OUTER HOUSE, COURT OF SESSION

[2018] CSOH 59

CA112/16

OPINION OF LORD DOHERTY

In the cause

MR KHALED HASSAN IBRAHIM ZAHID

Pursuer

against

DUTHUS GROUP INVESTMENTS LIMITED

Defender

and

HIS ROYAL HIGHNESS PRINCE TURKI BIN MUGRIN AL SAUD

Third Party

Pursuer: SP Walker QC, Frain-Bell; Young & Partners LLP
Defender: McBrearty QC, Paterson; Gilson Gray LLP
Third Party: Lord Davidson of Glen Clova QC; CMS Cameron McKenna Nabarro Olswang LLP

5 June 2018

Introduction

[1] The pursuer resides in the Kingdom of Saudi Arabia. The defender is a Scottish limited company which was formerly incorporated under the name RMJM Group Investments Limited ("RMJM GIL"). The third party is a member of the royal family of the Kingdom of Saudi Arabia.

[2] In this commercial action the pursuer sued the defender for repayment of two deposits totalling US$1million paid to the defender in respect of a proposed transaction, and for interest on those deposits. He also sought indemnification by the defender in respect of legal costs incurred by him in relation to recovery of the deposits. The defender denied liability, but maintained that if it was liable to repay the deposits to the pursuer it was entitled to relief from the third party.

[3] The contract between the parties was contained in a Letter of Intent ("the Letter") written on behalf of the pursuer to the defender on 2 November 2014, the terms of which were agreed and accepted in writing by the defender on 4 November 2014. The Letter superseded an earlier Letter of Intent between the parties dated 16 September 2014. The Letter set out the terms on which it was proposed that the pursuer would participate with the defender in the ownership of a new architectural company ("Newco") which was to acquire the existing business of Robert Mathew & Johnson Marshall & Partners in the Middle East. In exchange for the issuance or transfer of a 49% interest in Newco to the pursuer, the pursuer agreed to pay a purchase price. In terms of Section 1(d)(i) of the Letter the parties agreed that the pursuer had already paid US$250,000 of the purchase price as a refundable deposit (the "First Deposit"). In terms of Section 1(d)(ii) the parties agreed that within three business days of the Letter being signed the pursuer would pay the defender a further refundable deposit of US$750,000 (the "Second Deposit"). Section 1(d) (iii) provided that the Deposits would be refunded by the defender in the event that the pursuer decided not to proceed with the transaction.

[4] The pursuer decided not to proceed with the purchase. He sought repayment of the Deposits. The defender denied that the pursuer was entitled to repayment and it refused to repay the Deposits. The pursuer took steps to enforce his right to repayment. He initiated

criminal proceedings against the defender in Dubai. Thereafter he raised the present action. A diet of proof before answer was set down to commence on 13 March 2018. At the outset of the proof diet I was informed that, subject to one outstanding issue, the pursuer and the defender had settled their differences. I was also told that the defender and third party had reached agreement in principle to settle their dispute. Since the third party had no interest in the outstanding issue between the pursuer and the defender, his senior counsel sought leave to be excused further attendance at the proof. There was no opposition to that, and I granted the request. Senior counsel for the pursuer moved to amend the second conclusion of the summons. He also sought decree in terms of the first conclusion (which related to the repayment of the Deposits, with interest) and immediate extract; recall of caution for expenses; and the release of the pursuer's mandatary. None of these motions were opposed, and I granted them.

[5] The remaining contentious issues concerned the proper construction of a contractual indemnity contained within Section 1(d) of the Letter, and whether in terms thereof the defender is obliged to indemnify the pursuer in respect of certain costs and expenses which the pursuer avers he incurred in relation to the recovery of the Deposits. The pursuer avers (in article 7 of condescendence) that he incurred legal expenses of 218,259 Emirati Dirhams (US$59,431.95) to Dubai lawyers who instigated the criminal proceedings against the defender in Dubai and who sought an opinion from Scottish counsel as to the enforceability of the contract in Scotland. He further avers that he has incurred counsel's fees of £322,924.03 (US$410,856.24), legal costs to his Scottish solicitors of £196,644.19 (US$250,190.40), and legal costs to a Saudi Arabian firm of US$2,000. The total sum in respect of which indemnity is claimed is US$722,478.59 (conclusion 2).

