OUTER HOUSE, COURT OF SESSION

[2017] CSOH 148

CA45/17

OPINION OF LORD BANNATYNE

In the cause

MUHAMMAD ASAD IFTIKHAR

Pursuer

against

CIP PROPERTY (AIPT) LIMITED

Defender

Pursuer: McIlvride QC; Balfour + Manson LLP
Defender: Walker QC; Dentons UKMEA LLP

5 December 2017

Introduction

[1] In this action the pursuer sought declarator that he had entered into a binding contract of sale and purchase with the defender for 35 Argyll Street, Glasgow ("the subjects"), that the defender is still bound by said contract and the purported resiling from said contract of 22 December 2016 was of no effect.

The Issues

[2] The issues in the case are two in number:

1. Whether the defender has validly resiled from the contract? ("The contractual defence.")

2. Is the contract unenforceable on the ground of illegality? ("The illegality defence.")

Background

[3] On 8 December 2016 the pursuer agreed to purchase and the defender agreed to sell the subjects at a price of £500,000.

[4] The terms of the contract between the parties are contained in the Articles of Roup (including Minutes of preference and enactment), addendum to the catalogue, and completed sale memorandum (JB 1-3).

[5] The deposit of £50,000 required in terms of condition 2.6.3 was paid on 8 December 2016. The deposit was paid by means of a cheque drawn on the account of Robinco (Scot) Limited (JB 3).

[6] The material provisions of the Articles of Roup are:

(a) "2.6.3… if the purchaser fails to pay such a deposit the Vendor may treat such dishonour of failure as a repudiation of the contract without prejudice to the Vendor's right to claim damages for repudiation of the contract against the Purchaser. The Purchaser shall be obliged to provide to the Vendor's Solicitor the KYC information at that (*sic*) on or before 15 December 2016. Further the Vendor shall be entitled at their sole discretion to deem that the deposit has not been paid until such time as the Vendor's Solicitor receives the KYC information…"

(b) "1.9 'KYC information' means such information as the Vendor and the Vendor's Solicitors require in relation to the identity of the Purchaser and the source of funds utilised in respect of payment of the Balance of the Price and/or the deposit including, but not limited to, the verification certificate, and initial due diligence form aftermentioned."

(c) "2.6.6 Settlement shall be subject to the Purchaser procuring that the Purchaser or the Purchaser's Solicitor supply to the Vendor or the Vendor's Solicitors the KYC information (with the applicable information and/or

> documentation specified in the initial due diligence form aftermentioned) to the Vendor's satisfaction no later than 15 December 2016. The purchaser warrants the accuracy of the KYC information supplied by it, or on its behalf, to the Vendor or the Vendor's Solicitors."

[7] On 12 December 2016 the defender's solicitor emailed the pursuer's solicitor and the terms of said email are, so far as material, as follows:

> "Please, as a matter of urgency, send to me (in the post) the following AML documentation:
>
> 1. Certified true copy passport for Muhammad Asad Iftikhar – please ensure that, when certifying the true copy, you also confirm that the photo is a true likeness.
>
> 2. Certified true copy utility bill for Muhammad Asad Iftikhar.
>
> 3. Completed Initial Due Diligence form – form attached
>
> 4. Completed Verification Certificate – certificate attached." (JB 6)

[8] On 15 December 2016 at 14.28 the pursuer's solicitor emailed the defender's solicitor. The terms of this email are as follows:

> "I attach for your information (and confirm signed copies are in the post to you today);
>
> - Certified ID
> - Certified proof of address
> - Completed due diligence form (if I am being completely honest I am not sure if I have completed this correctly)
> - Completed certificate
>
> Let me know if you have any issues with the attachments.
>
> My client may also purchase the property in the name of a nominee – would there be any issue with this provided we go through the same checks? It's likely to be a Limited Company in which he would be the sole director and shareholder." (JB 17)

[9] On 15 December 2016 the pursuer's solicitor wrote to the defender's solicitor in the following terms:

"We refer to the above and enclose as undernoted.

Yours faithfully

Enc Certified ID
Completed Verification certificate and due diligence form." (JB 12)

[10] By 15 December neither the defender nor the defender's solicitor had received a certified true copy of (a) a passport for Muhammad Asad Iftikhar or (b) a utility bill for Muhammad Asad Iftikhar. In addition the utility bill provided by 15 December (which was not a certified true copy) was addressed to: "Mrs Shaista Ghafoor and Mr Mohammed Iftikhar".

[11] In an email on 19 December 2016 at 15:06, the defender's solicitor advised the pursuer's solicitor as follows:

> "I have taken instructions and our clients want to proceed with Mr Iftikhar as the purchaser (as opposed to a nominee company). This is due to the delay which would be caused in waiting for the new company to be incorporated, and then our clients repeating the AML checks. I assume your client will be able to transfer title on to the newly incorporated company, once he has finalised the purchase.
>
> In order for our clients to complete their AML checks, could you provide a brief explanation as to Mr Iftikhar's source of wealth (how has he built up his funds to make the purchase), source of income etc, all of which could be supported by bank statements/annual accounts (if source of wealth is reflected in company accounts?) – personal accounts if not?" (JB 19)

[12] On 19 December 2016 the pursuer's solicitor, in an email, replied to the above in these terms: "My client may be obtaining finance so I am not sure if (t)hat will be possible. Let me check." (JB 20)

[13] In an email to the pursuer's solicitor at 11:43 on 21 December 2016 the defender's solicitor advised the pursuer's solicitor that as: "the Articles of Roup were entered into by (the pursuer) as an individual and do not allow for (the pursuer) to nominate a company for the purposes of the disposition" and asked whether the pursuer's solicitor had instructions (JB 21).

[14] On 22 December the defender's solicitor wrote to the pursuer's solicitor in the following terms:

> "We refer to the Articles of Roup pertaining to the auction of 35 Argyle Street, Glasgow at London on 8 December 2016.
>
> On behalf of our clients, CIP Property (AIPT) Limited, incorporated under the Companies Act (Registered Number 02405153) ... we hereby GIVE YOU NOTICE that, due to your failure to fulfil your obligations in terms of Condition 2.6.3 of the said Articles of Roup, our clients have now exercised their right to resile from the contract and will not be proceeding with the sale of the property.
>
> This letter is written entirely without prejudice to our client's whole rights and pleas and may not be referred to or founded upon except at our client's sole instance." (JB 22)

[15] On 22 December 2016 in a further email at 14:16, the defenders' solicitor advised the pursuer's solicitors as follows:

> "Per the Articles of Roup your client was to provide source of funds information (as stated within the definition of KYC information) on or prior to 15 December 2016. This has not been provided.
>
> Furthermore, the Articles of Roup confirm that our clients can treat the deposit as unpaid until such time as it has received the required KYC information. On this basis, the deposit has not been paid, and our clients are fully entitled to rescind on that basis." (JB 25)

[16] The defender continues to refuse to proceed with a transaction.

[17] The deposit of £50,000 paid on 8 December 2016 has been reimbursed by the defender.

Evidence

[18] It was agreed in a Joint Minute of Admission that the affidavits of Mr Goheer (as revised), the affidavit of Mr Turok and that of Mr Ahmed should stand as their evidence in the case. Mr Anthony Christie gave evidence and in the course of this adopted his two affidavits. He was not cross-examined.

[19] The only other witness was Mr Anthony Besford-Land who gave evidence on behalf of the defender. He adopted his affidavit (No 6 in the Joint Bundle).

[20] He is presently employed as a Senior Financial Crime Analyst by Aviva Investors Global Services Limited ("AIGSL"), being part of the Aviva Group. He is a member of the Financial Crime Compliance Operations Team. This involves him in particular dealing with Know Your Own Client ("KYC") and Anti Money Laundering ("AML") issues. The defender is a Property Unit Trust (investment fund) for which AIGSL provides portfolio management services.

[21] He described the purpose of the KYC/AML due diligence in the context of a property transaction such as that in the present case as follows. Pursuant to the statutory scheme (provided by the Money Laundering Regulations 2007, the Proceeds of Crime Act 2002 and the Terrorism Act 2000), AIGSL is under a strict obligation to : (a) ensure that the business is not entering into a transaction with any sanctioned body (individual or entity); (b) to identify if any Politically Exposed Persons are involved in the transaction (which elevates the risk level); (c) to identify any "Amber", "Red" or "Black" jurisdictions within the structure; (d) to identify who the counterparty is in order to ascertain requirements and a related risk; (e) to establish the nature and purpose of the transaction; (f) to establish whether this is a clear rationale for the transactions and structure; (g) to identify source of funds and how wealth has been generated (for medium and high risk cases) to ensure that funds are not illicit; and (h) to ascertain the likelihood of credit or reputational risk to the business (in accordance with AIGSL's risk-based approach).

[22] He had been in charge of the KYC/AML aspects in the present transaction. From paragraphs 12 to 23 of his affidavit he set out the concerns from a KYC/AML due diligence process that arose regarding the pursuer.

