OUTER HOUSE, COURT OF SESSION

[2024] CSOH 20

CA72/23

OPINION OF LORD RICHARDSON

In the cause

FES LIMITED

Pursuer

against

HFD CONSTRUCTION GROUP LIMITED

Defender

Pursuer: MacColl KC; Brodies LLP
Defender: Wolffe KC, Steel; Pinsent Masons LLP

27 February 2024

Introduction

[1] This case, which I heard at debate, raises a short question of contractual construction.

[2] The pursuer and the defender entered into a contract dated 25 and 28 February 2020. The pursuer was to carry out certain fit out and related works in relation to an office building at 177 Bothwell Street, Glasgow. The parties' contract took the form of the Standard Building Contract with Quantities for use in Scotland (SBC/Q/Scot) (2016 Edition) but included certain bespoke amendments.

[3] During the course of carrying out the works, the pursuer encountered various delays. These included the closure of the site during the COVID-19 pandemic. A dispute

subsequently arose between the parties as to the pursuer's entitlement to an extension of time and an associated claim for loss and expense under the parties' contract.

[4] In October 2022, the pursuer referred the dispute to adjudication. The adjudicator issued his decision on 10 March 2023. Among the issues that the adjudicator identified and dealt with in his decision was the question: is the giving of a notice in terms of clause 4.21 a condition precedent for recovering loss and expense? The adjudicator answered this question in the affirmative. On this point, the adjudicator concluded:

> "[…] I am satisfied that the giving of notice under [clause] 4.21.1 is a condition precedent of an entitlement to loss and expense under clause 4.20.1." (at paragraph 11.120).

He went on to find that the pursuer had not given the required notice. Accordingly, he concluded that the pursuer had no entitlement to direct loss and expense in terms of clause 4.20 of the contract.

[5] In the present proceedings, the pursuer proceeds on the basis that the adjudicator's conclusion on this issue was wrong in law. However, the pursuer recognises that, even if it is correct in this contention, any such error by the adjudicator was *intra vires* and, as such, the adjudicator's decision remains binding on the parties until the issue is finally resolved by the court.

[6] Accordingly, in these proceedings, the pursuer seeks declarator that the notice provisions in clause 4.21 are not conditions precedent to any entitlement of the pursuer to reimbursement for direct loss and expense in terms of clause 4.20 of the contract. The pursuer also seeks a consequential declarator that the adjudicator's decision on this issue is no longer binding upon the parties. Equally, the defender seeks to be assoilzied from the conclusions of the summons essentially on the basis that the adjudicator's conclusion is correct in law.

The terms of the contract

[7] Clauses 4.20 and 4.21 of the parties' contract provide as follows:

"**Matters materially affecting regular progress**

4.20.1 If in the execution of this Contract the Contractor [the pursuer] incurs or is likely to incur any direct loss and/or expense as a result of any deferment of giving possession of the site or part of it under clause 2.5 or because regular progress of the Works or any part of them has been or is likely to be materially affected by any Relevant Matter, he shall, subject to clause 4.20.2 and compliance with the provisions of clause 4.21 be entitled to reimbursement of that loss and/or expense.

4.20.2 No such entitlement arises where these Conditions provide that there shall be no addition to the Contract Sum or otherwise exclude the operation of this Clause 4.20 or to the extent that the Contractor is reimbursed for such loss and/or expense under another provision of these Conditions.

Notification and ascertainment

4.21.1 The Contractor shall notify the Architect/Contract Administrator as soon as the likely effect of a Relevant Matter on regular progress or the likely nature and extent of any loss and/or expense arising from a deferment of possession becomes (or should have become) reasonably apparent to him.

4.21.2 That notification shall be accompanied by or, as soon as reasonably practicable, followed by the Contractor's initial assessment of the loss and/or expense incurred and any further amounts likely to be incurred, together with such information as is reasonably necessary to enable the Architect/Contract Administrator or Quantity Surveyor to ascertain the loss and/or expense incurred.

4.21.3 The Contractor shall thereafter, in such form and manner as the Architect/Contract Administrator may reasonably require, update that assessment and information at monthly intervals until all information reasonably necessary to allow ascertainment of the total amount of such loss and expense has been supplied.

4.21.4 Within 42 days of receipt of the initial assessment and information and 28 days of each subsequent update of them the Architect/Contract Administrator or Quantity Surveyor shall notify the Contractor of the ascertained amount of the loss and/or expense incurred, each ascertainment being made by reference to the information supplied by the Contractor and in sufficient detail to enable the Contractor to identify differences between it and the Contractor's assessment.

