said to arise in relation to the second defender's liability in terms of clause 24.2. That clause created an independent and primary obligation. The words "ceasing to be liable" could only be envisaging the precise scenario here. The submission for the defender that there was no loss caused by the operation of prescription was wrong, as was the defence position that there is no basis for indemnity under clause 24.2 unless there is subsisting liability under the contract.

Submissions for the defenders

[69] Mr Johnston KC submitted that clause 24.2 deals with the situation where the pursuers suffer loss as a consequence of the defenders' failure to comply with or discharge their obligations under the SPA. In this context, the obligation relied upon by the pursuers was the obligation to make payment under paragraphs 1.1.3 to 1.1.5. That obligation had, however, prescribed. It no longer exists. That compelled two conclusions: (i) there is no obligation to comply with, and (ii) no loss can arise as a consequence of the defenders' failure to comply with it. An obligation which has prescribed is no obligation at all. Questions of compliance and non-compliance fall away. Further, properly construed, the words in clause 24.2 were concerned with the situation in which obligations assumed by the Buyer have not been properly or validly constituted: that is the force of the phrase "purported to be assumed". The words are not apt to cover the situation in which validly constituted obligations have been extinguished by the operation of prescription.

[70] Mr Johnston KC also submitted that the effect of the pursuers' construction would be to subvert the 1973 Act. Prescription of a validly constituted obligation under paragraphs 1.1.3 to 1.1.5 would be rendered essentially irrelevant because clause 24.2 would

constitute an attempt to contract out of the five-year negative prescription applicable to the obligation, contrary to the terms of section 13 of the 1973 Act. Looking at the whole wording of the clause, it appeared to be directed at a concern if there was some invalidity or problem about enforceability, in which case the contract should bring in the obligation of the parent company.

Decision and reasons on Issue 3

[71] Clause 24.2 is an independent and primary obligation. It is expressed in wide terms, stating that the second defenders unconditionally and irrevocably agreed to indemnify and keep indemnified the pursuers against all and any losses, costs, claims, liabilities, damages, demands and expenses suffered or incurred by them, *inter alia:*

> "by reason of the [first defender] not being at any time, or ceasing to be, liable in respect of the obligations and liabilities purported to be assumed by it in accordance with the express terms of this agreement".

The reference to "not being at any time" liable for an obligation purported to be assumed could, as senior counsel for the defenders submitted, relate to circumstances in which the agreement was not properly and validly constituted. The word "purported" has been viewed by the Inner House as implying intention or purpose: *Barn Properties Ltd* v *Secretary of State for Scotland* [1995] SC 145, Lord Morton at 148.

[72] However, applying the standard approach to construction, it is not possible to restrict "ceasing to be, liable" to circumstances in which the agreement was not properly and validly constituted. The words "ceasing to be, liable" are expressly distinguished from "not being at any time … liable". This must mean that there was a period of actually being liable before then ceasing to be liable. The court was given no example or illustration of how the first defender could actually be liable for some period of time if the agreement was not

properly or validly constituted and then cease to be liable because of that situation. The reasons for ceasing to be liable are not in any way restricted by the contract terms and no ground for cessation is excluded, such as prescription. The liability of the second pursuer to indemnify is unconditional. I conclude that the word "purported" does not fall to be construed restrictively and must cover obligations and liabilities that the first defender professed, intended or appeared to assume, which includes those it did in fact assume. If the first defender ceased to be liable because of prescription, that caused loss to the pursuers.

[73] Further, I do not accept the contention for the defenders that this interpretation renders the clause contrary to section 13 of the 1973 Act. The guarantee is not a form of contracting out of the prescription of the obligation to pay the EOC. On the contrary, the guarantee is a separate, independent and primary obligation on the part of the second defender that applies *inter alia* on the cessation of liability under paragraphs 1.1.3 to 1.1.5.

[74] Accordingly, if, contrary to the decision I reached above, there has been no relevant acknowledgement, the second defender is liable under clause 24.2 of the SPA.

Conclusions

[75] I have not accepted the pursuers' contentions that the obligation to pay the EOC was enforceable only when the independent expert determined the amount due, for the reason that on a proper interpretation of the terms of the SPA the full amount of the EOC was due for payment on the dates referred to in paragraphs 1.1.3 and 1.1.5 of Part 8. However, while the pursuers did not achieve success in every respect in their submissions on relevant acknowledgement, they did succeed on several grounds, resulting in the obligation not being extinguished by prescription. If that is incorrect, the second defender is liable in terms of its guarantee under clause 24.2.

Disposal

[76] I shall therefore repel the pleas-in-law for the defenders, sustain the second plea-in-law for the pursuers and grant decree in terms of the first, second, third and fourth conclusions of the summons. All questions of expenses are reserved.