"12. The Initial Consideration template stated that the prospective purchaser of 35 Argyle Street ("the Property") was also the current tenant at the Property Although I did not know this at the time, I subsequently became aware that Clare Andrews and Harry Spooner had also been advised by the Auctioneers which had dealt with the sale, Acuitus, that Mr Iftikhar was somehow involved with the tenant at the Property. In this regard, I note that in the Summons, at Article 4, the Pursuer states that: 'the pursuer is, through another company, the current occupier of the subjects.' The first AML issue that I needed to resolve therefore was the identity of the purchaser (ie was it Mr Iftikhar or was it the current tenant, Wickton Limited.) As I describe at paragraph 29 below, we have not yet managed to get comfortable with the nature of the relationship between Mr Iftikhar and Wickton Limited. I had, on 12 December 2017, carried out searches on Wickton Limited at Companies House and ascertained that its sole director and shareholder was a Mr Ali Sameer. It had its registered office at ("A") and not at the property. I therefore asked my Colleagues Clare Andrews and Harry Spooner on 12 December for confirmation of the identity of the purchaser.

13. On 14 December 2016, at 22:15, I received an email from Craig Turok of Maclay Murray & Spens LLP ("MMS") (See 7/10 of Process). MMS had been instructed by AIGSL to act on its behalf in the sale of the property. I understood from Craig's email that the purchasing entity was to be Robinco (Scot) Ltd (Company No: (SCS525903) having its registered office (also at "A"). I was told that Mr Iftikhar was the sole director of Robinco (Scot) Ltd (and I later learned that Robinco (Scot) Ltd, and not Mr Iftikhar, had paid the deposit of £50,000). Craig indicated that he had requested the following documents from the purchaser's solicitors: (i) certified true copy passport for Muhammad Asad Iftikhar; (ii) certified true copy utility bill for Muhammad Asad Iftikhar; (iii) completed Initial Due Diligence Form; and (iv) completed Verification Certificate. I responded to Craig, by email, on 15 December at 10:51 (see 7/14 of process) to advise that once I was in receipt of the supporting documents, I would be in a position to submit the KYC. I copied my email to my colleagues Clare Andrews and Harry Spooner. This is by no means the final step in the KYC/AML due diligence process. Once in receipt of the documents I requested, I would then review them and assess whether there are any further AML/KYC issues which need to be addressed.

14. I was out of the office on Friday 16 December 2016. I received an email from Craig Turok at MMS (copied to Clare Andrews and Harry Spooner) on 19 December, at 09:36, attaching a copy of the supporting documents which had been sent to MMS by Mr Iftikhar's solicitors, Austin Lafferty (see 7/12 of Process). Copies of these documents are at 6/5, 6/7 and 6/8 of Process. Upon reviewing the documents attached to Craig's email, I saw that the letter from Scottish Power provided (included at 6/8 of process) was addressed to 'Mohammad Iftikhar' and did not accord with the name on the Pursuer's passport, being 'Muhammad Asad Iftikhar'. I also saw that the letter from Scottish Power was dated 6 May 2016, being a date more than 7 months prior to the date on which the documents was provided. Aviva requires that a

document vouching a counterparty's address is dated within 6 months of the date on which it is provided. Craig also advised that – despite having provided documents relating to Mr Iftikhar – Austin Lafferty had enquired about the possibility of Mr Iftikhar using a newly incorporated company (of which Mr Iftikhar would be the sole director and shareholder) – as the vehicle for the purchase. This was an issue from an AML perspective as it introduced the possibility of involvement by another entity which had not yet even been incorporated. It goes without saying that it is only possible to carry out KYC/AML due diligence in respect of an entity which actually exists. It is also the case that persons engaged in money laundering will often make (or seek to make) last minute changes to the parties involved in a transaction. I was, in particular, concerned to know why it was that Mr Iftikhar wanted to use an entirely new company, in circumstances where he already had a corporate vehicle available (Robinco (Scot) Limited.)

15. In his email of 19 December 2016, at 09:36 (see 7/12 of Process), Craig Turok advised that the sale contract (the Articles of Roup) did not entitle Mr Iftikhar to nominate a corporate vehicle as the acquiring entity. A decision was ultimately taken by AIGSL (Clare Andrews) on 19 December that it was only prepared to sell to Mr Iftikhar and not a corporate nominee. The reasons behind this decision were: (i) AIGSL was not contractually obliged to sell to a third party; (ii) a change would cause delay to the completion of the KYC/AML due diligence process (and possibly to the transaction generally); and (iii) AIGSL was concerned as to the number of relevant parties involved for the purposes of KYC/AML due diligence (and the relationships between them) and did not want matters complicated still further.

16. It was imperative, for the purposes of carrying out KYC/AML due diligence, for me to know the identity of the acquiring entity. Once it was confirmed that the purchaser was Mr Iftikhar – having reviewed the documents at 6/5, 6/7 and 6/8 of Process – I reached the view that (because the purchaser was a private individual) we also needed an explanation of Mr Iftikhar's source of wealth (ie how had he built up the funds necessary to make the purchase). We would also need to see suitable vouching (eg personal bank statements or annual accounts (if Mr Iftikhar's source of wealth was reflected in Company accounts rather than personal bank accounts)). This information and vouching is required for all transactions, irrespective of whether the purchaser is a private individual or a corporate entity. But, in respect of corporate entities, it is often (but not always) possible to be satisfied as to a purchaser's source of wealth/source of funds from publically available documents (eg accounts lodged at Companies House). This is obviously not possible in relation to most private individuals. Until 19 December 2016, I did not know whether I was dealing with a company or a private individual as the purchaser. I had initially thought that the purchaser was to be Robinco (Scot) Limited and that accounts would therefore be available on Companies House in respect of this company. It was for this reason I did not explicitly request sight of information pertaining Mr Iftikhar's source of wealth and source of funds prior to 15 December. Transactions involving private

individuals are always graded at least medium risk. Source of wealth/source of funds information and vouching are always required in respect of medium and high risk transactions. Source of wealth/source of funds is very important because AIGSL must be satisfied that a purchaser has a legitimate source of funds which will be used in respect of a transaction (whether that is accumulated capital or borrowed funds).

17. I am shown the documents at 6/5 (Initial Due Diligence Form), 6/7 (Verification Certificate) and 6/9 (copy material docquetted to the Verification Certificate) of Process. I am asked whether these documents were sufficient to allow the Defender to be satisfied as to the identity of the purchaser and the source of the funds to be utilised in the transaction. I can confirm that they were not. Specifically, no information was provided in relation to Mr Iftikhar's source of wealth/source of funds. The Initial Due Diligence Form is always the starting point in the process. It is the platform which we use for working out what else we need to know. The Verification Certificate and accompanying vouching simply confirmed that Mr Iftikhar was the person shown in the passport provided. There was, as I have explained more fully at paragraph 14 above, a discrepancy in the name shown on the utility bill. More information and supporting documentation was needed in respect of Mr Iftikhar's source of wealth/source of funds.

18. I am shown an email from Craig Turok at MMS to Omair Ahmed at Austin Lafferty on 19 December 2016 and timed at 15:06 (7/3 of Process). I see that Mr Turok writes: 'in order for our client to complete their AML checks, could you please provide a brief explanation as to Mr Iftikhar's source of wealth (how has he build up his funds to make the purchase), source of income etc, all of which could be supported by bank statements/annual accounts (if source of wealth is reflected in company accounts?) – personal accounts if not?' I can confirm that the form of words used by Craig in his email reflected a form of words which I had prepared for him earlier that day. I am shown a copy of Omair Ahmed's email in response dated 19 December 2016 and timed at 15:16 (7/4 of Process). Mr Ahmed writes '[M]y client may be obtaining finance so I'm not sure if hat [*sic*] will be possible. Let me check'. This is a source of concern and a red flag from an AML perspective. It suggests that information and supporting vouching was not available in respect of Mr Iftikhar's source of wealth/source of funds. I find this surprising, since Mr Iftikhar had bid for the property at auction and I would have expected him to have had the necessary funds in place at the time of bidding. I would also have expected Mr Iftikhar's solicitors to be aware of this source of funds.

19. By 19 December, I had become sufficiently concerned about the circumstances of this transaction to have recourse to a MLSB, Cherilyn Owen. I talked her through the events to that point and her advice was that I was correct to have cause for concern. She recommended that I carry out 'screening checks' in respect of all relevant parties. Those were: Muhammad Asad Iftikhar; Ali Sameer; Wickton Limited; and Robinco (Scot) Limited. I

duly carried out searches using the 'Oracle Watch List' system to which AIGSL subscribes. These searches produced one adverse media entry in respect of Ali Sameer – but I was able to negate this on the basis of the information available to me (ie I was able to be satisfied that the Ali Sameer described in the adverse media report was not the Ali Sameer with whom I was concerned). The searches produced seven adverse media reports in relation to 'Muhammad Iftikhar' (and various alternative spellings thereof). (The nature of these are set out in the statement). I could not negate these adverse media reports based upon the information available to me. (These could not be negated for reasons set out in the statement).

20. On 21 December 2016, I remained very concerned about this transaction. No information had been received by us in relation to Mr Iftkihar's source of funds/source of wealth. This – together with the adverse media reports – had caused the transaction to be categorised as 'high risk'. Consequently, it was escalated to the GFCCT (second line). There was a series of consultations between me, the MLSB (Cherilyn Owen) and AIGSLs MLRO (Steve Hyndman) on or around 21 December 2016. The combination of no information on source of funds and adverse media reports which we could not negate led us to the conclusion that the transaction carried a significant degree of risk.