4.21.5 [sic] have made reasonable and proper efforts to avoid or reduce such loss and expense; and

> 4.21.6 [sic] not be entitled to any loss and/or expense to the extent that the delay to the regular progress of the Works or of any part thereof or of any matter is attributable to the negligence, omission, default, breach of contract or breach of statutory duty of the Contractor or those for whom the Contractor is responsible;
>
> 4.21.7 [sic] any delay in the regular progress of the Works or any part thereof is caused by a matter or matters referred to in Clause 4.22 which is concurrent with another delay for which the Contractor is responsible such delay shall only give rise to an entitlement or director loss and/or expense (subject to the other terms of this Contract) if the delay is the dominant cause of the delay to completion. Where there is no dominant cause that delay shall not give rise to an entitlement to any loss and/or expense and the Architect/Contract Administrator is not entitled to apportion that delay between such causes in forming his opinion on the cause or effect of the delay."

The pursuer's arguments

The law

[8] Senior counsel for the pursuer submitted that the rules for the interpretation of contracts were well established and had been recently re-stated in *Lagan Construction Group Limited (in Administration) and others* v *Scot Roads Partnership Project Limited and another* [2023] CSIH 28 at paragraph 10. The court required to ascertain the intention of the parties. The parties' intention was most obviously gleaned from the language which they had chosen to use. This is done by determining what a reasonable person, having all the background knowledge of the parties, would have understood from the language selected by them. Senior counsel did not understand that there was any dispute between the parties as the correct approach to be adopted.

[9] Senior counsel also drew my attention to the approach of the Inner House in *Ashtead Plant Hire Co Ltd* v *Granton Central Developments Ltd* 2020 SC 244. He did so to emphasise the fact that any exercise of contractual construction required to be carried out both objectively and taking account of the contractual context of the words under consideration (at

paragraph 10). He also drew attention to what Lord Drummond Young, in giving the opinion of the court, had said concerning the regard that the court may have to business common sense in construing contracts purposively. Lord Drummond Young had considered the importance attached by parties to predictability in respect of their affairs and the fact that such predictability was not achieved by construing contracts with "brutal literalism" (at paragraph 16):

> "It is perhaps useful to mention three features of general business conduct that will frequently be relevant; all are of assistance in the present case. First, contracts are based on the principle of consideration, or exchange. This involves the notion of the *quid pro quo*; it is normal to find that the obligations of one party are broadly equivalent to the obligations of the other party. There may be exceptions, where a bad bargain has been concluded, but equivalence is the norm, and contracts should generally be construed accordingly. Secondly, the principle *pacta sunt servanda* applies; parties expect to perform their contractual obligations. For this reason they will normally avoid the risk of unreasonable or disproportionate burdens. Thirdly, predictability is generally regarded as important. For that reason the parties to a contract will normally try to avoid obligations or burdens that operate in an arbitrary manner. Conversely, they do not expect windfalls. Nevertheless, commercial 'predictability' is not achieved by construing contracts with brutal literalism, a practice that can easily produce arbitrary results; it is rather achieved by the use of a contextual and purposive construction of the words used, with the application where appropriate of commercial common sense. The foregoing three features, equivalence, avoidance of the risk of disproportionate burdens, and predictability, appear to us to be important aspects of commercial common sense, although we do not suggest that they are an exhaustive list."

[10] In this regard, senior counsel noted that Lord Drummond Young recognised that there would be exceptional cases where one or other party had entered into a bad bargain. However, senior counsel noted that, in the present case, where the court was dealing with a standard form contract produced by an industry body, this would seem highly unlikely.

[11] Senior counsel submitted that there was no tension between what had been said in *Ashtead* and *Lagan.* In *Lagan*, the court had looked at the particular clause in context and then had had no need, in that case, to go on to consider business common sense. In any

event, the Inner House had considered in *Lagan* that, had it been necessary to consider it, business common sense did not offend any of the principles identified in *Ashtead.*

[12] Senior counsel submitted that the principles identified in *Ashtead* were of particular relevance when considering whether a particular clause created a condition precedent. He recognised that such clauses can bring certainty. Equally, in such a situation, non-compliance could potentially preclude a party from exercising other contractual rights as a result of a trivial or inconsequential breach. As a result, clear wording was required to establish a condition precedent: *Heritage Oil and Gas Limited* v *Tullow Uganda Limited* [2014] EWCA 1048 at paragraph 33. As an example of the wording required, senior counsel made reference to the clauses considered in *Obrascon Huarte Lain SA* v *HM Attorney General for Gibraltar* 2014 BLR 484. In the absence of equivalent clear wording, the court should approach this type of provision on the basis that it merely set out contractual machinery.

[13] However, senior counsel was clear that, notwithstanding the particular authorities which discussed conditions precedent, the task which confronted the court remained simply one of construction: its character depended on the form of the clause itself, the relation of the clause to the contract as a whole and general considerations of law (*Bremer* v *Vanden* [1978] 2 Lloyds Rep 109 at 113 per Lord Wilberforce).

