OUTER HOUSE, COURT OF SESSION

[2019] CSOH 36

CA10/18

OPINION OF LORD BANNATYNE

In the cause

URY ESTATE LIMITED

Pursuer

against

BP EXPLORATION OPERATING COMPANY LIMITED

Defender

Pursuer: Mr MacColl QC, Ms McKinlay advocate; Davidson Chalmers LLP
Defender: Mr Dunlop QC, Ms Watts advocate; Pinsent Mason LLP

18 April 2019

Introduction

[1] This matter came before me for proof before answer in the commercial court.

[2] In summary, the present case centres around this:

- The pursuer seeks payment of compensation from the defender as a result of the pursuer's claimed inability to develop Ury House as a 35 bedroom five star luxury hotel ("the proposed development") due to the proximity to Ury House of the BP Forties Pipeline ("the pipeline").

- The pursuer claims that it is entitled to such compensation as a result of the provisions of a grant of servitude recorded in the General Register of Sasines for the county of Kincardine on 26 August 1977 ("the servitude").

[3] The dispute in the case in short related to:

- Whether the defender is liable to pay compensation to the pursuer in terms of the servitude?
- If the answer to the first question is yes: what is the proper quantification of loss which the pursuer has suffered?

Agreed background

(a) Title

[4] The pursuer is the heritable proprietor of certain lands known as and comprising Ury Estate near Stonehaven ("the pursuer's subjects").

[5] The pursuer's title to the pursuer's subjects is registered in the Land Register of Scotland under title number KNC11588, which title is produced in the joint bundle at 358.

[6] The defender was until 31 October 2017 the owner and operator of the pipeline.

[7] The pipeline passes through the pursuer's subjects.

[8] By the servitude the then owner of the pursuer's subjects (being a different company then known as Ury Estate Limited) granted in favour of BP Oil Development Limited a servitude right, tolerance and wayleave of laying down, maintaining, renewing and protecting a line of steel pipe not exceeding 36 inches internal diameter in and through, *inter alia*, the subjects comprising the mansion house of Ury and other parts of the lands and estate of Ury for the purpose and use of conveying crude oil or petroleum or its products

from the BP terminal at Cruden Bay, Aberdeenshire to their refinery terminal at Grangemouth.

[9] The presence of the pipeline within the pursuer's subjects is regulated by the grant of servitude.

[10] The servitude is recorded in paragraph 9 of the burden section of the said title sheet. The servitude incorporates a schedule of conditions the terms of which are agreed between parties.

[11] In the event that compensation is determined by the court in the present proceedings to be payable to the pursuer under the servitude, it is accepted by both parties that the compensation is due to be paid by the defender.

(b) The basis of claim

[12] The present claim is brought on the basis of condition 25 of the schedule of conditions incorporated in the servitude. The condition read short, as relevant to the circumstances averred by the pursuer, is as follows:

> "(a) if at any time the [pursuer] wishes to develop land affected by the pipeline…the [pursuer] shall if the said proposed development of the land is prevented in whole or in part by reason only of the existence of the pipeline, give written notice to [the defender] of the said proposed development including details of the application for and refusal of or conditional grant of planning permission in principle by the Planning Authority. Within six calendar months of the receipt of such written notice [the defender] shall give their decision in writing to the [pursuer] that they intend to divert the pipeline or that they intend to pay compensation for all losses arising from their decision not to divert the pipeline, including, without prejudice to the foregoing generality, losses of Development Value…"

(c) The development at Ury House

[13] A former mansion house ("Ury House") is located within the pursuer's subjects.

[14] Ury House is within the inner consultation zone applied by the Health and Safety Executive ("HSE").

[15] The pursuer obtained full planning permission for the conversion of Ury House into a hotel.

[16] Planning permission and listed building consent for conversion of Ury House into a hotel was obtained in 2012, 2014 and amended in 2015 ("the existing permissions").

[17] The pursuer has obtained various planning permissions for housing development at the wider Ury Estate.

[18] The pursuer has entered into agreements with Aberdeenshire Council ("AC") under section 75 of the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act") in relation to the restoration of Ury House (see: JB document 240-242).

[19] The pursuer commenced work on sight for the development of Ury House in about October 2014.

[20] In early 2017 the pursuer submitted an application for full planning permission regarding Ury House in terms of planning reference APP/2017/0241 contained at JB document 154-163 ("the refused application").

[21] HSE's PADHI system generated an "advise against" recommendation to the refused application on the basis of the proximity of Ury House to the pipeline and their recommendation is produced at JB documents 459 and 460. On 11 April 2017, AC refused the pursuer's application APP/2017/0241 for planning permission and their refusal is at JB document 165.

[22] By letter dated 20 April 2017 the pursuer served a notice on the defender, namely: JB document 328.

[23] The defender has failed to divert (or agree to divert) the pipeline within six months of the notice of 20 April 2017.

The evidence

[24] The following witnesses gave evidence on behalf of the pursuer:

[25] Jonathon Milne, who is the controlling mind of the pursuer.

[26] Neil Mair, a senior planner with AC who had been heavily involved in the planning applications process arising from the development of the pursuer's subjects.

[27] Duncan Moir, managing director of McLeod and Aitken Limited, construction cost consultants. Mr Moir is a quantity surveyor. He was involved in producing an elemental cost plan in order to develop Ury House into a 35 bedroom luxury 5 star hotel.

[28] Dougal Morgan the managing director of the William Cowie Partnership of architects. He is a qualified architect. He has done certain work in relation to the development of the pursuer's subjects.

[29] Norbert Lieder is the managing director of Inverlochy Castle Management International ("ICMI"), which is a management and consultancy business for the hotel and hospitality industries. He gave certain evidence regarding the viability of various hotel projects on the pursuer's subjects.

[30] Richard Slipper is a member of the Royal Town Planning Institute, he gave evidence in relation to planning issues regarding Ury House and in particular the refused application.