21. On 22 December 2016 I updated Clare Andrews on the upshot of my consultation with Cherilyn Owen and Steve Hyndman on 21 December. Ultimately, it is for the business to take a decision on whether or not to proceed with a transaction based upon the perceived level of risk. In light of the advice provided by FCCOT (first line) and GFCCT (second line), to the effect that the transaction involved a significant degree of risk, a decision was taken not to proceed with the transaction on the basis that we were not contractually obliged to do so in the circumstances, and in any event, we felt that AIGSL could not proceed with the transaction, in light of its statutory duties. Ultimately, the decision not to proceed was taken by Tony Christie, Senior Director – Head of Retail, AIGSL. Clare Andrews reported to Mr Christie.

22. I am shown a copy of a latter from MMS to Mr Iftikhar (and copied to Austin Lafferty) dated 22 December 2016 (6/11 of Process). I can confirm that this letter was issued following a decision by the Defender not to proceed with the transaction on the basis of the unsatisfactory outcome of the KYC/AML due diligence process.

23. The Defender remains dissatisfied with the information and vouching which it has been provided with regarding Mr Iftikhar's identity and the source of the funds to be utilised in the transaction."

[23] Later in his affidavit Mr Besford-Land dealt with a later attempt by the pursuer to provide satisfactory KYC/AML information and said this:

> "27. I am shown a copy of Austin Lafferty's letter to MMS dated 31 March 2017 and the attachments thereto (6/18 of Process). I can confirm that this letter (and the enclosures) did not satisfy the Defender's KYC/AML concerns. The concerns which the Defender continued to have are set out in the undernote to MMS' letter to Austin Lafferty of 7 April 2017 (6/19 Process). I can confirm that I drafted the wording of the undernote to this letter (in conjunction with my colleagues at AIGSL)."

Mr Besford-Land was cross-examined, however, as far as I can identify, he did not depart from the terms of his affidavit. In submissions it was not suggested that he had departed from his affidavit.

[24] The pursuer adopted his affidavit. In the course of his evidence only one matter of any significance arose: In the pursuer's pleadings at Article 4 this is observed:

> "As hereinbefore condescended upon the pursuer is, through another company, the current occupier of the subjects. He has a substantial business interest there and is anxious to secure that interest because the licence is from month to month and provides no security of tenure."

In his affidavit he gave a wholly different account regarding this issue:

> "Sameer Ali was occupying (the subjects) through his limited company Wickton Limited on a short term month to month licence. They had the licence signed and moved in on 3 December…" (see: para 4)

He accepted what was said in the pleadings at Article 4 was incorrect but gave no proper explanation as to how this averment had come to be made or why it remained his position on record when it was incorrect.

Submissions on Behalf of the Pursuer

[25] The first chapter of Mr McIlvride's submissions dealt with the defenders' contractual defence.

[26] The first issue requiring determination was this: the proper construction of Condition 1.9 of the Articles of Roup, and in particular the meaning of the expression "such information as the vendor and the vendor's solicitors require." It was his position that the

normal and ordinary meaning of the expression is that it refers to such information as the vendor or its solicitors have required or insisted that the purchaser provides. He submitted, that the foregoing construction is supported by consideration of Condition 1.9 in the context of the contract as a whole. Condition 1.9 refers to "the verification certificate and initial due diligence form aftermentioned." Condition 2.39 then provides that the purchaser is obliged to procure that his solicitor delivers to the vendor's solicitor a completed verification certificate, an initial due diligence form in the form of the drafts annexed to the Articles of Roup duly executed by the purchaser's solicitor on or prior to the settlement date.

[27] Thus the terms of the contract oblige the pursuer to complete and supply the KYC information identified by the defender in those forms. The imposition of that obligation is entirely consistent with the parties having contemplated that it was for the defender to determine and intimate what KYC information it considered it necessary for the purchaser to provide. He submitted that that position remains the case notwithstanding that the combined effect of Conditions 1.9 and 2.6.3 is to oblige the purchaser to provide KYC information required of it by the defender by 15 December 2016 whereas Condition 2.39 only imposes an obligation to do so by the settlement date.

[28] It was his position that the alternative construction advanced on behalf of the defender is wrong in that it does not give effect to the natural and ordinary meaning of the words employed in Condition 2.6.3. Had it been intended that the purchaser would be required to provide by 15 December 2015 all information that the defender was under a legal obligation to obtain it would have been easy to frame a stipulation to that effect, that was not the way the stipulation was worded.

[29] Secondly, the defenders' construction is not how the expression would have been understood by the reasonable man who was aware of the facts known or reasonably available to the parties at the time they contracted.

[30] In elaboration of that position he argued: the reasonable bystander would have been aware only that this was an arms-length transaction for the sale of a single heritable property. He would not have understood there to be any money laundering obligations incumbent upon the defender by reason of membership of an undisclosed corporate structure or scheme, which as he understood it was the basis upon which it would be argued by the defender that such money laundering obligations arose. In those circumstances he would not have understood the words used in Condition 1.9 as meaning it was for the purchaser to procure that he provided to the defender all information which the defender was obliged in law to obtain by virtue of being part of such a corporate structure or scheme.

[31] Thirdly, the defender proposed construction is inconsistent with the terms of the contract as a whole. If the pursuer was in fact under an obligation to work out what information the defender required as a matter of law to obtain and thereafter to provide that information to the defender by 15 December whether or not the defender had made any request for it, there would have been no reason for the defender to prepare an Initial Due Diligence Form and Verification Certificate identifying information it required the purchaser to provide, and for it to be an express condition of the contract that the purchaser was to procure that those forms were to be completed and executed by his solicitor and delivered to the defender's solicitor.

[32] On the basis that on their proper construction conditions 2.6.3 and 1.9 entitled the defender to resile if the pursuer had not by 15 December provided such KYC information as the defender had required of him, the defender purported exercise of its option to bring the

contract to an end does not satisfy the conditions on which that power can be exercised. The information requested prior to 15 December was the information to be provided by completion of the defender's due diligence form and verification certificate. That information was provided to the defender's solicitor by email on 15 December 2016. No complaint has been made by the defender regarding that information.

[33] Insofar as the defender's agents had in their email of 12 December also requested vouching or evidence in support of the information to be provided (in the form of certified copies of the pursuer's passport and a utility bill), that evidence did not amount to "KYC information" within the meaning of condition 1.19. A failure to provide those certified copies by 15 December accordingly gave rise to no entitlement on the part of the defender to resile although those certified copies were in fact provided by email on 15 December with hard copies being posted to the defender's agents on the same date. Both the expression "KYC information" in itself and the definition in condition 1.9 "means such information as the Vendor and the Vendor's solicitors require" make it plain that the obligation incumbent on the pursuer extended to information only and not to documentary evidence.

[34] The defender was entitled validly to resile from the contract only if there was strict compliance with the contractual conditions for the exercise of that power. The right to resile, and thus unilaterally bring the contract to an end, could be exercised only if the pursuer had by 15 December 2016 failed to provide all KYC information required by the defender. It is nothing to the point that the defender, through its agents, requested the pursuer in an email dated 19 December 2016 to provide further "source of wealth information." It is plainly implicit in the terms of condition 2.6.3 that for the defender to resile on the ground that information had not been provided by 15 December the information must have been

required on or before 15 December. The defender's purported rescission in terms of condition 2.6.3 was of no effect.

[35] The further contractual provision now relied upon by the defender is condition 2.6.6 (set out in full in paragraph [6], above). He argued that the defender had no entitlement to refuse to convey title to the property to the pursuer on the basis of that condition. Condition 2.6.6 makes settlement of the transaction conditional on the pursuer providing "the KYC information (with the applicable information and/or documentation specified in the initial due diligence form aftermentioned) to the defender's satisfaction no later than 15 December 2016."

[36] For the reasons set out above it is submitted that the pursuer did provide the KYC information to the defender by that date. However, condition 2.6.6 also makes settlement subject to the pursuer providing such documentation as was specified in the initial due diligence form. The documentation specified in the initial due diligence form was a "certified copy of passport (or similar identity document) and country of domicile": [JB 13]. That documentation was provided to the defender's agents by the pursuer's agents with the email and letter of 15 December as the pursuer's agents provided certified copies of the pursuer's UK passport and of his driving licence containing details of his place of residence: [JB 15].

[37] As condition 2.6.6 does not stipulate the form in which the documentation is to be provided it is submitted that the delivery of the certified copy documents electronically was sufficient to comply with the requirements of the condition. If, contrary to that submission, only hard copies of the documents satisfied the requirements of condition 2.6.6 the defender has no entitlement to refuse performance of the contract on that ground as (a) providing the hard copy documents by 15 December was not of the essence; (b) it is a matter of agreement

that the hard copy documents were received by the defender's agents on 19 December; and (c) the defender had not by means of an ultimatum made compliance on some date prior to 19 December of the essence of the contract.

[38] Insofar as condition 2.6.6 stipulates that the relevant information and documentation is to be supplied by the purchaser "to the Vendor's satisfaction" the evidence establishes that the defender clearly was satisfied. On 19 December 2016 at 15.06 hours Mr Turok of the defender's agents emailed the pursuer's agent to say "I have taken instructions and our clients want to proceed with Mr Iftikhar as the purchaser." That the email confirming the defender's wish to proceed was subsequent to the receipt of the hard copy documents sent by the pursuer's agents can be inferred from the time of the email and from the fact that in the same email Mr Turok said "In order for our clients to complete their AML checks, could you provide a brief explanation as to Mr Iftikhar's source of wealth…" [JB 19]. Mr Turok also confirmed in evidence that the defender "was minded to proceed with the sale to [the pursuer]" at that time; (see: paragraph 13 of Mr Turok's affidavit (No 16 of process)).