[14] Finally, in this regard, senior counsel referred to the judgment of Mr Justice Leggatt in *Scottish Power UK Plc* v *BP Exploration Operating Company Limited* [2015] EWHC 2658 (Comm). In considering whether a particular clause was intended to establish a condition precedent in the case before him, the learned judge had identified a series of factors which he considered to be significant. These factors included the fact that the clause in question did not spell out the consequences of failure to comply with its requirements (at paragraph 206). Mr Justice Leggatt also drew attention to the fact that the clause he was

considering did not clearly set out how it was to be complied with (at paragraphs 210 and 211). Overall, the view of the learned judge was that, commercially speaking, there were both merits and drawbacks in the clause being a condition precedent, but he found it impossible to conclude that the parties intended to constitute a condition precedent without considering it necessary to say so expressly (at paragraph 223).

The contract

[15] In respect of the contractual provisions in question, senior counsel submitted that the starting point was that clause 4.20 recognised the contractor's entitlement to reimbursement of loss and expense where the regular progress of the contractor's works had been materially affected. This recognition was not surprising. This wording reflected the contractor's common law entitlement. In this regard, senior counsel did recognise that in this case the parties had elected to amend the standard terms to exclude the contractor's common law right to claim damages for the matters which fell within the scope of clause 4.20 (see clause 4.24).

[16] Clauses 4.21.1 to 4.21.4 were basically taken directly from the standard form but the periods of time allowed for a response by the architect, contract administrator or quantity surveyor had been increased.

[17] In respect of clauses 4.21.5 to 4.21.7, senior counsel recognised that the wording did not appear to fit with the remainder of the clause. However, for present purposes, he did not consider that this awkward wording affected the analysis of clause 4.20.1. He submitted that it was reasonably clear that clauses 4.21.5 and 4.21.6 required to be read as though they each began with the words "The Contractor shall". Clause 4.21.7 had plainly been introduced to deal with the issue of concurrent delay.

Submissions

[18] On the basis of his submissions on the law and the wording of the clauses in question, senior counsel made the following arguments.

[19] First, the pursuer's position was that the parties had entered into the contract against a legal background in which notice provisions were not construed as conditions precedent in the absence of clear wording. Clause 4.20.1 did not contain such wording. This position could be contrasted with other provisions in the parties' contract in which the words "condition precedent" had been used (Schedule 7, Paragraph A.4.2).

[20] The parties had also chosen to base their contract on the JCT standard form. In that regard, senior counsel drew my attention to an article published by Suzanne Reeves, an English solicitor who sits on the JCT drafting committee, on the JCT website. In commenting on the JCT Standard Building Contract 2016 (on which the Scottish Standard Building Contract is based) she said:

> "JCT has not adopted the approach of some bespoke amendments whereby notification by the Contractor in accordance with a time limit is a condition precedent to entitlement to loss and expense, which means that in principle noncompliance avoids the claim."

He accepted that the "Guide for use in Scotland" (2016 Edition) issued by the Scottish Building Contract Committee did not contain equivalent wording. Equally, he pointed out that the guidance did not suggest that clause 4.20.1 created a condition precedent which, he submitted, would be surprising if that had been the intention of the drafters. (In this regard, he contrasted the position in the guidance notes issued in respect the NEC3 and NEC4 standard forms.)

[21] Second, neither clause 4.20 nor clause 4.21 expressly spelled out the consequences of non-compliance by the contractor with the supposed condition precedent. That position could be contrasted with clause 4.20.2 which stated expressly that the Contractor would have no entitlement to loss and expense where that provision applied.

[22] Third, as to the reference "compliance with the provisions of clause 4.21" there was no need to construe this as a condition precedent. This reference could simply be intended to indicate that any ultimate recovery for loss and expense on the part of the contractor could be reduced by a claim for damages by the employer in the event of non-compliance by the contractor with the requirements of clause 4.21. Senior counsel submitted that it was no answer to this point to argue that, construed this way, the provision was simply re-stating the common law. That could be said of very many contractual provisions which were insisted upon by parties nonetheless.

[23] Fourth, the defender's construction of clause 4.21 produced a result which was illogical, unreasonable and disproportionate. The failure by the contractor to give notice resulted in the loss of the contractor's entitlement to reimbursement for loss and expense. This was precisely the type of unreasonable burden which Lord Drummond Young had been referring to in *Ashstead* (above at paragraph [9])

[24] In this regard, as each of clauses, 4.21.5 to 4.21.7, properly construed, imposed obligations on the contractor, the pursuer's position was that, if clause 4.20.1 imposed a condition precedent, non-compliance would disentitle the contractor from any recovery of loss and expense. It was not open to the defender to pick and choose among the provisions of clause 4.21: either compliance was a condition precedent or it was not.

