OUTER HOUSE, COURT OF SESSION

[2024] CSOH 41

P750/23

OPINION OF LORD SANDISON

In the cause

(FIRST) ALASDAIR BEATON and (SECOND) CHEMCEM SCOTLAND LIMITED

Petitioners

against

LINDA BEATON

Respondent

Petitioners: Bowen KC; Lindsays LLP
Respondent: D.M. Thomson KC; Gilson Gray LLP

5 April 2024

Introduction

[1] By these proceedings, the petitioners, Alasdair Beaton and Chemcem Scotland Limited, ask the court to suspend charges in the amount of £1,100,000 served on each of them by the respondent Linda Beaton on 25 August 2023, and to interdict her from doing diligence on them. Interim orders to that effect were pronounced on 4 September 2023 and the case came before the court for final determination by way of an evidential hearing of one day's duration on 20 March 2024.

Background

[2] The parties to these proceedings entered into a Minute of Agreement dated 18 July 2022 and registered in the Books of Council and Session for preservation and execution on 4 August 2023, in the context of divorce proceedings between Mr and Mrs Beaton. So far as material to the present dispute, the terms of the Minute of Agreement are as follows:

> "Whereas Mr and Mrs Beaton are the shareholders of the Company and husband and wife and whereas they are in the process of being divorced and require to realise Mrs Beaton's shareholding in the Company therefore the parties have agreed as follows:
>
> (1) The Company agrees to buy back the shares held by Mrs Beaton in the sum of £1,653,500 within a period of 12 months.
>
> (2) The Payment shall be comprised of:
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> a. £500,000 payable within 14 days of today's date;
> b. Payment of the sum of £1,153,500 (the 'Residual Payment').
>
> (3) In exchange for the payment in paragraph 2(a) above Mrs Beaton will make immediate repayment of Mrs Beaton's Director's Loan Account, which liability is agreed to be £250,000 as at today's date. Mrs Beaton agrees that no further withdrawals will be made by her from the date of this agreement.
>
> (4) In order to pay the Residual Payment, the Company shall use its best endeavours to sell, within 6 months of today's date, the Blue Ridge Equestrian Centre. For the avoidance of doubt 'best endeavours' means, inter alia, that the Blue Ridge Equestrian Centre will be on the market within 6 weeks with an agreed selling agent; all correspondence relating to the sale by the agreed selling agent, including, without prejudice to that generality, any offers, shall be copied to both parties. On the proceeds being paid to the Company, the Company will pay Mrs Beaton within 7 days the sum received to the extent that these sums are required to pay any outstanding balance of the Residual Payment.
>
> (5) In turn, Mrs Beaton shall use her best endeavours to sell, within 6 months of today's date, the properties at 32a and 32b, High Street Linlithgow (the 'Linlithgow Properties'), in respect of which she accepts a duty to account to the Company, and which sums realised shall contribute to and be set-off against the Residual Payment. Mrs Beaton agrees that Mr Beaton and the Company shall have access to the Linlithgow Properties with immediate effect to carry out such decorative refresh before sale, as Mr Beaton considers necessary in his opinion to achieve best value for the Linlithgow Properties. Mrs Beaton also agrees, in mirroring of the obligations in clause (4) to agree the estate agent and to have the Company copied in on all

correspondence relating to the sale. Mrs Beaton will execute and exhibit (i) an assignation of the free proceeds of the sale of the Linlithgow Properties in favour of the Company; and (ii) an irrevocable mandate by her to the selling agents of the Linlithgow Properties directing that the free proceeds of sale, after costs, shall be paid to the Company. On the proceeds being paid to the Company, the Company will pay Mrs Beaton within 7 days the sum received to the extent that these sums are required to pay any outstanding balance of the Residual Payment.

…

(13) Mrs Beaton shall, within 14 days of today's date, resign as a director of the Company and as an employee and shall make no claims in respect of either matter against the Company. The Company waives all and any claims that it might have against Mrs Beaton from her time as an employee or director. On her resignation as a director of the Company, Mrs Beaton will make over to Mr Beaton any and all company property in her possession, including, but not limited to, computers, documents, plant, mail and the online security access information to the Company's bank account as may be reasonably required by Mr Beaton.

(14) In the event that the Company does not make payment in terms of this agreement for any reason whatsoever, Mr Beaton undertakes to indemnify Mrs Beaton for any shortfall in payment arising.

(15) All parties by their execution of this agreement undertake to fully cooperate with its implementation and to sign all and any documents required to bring it into effect whether as an individual, director or shareholder. All parties undertake to act in good faith in respect of the implementation of this agreement. All parties confirm their understanding that this agreement is lawful for the Company to enter into in terms of the Companies Act 2006 and to the extent that it is not, hereby agree to cooperate to implement the agreement in a manner which so lawful for the Company.

(16) Mr Beaton and Mrs Beaton confirm that they have had independent advice as to their rights and obligations in respect of this agreement and agree that this is a fair and reasonable settlement of the matters between them; and both parties by their execution of this agreement agree that this agreement shall be registered in the Books of Council and Session for preservation and execution …"

[3] Mrs Beaton was paid the £500,000 due to her within 14 days of the date of the Minute of Agreement and repaid the sum deemed to be due by her to the company by way of her director's loan account in terms of clause 3 of the Minute. She resigned as a director of the company on 8 August 2022.

[4] The Blue Ridge Equestrian Centre was put on the market in circumstances afterwards to be examined; it remains unsold. The Linlithgow properties referred to in the Minute were also marketed, but on 23 August 2023 Mrs Beaton served charges in each of the company and Mr Beaton. Each charge was in the amount of £1,100,000 and proceeded on the basis that that sum was due in terms of clause 2(b) of the Minute of Agreement. The Linlithgow properties were subsequently sold and Mrs Beaton received the free proceeds from that sale in January 2024, reducing the sum owed to her in terms of that clause of the Minute of Agreement to £878,958.52.

The proof

[5] Before evidence was heard at the diet of proof, counsel for the respondent produced a Note of Objections to certain passages in the affidavits produced by the witnesses Alasdair Beaton and Erin Black, largely but not exclusively based on a claimed lack of Record, and asked for those objections to be determined at that stage. I declined to do so. Counsel for the petitioners made a similar oral objection to a passage in the affidavit of Linda Beaton, which I likewise declined to entertain at that stage. In the course of the proof, counsel for the respondent made an objection to certain oral evidence which essentially replicated one aspect of the Note of Objections, and I allowed the evidence to be heard under reservation of the objection. I now repel all of the objections, which proceeded on an unrealistically narrow view of what the pleadings covered and the legal issues which they properly raised. For the avoidance of doubt, the evidence so admitted had no effect whatsoever on my decision as to how the case fell to be disposed of.

The evidence

Petitioners' case

[6] **Christopher Thomson**, an Associate Director in the Edinburgh Rural Agency of Savills, had declined to provide an affidavit or statement to any party, despite the court having required the production of such documents from any witnesses whose evidence it was proposed to adduce by 5 March 2024. Instead, his employers Savills (UK) Limited emailed an unsigned letter dated 14 March 2024 to the principal agents for the parties. The letter was in the following terms:

> "Dear Sirs,
>
> We write further to previous exchanges between your respective firms and our advisors, Kennedys (Scotland) LLP in respect of Blue Ridge Equestrian Centre (the 'Property').
>
> On 6 March 2024, Mr Christopher Thomson ('CT') of Savills (UK) Ltd ('Savills') had a citation served upon him on behalf of the Petitioners, Mr Alasdair Beaton ('AB') and Chemcem Scotland Ltd (the 'Company') in their pursuit of a case against Mrs Linda Beaton which is to be heard at the Court of Session between 20-22 March 2024.
>
> Savills understanding is that CT is to give witness evidence in respect of the marketing of the Property, which has yet to complete. To that end and in an effort to assist the Court, Savills have consulted their file and have set out below the key dates (as far as they are able) in respect of their involvement in the marketing of the Property:
>
> **Initial instruction and viewing**
>
> In or around the first week of August 2022, AB first made contact with Savills and was referred to CT and Charles Dudgeon (Savills Director).
>
> On 11 August 2022, CT and a colleague attended the Property and met with AB who informed them of his wishes to sell the Property. AB gave Savills some background information in respect of the Property and explained that the Company had operated a Riding School and Livery Yard there since around 2015 offering livery services, riding lessons and stabling and also hosted equestrian competitions and riding clubs. The equestrian centre occupies land extending to around 43 acres including fields, paddocks and various buildings. The Property contains two large indoor arenas, 25 stables, a café, office and staff accommodation and a detached bungalow. CT was also introduced to Erin Black ('EB'), AB's assistant. EB showed CT and his colleague

around the outside areas of the Property. CT explained that he would prepare a sale proposal.

On 12 August 2022, CT made a courtesy call to AB to let him know that the marketing proposal would be sent out shortly.

Marketing proposal

On 22 August 2022, the marketing proposal and Savills' Terms of Business ('TOBs') were sent to AB.

On 26 August 2022, as the marketing proposal and TOBs had not been returned, CT contacted EB to chase up progress. A further copy of the marketing proposal was requested and sent.

On 27 August 2022, EB contacted CT by text message to confirm approval of Savills TOBs. CT responded advising that Savills would need the marketing proposal returned in order to proceed.

Instructions and AML compliance

On 28 September 2022, CT was asked by EB to resend the marketing proposal as AB had misplaced it.

On 29 September 2022, Savills received formal instructions to market the Property and began their onboarding process for new clients.

On the same day, CT sent anti-money laundering ('AML') documentation to Savills inhouse compliance team for review and sign off. All estate agents have to follow strict HMRC guidelines for onboarding a client and Savills compliance team have to approve any sale, for example, where a company, trust or power of attorney is involved.

On 12 October 2022, the marketing proposal was signed and returned.

On 17 October 2022, CT emailed Morgan Legal in order to raise a number of property queries as part of Savills due diligence process and provided recommendations for a property solicitor. As part of their due diligence, Savills required a property solicitor to confirm that the relevant boundaries were correct and to carry out the conveyancing once a sale had been agreed.