[39] Subsequently, on 21 December Mr Turok sent a further email to Mr Ahmed in which he stated that the Articles of Roup were entered into by Mr Iftikhar as an individual and did not allow him to nominate a company for the purposes of the disposition. He then asked "Do you have instructions?", ie instructions to proceed with the transaction: see, Mr Turok's statement to that effect at paragraph 15 of his affidavit. In fact there was no obligation on the pursuer or his agents to confirm that the pursuer intended to proceed with the transaction on the basis title would be conveyed to the pursuer as an individual. The pursuer was already contractually bound to do so. Nevertheless this email implicitly confirms the defender's willingness to proceed with the transaction having had sight of the documents supplied by the pursuer.

[40] With respect to the illegality defence Mr McIlvride said this: the illegality defence as he understood it was this: the transaction would be illegal as in doing so the defender would, through failings on the part of the pursuer, be acting incompatibly with the duties incumbent upon it under the Money Laundering Regulations 2007 ("the 2007 Regulations"). Thereafter Mr McIlvride proceeded to take the court through what he submitted were the relevant provisions in terms of the 2007 Regulations. He first referred to Regulation 11(1) which provides as follows:

> "(1) Where, in relation to any customer, a relevant person is unable to apply customer due diligence measures in accordance with the provisions of this Part, he-
>
> (a) must not carry out a transaction with or for the customer through a bank account;
>
> (b) must not establish a business relationship or carry out an occasional transaction with the customer;
>
> (c) must terminate any existing business relationship with the customer;
>
> (d) must consider whether he is required to make a disclosure by Part 7 of the Proceeds of Crime Act 2002 or Part 3 of the Terrorism Act 2000."

He submitted that the transaction in the instant case was in terms of this regulation an occasional transaction.

[41] Thereafter Regulation 7(1) described when a relevant person must carry out "customer due diligence measures":

> "(1) Subject to regulations 9, 10, 12, 13, 14, 16(4) and 17 a relevant person must apply customer due diligence measures when he-
>
> (a) establishes a business relationship;
>
> (b) carries out an occasional transaction;
>
> (c) suspects money laundering or terrorist financing;
>
> (d) doubts the veracity or adequacy of documents, data or information previously obtained for the purposes of identification or verification.

(2) Subject to regulation 16(4), a relevant person must also apply customer due diligence measures at other appropriate times to existing customers on a risk-sensitive basis."

[42] He went on to submit that in considering Regulation 7(1) it was material to consider the terms of Regulation 17 which provides:

"(1) A relevant person may rely on a person who falls within paragraph (2) (or who the relevant person has reasonable grounds to believe falls within paragraph (2)) to apply any customer due diligence measures provided that-

(a) the other person consents to being relied on; and

(b) notwithstanding the relevant person's reliance on the other person, the relevant person remains liable for any failure to apply such measures.

(2) The persons are…

(i) an auditor, insolvency practitioner, external accountant, tax adviser or independent legal professional; and

(ii) supervised for the purposes of these Regulations by one of the bodies listed in Schedule 3…"

He drew to the court's attention that relevant persons include "independent legal professionals" (see: Regulation 3(1)(d)). It was not disputed that the pursuer's solicitor was such a legal professional.

[43] He then moved to the terms of Regulation 5 which provides:

"'Customer due diligence measures' means-

(a) identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source;

(b) identifying, where there is a beneficial owner who is not the customer, the beneficial owner and taking adequate measures, on a risk-sensitive basis, to verify his identity so that the relevant person is satisfied that he knows who the beneficial owner is, including, in the case of a legal person, trust or similar legal arrangement, measures to understand the ownership and control structure of the person, trust or arrangement; and

(c) obtaining information on the purpose and intended nature of the business relationship."

Having reviewed the regulatory framework it was Mr McIlvride's position that if the defender implemented the contract this would not involve any illegality on its part.

[44] In support of that proposition Mr McIlvride advanced a series of arguments:

- Firstly, the duty to carry out "customer due diligence measures" is imposed upon those who are a "relevant person". The defender is a Trust corporation acting solely as a nominee for the property securities of the Aviva Investors Property Trust and is a wholly-owned subsidiary of the Trustee of the Trust, Citibank Europe Plc. Against that background it was his position that it does not amount to a "relevant person" in terms of Regulations 3 and 4.
- He emphasised that this argument did not mean that a limited company which is a "relevant person" can evade its responsibilities under the 2007 Regulations by incorporating a subsidiary which transacts the parent company's business as a nominee. That is because if the subsidiary undertakes the type of financial activity which makes the parent company a "relevant person", within the meaning of Regulation 3 the subsidiary will, by undertaking that business, itself be a "relevant person". The Regulations do not impose "relevant person" status on nominees or subsidiaries regardless of the activities they undertake. An example to illustrate this was an investment company which is a "relevant person" may purchase a supermarket chain and incorporate a nominee but that does not mean each transaction between the subsidiary and the customer at the checkout is made subject to the Regulations.

- Secondly, the duty of customer due diligence is incumbent upon it only in relation to a "customer". That term is not defined in the Regulations but it is submitted that in its normal and ordinary meaning "customer" is a person who transacts with a supplier of goods or services. In any event, the pursuer cannot sensibly be characterised as a "customer" of the defender simply by reason of having entered into an arms-length transaction to purchase a single heritable property. One would not describe an individual who is the purchaser of a house as the "customer" of the individual who sells.
- Thirdly, in any event the defender can proceed with the transaction without illegality as it is in terms of Regulation 17 entitled to rely upon the pursuer's agents having applied customer due diligence measures. In the signed verification certificate provided to the defender the pursuer's agents certified they had carried out client verification checks that comply with the UK Regulations and that they had complied with the money laundering obligations imposed by the UK Regulations. They did so in circumstances where that certificate contained a provision that the defender considered it was the responsibility of the pursuer and his agents, as his UK solicitors, to ensure compliance, thus indicating by completing and submitting the certificate that they consent to being relied upon: [JB 14].

It was his position that the defender is entitled to proceed with the sale without illegality in circumstances where it can rely upon the pursuer's agents who carried out the necessary customer due diligence.

[45] Even if all of the preceding submissions were wrong he argued that the pursuer had complied with Regulation 5.

[46] The first of those measures is identifying the customer on the basis of documents, data or information obtained from a reliable and independent source. They have obtained copies, certified by solicitors as true copies, of the pursuer's passport and driving licence, each of which has a photograph of the pursuer.

[47] The second of the measures specified in Regulation 5 is not of relevance here as it applied only where the transaction involves a beneficial owner of an entity who is not the "customer".

[48] The third specified measure is obtaining information on the purpose and intended nature of the business relationship. That measure is not necessary in the circumstances of this case as the parties have never had or expected to have a "business relationship" as defined in Regulation 2 but in any event the defender has already obtained the relevant information as the contract the parties have concluded makes it clear that the purpose of the relationship is the pursuer's acquisition of the property at an agreed price and the intended nature of the relationship is one of buyer and seller.

[49] The Regulations do not impose an obligation to obtain evidence of the "source of funds" intended to be used in payment of the purchase price but in circumstances where the evidence has made it clear that the pursuer has not yet obtained the funds which will be used to make payment it is difficult to see how there could be any basis for a finding that this issue gives rise to any illegality.

The Reply on Behalf of the Defender

The Contractual Defence

[50] Mr Walker first set out his position, assuming the pursuer's construction regarding the word "required" is correct. It was his position that this did not avail the pursuer at all.

[51] The pursuer founds on the definition of "KYC information" and contends that properly interpreted this clause means that it is for the defender to "require", in the sense of "to demand", specific KYC information from the pursuer.

[52] The pursuer contends that this means that a demand for specific information must be made, information must then be provided and it is only where the defender is dissatisfied with what has been provided that the defender can resile.

[53] He went on to submit that even if that construction is correct, the defender was on the facts, entitled to resile.

[54] In development of this argument he began by referring to the email of the defenders' solicitor of 12 December 2016, which is set out in full in this Opinion at paragraph [7]. This required four items to be produced:

1. A certified true copy passport for Muhammad Asad Iftikhar.
2. A certified true copy utility bill for Muhammad Asad Iftikhar.
3. Completed Initial Due Diligence Form.
4. Completed Verification Certificate.

[55] In so far as it might not have been crystal clear that it required originals, not copy documents, that "requirement" also made express reference to these documents being issued "in the post".

[56] Giving the email a fair reading, it is clear that the defender's solicitor "required" all four of these documents to be originals, not copies. Mr Turok's agreed affidavit explains that originals were indeed what he was looking for.

[57] This is most clearly seen in relation to the first 2 items which are expressly described as "certified true copies". This amounts to a very clear and express "requirement" for the documents to be properly certified, not copy certified copy documents.

[58] That is how any reasonable reader would understand Mr Turok's email. Were it otherwise the words "in the post" would have no significance and the words "certified copy" would mean something other than what those words would ordinarily be understood to mean. In effect, "certified copy" would mean "copy certified copy" – which makes no sense at all.