[6] Neither party led any evidence. I heard (relatively brief) submissions from senior counsel for the pursuer and senior counsel the defender as to the proper construction of the indemnity.

The indemnity and other terms of the Letter

[7] The Letter states:

> "...
>
> 1 – **Prices and terms**. I understand that the principal terms of the proposed transaction would be substantially as follows:
> ...
>
> (d) **Payment.** The parties agree and acknowledge as follows in relation to the Purchase Price and the proposed transaction generally:
> ...
>
> (v) RMJM GIL (for itself and as agent for each of its affiliates) hereby fully indemnifies me in respect of all costs and expenses (including but not limited to legal costs and expenses) which I may incur in any jurisdiction in relation to the recovery of the Deposits ... in the event that the Deposits are not repaid ... as provided for in this Letter of Intent.
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> ...
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> 4. **Miscellaneous**. ... This Letter of Intent constitutes the entire understanding and agreement between the parties hereto and their affiliates with respect to its subject matter and supersedes all prior or contemporaneous agreements, representations, warranties and understandings of such parties (whether oral or written)... No promise, inducement, representation or agreement, other than as expressly set forth herein, has been made to or by the parties hereto. This Letter of Intent may be amended only by written agreement, signed by the parties to be bound by the amendment. Evidence shall be inadmissible to show agreement by and between such parties to any term or conditions contrary to or in addition to the terms and conditions contained in the Letter of Intent. This Letter of Intent shall be construed according to its fair meaning and not strictly for or against either party.
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> ...
>
> **7- Non-Binding**. Except for Section 1(d) and Sections 2 through 6 of this Letter of Intent (which are legally binding upon full execution of this Letter of Intent), this Letter of Intent is a statement of mutual intention; it is not intended to be legally

> binding, and does not constitute, create or give rise to any binding contractual commitment with respect to the transaction...
> ..."

Senior counsel for the pursuer's submissions

[8] Mr Walker submitted that on a proper construction of Section 1(d) the pursuer was entitled to recover from the defender all costs and expenses which he had incurred in relation to the recovery of the Deposits. That was the ordinary and natural meaning of the words which had been used. It was very plain that the indemnity granted had been in the widest of terms. The defender had agreed to "fully" indemnify the pursuer in respect of "all" costs and expenses. The costs and expenses recoverable were not merely reasonable expenses. There was no express qualification to that effect, and such a qualification ought not to be implied. All relevant costs and expenses were recoverable. While the pursuer's position was that all costs and expenses claimed had in fact been reasonably incurred, their recoverability did not depend on their having been reasonably incurred. If that represented an agreement which the defender had been imprudent to enter into (which was not conceded), that had been its look out. It was not a good reason for giving the provision something other than its ordinary and natural meaning. It was not necessary to imply any term in order to give the contract business efficacy. The pursuer's construction did not produce a commercially absurd result. The objectively ascertainable intention of the parties was that the pursuer should not be left out of pocket in respect of any costs and expenditure which it did in fact incur in relation to the recovery of the Deposits. Reference was made to *Bank of Scotland* v *Dunedin Property Investment Co Ltd* 1998 SC 657, per Lord President Rodger at p 661G-H; *Arnold* v *Britton* [2015] AC 1619, per Lord Neuberger of Abbotsbury PSC at p 1628, para 20; *Marks and Spencer plc* v

BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742, per Lord Neuberger at paras 18 and 28.