[25] Fifth, senior counsel drew attention to what was required of the contractor in terms of clauses 4.21.1 to 4.21.3 by way of compliance both in terms of notification and the

submission of information as well as when this required to be done. These provisions lacked a clear starting point. The content of the obligation to provide an initial assessment and provide updates were also unclear. He argued that these provisions were, in that respect, similar to those under consideration in *Scottish Power* (above at [14]). Bearing in mind Lord Drummond Young's analysis in *Ashstead* (above at [9]), senior counsel asked rhetorically whether it could have been the parties' common intention that the contractor would have no entitlement to loss and expense in the event that one monthly update (required by clause 4.21.3) was late?

[26] Senior counsel also highlighted the fact that clause 4.21.4 imposed obligations on a third party, namely the architect, contract administrator or quantity surveyor. Accordingly, on the defender's construction of clause 4.20, the contractor's entitlement to reimbursement could be lost as a result of the non-performance of a third party. Senior counsel noted that the reference to compliance in clause 4.21 was not restricted to compliance by the contractor.

[27] Finally, responding to the defender's arguments set out in its Note of Arguments, senior counsel submitted that they amounted to little more than saying that the wording of clause 4.21 was capable of being read as a condition precedent. However, that approach neither addressed nor rebutted the pursuer's arguments based on the contractual context. The task which the court required to carry out was to construe the parties' contract not parse it.

[28] The defender asserted that construing clause 4.20.1 as a condition precedent served an "intelligible commercial purpose to the advantage of both parties". However, when one considered the outcome resulting from the defender's construction, the achievement of apparent certainty did not justify disproportionate consequences. The defender's construction did not advance the positions of both parties entering the contract.

The defender's arguments

The law

[29] At the outset, senior counsel for the defender was in broad agreement with the pursuer's submissions in respect to the correct approach to contractual interpretation.

[30] The aim of the exercise was to ascertain the objective meaning of the language with which the parties had chosen to express their agreement. As to context in the exercise of construction, senior counsel reminded me of what was said by Lord Hodge JSC in *Wood* v *Capita Insurance Services Limited* [2017] AC 1173 at paragraph 13: textualism and contextualism are not in conflict. When the language used by the parties was relatively clear, read in context, and admitted of only one meaning then that was what the parties should be taken to have agreed. In such circumstances, there was no basis to embark upon a search for an alternative meaning using business common sense or any other aid to construction (see *Lagan* (above at [8]) at paragraph 11). That was not to say that business common sense could not form part of the context. However, such common sense was only relevant to the extent of determining how matters would or could have been perceived by the parties (or reasonable people in the position of parties) when the contract was entered into (*Scanmudring AS* v *James Fisher MFE Limited* 2019 SLT 295 at paragraph 81). Senior counsel submitted that the court should be careful to avoid thinking that it knew the parties' business better than they did.

[31] Senior counsel stressed the importance of considering the particular clause in the particular contract. All of the cases relating to whether a particular clause was or was not a condition precedent had to be read in this light (*Scottish Power* (above at [14]) at paragraph 204). There was no requirement for any particular wording to be used by parties

to create a condition precedent (see *Astrazeneca UK Limited* v *Albemarle International Corporation* [2011] EWHC 1574 (Comm) at paragraph 249 per Flaux J).

Submissions

[32] Senior counsel focussed on the last part of clause 4.20.1. The language used was clear. The contractor's entitlement to reimbursement was "subject to" his compliance with the provisions of clause 4.21.

[33] Senior counsel submitted that the fact that the standard form used the words "condition precedent" in a different place – Schedule 7, Paragraph A.4.2 – dealing with fluctuations was irrelevant. That provision did not form part of the context of clauses 4.20 and 4.21. Apart from anything else, that provision was not part of the parties' contract.

[34] The wording of the contract made clear that clause 4.20.2 was doing a slightly different thing – it excluded the contractor's entitlement from arising. That clause provided that no entitlement to reimbursement under clause 4.20.1 arose where the contractual conditions either excluded it or provided an alternative mechanism for reimbursement. There was no reference to "compliance" with clause 4.20.2 in clause 4.20.1.

[35] The pursuer's construction of clause 4.20.1 effectively had the result of striking out the words "and compliance with the provisions of clause 4.21". Clause 4.20.2 remained as would the provisions of clause 4.21. The obligations imposed on the contractor in clause 4.21 remained.