[31] Mark Cleaver and Andrew Pratt are respectively a director and associate director of Colliers International Property Consultants Limited and gave evidence regarding valuation of the proposed development.

[32] Lastly the evidence of Stuart David Reston, HM Principal Specialist Inspector of HSE's chemical, explosives and microbiological hazards division and the evidence of Peter Fraser, a director of Ramsey and Chalmers consulting structural and civil engineers as contained in their witness statements and in the appendices thereto was agreed as their evidence.

The witnesses on behalf of the defender

[33] John Handley, chartered town planner who gave evidence in respect of planning issues.

[34] Andrew Clark-Hutchison gave evidence regarding the fundability of the proposed development.

[35] Stuart Robinson, chartered quantity surveyor, gave detailed evidence regarding the costings for the proposed development.

[36] Dexter Moren, an architect who gave evidence regarding the buildability and viability of the proposed development.

[37] Mike Rothwell, who gave evidence regarding the buildability and viability of the proposed development.

[38] Robert Chess, who gave evidence regarding the valuation of the proposed development.

[39] As in all commercial cases detailed witness statements had been lodged on behalf of the various witnesses or detailed reports and these stood as their evidence in chief in the case.

Submissions for the pursuer

[40] Mr MacColl commenced his submissions by addressing the issue of assessment of the various witnesses.

[41] His broad position was that the pursuer's witnesses had given their evidence in a straightforward manner and that their evidence had been fully vouched.

[42] In respect to the evidence of Mr Moir and Mr Morgan he reminded the court of their direct involvement and lengthy experience with the developments at the pursuer's subjects and submitted that this gave them a particular advantage when giving evidence over the various witnesses for the defender who did not have such involvement.

[43] He made detailed submissions regarding two further witnesses for the pursuer: first Norbert Lieder, he submitted that Mr Lieder was both credible and reliable. He accepted that his oral evidence had been short in compass, however, that did not, in any manner, cut across the evidence given in his witness statements, nor indeed, was he challenged on the validity of the views expressed within those statements. The suggestion, advanced by the defender, that his oral evidence required the court to disregard the material in his witness statements he submitted was wholly unjustified. This was particularly the case given that the defender actively chose not to challenge the material contained in Mr Lieder's witness statements in any way.

[44] Secondly, he made certain observations in respect to the evidence of Mark Cleaver: it was his position that this witness provided robust and compelling expert testimony as to the basis of valuation which had been offered up by Colliers. He emphasised that Mr Cleaver was highly experienced, with more than 30 years in the hotel industry. He gave a clear explanation why in the circumstances it was appropriate to proceed on the basis of the assumptions disclosed in the said valuation. He was not challenged on the plain material

contained in the Colliers reports, particularly the second report, setting out Colliers' detailed views as to why a luxury hotel with 35 bedrooms could be regarded as developable at Ury House and further, was the proper basis for the valuation exercise which had been undertaken. He submitted that it was too late to claim that his opinions were mere *ipse dixit*, as the defender now sought to do, when this suggestion had not even been put to the witness. He submitted that Colliers had fully complied with the obligations incumbent upon them under and in terms of the red book.

[45] In respect to the witnesses for the defender he reminded the court that each of the witnesses had been led as an expert.

[46] It was his position that each, although to various extents, had engaged issues identified by the Supreme Court in *Kennedy* v *Cordia (Services) LLP* [2016] SC (UKSC) 59. In particular he drew the court's attention to the following guidance given by the Supreme Court in *Kennedy:*

(a) An expert witness requires to be independent and impartial and provide independent assistance to the court by way of objective unbiased opinion. An expert may not act as an advocate for a particular party's cause (see: *Kennedy* at paragraphs 51 and 52).

(b) If there are matters of which the expert is aware which are not supportive of his view or the position being advanced through the expert on behalf of his or her client, these require to be disclosed to the court and, indeed, the other party to the litigation (see: *Kennedy* at paragraph 52).

(c) A failure to meet the foregoing requirements of expert evidence renders material offered up as "expert evidence" inadmissible. It is more than a question of weight of evidence (see: *Kennedy* at paragraph 51).

(d) It is not good enough for an expert witness to rely upon their own *ipse dixit* to justify the views that he or she advances in relation to a matter upon which expert evidence is being led. An unsubstantiated *ipse dixit* is "worthless" (see: *Kennedy* at paragraph 48).

Against that background he then turned to look at each of the defender's witnesses in turn:

[47] In respect first to Mr Handley, he submitted that having regard to the observations in *Kennedy* his evidence was wholly inadmissible and fell to be disregarded. In development of this position he said this: as became clear during the course of his evidence, Mr Handley, far from being independent and impartial, was someone who had been a direct actor in the factual issues that were live before the court. He himself had made representations to the planning authority on behalf of the defender during the course of the planning process in respect to the refused application. He had also, during the course of that process, already reached clear and developed views on the merits of the refused application which he subsequently purported to offer as "expert evidence" in the present case. Accordingly his evidence fell to be excluded from consideration.

[48] In respect to Mr Clark-Hutchison, it was his position that his evidence required to be treated with care. He acknowledged that the conclusions that he offered up were wholly dependent upon the valuation and costing evidence offered by the defender's other witnesses. More importantly, however, he informed the court that he had prepared a supplementary report which advanced the position on the availability of funding which was significantly more favourable to the position of the pursuer. The supplementary report had not, however, been made available. As such it would appear that Mr Clark-Hutchison had not discharged the functions owed by an expert witness to the court, particularly as regards to giving a full and impartial picture.

[49] Turning to Mr Stuart Robinson, his general position was that this witness was not a compelling witness. Again, he submitted that this witness had not offered a full or impartial analysis of the matters upon which he was meant to give evidence. He went further, and said this; the witness did not appear to have applied himself in any particularly detailed manner to the validity or otherwise of the cost he gave for the potential development of Ury House. He disclosed, when tested in cross-examination, that he had applied throughout this process numbers which he knew were inaccurate, for example rejecting real world figures for speculative and higher figures, or figures which he had not tested in any rational manner as to their fairness. His overall approach led to a repeated and significant inflation of the costs which he had applied. Moreover, the want of objectivity in Mr Robinson's approach was such as to take him outwith the scope of a person acting as a true expert witness and into the position of someone merely advocating for increased and inflated costs. His evidence, therefore, should not be regarded as admissible. In any event, it should certainly be rejected where it ran contrary to that of Mr Moir.