[59] However, it also applies to the Verification Certificate – which had to be signed by the solicitor.

[60] It does not appear to be in dispute that the Articles of Roup required that the KYC information was to be produced by close of business on 15 December 2016.

[61] Accordingly, he submitted that, if "require" means what the pursuer contends it means, what was "required", namely original certified copy passport, original certified copy utility bill, original completed initial due diligence form and original completed certification certificate were not produced in time.

[62] Furthermore, it is not in dispute that one of the items specifically required by Mr Turok was not provided at all. That was the certified true copy utility bill for "Muhammad Asad Iftikhar". What was provided was a copy certified copy utility bill in a different, albeit similar, name.

[63] So, even on the pursuer's approach to construction of the Articles, his case is fundamentally flawed. He did not produce what was "required" within the contractual deadline of 15 December 2016.

[64] The second chapter of Mr Walker's argument was to address the issue of the correct meaning of "require" in Clause 1.9. It was his position that properly understood in its context, "require" in that Clause means exactly what it says. It does not mean "demand" as the pursuer contends.

[65] He submitted that in considering this question that the key clauses of the Articles of Roup were (1) Clause 1.9, (2) Clause 2.3.3 and (3) Clause 2.3.6.

[66] He further submitted the word "require" had to be construed (as did the Articles of Roup generally) in light of the clear common intention of the parties to align the contract with the then current AML law, namely: the 2007 Regulations (see: the terms of Clause 1.9 of the contract and the blank verification certificate which is incorporated into the Articles of Roup).

[67] He then submitted on the basis of the foregoing that read together, and in the context of the 2007 Regulations, the three relevant clauses of the Articles of Roup provide the defender with a complete, unfettered discretion in relation to whether or not whatever the pursuer provides is enough to satisfy the defender from an AML perspective. The onus is on the pursuer, not the defender, to produce evidence of his identity and source of funds. It is not on the defender to list out specific items of evidence that it "requires". Instead, whether or not what the pursuer has produced is sufficient is to be judged, after the fact of it being produced, at the sole discretion of the defender.

[68] It was his submission that such a construction made common sense. In addition critically it accorded with the 2007 Regulations in that from the terms of Regulations 5 and 7, in particular Regulation 7(3) it is clear that the Regulations provide discretion to the "relevant person".

[69] It is for the relevant person to determine the extent of customer due diligence that should be applied to the transaction, based on a risk-sensitive assessment.

[70] Furthermore, in terms of Regulation 14(1), if he needs to adopt Enhanced Due Diligence ("EDD"), it is for the relevant person to assess that EDD on a risk sensitive basis. So, again, we see discretion being injected into the process.

[71] This all sits alongside Regulation 11 which imposes an obligation on the relevant person not to carry out a transaction where the relevant person is unable to apply customer due diligence. The level of appropriate customer due diligence that needs to be applied is particular to each customer and is a matter for the relevant person to assess. As such, the onus is on the relevant person to decide what is required to satisfy him that all is well and, if he cannot obtain such satisfaction, he must not transact.

[72] This is also very clearly reflected in the applicable guidance issued by the Joint Money Laundering Steering Group ("JMLSG"). It is noteworthy that that guidance is expressly referred to in the draft Verification Certificate which is, in turn incorporated into the Articles of Roup (JB 1, pp 18 & 20). So, the Articles of Roup must be interpreted in light of the JMLSG Guide.

[73] Mr Walker also referred to Chapters 4 and 5 of the JMLSG Guide. These set out the aims and approach to AML for an institution such as the members of the Scheme in this case. In particular, the following paragraphs appear to be particularly relevant to this case: 4.4, 4.13, 4.15, 4.16, 4.29, 4.31, 4.45, 4.46, 5.3.1 – 5.3.4 (incl), 5.3.6, 5.3.29, 5.3.32, 5.3.33, 5.3.36, 5.3.38.

[74] The JMLSG Guidance envisages information being gathered and assessed. That information will then generate a risk categorisation low/medium/high (para 4.16). If the information or other information (such as screening checks) the relevant person obtains result in him being unable to apply the level of CDD that the relevant person considers is appropriate, he is obliged, by Regulation 11 not to transact (also see JMLSG Guide para 4.21).

[75] That is all duly reflected in the Articles of Roup which introduce discretion by the terms of clause 2.6.6 and 2.6.3.

[76] Clause 2.6.6 expressly states that the AML documentation supplied must be "to the Vendor's satisfaction". If satisfactory information is not supplied then, in terms of

clause 2.6.6, the Vendor, in its sole discretion, can treat the deposit as unpaid and repudiate the contract.

[77] Thus he submitted for the provisions in the Article of Roup to work alongside the Regulations and the guidance there is only one possible interpretation of "require" that makes sense. That is the interpretation suggested by him, where the onus is on the pursuer to put together a package of information and submit it, by 15 December 2016, and for the defender to then assess that and decide, in its sole discretion, if it is satisfactory. If it is not satisfactory, the defender can resile.

[78] He then turned to the pursuer's suggested construction of "require" and made two submissions: (a) it makes no commercial sense and (b) it does not accord with the 2007 Regulations and the applicable guidance.

[79] In expansion of this argument he said this:

[80] The pursuer contends that "require" means "demand". He says that the defender must demand whatever it needs before 15 December 2016. Then, on his analysis, the pursuer can submit that information at any time up to the end of 15 December 2016. Thereafter, again on his interpretation, the defender cannot ask for anything else and must transact if whatever has been demanded has been produced unless there is something objectionable about it, even if more information is required in order for the defender to be satisfied about AML matters and even if the defender is in possession of adverse media hits which it cannot negate (as is the case here).

[81] Critically, the pursuer says that the defender did not "require" any source of funds or source of wealth evidence before 15 December 2016 and so, regardless of any concerns it may have had, cannot complain that no source of funds or source of wealth information was

provided. Further, he contends that any further request for source of funds and source of wealth information (as was made on 19 December) would come too late.

[82] If that interpretation were correct, it would make it impossible for the defender to operate in accordance with the Regulations and the Guidance.

[83] The defender would have one shot at listing all the information it might need. The pursuer could then produce that at 11.55pm on 15 December 2016 (on his argument by email and containing spelling inconsistencies). There would be no opportunity for the defender to refuse to proceed if, upon considering the information it decided that it should have required something more of if the defender had obtained its own adverse screening hits which it could not negate. The defender would be obliged to transact even though doing so would put it in breach of Regulation 11.

[84] That is clearly not commercially sensible and fundamentally does not accord with the clear aim of this contract – ie to permit the defender to obtemper its AML obligations under the then current 2007 Regulations.

[85] Of course, the defender was not obliged to resile immediately on 15 December 2016. Not only would that not accord with the contract, but it would also not accord with 'the 2007 Regulations'. The defender had to have time to actually consider what was provided to it (on the last day permitted). Having considered it, together with the circumstances in which it was provided (ie along with an 11th hour request to change the Pursuer to a non-existent corporate vehicle), the defender afforded a further opportunity to the pursuer to produce more information. Despite the package of KYC information being inadequate on 15 December 2016, the pursuer sought more information on 19 December 2016. However, the defender then obtained negative media results which it was unable to negate and so, on 22 December 2016, exercised its option to resile.

[86] The third detailed chapter of Mr Walker's submissions, in terms of the contract defence related to the issue of unsatisfactory information and proceeded first on the basis of the defender's construction of KYC information and secondly on the basis of the pursuer's construction. It was his position that on either basis the defender was entitled to resile. With respect to the first part of his argument he developed his submission in this way.

[87] The Articles of Roup give the defender unfettered discretion to decide whether what had been provided was satisfactory. The defender was not satisfied with the KYC information provided. That is clear from the affidavit of Anthony Besford-Land and his oral evidence in chief and in cross.

[88] He clearly explains why that was so. He cites *inter alia*: the discrepancy in the name shown on the utility bill; the fact that the utility bill was out of date; the late attempt to change the purchasing entity to a non-existent corporate vehicle; no evidence regarding source of funds or source of wealth (affidavit paras 14 – 15 & 19). He also cites the adverse media results which he could not negate (affidavit para 20). He maintained the position that these factors all, individually and cumulatively, made him concerned in evidence despite being vigorously tested on it. Mr Besford-Land also spoke to his more senior, second line, colleagues and to the MLRO all sharing his concerns.

[89] Mr Christie's unchallenged evidence is to the effect that he took the ultimate decision to terminate the transaction based on the advice he and his colleagues had received from the FCCO team (ie Mr Besford-Land).

[90] On that basis, the pursuer having failed to produce KYC information that satisfied the defender by 15 December 2016, the defender was entitled to resile – which it did on 22 December 2016. This was even after giving the pursuer a further opportunity to produce

satisfactory information. The defender was not obliged to offer the pursuer that further opportunity but did so.

[91] Turning to his second argument in terms of this chapter he argued that if the court prefers the pursuer's interpretation of "require" in clause 1.9, then it was his position that the defender was, in any event, not satisfied with the documents that had been provided by 15 December 2016 and so was entitled to resile.

[92] There were a number of reasons for that. First, the utility bill was not in the correct name. Second, the utility bill was not recent enough to satisfy the defender. Third, the information was not contained on originals. Fourth, irrespective of the evidence received from the pursuer, the defender had independently received adverse media hits which it could not negate.