[36] Contrary to what had been argued on behalf of the pursuer, senior counsel submitted that the procedure set down by clause 4.21 did serve an intelligible purpose that was to the advantage of both parties. Clause 4.21.1 required prompt notification by the contractor. Such notification permitted contemporaneous investigation and the early

ascertainment of the Relevant Matter (as defined in the contract) and its effect. This, in turn, enabled timely and orderly settlement of any claims by the contractor. Further, such notification also alerted the employer as to, for example, the implications of a variation instruction. This, in turn, might enable those implications to be mitigated.

[37] This purpose was one which was well recognised. Achieving this purpose resulted in stipulations that required the provision of written notice by the contractor being regarded as condition precedents. This included within the predecessors to the JCT Standard Building Contract 2016 (see *Hudson's Building and Engineering Contracts* (14th Edition), at 5-040). While recognising that the wording was not identical, senior counsel submitted that it was useful to have regard to judicial consideration of both JCT 63 (clause 24) and JCT 98 (clause 26).

[38] In respect of JCT 63 the relevant wording was:

> "If upon written application being made to him by the Contractor the Architect/Supervising Officer is of the opinion that the Contractor has been involved in direct loss and/or expense […] and if the written application is made within a reasonable time of it becoming apparent that the progress of the Works […] has been affected […]"

In *London Borough of Merton* v *Stanley Hugh Leach Ltd* 32 BLR 51 at 95, Mr Justice Vinelott concluded that the clause only operated in the event that the contractor had invoked it through the making of an application.

[39] In respect of JCT 98, clause 26.1 began with similar wording:

> "If the Contractor makes written application to the Architect stating that he has incurred or is likely to incur direct loss and/or expense […]"

The clause also contained the words "provided always that" before setting out obligations which were similar to those contained in clauses 4.21.1 to 3 in the present contract. In *Walter Lilly* v *Mackay* [2012] BLR 503 it had been a matter of concession that the clause

created a condition precedent. Mr Justice Akenhead appeared to have no difficulty with that view, holding that the clause created two conditions precedent – the making of a timely application and provision of details of loss or expense to enable ascertainment (paragraphs 463 and 464). In this regard, senior counsel also referred to *Scottish Equitable plc* v *Miller Construction Limited* 2002 SCLR 10 at paragraph 27 as well as to passages from *Keating on Construction Contracts* (11th Edition) at paragraphs 21-335 and 21-346.

[40] Senior counsel submitted that the article published by Suzanne Reeves (see paragraph [20]) should properly be regarded as being her opinion as opposed to official guidance from the JCT. In this regard, senior counsel drew my attention to the fact that the official guidance notes published by the Scottish Building Contract Committee for the Standard Building Contract 2016 Edition did not indicate that that edition was intended to make any changes to the pre-existing position in relation to claims by a contractor for loss and expense (see paragraphs 5, 11, 100 and 101).

[41] In these circumstances, the contractor knew not only that it was obliged to comply with the procedure laid down in clause 4.21 but also that its compliance would be conducive to good, orderly and efficient administration of the contract. This was the *quid pro quo* referred to by Lord Drummond Young in the passage from *Ashtead* (see above at [9]). Viewed from this perspective, construing the clause as a condition precedent did not have a disproportionate effect. The opposite was true. Unless compliance with clause 4.21 was a condition precedent to the contractor's right to reimbursement, there was effectively no real sanction for breach of those provisions by the contractor. The possibility of a claim for damages arising from a breach by the contractor of the requirements of clause 4.21 was not a straightforward one. Demonstrating that a breach by the contractor had caused loss would not be easy for an employer.

[42] In respect of the procedure established by clause 4.21, senior counsel submitted that these provisions should be read in a practical way which was not unduly weighted against the contractor. He noted that clause 4.21.1 imposed an objective starting point on the contractor for the submission of notification – it was required as soon as the likely effect of a Relevant Matter was or should have become reasonably apparent to him. In a similar way, clause 4.21.2 required, "as soon as reasonably practicable" the submission of an initial assessment together with such information as reasonably necessary for the process of ascertainment.

[43] As to the pursuer's argument in relation to clause 4.21.4 and the suggestion that the contractor's entitlement was dependent upon compliance by a third party – the architect/contract administrator or quantity surveyor – senior counsel submitted that this argument proceeded on the erroneous assumption that the compliance referred to in clause 4.20.1 went beyond that of the contractor. Properly construed, the compliance in clause 4.20.1 referred only to that of the contractor. In the alternative, senior counsel submitted that the law was not without tools to achieve a just result given that the employer could not rely upon on the wrongful non-compliance of the architect/contract administrator or quantity surveyor (see *Panamena Europea Navigacion* v *Frederick Leyland* [1947] AC 428, 435-6; see also *Al-Waddan Hotel Ltd* v *MAN Enterprise SAL (Offshore)* [2015] BLR 478, paragraphs 56-64; and *Hudson* (above at [37]) at 4-056 to 4-058).