[50] Mr Dexter Moren was also heavily criticised by Mr MacColl. He first said that there was no material before the court to justify the defender's assertion that he was an architect of world renown and secondly, he did not appear to have any particular experience of the Scottish market. However, most importantly what was notable in his evidence was that views which he was proffering were entirely based on what might be described as his own personal say so. What he did not do in support of these views was provide any objective supportive evidence. He described this witness as being dogmatic in his approach and that he had sought to advance justifications for his positions that bore to be brought forward "on the hoof". As such it was his position that Mr Moren's evidence amounted to more than his *ipse dixit* and in terms of *Kennedy* should for that reason, if for no other, be entirely rejected.

Lastly, it was his position that this witness was not entirely reliable in that he appeared to have forgotten details of the background to the preparation of his report including the nature of material which had been provided to him for the purposes of the preparation thereof.

[51] Moving on to Mr Rothwell again it was Mr MacColl's position that his evidence should be treated with some caution. It was his position that his evidence was in large part *ipse dixit*. Insofar as it was sought to vouch it independently, when that independent vouching was examined his position was not consistent therewith. He accepted that many of the issues upon which he offered up a view were, in truth, issues for architects. Lastly he did, however, also accept that issues of layout were capable of satisfactory resolution.

[52] Lastly there was the evidence of Mr Chess, his position regarding this witness's evidence was this: he accepted that this witness was an expert and in addition that he bore, during the course of giving evidence, to be doing his best to assist the court however, the following points he submitted fell to be noted in his evidence:

(a) His valuation, as advanced in his report, was wrong. The reason for this error was not wholly clear. In this regard, he also submitted that at least some significant part of the work underlying the CBRE report was carried out by Mr Mitchell, who was not available as a witness.

(b) The task to which he addressed himself was a different task from that addressed by the pursuer's valuers, with Mr Chess valuing a 3/4 star hotel. He took no particular issue with the approach or conclusions reached by Colliers on the hypothesis on which they were working. There was also a material disconnect between the approach of Mr Chess and that of Mr Robinson, on whose material he bore to found, Mr Robinson bore to allow costs for the most luxurious

development imaginable, while Mr Chess rejected the view that such a development would take place.

(c) Lastly in cross-examination, Mr Robinson accepted that in reaching the values that he had provided he had omitted a relevant factor, being monies available further to the section 75 agreement, of which he was aware at the time of writing his report. He did not provide any clear reason or justification as to why this had not been disclosed in his report.

[53] On the basis of the foregoing analysis of the defender's position in evidence it was Mr MacColl's argument that I should prefer the evidence of the witnesses for the pursuer to that given on behalf of the defender in respect to all disputed matters.

[54] Having made the foregoing submissions Mr MacColl then sought to develop his argument as follows: the pursuer wishes to develop Ury House and parts of the surrounding lands comprised in the pursuer's subjects as a five star, luxury hotel and golf course. Jack Nicklaus has designed a golf course for the Ury Estate. It is reasonably anticipated that this will be a very significant attraction for guests to a hotel. It is also intended that there will be spa facilities included in the hotel (at its lower ground floor).

> In support of the foregoing submission Mr MacColl relied on the following evidence: Jonathon Milne Statement [20]; Neil Mair Statement [9]; Jonathon Milne Supplementary Statement [6]; Jonathon Milne Statement [24] and [31]; Jonathon Milne oral evidence (cross); and Norbert Lieder Statement [6] and [11]; Norbert Lieder Supplementary Statement [7]

Had the necessary planning permission been capable of being obtained, the development of a thirty five bedroom luxury five star hotel at Ury House was readily buildable and achievable, from both a commercial and practical perspective. Thirty five bedrooms could have been accommodated within the two upper floors of Ury House. There was no need for these bedrooms to have a minimum 30 metre square floor area for the hotel to be luxury or

five star (as contended for by the defender) – this was, albeit reluctantly, accepted even by Mr Moren. There is no such minimum area for bedrooms in a luxury or five star hotel. The only objective evidence (being the AA particulars) does not specify any requisite room size. Similarly, the other required facilities (both front and back of house) could have been accommodated within Ury House. As the defender's own witnesses (notably Mr Moren and Mr Rothwell) accepted, any issues with drawings which were before the Court were of a nature which could be readily cured. These are the sort of issues that are frequently encountered and resolved during the course of a development of this nature (at building warrant stage and by way of non-material variation of planning). There would have been no difficulty obtaining listed building consent for such a development.

> In support of the foregoing submission Mr MacColl relied on the following: Jonathon Milne Statement [37]; Peter Fraser Statement [6] to [16]; Duncan Moir Statement [11] to [15]; Dougal Morgan oral evidence (particularly in relation to his drawing – document 99 in the joint bundle at p461), and his statement [6], [9] to [10] and [27] to [48], and Supplementary Statement [3] to [5] and [10] to [14]; Norbert Lieder's Statement [11] and [17]; Colliers Supplementary Report at [2.3] to [2.4], (the content of which was not challenged during the course of cross-examination); Mark Cleaver's oral evidence (cross); Robert Chess oral evidence (cross); Peter Fraser's Statement [13][15]; Dougal Morgan Statement [48] and oral evidence; Dougal Morgan's Statement [10]; Norbert Lieder Supplementary Statement [6]; Mr Moren and Mr Rothwell in cross; Dougal Morgan's Statement [11] and oral evidence; Dougal Morgan's drawing (Witness bundle, p461); Dougal Morgan Statement [11] and Supplementary Statement [3] to [14]

Moving on Mr MacColl submitted that development works have already taken place within Ury House in order to progress its development into a hotel (albeit with fewer bedrooms than the pursuer would wish to develop within it). Prior to these works Ury House was a ruin (with no roof and no interior fit out). New floors, walls, stairs, roofs and windows have all required to be installed.