On 2 November 2022, CT chased Morgan Legal for a response to his email of 17 October 2022 and explained that Savills were keen to progress matters. Savills were unable to advance their due diligence without the information requested. On the same day, Morgan Legal responded and apologised for the delay which they explained had been due to certain land parcels remaining to be identified.

On 15 November 2022, EB advised that she would chase Morgan Legal on the appointment of a property solicitor.

By mid-November 2022, Savills compliance team completed their AML checks.

Pre-sale works and sales particulars

In or around the end of November and beginning of December 2022, Savills began work on the particulars of sale.

On 21 December 2022, CT received a text message from EB on behalf of AB to ask if Savills could advertise the Property 'as is' and change the sale plans at a later date. CT advised that particulars of sale had been started and Savills would need to return to the Property in the New Year in order to complete further information such as a Property Registration Form and to provide recommendations about the presentation of the Property.

On 5 January 2023, CT asked EB if he could return to the Property.

On 12 January 2023, Savills revisited the Property. Savills requested some additional information from AB and asked for some minor works to be completed so that the centre and facilities presented at their very best.

On 18 January 2023, CT emailed EB with a list of minor works to be undertaken. These were: tidy flat, tidy sponsors lounge and remove furniture, remove Christmas decorations from arena, remove grass from arena roof, tidy the area to the side / back of the arena, clear the grass from the stables and muck out the unused loose boxes and to fix the gutters. CT also requested the licence to run as an equestrian centre, the planning permission documents for the house, the architects details and the drawings / plans, British Show Jumping Association ('BSJA') approvals, accountant details (Sutherland and Black) and employee details.

On 26 January 2023, CT contacted the Company's architect, Scott Johnston, for clarity on planning permission and any restrictions such as restrictions of occupancy because the permission and restriction information was not on the planning portal. CT also asked Scott Johnston to plot the area of land which was to be excluded from the sale so it could be marked up on Savills' sale plan and to highlight any other relevant planning points.

On the same day, CT was contacted by AB via EB to ask when the property would be going on the market. CT responded to ask EB when he would receive a reply to his email of 18 January 2023 as this was needed in order to finalise the sales details. CT also advised that he had asked the floor planners and Energy Performance Certificate ('EPC') surveyors to contact AB and that he was speaking to prospective purchasers.

On 31 January 2023, the Property was measured by Square Foot Media.

On 1 February 2023, CT chased Scott Johnson for a response to the various queries raised on 26 January 2023.

On the same day, and following a request from Morgan Legal, CT provided Morgan Legal with a timeline of Savills marketing of the Property to date.

On 5 February 2023, CT received an email from Scott Johnston who advised that they would request the information which had been sought by Savills in respect of planning permission and restrictions from the council.

On 8 February 2023, Savills commissioned EPCs. EPCs are a legal requirement for a property sale and were required prior to the Property being launched.

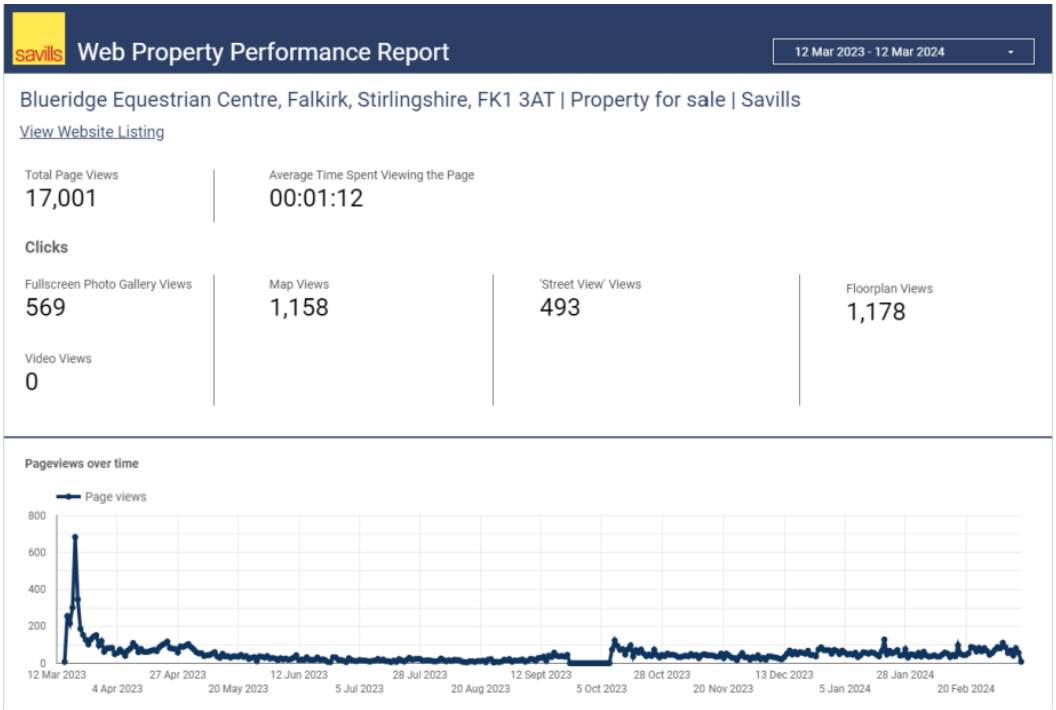
On 21 February 2023, CT chased Scott Johnson for an update on the queries raised on 26 January 2023. CT informed Scott Johnson that his clients were keen to get the Property on the market and the information requested was required for the sales particulars.

On 23 and 24 February 2023, the information requested from Scott Johnston was received.

On 8 March 2023, the sale plan was approved by AB's conveyancing solicitor, Tom Gray of Harper Macleod.

On 15 March 2023, the sales brochure for the Property was completed.

On 16 March 2023, the Property went live on the Savills website. The following shows the amount of interest over the past 12 months:



Viewing and offers

Between March 2023 and April 2023, 15 viewers were shown around the Property. These comprised equestrian buyers and commercial buyers (haulage, whisky warehousing, factory operators).

Between April 2023 and November 2023, two formal offers were received for the Property. Both offers were for the yard and the buildings, excluding the land on the north side of the public road.

The first offer was received on 14 April 2023, for an alternative use, of £1,175,000. Heads of Terms were agreed but the basis of the offer was amended to be conditional on change of use. The offer did not complete.

On 12 July 2023, Morgan Legal spoke to Savills about a potential change of use.

On 15 July 2023, CT wrote to AB outlining a secondary strategy following the offer failing to complete. In the meantime CT had been collating names/contact details of parties who had enquired about the Property.

On 9 October 2023, AB gave formal instructions to remarket the Property.

On 23 November 2023, a second formal offer of £1,000,000 was received from another alternative user and the Property was listed 'under offer' but Savills continued to take enquiries from any interested parties.

The sales process in respect of the second offer encountered various delays relating to the prospective purchaser's lender and a restructure of their legal team. The offer ultimately did not complete.

On 22 February 2024, the Property was relisted on the market as no longer being 'under offer'. Since relaunch Savills have gone back to the parties who expressed an interest in the Property to generate interest and encourage viewings.

As mentioned, if either party should so wish, this letter can be lodged with the Court.

Yours faithfully,

Savills (UK) Limited"

[7] Mr Thomson stated that the dates in the letter had been provided by him. The Savills file pertaining to the instruction was not produced. Mr Beaton had instructed Savills

in the first week of August 2022. The marketing proposal sent out on 22 August had contained a description of the property and set out the costs of selling. Terms of Business had been supplied at the same time. The on-boarding process for the company, the seller of the property, involved the provision of its Certificate of Incorporation and various compliance checks being carried out. Standard processes had been followed for the remainder of the year. From April to October 2023, the property had been marketed as "under offer" given that an acceptable offer for the property had been made. That offeror intended to use the property for storage and workshops associated with its crane business. It had taken advice from traffic consultants about its proposed use and had eventually withdrawn its offer on grounds related to that advice. In July 2023, Savills had written to Mr Beaton outlining a secondary selling strategy, and had in the meantime compiled the names of persons who had enquired about the property. Mr Thomson had spoken to Mr Beaton and discussed the market. The property continued to be advertised on the Savills website, and there had been viewings, including a second viewing. There had been nothing unusual about the marketing of the property at all.

[8] In cross-examination, Mr Thomson stated that he was enthusiastic about receiving the instruction to market the property. Other agents might have had too much work on hand to take on the instruction. Offers had been received within weeks of the property being marketed and then re-marketed. There was nothing unusual about the brief which Savills had been given. He had not been made aware of the company's obligation to market the property within 6 weeks of entering into the Minute of Agreement, although he had been told to get on with it quickly. Instructions had been taken from Mr Beaton or Erin Black, not from Linda Beaton. She had contacted Savills once, after the property was first put on the market. Two portions of land forming part of the property had been kept

back from the market. A strip of land had been kept back for development, and a cabin in the yard was also not part of the sales process. The company's architect had been asked to plot the excluded areas in January 2023. The property had been marked as under offer from around 14 April 2023 when agreement was reached in relation to the Heads of Terms on which an offer was to be made. Mr Thomson did not recall when that offer had fallen away. The property had ceased to be marketed as under offer on 9 October 2023. It had returned to "under offer" status on 23 November 2023, after an indication of a willingness to make an offer of £1,000,000 had been received from another party on 16 November. The same party had made an opening offer of £850,000 on 31 October 2023. The property had ceased to be marketed as under offer on 22 February 2024. In summary, it had been fully marketed between 16 March and 14 April 2023, 9 October to 23 November 2023, and from 22 February 2024 to date, otherwise it had been shown as under offer. Had he been instructed to get the property on the market within 6 weeks, that could have been done.

[9] In re-examination, Mr Thomson stated that the offer received from the crane operating company had been a particularly good one, and he had wanted to get that deal to happen. He would have decided, on client instructions, when to return the property to open marketing after that offer fell away.