[44] In respect of clauses 4.21.5 to 4.21.7, senior counsel agreed with the submission made on behalf of the pursuer that something had clearly gone awry with the drafting of these clauses. He did not take issue with the approach to construction offered by the pursuer.

[45] The defender's primary position in respect of these clauses was that compliance with clauses 4.21.5 and 4.21.6 could be construed as being further conditions precedent to the

contractor's entitlement. However senior counsel also recognised that these two clauses might also be construed as creating the basis upon which the contractor's entitlement to loss and expense might be abated rather than defeated. Approaching clause 4.21.6 in this way, it could be seen as performing a similar role to clause 4.20.2 restricting the contractor's entitlement as opposed to establishing a procedure with which compliance was required. The same could be said of clause 4.21.7.

[46] Finally, senior counsel for the defender addressed the fact that, in the bespoke amendments to their contract, the parties had effectively removed the contractor's common law right to claim for damages in respect of the matters which fell within the scope of clause 4.20.1 (see clause 4.24). Senior counsel accepted that the amendment represented part of the context in which clause 4.20.1 required to be construed. He made two points in this regard. First, the amendment emphasised that the parties had both agreed that any claims for loss and expense were to be dealt with through the contractual mechanism and, therefore, the importance which the parties clearly attached to that mechanism. Second, senior counsel submitted that it was significant that, although the parties had introduced an amendment to restrict the contractor's right to claim at common law, they had not materially altered the pre-existing standard terms – 4.20.1, 4.20.2 and 4.21.1 to 4.21.4. On this basis, one could infer that the parties were content that those terms expressed their intentions and they felt no need to alter them. This led one back to the clear language of clause 4.20.1.

The pursuer's reply

[47] In a brief reply, senior counsel for the pursuer submitted that it was important to appreciate that the contractual wording in the parties' contract was materially different to that which had been considered in either *Merton* (above at [38]) or *Walter Lilly* (above

at [39]). The "subject to" wording found in clause 4.20.1 was not present in the wording considered in either of those cases. This was in contrast to the *Heritage Oil* case (see [12] above) where that formulation had been considered.

[48] More fundamentally, senior counsel submitted that the approach adopted in the parties' contract in respect of the contractor's entitlement to reimbursement for loss and expense proceeded on a different basis to either of the two predecessors relied upon by the defender. The difference was that in the present contract, the contractor's entitlement to reimbursement arose from the fact that the contractor had incurred loss and expense. By contrast, the formulation used in both JCT 63 and 98 proceeded on the basis that the entitlement arose from the submission of notice. That was the effect of the "If" formulation used in both of those sets of terms and considered in *Merton* and *Walter Lilly* respectively.

Decision

[49] In this case, the parties' dispute turns on determining the correct construction of clause 4.20.1 and, in particular, whether the words "[…] he shall, subject to […] compliance with the provisions of clause 4.21 be entitled to reimbursement of that loss and/or expense" created a condition precedent to the contractor's entitlement.

[50] The rules as to the interpretation of contracts are well-established, having been re-stated in a number of recent cases: *Rainy Sky SA* v *Kookmin Bank* [2011] UKSC 50, Lord Clarke, paragraphs 20 to 23; *Arnold* v *Britton* [2015] UKSC 36, Lord Neuberger, paragraphs 15 to 23; W*ood* v *Capita Insurance Services Ltd* (above at [30]), Lord Hodge, paragraphs 10 to 14; *Ashtead Plant Hire Co Ltd* v *Granton Central Developments Ltd* (above at [9]), Lord Drummond Young, delivering the opinion of the court, paragraphs 9 to 17; *Network Rail Infrastructure Limited* v *Fern Trustee 1 Ltd* [2022] CSIH 32, Lord President

(Carloway), delivering the opinion of the court, paragraph 28; and *Lagan Construction Group Limited* (above at [8]), Lord President (Carloway), delivering the opinion of the court at paragraph 10.

[51] Before me, there was no dispute between the parties that the task which the Court must undertake is to ascertain the intention of the parties. The parties' intention can most obviously be found by determining the objective meaning of the language which the parties have chosen to express their agreement. That task involves considering what a reasonable person, who had all the background knowledge reasonably available to the parties, would have understood the parties to have meant by the language used. That task involves considering the language in the whole context in which it is used and, depending on the nature, formality and quality of the drafting of the contract, giving more or less weight to elements of that wider context.