> In support of the foregoing submission Mr MacColl relied on the following: Jonathon Milne Statement [16] [17] [21] [28-30] [32]35]; Jonathon Milne Supplementary Statement [1-7] [17-18] [22-24]; Peter Fraser Statement [6-16]

(unchallenged); Duncan Moir Statement [11-15]; Dougal Morgan Statement [6] [9-10] [27-48]; Dougal Morgan Supplementary Statement [3-5] [10-14]

Turning to the planning position in respect to Ury House Mr MacColl said this: the pursuer has obtained outline planning permission for the conversion of Ury House into a hotel. The planning permission held by the pursuer permits development of Ury House into a 5 bedroom hotel (only). The fact that this planning permission is restricted to 5 bedrooms only is made plain by the express incorporation into the grant of planning permission of plans showing 5 bedrooms. Reading the existing planning permission as permitting development of more than 5 bedrooms requires (as Mr Handley accepted in cross-examination) the express incorporation of plans to be ignored, which is not (and cannot be) an appropriate way in which to construe the planning permission. Further, there has been no established hotel use that might otherwise be argued to support an increase in the number of bedrooms without additional planning permission. The subsequent (2017) application for planning permission for a 35 bedroom hotel was addressed by the planning authority on the basis that the existing planning permission extended to a hotel with only five bedrooms. Contrary to the position advanced by the defender, and in the face of an express refusal of an application for planning permission for 35 bedrooms, no prudent developer would have proceeded on the basis that the existing planning permission (for a five bedroom hotel) would also be sufficient to enable development of Ury House as a 35 bedroom hotel.

In support of the foregoing submission Mr MacColl relied on the following: Jonathon Milne Statement [24]; Neil Mair Statement [8] and Supplementary Statement [4] to [6]; Richard Slipper, Supplementary Report [1.11] to [1.17]; Planning decision APP/2014/1714, Joint Bundle 72 (p535); WCP Approved Plan 2296/1703 Joint Bundle 56 (p379); Planning Decision APP/2015/2710 Joint Bundle 132 (p883); WCP Approved Indicative Floor Plan 2296/2004 Joint Bundle 114 (p841); Report of Handling APP/2017/0241 Joint Bundle 166 (p1081); and Jonathon Milne Supplementary Statement [10] to [12]

It was his position that on the basis of the whole evidence a luxury 35 bedroom hotel (with related Jack Nicklaus designed golf course) that could (and would) have been built at Ury House had planning permission been obtained therefor would have had a capital value of £12,400,000. The hotel is an integral part of the wider development of the Ury Estate. Its facilities tie in with the development of the golf course. The pursuer had already begun the development of Ury House so as to facilitate the placement there of a luxury hotel. A luxury 5 bedroom hotel at Ury House (with related Jack Nicklaus designed golf course) which could be built in terms of the existing planning permission would have a value of only £800,000. This differential valuation is consistent with the pursuer's position that it would have developed the thirty five bedroom hotel (to a luxury five star standard) had planning permission been available for that development.

> In support of the foregoing submission Mr MacColl relied on the following: the whole terms of the Colliers Report; Jonathon Milne Statement [20]; [29] to [31]; and Jonathon Milne Statement [25]

The difference in cost between developing a luxury 35 bedroom hotel and a luxury 5 bedroom hotel within Ury House would be an additional £716,810. This differential would remain the case even were the costs attributable to the development of Ury House as a hotel to go up or down from those calculated by Mr Moir.

> In support of the foregoing submission Mr MacColl relied on the following: Schedule of Mr Moir (witness bundle, p369)and the Oral evidence of Mr Moir

Turning to the question of the total costs of redevelopment of Ury House into a five star, luxury 35 bedroom hotel (including spa) he submitted that these were reasonably estimated at a maximum figure of £11,213,574. This figure is comprised of:

(a) £2,721,330 (costs already incurred in works actually carried out);

(b) £5,462,565 towards the cost of further build out costs (as provided for in the schedule of Mr Moir and spoken to him in evidence) – this includes elements towards spa facilities (by way of plunge pools) already allowed for by Mr Moir;

(c) £808,884 towards the cost of external works (including drainage and access works) (as also provided for in the schedule of Mr Moir and spoken to him in evidence);

(d) a generous £1,000,000 towards additional costs from the installation of a pool and spa in the lower grounds floor (as spoken to by Mr Moir);

(e) a generous £898,220, in respect of FFE (being half of the costs allowed for in Mr Robinson's excessive and unjustified FFE schedule); and

(f) a further £322,575 of additional costs (including a very generous £200,000 towards garden renovation costs, much of which is already allowed for by Mr Moir).

For completeness, any assertion by the defender that Mr Moir acceded to a suggestion that the true costs of redevelopment was at least £12.3 million is incorrect on the evidence before the Court.

> In support of the foregoing submission Mr MacColl relied generally on the following: Schedule of Mr Moir (witness bundle, p369); so far as the figure for additional costs at (f) this was made up as follows: £200,000 in respect of garden works; £18,000 in respect of lighting; £4,600 in respect of partitions; £3,000 in respect of IT cooling units; £3,000 in respect of bar store cooling; and £6,000 in respect of dry risers; together with £35,190 (by way of prelims at 15%), professional fees of £29,325 (at 12.5%), and risk and contingency of £23,460 (at a generous 10%).