[10] **Alasdair Beaton** (67) provided an affidavit in which he stated that he was the sole director of Chemcem. The respondent, his estranged wife Linda Beaton, had been a director of Chemcem until she resigned in August 2022. The issued share capital of the company was 4,000 ordinary £1.00 shares of which 1,400 were held by Mrs Beaton and 2,600 were held by him. The company provided specialist civil engineering services to local authorities and other contractors engaged in large scale civil engineering projects. His role was the sourcing of work for the company and carrying it out. Mrs Beaton had undertaken administrative,

financial and other management activities for the company. She and he separated in May 2016, but she continued with her administrative functions at the company until around June 2022. In addition to its core civil engineering business, the company also operated an equestrian centre, Blue Ridge Equestrian Centre at Wester Shieldhill, Falkirk, which it acquired in 2015. The separation had been acrimonious and it took until July 2022 for an agreement to be reached on the value of Mrs Beaton's shares in the company and the mechanism by which they were to be acquired from her. She had raised a commercial action in the sheriff court in which she was seeking amongst other things an order that Mr Beaton should buy her shares. The court had appointed an accountant to value the shares and based on that valuation, it was agreed that Mrs Beaton's shares were valued at £1,653,500. Mr Beaton did not have the funds to acquire them and thus it was necessary for the company itself to fund their purchase. The only way that the company could raise the funds to pay the bulk of the £1,653,500 was by selling the equestrian centre because much of its other value was tied up in plant and equipment that it needed to carry out its normal business. The company had made a lot of improvements to the centre and its facilities over the years and by 2022 Mr Beaton expected it to have a value of around £1,000,000.

[11] A Minute of Agreement was concluded on 18 July 2022 and provided that the company would buy Mrs Beaton's shares for £1,653,500 within a period of 12 months. The payment was to be composed of £500,000 which was paid to her in August 2022, with the balance of £1,153,500 to follow. Mr Beaton was given 6 weeks to get Blue Ridge on the market and sell it in 6 months to raise the balance. He was aware from the meeting at which the Minute of Agreement was signed that the company had to use its best endeavours to sell Blue Ridge within 6 months. He started making enquiries with estate agents within a couple of days of signing the Minute of Agreement, but detected little enthusiasm from the agents

he contacted to begin with. Knight Frank had been one of them, but he could not remember the names of the others. He had gone through their websites and looked to see what type of property they were selling and how long sales were taking. On the whole his calls were not returned and he spent time chasing them up. Eventually an enquiry he had made to Savills in Edinburgh was answered by their Christopher Thomson. Mr Beaton gave him the details over the phone of what he was looking to sell and also told him that he was under some time pressure to get it sold. Mr Thomson arranged to come and visit him at Blue Ridge and that happened on 11 August 2022. He had an assistant with him and they had a look around. He was enthusiastic that Savills would be able to get Blue Ridge sold and Mr Beaton took comfort from that, not having had any success getting any other estate agents interested at that point.

[12] The company employed Mr Beaton's present partner Erin Black as an administrative assistant. She took over that job around the summer of 2022 when Mrs Beaton stopped carrying it out. Mr Beaton introduced Mr Thomson to Ms Black and said that she would be an alternative point of contact if he could not get hold of Mr Beaton during the working day. He also got Ms Black to show Mr Thomson around the arenas, paddocks and stables during the first visit. He explained to Mr Thomson that the company had been running Blue Ridge since 2015 and that he now needed it sold quickly. Mr Thomson asked why that was the case and Mr Beaton told him it was because the company was buying out Mrs Beaton's shares under time pressure. On the day that Mr Thomson visited Blue Ridge there was a lot of the company's machinery and materials lying in the yard. Blue Ridge was being used at that time to store plant and equipment for the main business. Mr Thomson mentioned that he would like to see the yard tidied up with less equipment lying around as it would improve the look of the site for viewers and also initially for brochure photos to be taken.

When he left, he said he would email papers with fee proposals and so on. Mr Beaton had decided that Savills would be getting the job anyway because they were the only estate agents to follow up on his enquiries. About a week after meeting with Mr Thomson, Mr Beaton received by email a document headed "Savills Report", dated August 2022 and setting out their marketing recommendations and their fee structure. He was asked to sign and send it back if he wanted to proceed to instruct Savills. He thought that he had done so by emailing it back shortly after receiving it in August, but learned a week or so later that Savills had not received it. He got Ms Black to obtain another copy for him. He had deleted the original because he was having issues with the storage capacity on his phone at the time. He signed the report again but once again failed to transfer it electronically to Savills. In the end he signed it and delivered it to Savills on 29 September 2022.

[13] After meeting with Mr Thomson, Mr Beaton got busy getting the site tidied up so that the brochure photographs could be taken. That was confirmed to Mr Thomson. A lot of the day-to-day contact with Mr Thomson took place by WhatsApp messaging between him and Ms Black. At that time Mr Beaton had ongoing issues with phone storage and could not open any documents that were emailed to him unless he was on Wi-Fi. This was inconvenient because he was generally away on works sites for 10 to 12 hours a day and very rarely able to get Wi-Fi there. On the whole he was able to rely on Ms Black to deal with Savills and if his express agreement or instruction was needed on any point he would deal with it in the evening when he was able to get onto his home Wi-Fi. There was quite a delay with the marketing effort after he sent Savills the signed report on 22 September. The matter was in their hands and he called Mr Thomson regularly for updates. There was talk of getting photographers out to take photographs in October but that did not come to pass. In November 2022 the company formally appointed Tom Gray at Harper Macleod Solicitors,

Glasgow, to undertake the conveyancing. Mr Gray had been recommended by Mr Thomson. Both Ms Black and Mr Beaton made regular calls to Mr Thomson for updates. He was informed by Mr Thomson a number of times that his firm's client identification and on-boarding procedures were carried out in London and were very slow. Until that was completed they could not move forward. There was nothing that was asked for that Mr Beaton was not able to provide more or less immediately. He did not believe that he or the company contributed to the delay in getting the property on the market, because he supplied everything he was asked for when it was requested to try and move matters on. There was no progress in December 2023 despite his asking Savills to press on. He was regularly complaining about the lack of progress and got Ms Black to message Mr Thomson via WhatsApp to find out what was going on. He learned before Christmas 2022 that Mr Thomson had told her that Savills would move ahead with the marketing in the new year of 2023. He was not pleased about that but found that in practice he had no option but to go along with it and rely upon Savills to get the job done because he did not want to take the chance of losing even more time by trying to change agents. There was a flurry of activity in January when Savills came out to obtain more sales particulars. They also sent out photographers and floor planners and took measurements of Blue Ridge House. He learned from Ms Black that Mr Thomson was then speaking to the company's architect about its planning permission and had also asked Ms Black about any potential restrictions on vehicle access. In February 2023 Savills commissioned EPC certificates and asked for copies of local authority permits for the equestrian centre and from the British Show Jumping Association. Mr Beaton did not know why this was not done when they were given the go-ahead in September 2022. In March 2023 he was asked to provide Savills with an inventory of any machinery or equipment that was included in the sale and he answered

this immediately. By that point he was extremely distressed at how long it was taking to get the property onto a website, but appreciated that it was a fairly complex property and that Savills wanted it to be shown in its best light. He believed that the listing went live around 8 March 2023 and it took no time before Savills started referring viewers. There were quite a number of viewers from all over the country and also curious locals and people Mr Beaton knew from equestrian circles who came to look at the property, but the only really serious interest came from Forsyths of Denny. They used heavy cranes and wanted the site for commercial purposes. They were not interested in any equestrian use. Forsyths submitted a draft offer for £1,175,000 on 5 May 2023. Savills told Mr Beaton that that price was ahead of expectations, although he felt it was around what the property was worth. The offer was to be a cash purchase and the purchaser wanted to complete by around mid-July 2023. The offer was reported to Mrs Beaton's solicitor. Mr Beaton wanted to do all that could be done to make sure that the sale went through smoothly. In the course of multiple viewings, Forsyths indicated that there were structures on the site that they wanted removed. In an effort to meet their wishes Mr Beaton widened the secondary entrance, pulled down an outdoor arena and stripped some of the stables, which he now regretted doing. To his extreme disappointment during the conveyancing process, he learned that the purchaser's solicitor had raised an issue about the access shown on the title deeds for Blue Ridge. Harper Macleod ascertained that this had not been picked up by the company's solicitors when the property was acquired in 2015. Around the beginning of June 2023 Mr Beaton was told that the purchase would be conditional not only on Forsyths obtaining planning permission for their proposed use of the site but also on being satisfied about the access question. On about 20 June 2023 he was informed that Forsyths had decided not to proceed with the purchase of Blue Ridge. They were intending to use the site for the storage of

cranes and their planning consultants had apparently advised that the accesses at Blue Ridge would need to be widened so that even if planning were granted they could be faced with a potential ransom strip situation on the widened accesses. That was not a risk they were prepared to take. Mrs Beaton's solicitor was advised of this development and asked if she would agree to allow the company additional time to find an alternative purchaser. She was not cooperative. Mr Beaton nonetheless asked Savills to get the property back on the market. Since parts of the centre had been stripped to meet Forsyth's wishes, he suggested to Savills that it might be a good idea to advertise the commercial use potential of the site rather than just its use as an equestrian centre. He was also advised that he had to wait for Harper Macleod to address the title issue before the property could be returned to market. In due course, another potential purchaser who also wanted the property for commercial, as opposed to equestrian, purposes appeared in September 2023. It was intending to use the site for storage of props and vehicles for the film industry. It had multiple viewings and entered into detailed discussions about fencing areas of the ground. It seemed committed but did not submit an offer. Mr Beaton suspected it was having funding issues. He asked Mr Thomson to market the site actively regardless of that interest because he had no confidence that it was going to come to anything. He instructed Mr Thomson and Harper Macleod to press the prospective purchaser for an offer because more time was being lost. The prospective purchaser finally admitted around 15 February 2024 that it had not secured funding and was stepping back. The property was still on the market. Another party had recently expressed an interest in acquiring the site for an equestrian centre, with completion around 6 April 2024. He was waiting to hear if a formal offer was going to be forthcoming. Mrs Beaton's agent had been supplied with the relevant information.