[52] The significance attached to the quality of the drafting is

> "[…] that the poorer the quality of the drafting, the less willing the court should be to be driven by semantic niceties to attribute to parties an improbable and unbusinesslike intention […]"

(*Mitsui Construction Co Ltd* v *AG of Hong Kong* [1986] 33 BLR 14, per Lord Bridge) referred to in *Wood* at paragraph 11). In contrast,

> "[s]ome agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals"

(*Wood* at paragraph 13; paraphrased in *Lagan* at paragraph 10).

[53] In the present case, the key provision which I am required to construe, clause 4.20.1, falls to be regarded as one which has been negotiated and drafted by skilled professionals. This clause comes directly and unaltered from the Standard Building Contract with Quantities 2016 Edition prepared by the Scottish Building Contract Committee. Exactly the

same wording can also be found in clause 4.20.1 of the JCT Standard Form of Building Contract 2016 Edition. The JCT or Joint Contracts Tribunal is a non-governmental, non-statutory body. Its constituent members are the British Property Federation, Contractors Legal Group Limited; Local Government Association; Build UK Group Limited; Royal Institute of British Architects; Royal Institution of Chartered Surveyors and the Scottish Building Contract Committee.

[54] On its face, the language used in clause 4.20.1 is clear and straight-forward. It indicates that that the contractor's entitlement to reimbursement is "subject to… compliance with clause 4.21". It is difficult to construe this language other than that it creates a condition precedent. To construe the clause as the pursuer contends for would involve having to delete or ignore this critical phrase.

[55] None of the arguments ably advanced on behalf of the pursuer leads me to a different conclusion.

[56] The pursuer argues that as clause 4.20.1 does not spell out the consequences of non-compliance with the provisions of clause 4.21, the parties cannot have intended that the clause create a condition precedent. In my opinion, this argument fails to take account of the fact that, as a result of the way in which clause is structured, the contractor's entitlement is dependent on compliance. Accordingly, far from not spelling out the consequences of non-compliance, the wording of the clause makes it clear that without such compliance, the contractor is not entitled to reimbursement. In this regard, it is notable that the reference in clause 4.20.1 to clause 4.20.2 does not refer to "compliance" with that latter clause and that clause 4.20.2 then sets out how it interacts with the contractor's entitlement.

[57] The provisions of clause 4.21 do not compel an alternative reading of clause 4.20.1. The provisions of clause 4.21 need to be considered in two halves: first, there are the

procedural provisions contained in clauses 4.21.1 to 4.21.4 and second, there are the bespoke amendments contained in clause 4.21.5 to 4.21.7.

[58] In relation to clauses 4.21.1 to 4.21.4, I reject the pursuer's argument that these provisions are so unclear that the parties could not have intended that compliance with them would be a condition precedent. Clause 4.21.1 imposes an objective starting point for notification by the contractor being the point at which the likely effect of the Relevant Matter or the likely nature and extent of any loss and expense becomes or should have become reasonably apparent to him. The same point can be made in respect of clause 4.21.2. Overall, in my opinion, clauses 4.21.1 to 4.21.3 set out a practical and workable set of steps for notification and provision of information by the contractor. In this regard, I note that the obligations on the contractor to provide information in clauses 4.21.3 and 4 are both qualified by what is reasonably necessary or what may be reasonably required.

[59] My rejection of the pursuer's arguments in respect of clause 4.21.1 to 3 is consistent with Mr Justice Akenhead's reading of similarly worded provisions in *Walter Lilly* (as above at [39], in particular at paragraphs 461 to 466). Although the existence of a condition precedent was conceded in that case, the wording of obligations similar to those in clauses 4.21.1 to 4.21.3 did not cause the learned judge to doubt that concession. Mr Justice Leggatt's analysis of different provisions in *Scottish Power* (above at [14]), which was founded on by the pursuer, can be distinguished. Most significantly, in that case there was no express wording tying entitlement to relief with compliance with the procedure for a claim (see *Scottish Power*, at paragraphs 194 to 196 and 204 to 223). That is quite different from the "subject to … compliance with" wording in clause 4.20.1.

[60] The pursuer's argument in respect of clause 4.21.4 is also misconceived. The pursuer argued that as clause 4.21.4 imposed obligations on a third party – the architect/contract

administrator or quantity surveyor – to consider and respond to the contractor's submissions, compliance with clause 4.21.4 could not be a condition precedent to the contractor's entitlement under clause 4.20.1. I agree. But this does not assist the pursuer. That is because, properly construed, the compliance with the provisions of clause 4.21 which is required by clause 4.20.1 is compliance by the contractor. This construction flows from a natural reading of clause 4.20.1. As a matter of grammar, the contractor is the subject of clause 4.20.1. It is the contractor's entitlement which is subject to compliance with the provisions of clause 4.21. It follows that it is compliance by the contractor which is required by clause 4.20.1 and which constitutes the condition precedent to entitlement.