Accordingly on the foregoing basis, there would be a 35 bedroom hotel which would be worth £12,400,000 and would cost (at most) £11,213,574 to build (of which at least £7.6 million was available by way of enabling development funding and had to be used for

the purpose of renovation of Ury House. There would, even on the analysis of Mr Clark-Hutchison (and on any of his lending covenants), be no difficulty in securing commercial funding for the development, given that the level of funding required would be only £3,613,574. Indeed, the pursuer notes that Mr Clark-Hutchison (in cross-examination) stated that the prospects for lending were much more positive (on the Colliers valuation) than those set out in his report. In any event, the pursuer also notes that the unchallenged evidence of Mr Milne was that additional monies (beyond the ring fenced section 75 funding) were being generated by way of house sales and that a funding difficulty for the proposed development would only emerge were costs to reach £14,000,000. Thus, the pursuer could and would have developed Ury House as a thirty five bedroom luxury five star hotel but for the fact that planning permission for that development could not be obtained as a result of the location of the pipeline. Thus it was his position that there would be no difficulty in developing a 35 bedroom 5 star luxury hotel in Ury House. There was no practical difficulty in funding the proposed development.

> In support of the foregoing submission Mr MacColl relied on the following: Colliers Report together with the oral evidence of Mr Cleaver and Mr Pratt in cross examination. He argued that when considering these issues it was noteworthy that Mr Chess (of CBRE) did not challenge the validity of the valuation offered up by Colliers on the hypothesis that they have advanced it. Rather, the position of Mr Chess, on the basis of information provided to him by others – is to argue that the quality of the offer which the pursuer maintains would have been available at its thirty five bedroom hotel would not be sufficient to generate the income which underlies the Colliers' valuation. This approach does not disturb or undermine the validity of the Colliers' valuation. Moreover, nothing advanced by the defender in cross-examination caused the Colliers' witnesses to depart from their valuation. The court is invited to note, in particular, the robust nature of the evidence of Mr Cleaver, a highly experienced hotel operator, with more than thirty years of experience in the market. Jonathon Milne, oral evidence (cross)

Mr MacColl emphasised that the pursuer has ready (and necessarily) ring-fenced funding which must be used for the development of Ury House into a luxury hotel. The housing

developments within the pursuer's subjects will provide a source of funding for the development of Ury House into a hotel. Indeed, the pursuer is required to use monies generated from those separate housing developments for the restoration of Ury House (which does not, for the avoidance of doubt, include the walled garden). Planning permission has been granted for 230 housing units in the housing developments within the pursuer's subjects. Agreements with Aberdeenshire Council granted in terms of section 75 the 1997 Act provide *inter alia* that a sum equal to the sum of £33,083 (Index Linked) from the disposal of each housing unit are to be placed in a joint deposit account with the Council and used for the restoration of Ury House. This will generate a total sum of £7,609,090. The housing is (and will continue to be) sold.

> In support of the foregoing submission Mr MacColl relied on the following: Jonathon Milne Statement [21]; Joint Bundle document 241 (p1431); Jonathon Milne Statement [28]

A separate section 75 agreement is in place to provide funding by way of enabling development for the Jack Nicklaus golf course. The golf course has already been laid out on the ground. This was the unchallenged oral evidence of Mr Milne.

[55] So far as the genuineness of the pursuer's plans to carry out the proposed development it commenced work on site for the development of Ury House in about October 2014. The pursuer has already spent at least £2,721,330.24 on the development, having carried out significant works to install new floors, walls, stairs, roofs and windows. This is plainly indicative of there being a real and achievable intention on the part of the pursuer to redevelop Ury House (and to do so as a hotel). This is also consistent with the fact that the golf course (for which there is separate funding) has already been laid out.

[56] Against that general background, as at 2017, the pursuer wished to develop Ury House into a luxury 35 bedroom hotel. Such a development could readily have been

achieved within Ury House, but for the presence of the pipeline on the basis of the evidence referred to. A 35 bedroom hotel within Ury House makes significantly more commercial sense than its use as a hotel with only 5 bedrooms (which is the alternative development that will be taken forward, in concert with additional bedrooms in the walled garden). A 35 bedroom hotel within Ury House would also have significantly greater capital value than a 5 bedroom hotel there. In early 2017, the pursuer sought full planning permission to develop Ury House into a 35 bedroom hotel. The pursuer's application had reference APP/2017/0241.

[57] The HSE objected to the application on the basis of the proximity of Ury House to the pipeline. The application and HSE's position were not disputed.

[58] On 11 April 2017, Aberdeenshire Council refused the pursuer's application for planning permission. The application was refused only on the basis of the proximity of Ury House to the pipeline. This was made clear by the letter refusing planning permission from Aberdeenshire Council to the pursuer's agents dated 11 April 2017. The proximity of the pipeline was the only reason for refusal of the planning permission to develop a 35 bedroom hotel at Ury House.

[59] By letter dated 20 April 2017, the pursuer (through its solicitors) served notice on the defender seeking diversion of the pipeline, which failing payment of compensation in respect of losses arising from the presence of the pipeline. This letter was a valid and effective notification of a claim by the pursuer to the defender under and in terms of Condition 25 of the Schedule of Conditions.

[60] The defender has failed to divert (or agree to divert) the pipeline within six months of the notice of 20 April 2017. Neither of these matters were contentious.

[61] He submitted that having regard to the foregoing the pursuer is now entitled to payment of compensation by the defender in accordance with Condition 25.

[62] Mr MacColl then turned to address the issue of the proper measure of loss and to the issue of quantification of loss in terms thereof and said this: the pursuer reasonably estimates that it will incur losses of at least £10,883,190 as a result of the ongoing presence of the pipeline (and the refusal to divert it away from Ury House). This is the difference in value between the luxury 35 bedroom hotel (with related Jack Nicklaus designed golf course) that could have been built at Ury House had planning permission been obtained therefor (being £12,400,00) and a luxury 5 bedroom hotel at Ury House (with related Jack Nicklaus designed golf course) for which the pursuer presently has planning permission (being £800,000), less the further sum of £716,810, which it is reasonably estimated would be the additional build cost for a thirty five bedroom hotel at Ury House over a five bedroom hotel there. This is the proper measure of the loss for which the pursuer falls to be compensated under the Servitude.