[14] Mr Beaton rejected Mrs Beaton's accusation that he and the company had not used best endeavours to achieve the sale of Blue Ridge. Selling an equestrian centre in the midst of a cost-of-living crisis had proven very challenging but he had done all that he could to make it happen. He had engaged a reputable firm of estate agents within weeks of signing the Minute of Agreement. Every request for a viewing had been answered and every viewer accommodated. He had no practical choice but to go along with the efforts of Savills in the marketing of Blue Ridge to try and get the job done. Without the sale of Blue Ridge, the company could not fund the purchase of Mrs Beaton's shares and this fact had been recognised by Mr and Mrs Beaton from the outset.

[15] The Minute of Agreement also provided that Mrs Beaton would use her best endeavours to sell two flats at 32 High Street, Linlithgow. These had been purchased by the company but were held in Mrs Beaton's name. She and he had been in dispute over the properties throughout their separation because they had been bought for the company to rent out, but she had changed the locks and installed intruder alarms to prevent Mr Beaton from accessing them. She also insured them as a landlord but would not disclose if she was receiving rental income. She had been invited to transfer the titles to the company but maintained that the title reflected the true position of the ownership of the flats. It was only when the Minute of Agreement was being finalised, and for the purpose of considering how the further payment would be funded, that she finally conceded that the flats were assets of the company. Even after making that concession she had denied Mr Beaton access to the flats. In any event she agreed she would sell them and pass the proceeds of sale to the company to contribute towards the further payment. Mr Beaton learned around 11 April 2023 that Mrs Beaton had that day received an offer of £120,000 for the first floor flat at 32 High Street Linlithgow. The home report value for the flat had been £145,000 so he

thought the price offered was poor and instructed his solicitor to let Mrs Beaton's solicitor know this. In addition the flats had been acquired as a pair and he anticipated that selling the two flats together as a package would make them more attractive to a buy-to-let landlord than selling them separately. Since the flats together were not attracting much interest, he instructed his solicitor at the end of April 2023 to suggest to Mrs Beaton's solicitor that they should be taken off the market and conveyed to the company to rent them out until the market improved. That suggestion was met by a demand that the company should pay Mrs Beaton £255,000 for the two flats. At that point Mr Beaton was confident of the interest that Forsyths were showing in Blue Ridge and fully expected the sale to proceed. He believed that in view of the price Forsyths were going to pay, the company should not need to sell the Linlithgow flats to fund the further payment because it would be paid fully from the price they were going to offer. That situation changed with the loss of interest on the part of Forsyths in June 2023. In July 2023 he was approached by an acquaintance, Mrs Aitken, whom he knew had a number of buy-to-let flats. She was interested in having a look at the Linlithgow properties. He told her the home report values were £145,000 each and she said that subject to looking at them she would offer those values for the two flats together. On 5 July 2023 he instructed his solicitors to email Mrs Beaton's solicitors to ask if he could be given a set of keys to show Mrs Aitken around the flats. He had already approached Mrs Beaton herself for the keys but she had ignored him. On 7 July 2023, on his instructions, a further reminder of his request for the keys was sent by his solicitors to Mrs Beaton's solicitors. The email also mentioned the fact that when Mrs Beaton's solicitor had supplied viewing feedback from her estate agent, an observation had been made about cracked paintwork in the hallway. He had therefore asked his solicitors to request prior access for him to tidy that up before he took Mrs Aitken to the

property. Mrs Beaton's solicitor did not answer his request directly. He was increasingly embarrassed that he was unable to make arrangements with Mrs Aitken to show her the flats. She was still interested but obviously frustrated that he was unable to show her around. On 10 July 2023 he instructed his solicitors to send another email to Mrs Beaton's solicitor repeating his request for a set of the keys, amongst a number of other issues that he wanted to be addressed. Ultimately Mrs Aitken contacted Mrs Beaton's estate agent herself because she was clearly losing patience with Mr Beaton. Mrs Aitken later told Mr Beaton that she was not pursuing the purchase because Mrs Beaton's estate agent advised her that the flats were not to be made available to anyone. She had eventually persuaded the estate agent to make an appointment to view, but the estate agent did not attend for the viewing. Around that time Mr Beaton was informed that Mrs Beaton herself was asking to acquire the flats for a price of £200,000, which would be deducted from the further payment due. When he heard about this, he instructed R & RS Mearns, Solicitors, Glasgow to submit offers to Mrs Beaton's solicitors amounting to £220,000 for the two flats. The offers were sent on 27 July 2023. He also instructed his usual solicitors to lay out his thinking behind the offers in an email that was sent to Mrs Beaton's solicitor on 4 August 2023. He was subsequently informed that Mrs Beaton was unhappy with the price offered so he instructed R & RS Mearns to withdraw them on 18 August 2023 and submit improved offers for a total of £230,000 on the same day. Within days of him submitting those improved offers Mrs Beaton served charges for payment on the company and himself, each for the sum of £1,100,000. The improved offers of £230,000 were never responded to by Mrs Beaton, so he eventually formally withdrew them in October 2023. In his view, Mrs Beaton had been playing a game with the Linlithgow flats. Her conduct towards Mrs Aitken's interest, and her failure to answer Mr Beaton's formal offers for the flats suggested to him that she had

not used her best endeavours to sell them. Mrs Aitken and her husband eventually made formal offers amounting to £280,000 for the Linlithgow properties which were accepted by Mrs Beaton in December 2023. The net sale proceeds of £274,541.48 were paid over to the company on 20 December 2023 and ought to have been sent on to Mrs Beaton by 27 December 2023. That was delayed over the Christmas break because Mr Beaton thought that he had to receive an instruction from his solicitors to make the payment. In the event the proceeds were paid to Mrs Beaton's solicitors on 5 January 2024. She had meantime raised another court action for payment of the sale proceeds over the Christmas break. The residual sum due to Mrs Beaton had now reduced to £878,958.52. He intended that that sum would be met fully from the proceeds of a future sale of Blue Ridge.

[16] In cross-examination, Mr Beaton stated that he had phoned a few estate agents to try to get Blue Ridge marketed. Some had not returned his calls, and two who had done so had said that there were a lot of equestrian centres on the market and that they were hard to sell. Galbraiths had been one firm which had said that. He had done his best. He could not make people phone him back; he had phoned them again, and time had gone by. He had told Savills that the property had to be sold quickly, and in general terms why, but not specifically about the six-week period for first marketing stipulated in the Minute of Agreement. He was desperate to get the property sold. Mr Thomson had seemed enthusiastic about taking on the job. Mr Beaton had made a mistake about signing and returning the first marketing report so as formally to instruct Savills. He had read it but not signed it, and did not know why. Savills had phoned to chase it a week or so later, and had sent Ms Black a further copy. He had signed that but made a mistake in not returning it to Savills. He did not have a computer and was not good with that kind of technology. He did not know what he had done wrong, but accepted that it was his mistake. He thought he had

finally returned the signed document on 29 September, but if Savills said they did not get it until 12 October, that would probably be right. He accepted that Savills had not even been instructed by 29 August, being 6 weeks after the date of the Minute of Agreement. There had then been a delay in getting the property marketed. If Savills said that that had not happened until 16 March 2023, he would accept that. He had instructed certain areas to be held back from the market, for his own commercial reasons. He did not consider that he was putting the company in breach of contract by doing so, even if Mrs Beaton's solicitors had expressed that view to his own in April 2023. He was simply trying to raise £900,000 to pay Mrs Beaton out. His solicitors had told Mrs Beaton's that it had been a commercial decision to withhold parts of Blue Ridge from sale for the purpose of facilitating the sale of the principal land parcel. He had not made an agreement with Mrs Beaton that Savills should be appointed as marketing agents, or that certain areas should be withheld from sale.

[17] When an offer was received in April 2023, he assumed that it had been reported to Mrs Beaton's solicitors by his own. In May 2023 he and the company had been ordered by the Sheriff at Falkirk to lodge all correspondence relating to the proposed sale. He had just assumed that his lawyer would do what the Minute of Agreement required, and was not hiding the fact that he had had an offer. Once that offer had fallen away, it was up to Savills to put the property back on the market. It ought to have gone straight back on the market in June 2023, and that is what Mr Thomson had told him was happening. If it had been off the market until October, then that was not his doing. It was the responsibility of Savills to market the property. There had never been another acceptable formal offer, only an unacceptable formal offer for £850,000 at the end of October and a later informal offer of £1,000,000. The formal offer had been reported to Mrs Beaton. The verbal one did not

have to be reported. He had told Mr Thomson to keep the property on the market until it was sold.

[18] In re-examination, Mr Beaton stated that he never thought that Blue Ridge would be sold as an equestrian centre. He was going to keep two parts of it that added nothing to the commercial value of the property. He had never had an offer for the property as an equestrian centre; the market was only interested in the large sheds on the site. How he got the £900,000 he needed to pay out Mrs Beaton was his business.

