**5 May 2010**

**PRESS SUMMARY**

**Inveresk plc (Respondent) v Tullis Russell Papermakers Limited (Appellant) (Scotland) [2010] UKSC 19**
*On Appeal from: 2009 CSIH 56*

**JUSTICES:** Lord Hope (Deputy President), Lord Saville, Lord Rodger, Lord Collins, Lord Clarke

## BACKGROUND TO THE APPLICATION

On 9 June 2005, Tullis Russell entered into an asset purchase agreement ("the Asset Purchase Agreement") and related services agreement ("the Service Agreement") with Inveresk for the acquisition of the property rights to the Gemini brand of paper.

To acquire these rights, Tullis Russell was to pay: (i) a fixed sum of £5 million as initial consideration; (ii) a sum of up to £2 million as additional consideration, depending upon the volume of products sold and invoiced by Tullis Russell between 8 November 2005 and 8 November 2006; and (iii) various payments under the Service Agreement. To date, Tullis Russell has paid Inveresk £5 million as initial consideration under the Asset Purchase Agreement and £8 million under the Service Agreement.

The parties are now in dispute regarding various payments and sums in damages that are said to be due. Inveresk claims that it is entitled to a further sum of £909,395 under the Asset Purchase Agreement. Tullis Russell claims that Inveresk breached the Asset Purchase Agreement and Service Agreement by failing to maintain required product quality standards and dealing with customers so as to damage the goodwill of the business. It seeks £5,358,032.90 in damages.

Two issues arise in the appeal: Firstly, whether the additional consideration claimed by Inveresk has become due and payable under the Asset Purchase Agreement. Secondly, whether Tullis Russell is entitled to retain the sum it claims in damages, pending resolution of the claim, against any payment it is required to make to Inveresk.

The Court of Session held that the additional consideration sought by Inveresk was due and payable and that Tullis Russell had no right of retention.

## JUDGMENT

*The Supreme Court unanimously allows the appeal, holding that the additional consideration has not become due and payable pursuant to the Asset Purchase Agreement and that a right of retention may in principle arise. The matter is remitted to the commercial judge for further procedure. Lord Hope delivered the leading judgment of the Court.*

## REASONS FOR THE JUDGMENT

### *The Additional Consideration*

The operative provisions of the Asset Purchase Agreement clearly direct that, having elected to exercise its right to require a tonnage audit, Inveresk is not entitled to change its position on this issue.

The terms of the agreement are perfectly intelligible, and the approach adopted accords with business sense. The additional consideration does not become due and payable until the contractually required tonnage audit is completed [per Lord Hope, paras [21]-[24]].

The matter is remitted to the commercial judge to determine how the conduct of the tonnage audit should proceed [per Lord Hope, para [25]; Lord Rodger, para [1]].

***The Right of Retention***

A contractual right of retention can arise notwithstanding the fact that the relevant obligations are not recorded in a single agreement. The critical question in determining whether a right of retention may apply is whether the relevant obligations can truly be said to be counterparts of one another [per Lord Hope, paras [35]-[36]].

In the present case, the entire agreement clauses in both the Asset Purchase Agreement and the Service Agreement record the parties' agreement that both documents form a single, indivisible transaction. This is also emphasised by the recitals to the Service Agreement. The agreements are expressly linked with each other. The conclusion that they form part of a single transaction to which the principle of mutuality can apply is inescapable [per Lord Hope, paras [37]-[38]; Lord Rodger, para [64]].

The Court of Session erred in concluding that the Asset Purchase Agreement and Service Agreement were not properly to be regarded as constituting two parts of a single transaction. The guiding principle in such an assessment is that the unity of the overall transaction should be respected. The analysis should commence form the starting point that all the obligations which the transaction embraces are to be regarded as mutual counterparts unless there is a clear indication to the contrary [per Lord Hope, para [42]].

While the current transaction did proceed in stages, it is unrealistic to suggest that these could be divided into a series of sub-units or compartments. The obligations undertaken by Inveresk were all inter-related and served the same end. This was to preserve the value of the intellectual property rights and other assets acquired by Tullis Russell as a result of the transaction. Accordingly, Tullis Russell's obligation to pay the initial and additional consideration are properly regarded as counterparts to Inveresk's obligations under both the Asset Purchase Agreement and the Service Agreement [per Lord Hope, para [45]].

In the result, Tullis Russell are entitled to retain any additional consideration that becomes due pending the outcome of its claims for damages under the Asset Purchase Agreement and Service Agreement. The matter is remitted to the commercial judge for further procedure [per Lord Hope, paras [46]-[47]; Lord Rodger, para [65]].