[61] Turning to bespoke amendments – clauses 4.21.5 to 4.21.7, I consider that they fall to be treated differently. It is plain that something has gone significantly awry in the drafting of these provisions. There was agreement between the parties that it was broadly clear what was intended by them. I accept that submission. However, I am not satisfied that patent infelicities in the wording of these clauses can be cured by simply reading in "The Contractor shall" at the beginning of clauses 4.21.5 and 6 as was submitted on behalf of the pursuer. Apart from anything else, such a reading would not work grammatically. It is also not clear to me that these provisions are intended to impose obligations on the contractor akin to clauses 4.21.1 to 3. That is plainly not what is intended by clause 4.21.7. On balance, it appears more likely that these provisions are concerned with the process of ascertainment of the contractor's entitlement to loss and expense and the possible abatement of that entitlement rather than procedural steps as set out in clause 4.21.1 to 4.21.3. However, for present purposes, I do not require to resolve this issue. That is because, whatever was intended by these provisions, the key point is that the wording of clause 4.20.1, taken from

the standard form, was not altered by the parties. Accordingly, these provisions do not cause me to alter my view of the wording of that clause.

[62] In relation to other authorities referred to by both counsel in submissions, I agree with Mr Justice Leggatt in *Scottish Power* that constructions of differently worded clauses are of limited assistance in construing clause 4.20.1 (at paragraph 204). That said, I do consider the approach taken to the notification of loss and expense claims in earlier editions of the JCT standard form to be a useful aid to construction in this case. The pre-existing position in respect of JCT 63 and 98 was that the notification provisions created a condition precedent to the contractor's entitlement (see *Merton* (above) at 95 and *Walter Lilly* (above) at paragraphs 463 and 464). It is, of course, true that the material clauses are worded differently in both the JCT 63 and JCT 98 standard forms. However, there appears to be no suggestion that any significant change was intended in the 2016 Edition (see the guidance notes published by the Scottish Building Contract Committee for Standard Building Contract the 2016 Edition at paragraphs 5, 11, 100 and 101).

[63] In relation to the article written by Ms Reeves, referred to by the pursuer (see above at paragraph [20]), if the author is to be understood to be saying that clause 4.20.1 of the 2016 Edition does not create a condition precedent, I respectfully disagree for the reasons I have set out. However, I do wonder if, in fact, the thrust of Ms Reeves' point concerned highlighting that the drafting of clause 4.21 does not include specific time limits in which notification is to be made by the contractor. As noted above, rather than setting out, for example, a period of days in which notification is to be made, clause 4.21.1 requires the contractor to notify as soon as things become, or ought to have become, reasonably apparent to it.

[64] Finally, it will also be apparent that I reject the pursuer's argument, made in reply, that the wording of clause 4.20.1 in the 2016 Edition of the standard form represented a fundamental change in approach to the contractor's entitlement when compared with earlier versions of the standard form. Although the relevant provisions are worded differently, I consider that in each case, the contractor's entitlement depended on loss and expense having been incurred and required compliance with notification provisions.

[65] In light of the foregoing, having reached the conclusion that the parties' intention was clear from the language that they had chosen to use in clause 4.20.1, it is not necessary for me to go further and address the arguments based on business common sense and disproportionality made by the pursuer. Where, as I have found in the present case, the language the parties have used clearly discloses their intention, it is not for the court to second guess what it considers business common sense might have otherwise dictated (*Lagan* at paragraphs 10 and 11).

[66] However, even if such factors were to be considered, they do not favour the pursuer's construction. As was articulated on behalf of the defender, construing clause 4.20.1 as a condition precedent served an intelligible purpose (see paragraphs [36] and [37] above). This was apparently recognised within the construction industry more widely (see *Hudson's Building and Engineering Contracts* (14th Edition), at 5-040).

[67] Properly analysed, the pursuer's complaints of disproportionality arise from circumstances which have now arisen as opposed to at the point at which the contract was entered into. The obligation to comply with clause 4.21 is not, in my opinion, an unduly onerous one. Benefits, in the form of timely and well administered contract administration, can reasonably have been anticipated as accruing to both parties from that compliance. The difficulty for the pursuer is that, on the basis upon which I am to proceed, those obligations

were not complied with by it. As a result, if compliance is a condition precedent, the pursuer has lost its entitlement both in terms of clause 4.20.1 and, because of clause 4.24, at common law. As such, it seems to me that the pursuer's argument is an example of the retrospective invocation of business common sense which Lord Neuberger PSC warned against in *Arnold* v *Britton* (at paragraph 19).

Disposal

[68] For these reasons, I will sustain the defender's first plea-in-law and dismiss the action. Having not been addressed on the question of expenses, I will reserve these meantime.