[19] **Erin Black** (26) provided an affidavit in which she swore that she lived in Slamannan with Mr Beaton and had been employed by the company as a rider/groom since January 2022 and then as an administrative assistant from June 2022. She moved into the latter role around the time that Mrs Beaton left the business and resigned as a director. She was brought in to try and get the business communications on an even keel. She had entered into a romantic relationship with Mr Beaton in around May 2022. When she first started to tackle the paperwork she emailed Mrs Beaton to enquire if she was able to assist with the transition, but she never responded. She accompanied Mr Beaton to Edinburgh on the day that he and his lawyers were having a meeting with Mrs Beaton's legal team, 18 July 2022. She waited in the car whilst the meeting lasted into the evening. When Mr Beaton emerged from the meeting he told her that they had reached an agreement that the equestrian centre at Blue Ridge had to be sold so that the company could buy out Mrs Beaton's shares. He said that he had not much time to get it on the market and would have to get an estate agent on the job immediately. She did not recall him showing her the Minute of Agreement at that time. She recalled that Mr Beaton almost instantly started to address the sale. He was concerned Blue Ridge should be sold quickly so that Mrs Beaton would get her money. He told her within days of the meeting that he had phoned a number

of estate agents but no one seemed to be interested in taking on Blue Ridge. She remembered him looking at estate agents' websites to try and work out how quickly they were getting their properties sold. Eventually he had identified that Savills office in Edinburgh should be able to handle the sale. She was present when Christopher Thomson of Savills first visited Blue Ridge on 11 August 2022, accompanied by a colleague whose name she did not recall. They met with Mr Beaton. She was not present at the meeting but was later that day asked to take them around the site to see the fields, arena and equestrian areas and to explain how they were used. They asked her about the maximum capacity of the stables, the surfacing used in the arenas and an energy pylon on the land. When she returned with the Savills people to Mr Beaton, she remembered him telling them that he needed a sale quickly and was hoping to achieve around £1,200,000 for the site. He told them that the company had bought Blue Ridge in 2015 from a liquidation and had since carried out extensive renovations and improvements to the facilities including upgrading surfacing, staff accommodation and building the bungalow, known as Blue Ridge House. On the day of the visit the company had a lot of plant and equipment and materials sitting around the site and Mr Beaton was advised to get the place tidied up because marketing photographs would have to be taken. She also remembered Mr Thomson asking what was behind the urgency to sell and Mr Beaton told him that he needed to sell Blue Ridge to pay out his wife. Mr Thomson had said that he was confident that Savills would find a buyer. The next day, 12 August 2022, Savills called to advise that they hoped that the company would agree to engage them and that they would be in touch shortly with their marketing proposal. By that point Mr Beaton had decided regardless that Savills would be given the job as he needed to get it up for sale. On 18 August 2022 Mr Thomson called to ask for details of the company's solicitors, accountants and architects. Ms Black sent these details to

him on 19 August by WhatsApp. A lot of contact with Savills was conducted between Mr Thomson and herself on WhatsApp. Mr Beaton had the company email account on his phone but rarely accessed it during the working day because he was generally working out on sites. As he was not always able to respond to them, Savills would pass enquiries to Ms Black and she was usually able to answer them. Shortly after 19 August 2022, Savills sent Mr Beaton their marketing proposal or Sales Report. She believed that this was emailed by Savills to Mr Beaton. He had to download and sign it. He told her that he had received it, signed it, and sent it back to Savills. On 26 August she had received a WhatsApp message from Mr Thomson enquiring if the Marketing Report had been signed. She had managed to locate it again and got Mr Beaton to sign it. She messaged Savills on 28 August confirming that he had signed it and would send it to them. Her father in Dundee had then become unwell and she had to leave Blue Ridge urgently to go and look after him. She was away for about 4 weeks. When she got back on about 27 September she discovered that Mr Beaton had not successfully uploaded the Sales Report in August. She had to get a further copy of the Sales Report emailed by Savills, which was received on 28 September, signed by Mr Beaton and successfully submitted to Savills on 29 September 2022. On 27 September she also confirmed to Mr Thomson that Mr Beaton had had the entire site tidied up and that it was very much ready for the marketing photographs to be taken. She also offered to send him a video to show how well the site was looking. Mr Thomson asked her to send photos of the yard, which she did. On 13 October Savills confirmed to her that Mr Beaton's details had been passed to a professional photographer who would be in contact to take the Blue Ridge photos. Neither she nor Mr Beaton ever heard from the photographer and time passed. They were waiting for progress and Mr Beaton was always complaining that Savills still did not have the property on their website. This was upsetting him, as he desperately

wanted it on the market. She messaged Mr Thomson on 21 December to let him know that Mr Beaton was asking if Savills could please just advertise Blue Ridge. Mr Thomson responded that his plan was to crack on in the new year and that he had to come out to get other forms filled in. He arranged to come on 12 January 2023. On 23 January Mr Thomson messaged her to advise that he now needed floor planners to visit to get Energy Performance Certificates done for the house and the manager's flat. That was done during the first week of February. On 26 January 2023, on Mr Beaton's instructions she had messaged Mr Thomson again and asked if Savills could just get the property on the market as soon as possible. He messaged back and indicated that it should be up and running by the following week. On 1 February Mr Thomson messaged to say that he had sent Mr Beaton a first draft plan which he had copied from the titles to look over. On 4 February Mr Thomson was asking for certificates from British Showjumping and on 24 February for the completion certificate for Blue Ridge House. On 8 March 2023 he sent further papers for checking and approval and asked for an inventory of any machinery or equipment that would be available to sell. The listing went live a day or so after this. Ms Black knew that Mr Beaton felt it could have been advertised from around September or October, but Savills were in control. Ms Black received notification of the first planned viewer on 20 March. On the same day Mr Thomson asked for details of the running costs, which she thought he ought to have thought to collect before then. Further notifications of viewers came on 21, 24 and 27 March. Mr Beaton had expected that Savills would be doing the viewings but Mr Thomson had said that they preferred sellers to do it themselves, so Ms Black handled the viewings because Mr Beaton was rarely on site. On 28 March Mr Thomson notified her that crane operators, Forsyths of Denny, wanted to view the following day. That went ahead, as did various other viewings for individuals and businesses with their own views of

what the site might be used for. Not all intended to use it for equestrian purposes. The viewings continued sporadically through March and into April 2023. By 12 April Forsyths and another viewer appeared very interested and Mr Beaton asked her to suggest to Mr Thomson that Savills set a closing date for offers in 2 weeks' time. Mr Thomson said that he would look at the suggestion. Forsyths of Denny submitted a formal offer on about 5 May 2023 for £1,175,000.00. Mr Beaton had been over the moon. Forsyths were looking at completing in mid-July 2023 which would have fallen around the first anniversary of the Minute of Agreement and the sale at that point would have allowed the company to pay Mrs Beaton the money she was to receive in exchange for her shares in the company. Unfortunately, Forsyths found a problem with the access on the title. They were planning to use the property for storage of cranes and equipment for their business and potential issues about the access to the site meant that they decided to walk away from the purchase. This happened around 20 June 2023. Mr Beaton was desperate to get the property back on the market as quickly as possible, however that did not move as quickly as he wanted it. Savills were very much in control of deciding what would go on the website and when, and the title issue was being attended to at the same time. There was a reasonable level of interest when the property was put back on. Ms Black's recollection was that in around September 2023 a new potential buyer emerged who was looking at using the site for storage of film plant, props and vehicles. He was very eager. He visited a number of times and got into detailed discussions with Mr Beaton about fencing the area and removal of some of the equestrian buildings. His lawyers confirmed his interest but the company never got a formal offer despite his enthusiasm for the property, and after months of accommodating his questions and enquiries he eventually decided in mid-February 2024 that he would step back as he was having issues over financing.

[20] Mr Beaton remained very hopeful about another potential (cash) buyer, who wanted to acquire the property for equestrian use. She had mentioned a completion target date of 6 April 2024 and he was currently waiting to learn if she was going to put forward a formal offer. Ms Black was aware that the company had been accused of dragging its heels getting Blue Ridge to market but she knew that Mr Beaton was desperate throughout to get it marketed and sold and was always complaining to her about how slow the process was. She was not sure what more he could have done personally apart from being more careful about transmitting the signed Sales Proposal back in August 2022. He had Savills involved from 12 August 2022 and she would say that they had steered the project.

[21] In cross-examination, Ms Black stated that she had seen Mr Beaton make phone calls to estate agents such as Slater & Hogg and Stewarts, who were specialist farm estate agents. He had told her that he was struggling to get any interest in the instruction. Mr Thomson had been told about the background to the sale and that quick action was needed, but perhaps not specifically about the six-week limit for commencing marketing set out in the Minute of Agreement. Mr Beaton had signed and submitted the formal instruction to Savills on 29 September; she was not sure when they had got it. She had texted Mr Thomson to see if he had got it, and he had not. She had then dealt with it herself, successfully. She was not sure exactly when marketing of the property had gone live. Mr Beaton had been reliant on Mr Thomson in relation to all aspects of the marketing process.

[22] In re-examination, Ms Black stated that it was probably 12 October by the time Savills got the signed formal instruction to proceed with the marketing exercise. She had eventually sent it to them by way of her own email account after they had not received it when Mr Beaton had sent it from his account on 29 September.

Respondent's case

[23] **Graham Basten** (60) gave an affidavit in which he stated that he was an enrolled solicitor of 30 years' standing, and that he had acted for Mrs Beaton for over 6 years in various disputes arising from her separation, including at the time of the signing of the Minute of Agreement. He stated that he had sent to and received from the solicitors acting for Mr Beaton and the company various identified items of correspondence, as well as correspondence with R & RS Mearns, solicitors. The content of the affidavit was agreed to be his unchallenged evidence, although it seemed to me that little of significance could be drawn from it, at least standing a further agreement between the parties that all the copy productions to which he adverted should in any event be treated as principals.

[24] **Linda Beaton** (69) swore an affidavit in which she stated that she was married to Alasdair Beaton and that they were interested to the extent of 35% and 65% respectively in the company, of which both had been directors. She and Mr Beaton had separated in 2016 and there were ongoing divorce proceedings between them. There had also been proceedings in terms of section 994 of the Companies Act 2006. The Minute of Agreement had been entered into on 18 July 2022, after those proceedings had been set down for proof. She had received the initial payment of £500,000 due to her in terms of the Minute and had paid the company £250,000 as it required.

[25] The Linlithgow properties had now been sold and she had received the free proceeds of those sales, being £274,541.48, on 5 January 2024. That left £878,958.52 still due to her in terms of the Minute of Agreement. Mr Beaton had made an offer to buy those properties for £110,000 each, but before then, in April 2023, she already had an offer from a third party for one of the properties for £120,000. The company's solicitors had advised her to reject that

offer as being too low. She had agreed in principle to taking the properties off the market in exchange for a payment of £255,000 from the company (being £35,000 or so less than the combined Home Report valuations), but Mr Beaton was not agreeable to that.