[93] However, for the reasons already set out above, properly construed, the Articles of Roup give the defender complete discretion in relation to whether or not whatever it receives is satisfactory. It does not need to explain itself or justify why it is dissatisfied. It merely has to be dissatisfied (as it clearly was).

[94] Accordingly, even if the pursuer is correct and the Articles of Roup, properly interpreted, only allow the defender to resile if it is not satisfied with what is produced in response to a demand for specific information, that is the situation here. In short, the defender was not satisfied by what was produced on 15 December 2016. That is, even ignoring the absence of source of funds and source of wealth information.

[95] Mr Walker then moved on to the fourth chapter of his argument and to make a further alternative argument. This argument turned on the necessity, if the court were not with him on any of his earlier arguments, for a term to be implied into the contract. In development of this argument he said this: if the Court accepts the pursuer's interpretation

of the Articles of Roup, it would be necessary to imply a term into the Articles of Roup. An implied term would only be required if the Court also concluded that the Articles of Roup, properly interpreted, did not give the defender a complete discretion to terminate if it was not satisfied with whatever KYC information had been provided.

[96] If the Court accepts the submission that, whatever 'require' might mean, clause 2.6.6 gives the defender an unfettered discretion to resile if it is not satisfied with whatever KYC information is produced, then no term requires to be implied.

[97] However, on the hypothesis that the Court does not accept any of the earlier submissions, for the reasons already explained, the Articles of Roup would not work in a manner that (i) coincides with how the parties clearly intended the contract to work, namely in a manner that corresponds with the 2007 Regulations or (ii) complies with the mandatory provisions of the 2007 Regulations which (i) obliges a relevant person to apply customer due diligence and (ii) precludes him from transacting if he is not able to do so. Instead, on the pursuer's interpretation, the Articles of Roup would oblige the defender to transact even where it was unable to apply its own customer due diligence measures.

[98] He submitted this is a clear case of a term being necessary. If, after interpreting the express terms, the Court comes to the conclusion that the parties have created such a contract then the test for implication is met. The law on implication of terms has recently been clarified in *Marks & Spencer* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742.

[99] In the present case a term would be required which, allowed the Vendor, after receipt of the KYC information, to require the Purchaser to produce such further AML evidence as the Vendor, at their sole discretion, requires in order to satisfy itself in relation to the identity

of the Purchaser and the source of funds utilised in respect of payment of the Balance of the Price and/or the deposit.

[100] In proposing the terms of the implied term he had sought to use language which is as close as possible to the definition of KYC information in the formulation of the term that the defender would seek to imply.

[101] Mr Walker then turned to deal with the issue of the illegality of the contract and therefore its unenforceability. This argument was advanced on the basis that the court had rejected all of the arguments which he had made in terms of his contractual defence to the action.

[102] It was his position that, if the Court accepted the pursuer's interpretation of the Articles of Roup and refuses to imply a term as desiderated for, the Articles of Roup would be unenforceable.

[103] If the agreement, properly construed, does not allow the defender to apply customer due diligence as determined by it on a risk-sensitive basis and to resile if it is not able to carry out that customer due diligence, then it was contrary to the old 2007 Regulations and it is contrary to the current 2017 Regulations, being the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017/692.

[104] I did not understand it to be a matter of contention that the old and new Regulations matched up and that there was with respect to the arguments before the court no material difference between the Regulations.

[105] Mr Walker submitted that the 2007 Regulations applied to the defender and that the 2017 Regulations applied now to the defender. If the court accepts those submissions then it can conclude:

- First, that the defender was required to terminate the transaction when it did on 22 December 2016; and
- Second, that it would be required not to enter into the transaction now.

That is because the defender was, and remains, dissatisfied on AML grounds and has been unable to carry out its desired level of Customer Due Diligence.

[106] The defender's witnesses (Besford-Land and Christie) have explained why, as matters stood on 22 December 2016 and as they stand today, the defender has not been able to satisfy itself in relation to various AML issues surrounding this transaction.

[107] The defender has still been unable to negate the adverse media results it has received. It has been unable to verify the pursuer's correct name (he used Mohammad in his pleadings in this action until recently when he amended the Summons). It has been unable to verify the legitimacy of the pursuer's source of funds and source of wealth. The pursuer's oral evidence was wholly unconvincing in that regard. It has been unable to verify the legitimacy of the pursuer's relationship with Wickton.

[108] In this last respect it is noteworthy that the pursuer's pleaded case still asserts "the pursuer is, through another company, the current occupier of the subjects. He has a substantial business interest there…" That averment seems completely at odds with what is said in the pursuer's affidavit. The pursuer seemed to accept that in his evidence. Nonetheless, from an AML perspective, the defender is left in doubt. Clearly, the defender cannot just accept whatever version the pursuer happens to choose to advance on a day by day basis. If his pleaded position is correct then, standing that he clearly is neither a shareholder or a director of Wickton, legitimate concerns clearly arise in relation to whether his funds may be coming from undeclared income – ie the Proceeds of Crime.

[109] A contract which requires a breach of the Regulations and obliges a party to transact in these circumstances would be contrary to public policy. Both the 2007 and 2017 Regulations create criminal offences which will be committed by a person who proceeds with a transaction in a situation where he has been unable to complete his Customer Due Diligence or, if applicable, Enhanced Customer Due Diligence. If he transacted and then it were to transpire that he had received or dealt with the proceeds of crime, the person would also be guilty of offences under the Proceeds of Crime Act 2002.

[110] In *Jamieson* v *Watt's Trs* 1950 SC 265 Lord MacKay opined at page 274 that a claim by a contractor who sought payment for work which had been carried out illegally was irrelevant. He stated: "How can any Court lend itself to carry into force (whoever pleads it) a contract, or an operation, which the law bans and calls illicit?". Lord MacKay quoted with approval the dicta of Lord Lindley: "No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal." In the same case Lord Patrick (page 279), citing Gloag, draws a distinction between "a statutory prohibition" and "contracts intended to secure the commission of a crime …" Even in the former class of illegality Lord Patrick is clear that such contracts cannot be enforced.

[111] Lastly, it was Mr Walker's position that insofar as the submissions put forward by Mr McIlvride were to the effect that the Regulations did not apply to this transaction the court should exclude the submissions. The basis for this assertion was that there had been no suggestion in the pursuer's pleadings that there was to be a challenge to the applicability of the Regulations. Moreover, in an earlier Note of Argument prepared for a Debate (which did not take place), the pursuer's position as there set out did not challenge the applicability of the Regulations. In these circumstances he had not been given fair notice of this line of

argument. He in fact described the position as really being one of an ambush. The court should not allow this to happen.

[112] If the court were not with him in relation to this preliminary position he then proceeded to argue as follows: Mr Christie's supplementary affidavit confirms that Mr Korek's understanding of the Aviva Scheme and of the roles of the defender and AIGSL is correct (Christie supp affidavit para 4).

[113] Mr Korek has set out his understanding of the Scheme and the respective roles in paras 4.9, 4.10 & 4.24 of his report. Whilst the report ended up not being spoken to, he submitted that its text can be referred to as it is referred to by Mr Christie in his unchallenged affidavit.

[114] Paragraph 4.24 of the Korek report explains, under reference to Regulation 3(1)(b) and 3(3) of the 2007 Regulations, which in turn refers to points 2-12, 14 and 15 of Annex 1 to the Capital Requirements Directive which is in schedule 1 to the 2007 Regulations that AIGSL carries out (i) portfolio management and advice (ii) safekeeping and administration of securities and (iii) safe custody services.

[115] If one then looks at the MLTF one sees equivalent provisions in Regulations 8(2)(b), 10(2)(a), 10(4) and schedule 2.

[116] As Mr Christie's evidence to the effect that Mr Korek's understanding is correct was unchallenged, the Court should accept that AIGSL is a "financial institution" for the purposes of the 2017 Regulations and so caught by those regulations.

[117] Paragraphs 4.9 – 4.10 of the Korek report set out Mr Korek's further detailed understanding of the Scheme. Again, this was confirmed in Mr Christie's unchallenged affidavit. On the basis that there was no issue taken by the pursuer about the applicability of the regulations, no further evidence was led on this issue. These passages in the Korek

report make clear that AIGSL and the defender are constituent parts of the overall Scheme. Again, that has not been challenged. The defender enters into transactions as nominee.

[118] So, it is submitted that the defender, as the operational arm of the Scheme, must comply with the regulations which apply to AIGSL. Were it otherwise the rules on AML would be worthless. Any regulated entity or scheme which was otherwise subject to the regulations could elide them simply by transacting its business through a nominee company. That would be ludicrous and would completely undermine the UK economy and open the door to incalculable levels of money from criminal activity being routed through the UK economy.

Discussion

The First Issue: the Contractual Defence

[119] I believe that the appropriate starting point with respect to this branch of the argument is to assume that Mr McIlvride's position with respect to the proper construction of the word "require" in Clause 1.9 is correct.

[120] I am persuaded that Mr Walker's submission is correct that the email of 12 December 2016 from the defender's agent to the pursuer's agent comprised a requirement as that term was defined by Mr McIlvride. It, on a sound construction insisted or demanded that the pursuer produce four items. Each of the items required, on a proper construction, related "to the identity of the purchaser", a matter in respect of which the defender was entitled in terms of Clause 1.9 to require "information". The issue therefore came to be this: was what was required "information" in terms of Clause 1.9? Mr McIlvride submitted that it was not "information". His argument was a short one and was this: the expression "KYC information" in itself and the definition in condition 1.9 make it plain that the obligation

incumbent upon the pursuer extended to information only and not to documentary evidence.