Senior counsel for the defender's submissions

[9] Mr McBrearty submitted that it was clear that there had to be some limit upon the costs and expenses which were recoverable under Section 1(d). Mr Walker had recognised that expenses which were "beyond the pale" or which "would produce a commercially absurd result" should not be recoverable. While it would indeed be absurd to give the indemnity clause the construction which Mr Walker contended, it was not necessary for the defender to go as far as that. It was enough for it to show that the pursuer's construction was not a commercially sensible one.

[10] Reasonable persons in the positions of the contracting parties at the time of contracting could not have intended that the pursuer should be able to recover expenditure which was unreasonably incurred because, eg, it was disproportionate or extravagant or exorbitant or unnecessary. The defender had very real concerns in relation to some of the expenditure which the pursuer sought to recoup.

[11] The commercially sensible construction of the provision was that it meant "all *reasonable* costs and expenses ... which I may *reasonably* incur ...". That conclusion could be arrived at in either of two ways. First, by construing the words of the Section as bearing that meaning. Second, and alternatively, by implying the reasonableness qualifications. The requirements for implication of such terms were satisfied. In particular, the suggested terms were necessary to give business efficacy to the contract. In addition, they were so obvious that they went without saying. Reference was made to *Marks and Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd, supra,* per Lord Neuberger at paras 18, 19, 20, 21 and 26.

Decision and reasons

[12] The sums claimed for counsel's fees and solicitors' fees do seem remarkable. However, on the basis of the material before me I am not in a position to assess whether those fees represent reasonable remuneration for work done by counsel and the solicitors, or whether they are costs and expenses which were reasonably incurred by the pursuer.

[13] It is perhaps helpful to clarify two matters at the outset. First, senior counsel for the defender did not argue that the indemnity clause ought to be construed *contra proferentem* the pursuer. Such an argument would have been difficult. The application of that canon of construction is generally a matter of last resort: the court's first task is to construe the contract properly on ordinary principles (Lewison, *The Interpretation of Contracts* (6th ed), para 7.08). Here there would also have been the added difficulty of the final sentence of Section 4 of the Letter. Second, senior counsel for the pursuer did not suggest that the entire agreement clause within Section 4 precluded the suggested implied terms. That position was adopted, I presume, because it is well established that if an entire agreement clause is to exclude the implication of a term in a contract the language of the clause must make that clear (see eg *J N Hipwell & Son* v *Szurek* [2018] EWCA Civ 674, per Hildyard J at paras 27 and 40; *Axa Sun Life Services plc* v *Campbell Martin Ltd* [2012] Bus LR 203, per Stanley Brunton LJ at paras 13, 34, 35 and 36; *Barden* v *Commodities Research Unit International (Holdings) Ltd & Others* [2013] EWHC 1633 (Ch), per Vos J at paras 16 and 47; *Burnside* v *Promontoria (Chestnut) Ltd* [2017] CSOH 157, [2018] BLR 111, per Lord Clark at paras 55-57; Lewison, *The Interpretation of Contracts*, *supra,* para 3.16 (p 156)).

[14] In my opinion it is appropriate to consider first the proper interpretation of the words used in Section 1(d)(v). The exercise of interpretation of the words used in a contract is

different from, and usually ought to precede, any consideration of whether a term falls to be implied into the contract (*Marks and Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd, supra,* per Lord Neuberger at paras 22-31; *Trump International Golf Club Scotland Ltd* 2016 SC (UKSC) 25, per Lord Hodge JSC at para 35; *Impact Funding Solutions Ltd* v *Barrington Support Services Ltd (formerly Lawyers at Work Ltd)* 2017 AC 73, per Lord Hodge at para 31: cf Lord Carnwath JSC (at para 57-74) and Lord Clarke of Stone-cum-Ebony JSC (at paras 75-77) in *Marks and Spencer*, and Lord Mance JSC in *Trump International* (at paras 41-44)).