[26] At the beginning of May 2023, the company's solicitors had advised her that Blue Ridge had a buyer and that the price would be enough to pay the residual payment due in terms of the Minute of Agreement. Eventually, after the intervention of the Sheriff hearing the section 994 proceedings, she had been provided with the correspondence setting out the offer. The sale of Blue Ridge then fell through. She had then decided to put the Linlithgow properties back on the market, and had received a request for keys from Mr Beaton so that he could do a viewing for a prospective purchaser. Given that there was already a selling agent appointed, she had suggested via her solicitors that the viewing should be done through the selling agent. She was concerned that Mr Beaton would not return the keys afterwards. He had then said that he needed the keys to carry out painting and plastering work. She allowed him to have access to carry out works and then to attend with the selling agent with the viewing. He had kept the keys after the viewing.

[27] In July 2023 he had made his own offers for the property, but given that his offer was for £110,000 for each flat and he or the company had already advised her to reject an offer for one flat of £120,000, she did not consider it appropriate to accept his offers. He had withdrawn his offers on 18 August 2023 and on the same day had submitted new offers of £120,000 for each flat. After discussing it with the selling agent, she had accepted those offers in principle via her solicitors on 12 September 2023. Proof of funds had been requested from Mr Beaton's solicitors, and he and the company were requested to confirm that they would treat the acceptance of the offers as constituting the use of best endeavours on Mrs Beaton's part in terms of the Minute of Agreement. Mr Beaton's solicitors had

confirmed that they were holding funds, but no confirmation had been given on the best endeavours point. On 17 October 2023 Mr Beaton had withdrawn his offers for the Linlithgow properties. On 23 October 2023 two offers came in from a Mr and Mrs Aitken for £140,000 for each property. These were accepted and the sales concluded on about 19 December 2023.

[28] The provisions governing the marketing of Blue Ridge contained in the Minute of Agreement had not been observed. It had only been marketed for sale in March 2023. Mrs Beaton had seen it advertised then with Right Move. Neither she nor her solicitors had received any communication from the company regarding Blue Ridge. Nothing that might have been happening with Savills was communicated to her or her solicitors. The first communication in any form which had been received in relation to the sale of Blue Ridge was on 13 April 2023, in answer to a question as to why the whole of Blue Ridge was not being exposed for sale. The next was on 27 April, asking her to withdraw the Linlithgow properties from the market as the receipts from the sale of Blue Ridge were expected to be sufficient to discharge the company's liability to her. Those communications had come from the company's solicitors. Further sporadic communication had followed, until she had been told on 27 June that the prospective purchasers were withdrawing their interest. However, the property was still being shown as under offer when she checked the Savills website on 11 September.

[29] In further examination-in-chief, Mrs Beaton stated that she had been unaware of an offer of £1,000,000 until the week before the proof, when the letter from Savills (UK) Limited arrived. She had previously been told nothing about it.

[30] In cross-examination, Mrs Beaton stated that she knew now that two offers had been made for Blue Ridge; at the time, she had known nothing of them. She had no

communication from Savills about anything. She had been a 35% shareholder in, and a director of, the company. She and her husband had both played a full role in its administration. Blue Ridge had been an equestrian centre from 2015 to 2022, but the wrong people were running it. Mr Beaton had decided to stop trading as an equestrian centre. She was aware that the company could not raise the money needed to pay her out without selling things that it did not require, like three horse boxes and horses. A lot of things had been kept secret from her. The company had to come up with the money to pay her out, and selling Blue Ridge and the Linlithgow properties was the easiest way for it to do that.

Petitioners' submissions

[31] Senior counsel for the petitioners invited the court to grant the prayer of the petition and to suspend the charges for payment. In summary, the company's obligation to make the residual payment was conditional on it using its best endeavours to sell Blue Ridge and on Mrs Beaton using her best endeavours to sell the Linlithgow properties. Mrs Beaton's remedy to enforce the petitioners' obligations under the Minute of Agreement was an action of specific implement, which failing damages for her loss. The Minute of Agreement did not create two simultaneous obligations on the petitioners on which charges for payment of £1,100,000 could competently be founded. Quantification of the residual payment was entirely dependent on the sale of Blue Ridge and the Linlithgow properties. Mrs Beaton could not competently serve charges for payment which were in part founded on the assumption that she had failed to sell the Linlithgow properties.

[32] In relation to the proper approach to the construction of the Minute of Agreement, the court should consider the relevant words of a contract in its documentary, factual and commercial context, assessed in the light of the natural and ordinary meaning of the

provision being construed, any other relevant provisions of the contract being construed, the overall purpose of the provision being construed and the contract in which it was contained, the facts and circumstances known or assumed by the parties at the time that the document was executed, and commercial common sense, but disregarding subjective evidence of any party's intentions. In carrying out that exercise, it was necessary to consider the contract as a whole since it might be apparent from such a reading that the parties intended either a narrower (or, conceivably, a wider) meaning than the literal meaning of the words used might suggest when read in isolation. The court could only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract was made; that which was known to one party alone was immaterial and what was reasonably available generally meant what was readily available to all the parties. In arriving at the true meaning and effect of a contract, the departure point in most cases would be the language used by the parties because they had control over the language they used in a contract, and must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision. Where the parties had used unambiguous language, the court had to apply it, but where the language used by the parties was unclear, the court could properly depart from its natural meaning where the context suggested that an alternative meaning more accurately reflected what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used, but that did not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used. If there were two possible constructions, the court was entitled to prefer the construction which was consistent with business common sense and to reject the other but commercial common sense was relevant only to the extent of how matters would have been perceived

by reasonable people in the position of the parties as at the date that the contract was made. Language used by the parties should not generally be treated as surplus but it was well established law that the presumption against surplusage was of little value in the interpretation of commercial contracts. In striking a balance between the indications given by the language and those arising contextually, the court had to consider the quality of drafting of the clause and of the agreement in which it appears. Sophisticated, complex agreements drafted by skilled professionals were likely to be interpreted principally by textual analysis unless a provision lacked clarity or was apparently illogical or incoherent. A court should not reject the natural meaning of a provision as incorrect simply because it appeared to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of the wisdom of hindsight, because it was not the function of a court when interpreting an agreement to relieve a party from a bad bargain.

[33] As to the content of an obligation to use best endeavours, such an obligation had to be approached within the framework of the contract as a whole, and on the basis that its role was to give effect to the totality of the agreement between the parties. An obligation to use best endeavours probably required a party to take all reasonable courses of action that he could. In considering whether there had been a breach of obligation, an important consideration was whether taking the steps in question would have achieved the objective. In considering whether the objective would have been achieved, the court should adopt a broad and purposive approach. Where the contract provided for a party to use best endeavours to obtain a particular result then he was required, if necessary, to some extent to subordinate his own financial interests under the contract to the obtaining of that result. Such clauses required the obligor to go on using endeavours until the point was reached when all reasonable endeavours had been exhausted, or to do all that it reasonably could:

KS Energy Services Ltd v *BR Energy (M) Sdn Bhd* [2014] SGCA 16. The obligor needed only to do that which had a significant or real prospect of success in procuring the contractually-stipulated outcome. If there was an insuperable obstacle to procuring that outcome, the obligor was not required to do anything more to overcome other problems which also stood in the way of procuring that outcome but which might have been resolved. The obligor was not always required to sacrifice its own commercial interests in satisfaction of its obligations, but it might be required to do so where the nature and terms of the contract indicated that it was in the parties' contemplation that the obligor should make such sacrifice. An obligor could not just sit back and say that it could not reasonably have done more to procure the contractually-stipulated outcome in cases where, if it had asked the obligee, it might have discovered that there were other steps which could reasonably have been taken. Once the obligee pointed to certain steps which the obligor could have taken to procure the contractually-stipulated outcome, the burden ordinarily shifted to the obligor to show that it took those steps, or that those steps were not reasonably required, or that those steps would have been bound to fail.

[34] Applying those principles to the question of the proper construction of the Minute of Agreement, the obligation on the company set out in clause 1 of the Minute to buy back Mrs Beaton's shares in the sum of £1,653,500 within a period of 12 months was not an unqualified obligation to make payment within that period. The parties to the Minute of Agreement were aware that Blue Ridge would require to be sold in order that the company could buy back the shares in the agreed sum. Had the parties intended that the obligation in clause 1 should be unconditional, there would have been no commercial sense in including clauses 4 and 5, which were entirely superfluous if the obligation was unconditional. Although the presumption against surplusage was of little value, the court was required to

construe the words used by the parties on the assumption that the parties intended the words used to reflect the agreement reached. The natural and ordinary meaning of the words used in the Minute coincided with the only sensible commercial construction, namely that by using the words "In order to pay the Residual Payment" the parties intended that the obligation to pay the Residual Payment was conditional on the company using its best endeavours to sell Blue Ridge within 6 months. Equally, the words "In turn" in clause 5 referred back to the preceding clause 4 and echoed the best endeavours obligation. In the event that Blue Ridge and the Linlithgow properties were not sold within 6 months, then the obligation in clause 1 in respect of the Residual Payment was suspended until sales had been achieved. That flowed from the parties' mutual understanding. Further, the company did use its best endeavours to sell Blue Ridge within 6 months. Mrs Beaton did not identify steps which the company had failed to take. Ultimately the potential sale was unsuccessful because of title complications and not because of any failure to use best endeavours.

[35] In any event, Mrs Beaton should not be permitted to proceed with charges against both the company and Mr Beaton. One charge only, in the lesser amount now said to be due, was all that ought to be allowed if the court was not persuaded by the petitioners' arguments that no sums were in fact due to Mrs Beaton in terms of the Minute.

Respondent's submissions

[36] On behalf of Mrs Beaton, senior counsel sought refusal or at any rate dismissal of the petition. The petition proceeded upon the premise that the service of charges upon the petitioners, pursuant to the Minute of Agreement, was unlawful and wrongful. The essential foundation of the petitioners' entire case was the proposition that the company's

obligation to pay the residual payment did not arise unless and until the properties had been sold. On a proper construction of the Minute, that proposition was unsound.