[63] Lastly before turning to his legal submissions Mr MacColl turned to the issue of the walled garden planning permission which had been obtained by the pursuer. He accepted that the pursuer has obtained conditional permission for the development of hotel rooms (but not a full hotel) at an old walled garden within the Ury Estate. This potential development is a separate and supplementary development to the proposed hotel development of Ury House. It is, critically he submitted, not a substitute for the thirty five bedroom development at Ury House which is precluded by the pipeline. In expansion of that proposition he argued it does not impact in any negative manner upon the viability of the proposed thirty five bedroom development at Ury House. Moreover, the availability of planning for the walled garden development is not is any way dependent or conditional

upon the pursuer not having planning for the larger (35 bedroom) hotel at Ury House itself. There is no suggestion before the Court (and it was not put to Mr Mair, the planning officer) that Aberdeenshire Council would regard 35 bedrooms as being the maximum development for a hotel that they would permit within the Ury Estate.

[64] On the basis of his discussion of the evidence Mr MacColl made the following legal submissions.

[65] In order to entitle the pursuer to compensation in terms of the provisions of condition 25 it was his position that the pursuer had to demonstrate three things:

- That the pursuer wished to develop land affected by the pipeline;
- That the proposed development has been prevented in whole or in part by reason only of the existence of the pipeline; and
- That the defender has refused to divert the pipeline to enable the development to take place.

[66] The pursuer on satisfying these tests then is entitled to: "compensation for all losses arising from [the defender's] decision not to divert the pipeline". He emphasised that the test for compensation was not the difference in value of the pursuer's land with and without the planning permission for the 35 bedroom hotel, as the defender appeared to suggest.

[67] He submitted that for the reasons which he had detailed earlier in his submissions each of the foregoing tests was met.

[68] He submitted that the points developed by the defender in rebuttal of the pursuer's position were without merit.

[69] He argued first that the pursuer had a clear and genuine wish to develop a 35 bedroom luxury five star hotel at Ury House. In support of this he argued that such a development wold have been by far the most commercially sensible way in which to make

use of Ury House, given its position at the centre of the wider development of the pursuer's subjects. Moreover, it was a desire which was wholly consistent with the extensive planning history of the sight, with the pursuer regularly and repeatedly taking steps to utilise Ury House as a luxury five star hotel. The fact that Mr Milne accepted that he was aware that the application for planning for a 35 bedroom hotel would have been likely to fail did not mean that there was any want of desire to carry out the development. The evidence he submitted plainly pointed to the development taking place but for the existence of the pipeline. Similarly, the "quality" of the plans accompanying the 2017 application and the volume of other supporting documentation was neither here nor there. There was as a matter of fact, a genuine application made to obtain planning for a 35 bedroom hotel. This application was refused for a single reason, namely: the location of the pipeline close to Ury House.

[70] Secondly, he turned to the issue of viability raised on behalf of the defender, and submitted that the development of a 35 bedroom five star luxury hotel at Ury House was clearly viable on the evidence before the court. The necessary rooms and facilities could be accommodated within Ury House. There was no undermining of Mr Morgan's clear evidence on this point, supported by the views expressed by Colliers' witnesses within their supplementary report. The defender's witnesses accepted that any issues that they identified in drawings could be resolved as a matter of layout. There was nothing unusual for such changes to be made as matters proceeded through the building warrant stage. Overall it was his position that the defender had failed to identify and establish that there were any true impediments, in respect to the issues of funding, buildability and viability, to the development of the 35 bedroom luxury hotel beyond those caused by the presence of the pipeline. The criticisms based on these three issues were without merit.

[71] Moving from the substance of the claim for compensation to the method of assessment of that claim his general position was that again there was no merit in the defender's arguments.

[72] He submitted that the pursuer had for the following reasons adopted the correct approach to the issue of quantification: the pursuer's position on loss is straightforward. Given the funding available as a result of the section 75 agreement, the issue of funding and costing of the development of the subjects is of only limited relevance. The correct approach, it is submitted (and acknowledging that the Court will properly take a broad axe to all questions of loss – *cf Duke of Portland* v *Wood's Trustees* 1926 SC 640), is to compare the difference in value between a 35 bedroom hotel (with related Jack Nicklaus designed golf course) at Ury House which cannot be developed with the 5 bedroom hotel at Ury House (with related golf course) for which planning permission exists, allowing also a further discount for the additional build costs of a 35 bedroom hotel at Ury House beyond those of the 5 bedroom hotel. On the evidence before the court, this gives rise to a loss of £10,883,190.

[73] In further development of this position he went on to say this regarding the approach to the assessment of compensation adopted by the pursuer: it compares the position that would have been had there been "no pipeline" with that in which the pursuer finds itself in the present circumstances, given the existence of the pipeline. The words of the servitude do not restrict recoverable losses to mere losses of development value, as the defender attempts to assert. Nor is there any basis, in fact or law, to adopt the approach urged by the defender, founding, again, on a case which turns on wholly different facts, namely: *Transport for London* v *Spirerose Limited* [2009] 1WLR 1797, that any recoverable loss should be restricted to hope value alone. In this case, as is opposed to *Spirerose,* there is no basis for arguing that planning permission for a 35 bedroom luxury hotel would not have

been obtained but for the presence of the pipeline. That position is clearly established on the wording of the 2017 planning refusal itself.

[74] Mr MacColl also advanced a fall-back position, should the court believe that there was any merit in the defender's attack on the pursuer's primary approach to quantification of loss. He submitted that in those circumstances the court would nevertheless require to consider the loss of a chance to develop a 35 bedroom luxury hotel as against a five bedroom luxury hotel.

[75] Such a loss he submitted would be compensatable. He relied on the following cases: *Kyle* v *P and J Stormonth Darling* [1992] SLT 264 and *Barker* v *Corus (UK) Limited* [2006] 2 AC 572.