[15] In *Arnold* v *Britton*, *supra,* Lord Neuberger (with whom Lord Sumption, Lord Hughes and Lord Hodge JJSC agreed) observed:

> "15 When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions...
>
> 16 For present purposes, I think it is important to emphasise seven factors."

Only the first five need be repeated here. Read short, they were, first (para 17), that

> "the reliance placed in some cases on commercial common sense and surrounding circumstances...should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision."

Second (para 18), that the less clear the centrally relevant words are, or the worse their drafting, the more ready the court can properly be to depart from their natural meaning.

Third (para 19), that commercial common sense is not to be invoked retrospectively: it is only

relevant to the extent of how matters would or could have been perceived by reasonable people in the position of the parties as at the date that the contract was made. Fourth (para 20), that a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. Fifth (para 21), that when interpreting a contractual provision only facts or circumstances which existed at the time that the contract was made and which were known or reasonably available to both parties may be taken into account.

[16] In *Wood* v *Capita Insurance Services Ltd* [2017] AC 1173 (a case dealing with the interpretation of an indemnity clause in a sale and purchase agreement) Lord Hodge (with whose judgement all the other Justices agreed) observed:

> "10 The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning...
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> 11 Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky* case [2011] 1 WLR 2900, para 21f. In the *Arnold* case [2015] AC 1619 all of the judgments confirmed the approach in the *Rainy Sky* case: Lord Neuberger of Abbotsbury PSC, paras 13-14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the *Rainy Sky* case, para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the *Arnold* case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

> 12 This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold* case, para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.
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> 13 Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some 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. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions.
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> 14 On the approach to contractual interpretation, the *Rainy Sky* and *Arnold* cases were saying the same thing.
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> 15 The recent history of the common law of contractual interpretation is one of continuity rather than change. One of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation."

[17] The Letter did not form part of a particularly detailed agreement. It was intended to be the precursor of a fuller formal agreement for the sale and purchase of an interest in Newco. It appears to be a matter of admission by the defender that the pursuer had had the

benefit of legal advice in relation to it from Tim Watkins of Hadef & Partners, Dubai (article 2 of condescendence and answer 2). There is no equivalent averment or admission indicating whether the defender had legal assistance when the contract was being concluded. In terms of the Letter, Deposits paid by the pursuer to the defender were to be repaid in the event of the transaction not proceeding. Clause 1(d) made provision as to what was to happen if the pursuer had to incur expenditure in order to obtain the return of the Deposits.

[18] On an ordinary and natural reading of Section 1(d) I do not think that its express terms are capable of bearing the construction which the defender suggests. Nor in my opinion is there anything in the remainder of the Letter, or in any relevant surrounding circumstance which was known or ought reasonably to have been known by the parties at the time of contracting, which suggests that the defender's interpretation of the express terms is an available one.

[19] It follows that the defender can only succeed if a term falls to be implied in Section 1(d). I turn then to consider the criteria discussed in *Marks and Spencer* v *BP Paribas Securities Services Trust Co (Jersey) Ltd*, *supra*. Lord Neuberger (with whom Lord Sumption and Lord Hodge JJSC agreed) opined:

> "18 In the Privy Council case *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 , 283, Lord Simon of Glaisdale (speaking for the majority, which included Viscount Dilhorne and Lord Keith of Kinkel) said that:
>
> > 'for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.'
>
> 19 In *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 481, Bingham MR set out Lord Simon's formulation, and described it as a summary which 'distil[led] the essence of much learning on implied terms' but whose 'simplicity could be almost misleading.' Bingham MR then explained, at pp 481–482, that it was 'difficult to infer with confidence what the parties must have intended

when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue', because 'it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision', or indeed the parties might suspect that 'they are unlikely to agree on what is to happen in a certain … eventuality' and 'may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur.' Bingham MR went on to say, at p 482:

> 'The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. [He then quoted the observations of Scrutton LJ in the Reigate case, and continued] it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred …'

20 Bingham MR's approach in the Philips case was consistent with his reasoning, as Bingham LJ in the earlier case *Atkins International HA v Islamic Republic of Iran Shipping Lines (The APJ Priti)* [1987] 2 Lloyd's Rep 37, 42, where he rejected the argument that a warranty, to the effect that the port declared was prospectively safe, could be implied into a voyage charterparty. His reasons for rejecting the implication were 'because the omission of an express warranty may well have been deliberate, because such an implied term is not necessary for the business efficacy of the charter and because such an implied term would at best lie uneasily beside the express terms of the charter.'