[37] The applicable principles of contractual construction were very well-known. The petitioners' construction of the Minute was unsound for the following reasons. First, it nowhere said that the obligation of the company to make payment of the residual sum was suspensively conditional upon the sale of the properties. Rather, the obligation to make payment of the residual sum was set out in clause 1 of the Minute, which provided that the obligation to purchase Mrs Beaton's shares (for which the residual payment was the balancing payment) was one which was to be discharged "within a period of 12 months". That language did not admit of the introduction of a further condition, namely, as long as the properties had been sold within that period and the proceeds received by the company. There was simply no language within the Minute which supported the conditionality upon which the petitioners' case necessarily depended. The petitioners' preferred construction of the Minute was one that was simply not available given the language chosen.

[38] Secondly, it was perfectly clear, on analysis of the remaining terms of the Minute, that the sale of the properties was not a precondition to the crystallisation of the company's obligation to purchase Mrs Beaton's shares and make payment of the residual sum. In particular, clauses 4 and 5 set out the parties' understanding as to the practical steps which they agreed required to be taken as a potential mechanism by which assets might be realised and the proceeds in question used to discharge the company's obligations, giving some comfort that those obligations would in fact be discharged. In common with clause 1 of the Minute, neither clause 4 nor 5 stated that the sale of the properties was a precondition to the enforceability of the obligations set out in clauses 1 and 2; and clauses 4 and 5 expressly recognised that the proceeds from the sales of the properties might not be required, in whole

or in part, to make payment of the residual sum at all, by referring to "the extent that these sums are required to pay any outstanding balance of the Residual Payment." There was no proper basis for the suggestion that the parties to the Minute were aware when they entered into it that the company would need to sell the properties in order to meet its obligations thereunder, and even if they did have such knowledge, that consideration was not sufficient to displace the language used in the Minute itself, which plainly did not allow for sale of the properties to be a condition suspensive of the company's obligation to pay what was due to Mrs Beaton.

[39] Thirdly, the petitioners' construction could not work standing the express obligation, in clauses 1 and 2, that the company was to purchase Mrs Beaton's shares, and make payment of the sums set out in clause 2 within a period of 12 months. The obligations to purchase Mrs Beaton's shares, and make payment therefor, could not be obligations which were to be implemented within a period of 12 months, while also being subject to an unstated suspensive condition.

[40] Fourthly, the introduction of a suspensive condition as contended for by the petitioners would be a matter of very considerable and material importance. The qualification of the parties' bargain in that way would necessarily require clear language. In fact, however, the Minute contained no language whatsoever which could be construed as having the effect contended for by the petitioners. As the petitioners' case proceeded upon an unsound construction of the Minute, it must fail *in limine*.

[41] The petitioners further claimed that the company had used its best endeavours to sell Blue Ridge but, despite those best efforts, had failed to achieve a sale, and that Mrs Beaton had not used her best endeavours to sell the Linlithgow properties. In respect that the

Linlithgow properties had in fact now been sold, that point could no longer be insisted upon. So far as Blue Ridge was concerned, clause 4 of the Minute provided:

> "In order to pay the Residual Payment, the Company shall use its best endeavours to sell, within 6 months of today's date, the Blue Ridge Equestrian Centre. For the avoidance of doubt 'best endeavours' means, inter alia, that the Blue Ridge Equestrian Centre will be on the market within 6 weeks with an agreed selling agent; all correspondence relating to the sale by the agreed selling agent, including, without prejudice to that generality, any offers, shall be copied to both parties. On the proceeds being paid to the Company, the Company will pay Mrs Beaton within 7 days the sum received to the extent that these sums are required to pay any outstanding balance of the Residual Payment."

[42] An obligation to use "all reasonable endeavours" was more onerous than an obligation to use "reasonable endeavours": *EDI Central Ltd* v *National Car Parks Ltd* [2012] CSIH 6, 2012 SLT 421 at [28]. Such an obligation involved identifying whether there were reasonable steps which the obligant could have taken but did not. The Minute used the test of "best endeavours". Such an obligation was more onerous than an obligation to use "reasonable endeavours": *Mactaggart & Mickel Homes Ltd* v *Hunter* [2010] CSOH 130 at [63]. An obligation to use "best endeavours", as was imposed on the company under the Minute, required something more than "all reasonable endeavours" and indeed requires the party obliged to "leave no stone unturned" in securing the contractually stipulated outcome: *Sheffield District Railway* v *Great Central Railway* [1911] 27 TLR 451. In the present case, such general requirements as to the content of an obligation to use "best endeavours" had superimposed upon them, in the Minute, certain specific steps which were included within, but which did not exhaust, the general obligation to use "best endeavours". Thus, clause 4 specifically required, as an aspect of best endeavours, that Blue Ridge "will be on the market within 6 weeks with an agreed selling agent"; and that all correspondence, not just offers, would be copied to both parties. The whole subjects had not even been exposed for sale, a situation for which the Minute provided no warrant whatsoever. Those requirements were

not discharged by the company, and on that basis alone, it was clearly in breach of its obligation to use best endeavours. More generally, beyond that, the narrative put forward by the petitioners regarding the company's attempts to sell Blue Ridge did not, on analysis, come close to a discharge of an obligation to use best endeavours. It followed that, even if the petitioners were correct in their core proposition that the company's obligation to make payment of the residual payment was conditional upon a sale of Blue Ridge, their case must nevertheless fail because they had failed to discharge the obligation to use best endeavours (the onus, in this respect, being on them: *Yewbelle Ltd* v *London Green Developments Ltd* [2007] EWCA Civ 475; [2008] 1 P & CR 17; *Mactaggart & Mickel* at [58]). Standing the petitioners' failure to establish that the company had discharged its obligation to use best endeavours to sell Blue Ridge within 6 months of the date of the Minute, it necessarily followed that their liability was made good by the application of a long-established principle of the common law, summarised by Bell, *Principles of the Law of Scotland*, (10th Ed., 1899), §50:

> "If the debtor, bound under a certain condition, have impeded or prevented the event, it is held as accomplished. If 'in such circumstances' the creditor have done all that he can to fulfil a condition which is incumbent on himself, it is held sufficient implement."

A similar statement of principle was to be found in Gloag, *The Law of Contract*, (2nd Ed., 1929), pp. 279-280:

> "Where the condition under which an obligation is undertaken is potestative, so that its accomplishment is within the power of the party conditionally liable, it may be held that his implied obligation is not merely to impose no obstacle to accomplishment, but to take active steps to promote it. This is by no means a general rule."

The leading case was *Mackay* v *Dick & Stevenson* (1881) 8 R (HL) 37 in which Lord Blackburn articulated the principle as follows:

> "As a general rule, where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both

> parties concur in doing it, the construction of the contract is that each agree to do all that is necessary to be done on his part, though there may be no express words to that effect."

Most recently, this principle had been summarised in my own opinion in *Scottish Ministers* v *Scotland Gas Networks plc* [2023] CSOH 77 at [40]:

> "the principle set out in *Mackay v Dick & Stevenson* […] is essentially to the effect that a precondition to a particular contractual obligation, if deliberately impeded by the obligant, is to be held as fulfilled."

In the present case, the company's obligation to make payment was, on the petitioners' hypothesis that sale of the properties was a precondition to the obligation to make the residual payment, conditional upon the sale of the properties occurring. Since the company had breached its obligation to use best endeavours to sell Blue Ridge within 6 months, it followed on the *Mackay* v *Dick & Stevenson* principle that that condition was deemed to be fulfilled, in other words, a sale of Blue Ridge was deemed to have occurred. In these circumstances, it again followed that the obligation to make the residual payment was enforceable but had not been discharged. Again, therefore, the petitioners' case failed.

[43] Clause 14 of the Minute of Agreement provided that:

> "In the event that the Company does not make payment in terms of this agreement for any reason whatsoever, Mr Beaton undertakes to indemnify Mrs Beaton for any shortfall in payment arising."

The company had not made payment. Having regard to the terms of clause 14, it did not matter why that payment had not been made. The mere fact of non-payment triggered Mr Beaton's obligation to make payment. The parties agreed that the Minute of Agreement would be registered for preservation and execution. The Minute set out the sum which was due to be paid, and provided a contractual mechanism for any accounting in respect of payments received. That was sufficient to allow the use of summary diligence based upon the extract registered Minute.

[44] As to the service of two charges, Mr Beaton had undertaken a joint and several obligation with the company to Mrs Beaton in the event that it defaulted in its obligation to pay her what she was due under the Minute. That rendered the service of, and insistence in, two charges entirely competent, even though Mrs Beaton could not in total recover more than the sum due to her, and account would have to be given for the sum since received from the sale of the Linlithgow properties. Mr Beaton would have a right of relief against the company to the extent that he discharged its principal debt.