[76] In order to be compensated in terms of this approach, the court must be satisfied that the chance which has been lost is a real and substantial one. However, this does not mean that it requires to be shown on a balance of probabilities that it would have come to fruition. Even a limited chance of a very significant financial outcome would be more than negligible and would give rise to recoverable loss. In support of this position he directed my attention to *Harding Homes (East Street) Limited and others* v *Bircham Dyson Bell* [2015] EWHC 3329 and *MacGregor, Damages (20th Edition),* paragraph 10-051.

[77] In calculating a loss based on the foregoing approach a Scottish court should simply adopt a "broad axe" approach to the quantification of any loss (see: *Duke of Portland*). In the present circumstances given the strong prospects of the development being progressed, were there to have been no pipeline, the damages quantified on such a basis would be a very high proportion, and he submitted that such a high proportion would be 80% of the losses based on the pursuer's principal approach to quantification as above advanced.

[78] Moving on, Mr MacColl examined the defender's contention that benefits had accrued to the pursuer as a result of the existence of the pipeline and these benefits required to be set off against any proven losses arising from the existence of the pipeline. Mr MacColl disputed, on the basis of the wording of the relevant condition, that account had to be taken of any such benefit.

[79] Beyond that, he argued there was no evidence that any such benefits had in fact accrued to the pursuer. In particular he submitted that there was no evidence that the enabling development, the planning permission for the golf course and the planning permission in respect to the walled garden were obtained because of the existence of the pipeline, the refusal of the relevant planning permission and the failure to move the pipeline.

[80] Lastly he submitted that there was no evidence supporting the defender's assertion that the refused permission would have been refused anyway, namely: even if there had been no pipeline. It was his position that there was no support for this position in the evidence.

The defender's response

[81] Mr Dunlop commenced his submissions by looking at the evidence of the various witnesses. Broadly it was his position that the evidence of the various witnesses for the pursuer could be accepted as credible. However, it was his position that certain issues arose relative to the reliability of certain of these witnesses.

[82] So far as specific remarks regarding the pursuer's witnesses he said this:

- Mr Milne was plainly doing his best to bolster the claim made by his company. He submitted that concerns arose given his failure to produce various

documents, and his evidence at the commission that such documents did not exist, only for those documents then to be forthcoming from other parties, in particular, ICMI. However, he accepted that little perhaps turned on the evidence of Mr Milne, other than the question of the genuineness of the refused application. It was Mr Dunlop's position that having regard to the evidence of Mr Milne, he had accepted that the application was not a real attempt to obtain planning permission.

- Mr Mair's evidence could be accepted.
- In respect to Mr Slipper it was his position that he had said little to disagree with Mr Handley. Insofar as there was any disagreement, Mr Handley it was submitted was the more impressive expert.
- Turning to Mr Lieder's evidence it was his position that this could be discounted in its entirety, standing his candid acceptance that he had not been asked to appraise, and thus could not offer evidence on, the 35 bedroom proposal to develop Ury House.
- Turning to Mr Moir's evidence he described it as being useful so far as it went. However, there were two clear difficulties with it: he did not produce costings for everything necessary to get the pursuer to where it needed to be, namely: with a fully built and successfully operating five star luxury hotel; and insofar as he quarrelled with the defender's costings his evidence rather detracted from the idea that what would be built would be able to trade as such a hotel.
- Lastly, in respect to the report prepared by Colliers he submitted that it had a fundamental flaw, namely: its use of special assumptions. This was an issue which he intended to further develop later in his submissions.

- He described Messrs Cleaver and Pratt as credible witnesses, but the reliability of their evidence could not be accepted uncritically given their failure to address basics such as the professional requirements incumbent on a surveyor giving expert evidence to the court; their failure to interrogate the use of special assumptions; and the disconnect between what they were valuing and that in respect of which planning permission had been refused.

[83] Turning to the defender's witnesses he made the following observations: they should be accepted as credible and reliable. There were challenges to the independence of Mr Handley and Mr Robinson, however, these should be rejected. His position in response to these challenges was that both witnesses were clearly doing their best to assist, and were nonplussed by the suggestion that they were "guns for hire". Mr Robinson, who faced the sternest of the challenges, he submitted could clearly be seen to have taken an objective stance, in his assessment of the pursuer's quantity surveyor's figures, in particular this was shown by his identifying over £370,000 in terms of costs which had been included by McLeod and Aitken but which should not have been. That is not the action of someone doing his best, as was submitted by Mr MacColl, to inflate the cost of the project.

[84] So far as the rest of the defender's witnesses were concerned there was he submitted no real challenge to the credibility or reliability of these. It was his position that each of them could be regarded as an expert in his respective field.

[85] Moving to his detailed submissions in respect of the various issues in the case Mr Dunlop first said this: the first and primary requirement in terms of condition 25 is that the pursuer genuinely wishes to develop the land, in the way specified in the proposed development. It was his broad position that this had not been proved.

[86] In development of the above he submitted that it is quite clear that the 2017 planning application was designed to fail. In the pleadings it was admitted that there had been a previous claim for compensation, which was abandoned in light of the pursuer's failure to show that planning permission had actually been refused as a result of the existence of the pipeline. The 2017 application was submitted in order to fill that lacuna. Thus the 2017 application was not a serious one, and was designed to fail. This can be seen from the following considerations:

- Mr Milne practically accepted that it was not a serious attempt to obtain planning permission.
- None of the documents that one might expect to be submitted with a serious attempt to obtain planning permission were in fact submitted.
- Before one might envisage incurring the costs of developing a 35 bedroom hotel, one would need to be confident of its viability. Here, the project is not viable. But before one even begins to explore whether or not the project would be viable, one would need to know that there was a genuine desire to develop. Absent such a desire, the compensation provisions are not triggered. The absence of any assessment of viability by the pursuers, in advance of the 2017 application, is redolent of an attempt to manufacture a claim for compensation under the servitude.
- The plans attached to the 2017 application were on any view produced in a most unusual and unsatisfactory way: rather than coming from the retained architects, as might have been expected, the plans were cobbled together by someone in-house at the pursuer, without any thought as to whether the resulting picture was buildable. It was clear from the evidence that it was not: basics such as the

marrying up of staircases had not taken place. Moreover, the plans were "passed off" as those of Mr Morgan, standing the use of his firm stamp, despite the fact that this was incorrect.