[121] In my view Mr McIlvride's contention is misconceived and is not based on a sound construction of Clause 1.9.

[122] On an ordinary and natural meaning information is knowledge or facts communicated about a particular subject.

[123] The knowledge or fact required from the pursuer by the defender's solicitor in the said email with respect to the pursuer's identity was:

> "1. A certified true copy passport for Muhammad Asad Iftikhar...
>
> 2. A certified true copy utility bill for Muhammad Asad Iftikhar."

[124] An essential part of the knowledge or fact required by the defender was that what was provided is a certified true copy (not a copy of a certified true copy). This is emphasised by reference in the email to the documents being sent "in the post".

[125] Accordingly on an ordinary and natural construction of the word "information" the requiring of the certified true copies forms part of the information required by the defender.

[126] The pursuer on the basis of his own construction of "require" envisages the defender saying what it demands in relation to the issue of identity. Here the defender has demanded particular documentary information with respect to the issue of identity. On a sound construction of Clause 1.9 the requiring of the above clearly falls within the definition of "information".

[127] Documentary information is merely one form in which information can be presented. It is not on a proper construction something other than information as contended for by Mr McIlvride. That is far too narrow a definition of information. There is no restriction in the Clause as to what form information can be required. If the parties had wished to exclude

a particular form of information a stipulation to that effect could easily have been drafted. That is not the course they followed.

[128] Support for the construction I have arrived at can be found within Clause 1.9 itself. "KYC information" in part is defined as information required "in relation to the identity of the purchaser". That part of the clause clearly envisages documentary information being produced. I find it very difficult to believe that parties intended information required in relation to identity would exclude documentary information. A reasonable person having the necessary background knowledge available to the parties would have understood information to include documentary information.

[129] Support for the requiring of such documents falling within a sound construction of information is also found in terms of Clause 2.6.6 which provides that KYC information supplied must be to the "Vendor's satisfaction". This envisages the defender being able to require information in whatever form satisfies it.

[130] Lastly, that information, includes information being in a documentary form and being certified in a particular way, fits in with the context in which the contract was to take place, namely: Anti Money Laundering Regulations.

[131] That this was the context of the contract and of the clauses being considered would have been clear to the reasonable person with the background knowledge which would have been available to parties for reasons which I will detail later in this Opinion.

[132] The approach of the pursuer to the construction of the word "information" renders the clause meaningless and unworkable. If the defender cannot require that a particular form of information is produced ie documentary information, then it is difficult to see that the clause has any content. The defender has an absolute discretion as to when it is satisfied and this suggests that information must be given a wide definition and not the narrow

construction contended for by the pursuer. The pursuer's construction does not make commercial sense as it denies to the pursuer the ability to say the form of information which it requires.

[133] I am clearly of the view that the pursuer's construction of the word "information" is not a sound construction and the defender's position on this issue should be preferred.

[134] It was not a matter of dispute that as at 15 December the pursuer had not supplied certified true copies of the above two documents. In addition the original completed due diligence form and original completed verification certificate were not produced on time. Thus the information required was not produced. Accordingly the pursuer was in breach of contract and the defender was entitled to resile.

[135] Further the utility bill which was produced, as at 15 December, as well as not being a certified true copy in accordance with the requirements in the email was further not in the name of Muhammad Asad Iftikhar. It was therefore not in accordance with what was required. The pursuer was for this further reason in breach of contract and the defender was entitled to resile.

[136] The defender had a unilateral right to resile and on the pursuer's construction of "require" and on a proper construction of "information" the pursuer was required to produce certain information by 15 December 2016. He did not do so. On exercising its right to resile the defender fully complied with the conditions for its exercise. Such strict compliance was required by *Scrabster Harbour Trust* v *Mowlem Plc* 2006 SC 469 at paragraph 47; *Ben Cleuch Ltd* v *Scottish Enterprise* 2006 CSOH 35 at paragraphs 24 and 25; and *Batt Cables Plc* v *Spencer Business Parks Ltd* 2010 SLT 860 at paragraphs 23 to 25. My decision with respect to this issue decides the whole matter before the court, however, I was addressed on a number of alternative arguments and it is appropriate that I deal with these.

[137] Having assumed for the purposes of the first argument that the pursuer's construction of the word "require" is correct I turn to consider the issue of what is a sound construction of the word "require".

[138] In arriving at a proper interpretation of this word regard has to be had to Clauses 1.9, 2.3.3 and 2.3.6 of the Articles of Roup.

[139] First it is, I believe, clear that the Articles of Roup fall to be construed in light of the 2007 Regulations.

[140] Having regard to the terms of the above clauses and the terms of the blank verification certificate which accompanied the Articles of Roup and which is incorporated therein the clear intention of parties was to align their contract with the then current AML law, namely: the 2007 Regulations.

[141] The terms of the above clauses, are I think difficult to understand, if that was not the position. The clauses serve no real purpose if that was not the parties intention. Further the blank verification certificate makes express reference to the Regulations in the verification certificate itself and in the notes accompanying it. I believe, there is no merit in the pursuer's argument, that the reasonable bystander would not understand having regard to the above that the contract was intended to be aligned with the money laundering obligations to which the defender believed it was subject. That argument gives no meaning or purpose to the said clauses of the contract and entirely fails to take account of the references in the verification certificate to such obligations.

[142] So far as whether the Articles of Roup fall to be construed in terms of the 2007 Regulations I am persuaded that it does not matter whether the Regulations were in fact applicable to the transaction. The relevant question was whether the reasonable bystander would have understood that the intention was to align the contract with the

2007 Regulations and it is, I consider, for the foregoing reasons, clear that this was parties intent.

[143] In addition the contract falls to be interpreted in terms of the relevant guidance to the 2007 Regulations as referred to by Mr Walker. This guidance was expressly referred to at note 3 in the blank verification certificate.

[144] Having regard to Regulations 5, 7, 11 and 14(1), to which I was directed by Mr Walker and to the various parts of the guidance I am persuaded that they support the defender's construction.

[145] Reading the three clauses together and in the context of the provisions of the 2007 Regulations I am persuaded that the defender's construction of "require" is the correct one. In that context "require", does not mean what the defender asserts namely: what is demanded by the defender. Rather what it means is this: what the defender needs in order to satisfy itself that it can comply with its obligations in terms of the 2007 Regulations. The defender, on Mr Walker's construction is given an absolute unfettered discretion with respect to this issue. If information to its satisfaction is not provided then in its sole discretion it can repudiate. That construction reflects the obligations incumbent upon it in terms of the 2007 Regulations. It allows the defender to operate within the framework of the obligations incumbent upon it in terms of the 2007 Regulations. I agree with Mr Walker's position: it is for the pursuer to produce such information as to satisfy the defender from an AML perspective.

[146] That being the case, the onus is on the pursuer, not the defender, to produce evidence of his identity and source of funds. It is not on the defender to list specific items of evidence that it "requires". Instead whether or not what the pursuer has produced is sufficient is to be

judged after the fact of it being produced at the sole discretion of the defender. Only if the defender can judge the position after the fact is the clause workable.

[147] Turning to the pursuer's contended for construction it is argued that the defender's construction of the word "require" does not give effect to the intention of parties. It appears to be suggested by Mr McIlvride that an argument against the defender's construction is that it would impose an obligation on the pursuer to work out what information the defender required as a matter of law.

[148] I believe the answer to the above argument is this: the pursuer is in the best position to provide information regarding his identity and his source of funds. In addition he is taken to know the law and the 2007 Regulations are publicly available. Accordingly there is no reason why the pursuer should find it difficult to provide the defender with the information which it required in terms of AML.

[149] The preparation of the due diligence form and verification certificate identifies certain information which the defender requires. However, this does not support the pursuer's construction. The defender has expressly provided that these forms are to be completed. Beyond the above, at no point is it expressly provided that this is all the information it requires.

[150] However, the main points against the pursuer's proposed construction are these: (1) it does not accord with the 2007 Regulations for the reasons above set out and (2) it does not conform to commercial sense.

[151] With regard to commercial sense it follows from the pursuer's contended construction that the pursuer can produce such information as is demanded by the defender prior to 15 December and can provide that information at the last minute on 15 December. Assuming he produces what has been required/demanded and it is not objectionable then

the defender must proceed with the contract. It must do so, as argued by Mr Walker, even if it wished further information in light of what had been provided. On the pursuer's construction the defender would not be entitled to obtain this further information, in that it had been provided with what had been demanded.

[152] On the pursuer's construction the defender would be bound to proceed if the demanded information were provided even if in doing so the action was to be in breach of the statutory obligations incumbent upon it in terms of the 2007 Regulations.

[153] In the instant case this construction would have the following effect: it is the pursuer's position that the defender did not require any source of funds/source of wealth evidence prior to 15 December thus regardless of concerns which it had with respect to these matters it still must proceed. Any request post 15 December on this approach would come too late. Thus the defender could not act in accordance with the 2007 Regulations.