21 In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in the *BP Refinery case* 180 CLR 266, 283 as extended by Bingham MR in the *Philips case* [1995] EMLR 472 and exemplified in *The APJ Priti* [1987] 2 Lloyd's Rep 37. First, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was 'not critically dependent on proof of an actual intention of the parties' when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, para 27, although Lord Simon's

> requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is 'vital to formulate the question to be posed by [him] with the utmost care', to quote from *Lewison, The Interpretation of Contracts* 5th ed (2011), p 300, para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of 'absolute necessity', not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

[20] In the present case the terms which the defender says fall to be implied are not said to be a legal incident of a particular kind of contractual relationship. Rather, the implied terms are said to be based on the intention imputed to the parties from their actual circumstances.

[21] In my opinion the real issue here is whether a term should be implied that the costs and expenses which Section 1(d) indemnifies are those which the pursuer may *reasonably* incur in relation to the recovery of the Deposits. If such a term were to be implied there would in my view be no arguable basis for also implying a further term that the costs and expenses indemnified are only reasonable costs and expenses. Such a further term would not be necessary to give the contract business efficacy, nor would it be so obvious as to go without saying. However, if costs and expenses are unreasonable in extent or amount it may be harder to demonstrate that they have been reasonably incurred: but it may not necessarily follow from the mere fact that costs or expenses are not reasonable in extent or amount that they were not reasonably incurred. Whether costs and expenses were reasonably incurred is likely to be a matter that requires to be assessed broadly, not using too fine a scale.

[22] On the pursuer's construction of Section 1(d) he would be entitled to be indemnified for costs or expenses even if they were unreasonably incurred. I do not accept that a

reasonable reader of the contract at the time it was made would have understood it to have that effect. On the contrary, in my opinion such a reader would have considered the term that the indemnity was of costs and expenses which the pursuer might reasonably incur to have been so obvious as to go without saying.

[23] Moreover, in my view the implication of that term is necessary in order to give the contract business efficacy. Implication of a term does not succeed only where without it the contract would be completely inoperable. As Lord Neuberger reminds us at para 21 of *Marks and Spencer* v *BP Paribas Securities Services Trust Co (Jersey) Ltd, supra*, "the test is not one of 'absolute necessity', not least because the necessity is judged by reference to business efficacy." A contract lacking business efficacy must, if possible, be supplemented to cure the defect. The exercise involves implication from the presumed intention of the parties. The object is to give the transaction the efficacy which the parties are taken to have intended. I am satisfied that without implication of the term that indemnity was of costs and expenses which the pursuer might reasonably incur the contract would lack commercial and practical coherence. In my view it would fail to give effect to the presumed intention of the parties.

[24] While it may suffice that one or other of the obviousness or business efficacy requirements is satisfied, I think that each of them is met in the present case. That both are fulfilled is unsurprising. As Lord Neuberger observed in *Marks and Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd, supra,* at para 21, while business necessity and obviousness can be alternatives, in practice it would be a rare case where only one of them was satisfied.

[25] In my opinion the remaining requirements discussed by Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd* v *Shire of Hastings* are also satisfied. The term is reasonable and

equitable. It is capable of clear expression. It does not contradict any express term of the contract.

Disposal

[26] I shall put the case out by order to discuss (i) an appropriate interlocutor to give effect to my decision; (ii) further procedure.