Discussion and decision

[45] Although the resolution of this dispute turns on a matter of law rather than on any factual consideration, it is appropriate to make certain observations about the witnesses and the evidence they gave, not least because of the extraordinary and quite unacceptable approach which was taken to the presentation of Mr Thomson's evidence. It is fundamental to the position of a witness in our system that he or she generates, and takes personal responsibility for the content and accuracy of, his or her evidence. In this case, I was informed that Mr Thomson had refused to provide a statement or affidavit in advance of the proof diet. I expect (though was not in terms so told) that that was because his employer, Savills (UK) Limited, was concerned about potential criticism of the services which it rendered to the company in connection with the marketing of Blue Ridge. After consulting with lawyers, Savills (UK) Limited sent the letter dated 14 March 2024 to the solicitors for the parties in this case. That letter, which was not signed by any person, natural or legal, contained a version of events which, as transpired in the course of Mr Thomson's evidence, was neither full nor accurate. For example, the availability of documents from other sources enabled the demonstration that the letter omitted to narrate certain material events in the

marketing process, as well as showing that the chronology it adopted depended on the dates when events happened to be noted in the activity recording system operated by Savills, rather than necessarily when they actually occurred. Although Mr Thomson appeared to have provided Savills (UK) Limited (but not the court) with the primary material from which the content of the letter was derived, it was ultimately plain that his evidence was in effect coming from an anonymously-authored script thrust into his hand rather than from his own recollection and research. I entirely fail to see how those advising Savills (UK) Limited, or those advising the parties to these proceedings, could have regarded that as an expedient which would be acceptable to the court. The letter was only in process because it formed part of an Inventory of Productions tendered on behalf of the petitioners, without objection, on the morning of the proof. My attention was not drawn to the presence of the letter in that inventory, nor to the purpose to which it was proposed to put it. Had I been so informed, I would have refused to admit the letter into process. What ought to have happened when Mr Thomson initially refused to give a statement or affidavit on his own behalf was that that state of affairs should have been drawn to the attention of the court and an application made for the recovery of the whole pertinent files and records of Savills. His examination and cross-examination ought then to have proceeded on the basis of that and other relevant documentary material and the statement evidence of others. What in fact happened should under no circumstances be replicated in future litigations. In the event, I was left sufficiently unpersuaded by the content and quality of Mr Thomson's evidence to regard it as having any weight save insofar as confirmed by evidence from other acceptable sources.

[46] Mr Beaton commenced his cross-examination in a querulous, and by turns truculent manner, but after receiving a warning from me was able to contain any further excesses. I

was nonetheless left with an impression of an angry and frustrated individual who was less concerned about the precise obligations he and the company had undertaken towards Mrs Beaton than with upholding his own interests in the context of what appears to have been, and continues to be, a bitter separation and divorce process. He was plainly not a details man. I do not doubt that he was telling the truth as he saw it; I am rather less convinced that how he saw it would bear any very close relationship to how it would be seen by an objective and reasonable observer. Overall, I approach his evidence with an ample degree of circumspection.

[47] Ms Black, by contrast, gave her evidence in a very polite and careful manner, placing an emphasis on accuracy even when that did not necessarily redound to the benefit of Mr Beaton and the company. For example, she spoke of having heard Mr Beaton apparently speaking on the telephone to estate agents about the marketing of Blue Ridge, but volunteered that, as she could not hear what the other person on the call was saying, she could not herself swear that the appearance was the reality. I have no hesitation in accepting her evidence as entirely credible and reliable.

[48] Mrs Beaton was only in the witness box giving her oral evidence for a short time, but nothing that I heard or observed during that period gave me any cause to doubt her credibility and reliability.

[49] The first question which requires to be addressed is that of the proper construction of the Minute of Agreement. The petitioners' submissions covered, in a somewhat abstract manner, the relevant principles, which on analysis come to the proposition that the express words of obligation undertaken by the company in terms of clauses 1 and 2 of the Minute should be read as suspensively conditional on the exercise by the company of its best endeavours to sell Blue Ridge, and the exercise by Mrs Beaton of her best endeavours to sell

the Linlithgow properties, in each case within 6 months of the date of the Minute, and carried to the extent that, if after such efforts had been made, either Blue Ridge or the Linlithgow properties remained unsold after that period, the company's obligations to pay out Mrs Beaton for her shares should be suspended until such time those sales were achieved. That would involve a degree of judicial activism in the field of contractual construction not seen since the decision of the Supreme Court in *Aberdeen City Council* v *Stewart Milne Group Ltd* [2011] UKSC 56, 2012 SC (UKSC) 240, 2012 SLT 205, a place from which the tide is generally perceived, at least for now, to have retreated.

[50] The justification for the court taking that approach in the present case was, in essence, said to lie in the propositions, firstly, that the common understanding of the parties to the Minute was that the company could not pay out Mrs Beaton without the sale of the properties and secondly, that the Minute (and in particular clauses 4 and 5) did not make commercial (or indeed any) sense unless read in that way.

[51] Dealing with the first proposition, clause 4 of the Minute does begin by narrating that the company's duty to use best endeavours to sell Blue Ridge is "in order to pay the Residual Payment" and the introductory words "in turn" in clause 5 infer the same connection. There is, however, a considerable difference between what the company might require to do in order to discharge its obligation towards Mrs Beaton, and what it intended to do towards that end. It plainly intended to sell the properties in order to raise the money to pay her out, but the introductory words to clauses 4 and 5 do not in themselves carry the proposition that the parties were aware that it required to do so. When one turns from the four corners of the Minute itself in order to assess whether there was a common understanding amongst the parties to it as to the company's need to sell Blue Ridge, at least, so as to have the funds to meet its liability to Mrs Beaton, Mr Beaton maintained that he took

the view that that sale was necessary (albeit he also maintained that how the company got the money it needed was his business and no one else's) but Mrs Beaton adopted the rather different position that her view was that the contemplated sale would be the most obvious and easy way for the company to raise the money it needed, but (concurring in this regard at least with her husband) that ultimately how it got the money was its business and not hers. Against that background, there is no proper evidential basis (at least without discounting Mrs Beaton's evidence, which I am not prepared to do) for a finding that the parties to the Minute were aware that the company required to sell the properties in order to meet its liability to Mrs Beaton. In any event, even if I had been prepared to make such a finding, I would not have been able to conclude that it was capable of forming a foundation apt to displace the plain import of clauses 1 and 2 of the Minute that the obligation being undertaken by the company to Mrs Beaton was unconditional. Put another way, the language used in those clauses to describe the obligation being undertaken by the company is so clear as to leave no room for the implication of the conditionality for which the petitioners contend by reference to the background circumstances against which the Minute was entered into.

[52] Turning to the second basis upon which the petitioners advanced their preferred construction of the Minute, that it alone gives effect to that which the Minute was intended to achieve, it is clear from the preamble to the Minute that its purpose was the realisation (sci. purchase from her) of Mrs Beaton's shareholding in the company in the context of the Beatons' ongoing divorce proceedings. That was the primary obligation undertaken by the company. The function of clauses 4 and 5 can in that context be seen as a means by which Mrs Beaton was to be assured that the company would take steps calculated to enable it to raise funds to buy her out and to apply any funds so raised to that end, and the company

was respectively to be assured that she would co-operate in the sale of the properties she held on its behalf, to the same end. The suggestion that clauses 4 and 5 properly form the basis for a conclusion that the company's primary obligation to pay out Mrs Beaton was merely conditional is in direct contradiction to the purpose of the Minute as expressed in its preamble. Those clauses do perform a function in the overall contractual arrangement, but it is in furtherance of the purpose of the Minute to have Mrs Beaton paid out in the timescale envisaged therein, rather than detracting from that purpose.

[53] In any event, even if the construction of the Minute urged by the petitioners were to be accepted, their argument involves the contention that suspension of the company's obligation to pay out Mrs Beaton would only occur if it had used best endeavours as defined in the Minute to sell Blue Ridge but had not achieved a sale. No submission that Mrs Beaton was also in breach of the obligation incumbent on her to use best endeavours to sell the Linlithgow properties was made to me, and given that those properties have now been sold and the free proceeds remitted to the company and paid out in turn to her, any suspensive effect that might have resulted from such a failure on her part would have flown off. Turning to the company's efforts, it was not in dispute that, as a matter of fact, it did not seek or obtain Mrs Beaton's agreement to Savills being appointed as the selling agents for Blue Ridge, it did not ensure that Blue Ridge was on the market within 6 weeks of the date of the Minute, and it did not put the whole of Blue Ridge on the market at any stage. It is not necessary in those circumstances formally to determine whether it was also in breach of its obligation to see to it that all correspondence relating to the sale was copied to Mrs Beaton (although it probably was) or whether it was in breach of its general and unparticularised obligation to use best endeavours to sell Blue Ridge within 6 months (which it probably was not), since the uncontroversial facts just noted involve material

breaches of its obligation to use best endeavours to that end as the parties chose to define that concept for the purposes of the Minute. Standing the fact that the company was in material breach of clause 4 from shortly after the Minute was entered into (and remains in such breach), any suspensive effect which due performance of the requirements of that clause might otherwise have induced cannot operate. I do not find it necessary in that regard here to explore the uncertain limits of the ever-so-slightly antiquated principle in *Mackay* v *Dick & Stevenson*. In a case like the present, where the company is in frank breach of contract (as opposed to having merely otherwise hindered or impeded the fulfilment of a potestative condition as to its liability), I see no need for appeal to anything other than the larger and more basic principle that it is to be presumed that a party to a contract is not to be permitted to take advantage of his own wrong as against another party: see *Alghussein Establishment* v *Eton College* [1988] 1 WLR 587; *Crimond Estates Ltd* v *Mile End Developments Ltd* [2021] CSIH 60, 2022 SLT 570 at [20]. It follows that, even if the true interpretation of the Minute were to be that for which the petitioners contend, they would not qualify for the protection which they maintain it might offer to them.

[54] The service of the charges by Mrs Beaton on 25 August 2023 was accordingly lawful. The company was by then in breach of its obligation in terms of clause 2(b) of the Minute to pay her £1,153,500 within the period of 12 months from 18 July 2022. In terms of clause 14 of the Minute, Mr Beaton had bound himself to indemnify her for any shortfall if the company did not make the payments due from it. There was accordingly, as at 25 August 2022, a joint and several liability on the part of the company and Mr Beaton towards Mrs Beaton in the amount of £1,153,500 which, in terms of clause 16 of the Minute, was enforceable by way of summary diligence. Mr Beaton had, and has, a right of relief against the company to the extent that he may discharge its liability, but that is no concern of Mrs Beaton. The

subsequent payment to her of the free proceeds of the sale of the Linlithgow properties reduces the amount jointly and severally due to her to £878,958.52, which is therefore the maximum extent to which the charges may properly be enforced.

Conclusion

[55] I shall sustain the respondent's first plea-in-law as to the relevancy of the petition, and dismiss it accordingly. Lest there be any doubt, the interim orders granted on 4 September 2023 fall automatically upon such dismissal.