[154] The above, would I believe, be an absurd result. The intention of parties was that the contract did allow the defender to conform to the 2007 Regulations and guidance.

[155] For the foregoing reasons I preferred the construction of "require" as argued for by Mr Walker.

[156] The next section of the argument turned on the issue of whether the KYC information provided was "satisfactory".

[157] Looking at this issue on the basis of the defenders' construction of the word "require", which I have earlier accepted, there can be no doubt on the basis of the evidence of Mr Besford-Land and Mr Anthony Christie that they had a number of significant concerns about the information provided and were clearly not satisfied and thus the defender was entitled to resile when it did, though it did in fact give the pursuer a further opportunity to produce satisfactory information.

[158] Approaching the issue on the basis of the pursuer's interpretation of "require" the defenders were once more not satisfied and were thus entitled to resile. It was not satisfied for these reasons: the information provided was not certified as required and the utility bill was not in the name of the person as required. The defender in particular was not satisfied in that the utility bill was not in the name required. Accordingly on the basis of what had been demanded the defender was not satisfied.

[159] I do not believe Mr Turok's actings after 15 December show that the defender was satisfied. The evidence of Mr Besford-Land is clear the defender was not satisfied. Given the proper construction of the contract as I have above set out I am persuaded there was no need for the defender to go through any form of ultimatum procedure. I further observe that on the evidence as at the date of proof the defender remained unsatisfied.

[160] This next issue arose out of an alternative position advanced on behalf of the defender on the basis that I was against the defender on all of the points that had been advanced to this stage, by Mr Walker.

[161] Mr Walker's position was that if the court did not accept his earlier arguments the effect would be that the Articles of Roup would oblige the defender to transact even where it was unable to apply its own due diligence measures. I am satisfied that in so contending he is correct.

[162] He set out in his submissions the implied term for which he argued.

[163] The test for implication of a term is set out in *Marks & Spencer Plc* v *BNP Paribas Securities Services Trust Co (Jersey) Limited & another* and is as follows:

> "(i) that a term would be implied into a detailed commercial contract only if that were necessary to give the contract business efficacy or so obvious that it went without saying; that the implication of a term was not critically dependent on proof of an actual intention of the parties when negotiating the contract but was concerned with what notional reasonable people, in the position of the parties at the time at which they had been contracting, would have agreed;

> and that it was a necessary but not sufficient condition for implying a term that it appeared fair or that the court considered that the parties would have agreed it if it had been suggested to them (post, paras 14-21, 57, 75, 77)."

[164] In my view in the circumstances here the test is met and if I had been against the defender in relation to its earlier arguments I would have implied the term sought. The contract would I believe be unworkable without such an implied term in that as argued by Mr Walker it would force the defender to contract in circumstances where it could not apply its own due diligence measures. A term of this type was accordingly required in order to give the contract business efficacy. I believe notional reasonable parties would have agreed on such a term.

[165] I am accordingly of the opinion that each of the bases for the defender's contractual defence is made out.

The Second Issue: the Illegality Defence

[166] Having dealt with the contractual defence I now turn to the illegality defence advanced by Mr Walker on the basis that I was against him on the first issue.

[167] The first argument under his lead related to the applicability of the appropriate regulations. There was a preliminary pleading point argued, by Mr Walker which I have earlier set out in full.

[168] Mr McIlvride's response to this argument was this: (a) the defender did not admit that the Regulations applied in the circumstances of the case and such reference as there was in the Summons to the Regulations was covered by a general denial; (b) he could not be held to the terms of the Note of Argument prepared by another Counsel and which in fact was not argued at any Debate and (c) he had taken over the case from another Counsel at a late

stage and he had formed his own views on the matter and wished to argue the applicability issue. It was no part of his intention to ambush Mr Walker.

[169] The pleadings on the issue of the Regulations and their applicability were on neither side particularly developed. It is unfortunate that the detail of the dispute on applicability of the Regulations has only become apparent at this late stage. However, I do not think that Mr Walker to any extent was prejudiced by this. The issue was a legal one on which he was able to make full submissions in response to the arguments put forward by Mr McIlvride. In the circumstances I believe it appropriate to allow the arguments to be advanced. I would wish to expressly state that Mr McIlvride had acted entirely properly in relation to this issue.

[170] The first issue in terms of this chapter was whether the defender is a relevant person.

[171] This point arose from the structure of the scheme of which the defender forms a part.

[172] Mr Christie in his supplementary affidavit at paragraphs 3 and 4 confirms the analysis of that scheme as set out by Mr Korek. Mr Christie's evidence was not challenged. The analysis which he confirmed was set out in full in Mr Korek's report at 4.21 to 4.23.

[173] These paragraphs were in the following terms:

> "4.21.1 The Manager, AIFSL, (or its delegate) is responsible for the day-to-day management of the Scheme including compliance with relevant AML regulations;
>
> 4.21.2 The Trustee/Depositary, Citibank Europe Plc, is responsible, amongst other matters, for the safekeeping of the Scheme property and securities; and;
>
> 4.21.3 CIP, as wholly owned subsidiary of Citibank Europe Plc, is responsible for acting as nominee for the property and securities of the Scheme;
>
> 4.21.4 As nominee, it is my understanding of CIP that property and securities of the Scheme cannot be purchased or sold without the approval of the Manager (or its delegate) and that the approval of the Manager (or its delegate) will depend, amongst other things, on compliance with relevant AML regulations. This is of course entirely as one would expect as, were that not the case, any regulated entity could

circumvent the rules and avoid the obligations which are intended to defeat criminal and terrorist activity by acting through a nominee; and

4.21.5 AIFSL has delegated portfolio management and other ancillary services to AIGSL under the New Investment Management Agreement.

4.22 Based on the above analysis of the Prospectus, I believe that AIGSL (via the New Investment Management Agreement) is responsible on behalf of the Scheme for compliance with relevant AML regulations with respect of the assets and securities within the Scheme.

4.23 In practice, this means that CIP, as the legal entity entering into transactions as nominee for the Scheme, cannot complete a transaction on behalf of the Scheme if AIGSL is unable to be satisfied that all AML requirements have been met."

[174] Given this structure I conclude that the defender is a relevant party in terms of Regulation 3. The defender in terms of the structure is the operational arm and therefore is a relevant party.

[175] Mr Walker is, I believe, correct in saying that if the foregoing is not correct and the defender is not a relevant party then any regulated entity could circumvent the 2007 Regulations and avoid the obligations with respect to money laundering by simply setting up a nominee. That cannot have been the intention of Parliament.

[176] I accept in the example used by Mr McIlvride the nominee is not a "relevant person". However, the situation in the present case is entirely different. To illustrate this difference I would use the following example: If Mr McIlvride's investment company, in his example, had used a nominee to purchase the supermarket chain the transaction would have been subject to the regulations. In the same way in the instant case given the type of business in which the defender is involved and its place in the structure, it is a "relevant person".

[177] Beyond that, on any view, AIGSL is "a relevant person". Thus the court should not force the defender to cause AIGSL to commit a criminal offence by directing the defender to enter into the contract.

[178] The next argument was to the effect that the defender was not obliged to carry out due diligence as the relationship of the defender to the pursuer did not fall within Regulation 7. In my opinion the transaction falls within Regulation 7(1)(b). The pursuer is someone with whom the defender had no business relationship but with whom the defender was carrying out an occasional transaction. The language of the Regulation 7(1)(a) and 7(1)(b) is clearly intended to cover a long term relationship (business relationship) and a short term relationship. The pursuer clearly falls into the latter category. If a relationship such as that between the pursuer and defender is not covered by Regulation 7(1)(b), once more a coach and horses could be run through the 2007 Regulations and that again cannot have been the intention of Parliament. The pursuer clearly falls within Regulation 7(1)(b). The pursuer's argument that the pursuer could not be said to be a customer is clearly misconceived.

[179] Beyond that, on any view, AIGSL is "a relevant person". Thus the court should not force the defender to cause AIGSL to commit a criminal offence by directing the defender to enter into the contract.

[180] The next argument was that the pursuer can proceed in reliance on the terms of Regulation 17 without illegality. Regulation 17 gives the defender an option to rely. It is not an obligation to rely. In terms of Regulation 17(2)(b) the relevant person would remain liable for any failure to apply the due diligence measures. The defender cannot be made to go down this route. It has decided, by its actings in this case, to carry out due diligence itself and not in whole to rely on such due diligence as was carried out by the pursuer's solicitors. In particular it has decided to carry out enhanced due diligence. In these circumstances in continuing to proceed where it was not satisfied on the basis of the due diligence which it had carried out it would be acting illegally.

[181] The last argument was to the effect that the pursuer had complied with the obligations of Clause 5. He has not: the defender is not satisfied about the pursuer's identity: (1) the defender is not satisfied by the utility bill produced; and (2) the defender is not satisfied with regard to the pursuer's identity having regard to the matters spoken to by Mr Besford-Land including adverse hits.

[182] In the whole circumstances it would, I believe, be illegal for the pursuer to proceed with this matter.

Conclusion

[183] For the foregoing reasons I hold first that the defender was entitled to resile as at 22 December and secondly, that if they were not entitled to resile, for them to be forced to continue with this transaction would be for them to act illegally, or for AIGSL to act illegally

Decision

[184] I have had the matter put out by order for a discussion regarding the precise terms of the interlocutor I should pronounce and the issue of expenses.