- AC's suggestion to Mr Milne that the existing consent would allow the formation of additional bedrooms was not pursued (JB page 1208).

[87] Secondly it is a requirement that the proposed development be "prevented [by] the existence of the pipeline". Whilst it is admitted that the refused application was refused as a result of the existence of the pipeline, there was already an existing planning permission, from 2014 and 2015 (the existing permissions), to convert Ury House into a hotel, with no condition limiting that permission regarding the number of bedrooms. The only limitation on room numbers is found in the space available within the building and not in the 2017 refusal itself.

[88] Mr Dunlop in development of this argument submitted: that nothing could be done by AC to stop the creation of a 35 bedroom hotel, that is clear from the evidence of Mr Mair, and the contemporaneous email traffic, in particular joint bundle at pages 1208 and 1371. Moreover, he submitted that it was relevant to consider what happened in 2018. As can be seen from appendix L to Mr Reston's statement (witness bundle at page 715 to 717), the pursuer submitted an application for full planning permission ("the 2018 application") which went far beyond permission already obtained in 2015. For example, there was to be development across all floors, involving use of the building by potentially hundreds of people. HSE's "advise against" recommendation in relation to the 2018 proposed planning application was side stepped by the planning authority, which was plainly keen to assist the pursuer, on realisation that the 2018 proposal involved only internal changes to the building and did not require planning permission at all. There was no suggestion of the need for the

hotel to be trading. Mr Dunlop directed the court's attention to the fact that there had been no explanation in the evidence of why the position was any different regarding internal changes to increase the number of rooms. The highest the evidence got on this aspect of the case, from the viewpoint of the pursuer, was the indication from Mr Mair that hotel use would need to be implemented first before changes in the number of rooms could be made without further planning permission. However, as was explained by Mr Handley and as in any event is clear as a matter of law (see 1997 Act, section 27(1)) implementation, in this context, simply means commencement of operations, and on no view has that not happened. It was then argued that it flowed from the foregoing submissions that there were a number of possible scenarios. However, none of these availed the pursuer.

[89] If as was envisaged by Mr Handley, the existing permissions authorise the development of a hotel, without limitation on numbers of bedrooms then on that basis, there is no loss: the proposed development has not been prevented.

[90] If as was envisaged by Mr Mair, the existing permissions authorise the development of a hotel, without limitation on numbers of bedrooms as long as those permissions have been implemented then on that basis, there is no loss: as works have commenced and the permissions have thereby been implemented, the proposed development has not been prevented.

[91] If as was envisaged by Mr Mair, the existing permissions authorise the development of a hotel, without limitation on numbers of bedrooms as long as those permissions have been implemented in the form of operation as a five bed hotel then on that approach (even if that were correct), there is no basis upon which loss might be assessed: the loss, if any, would be the difference between (a) building a five bed hotel and then, once established, converting this to a 35 bed one; and (b) building a 35 bed hotel in the first place. The

pursuer has led no evidence that might allow the court to assess whether that would lead to any loss at all, or, if it would, to quantify same.

[92] Beyond that, if as now seems to be the pursuer's contention, they are pinned entirely to the 2017 planning application plans, then if that is the case the evidence which it has led as to quantum (which is based on valuing something entirely different from that in respect of which planning was sought in 2017 – see, for example, the inclusion of the spa and conference facility) is inept to justify the claim advanced.

[93] Thirdly Mr Dunlop contended that the court had to be satisfied: that the proposed development was "prevented…by reason only of the existence of the pipeline".

[94] He submitted that in respect of this requirement the pursuer had clearly failed in that the evidence was that the proposed development was neither buildable nor viable.

[95] Mr Dunlop developed the above argument in conjunction with his submission that the pursuer had not fulfilled the burden of proving that any loss had arisen entitling it to compensation.

[96] The fundamental point in this argument was as follows: the pursuer's case is predicated on the ability to create a five star luxury "trophy" hotel, to compete with the likes of Gleneagles. The pursuer's valuation evidence depends entirely on successful trading at the top end of the luxury hotel market. As Mr Pratt properly conceded, if that premise is not sound then neither is his valuation.

[97] He then submitted that the pursuer had failed to prove that Ury House could host an arrangement of the above type.

[98] In advancing the above submission the first point he made related to the plans submitted with the refused application. They, he submitted, did not show something that could result in the necessary trading levels. He submitted that that had been implicitly

recognised by the pursuer, who placed no reliance on these plans and who asked Colliers to value something entirely different. He submitted that it was noticeable that Colliers were unable to refer to any plan representing the hotel that they had purported to value. The long list of facilities and rooms referred to by Colliers at pages 2048 and 2049 of the witness bundle did not appear in any floor plans for Ury House, planning or otherwise. He submitted that this created a substantial problem for the pursuer's case: the claim was based on the 2017 refusal and the court should be valuing what was refused permission in 2017 and not something re-imagined, very late on in the case, when the pursuer was faced with insuperable problems stemming from the 2017 plans and beyond that was not even properly defined by the valuers themselves.

[99] Also he argued that even if the court were prepared to have regard to the 2018 plans this did not assist the pursuer. He highlighted a number of difficulties which arose for the pursuer on consideration of these plans: the plans did not show room sizes, but on the evidence the space was cramped. A detailed critique of those plans was offered by Dexter Moren, who was an architect with experience across the globe in designing luxury hotels. He submitted that there was no persuasive answer to the multitude of problems he raised with the lack of space and the consequent constraints on any ability to offer five star luxury standards and "feel". This problem was not confined simply to room size, things like the limits on the number of lifts and "back of house" facilities, such that there would be a constant crossover between guests and staff, pointed strongly away from this being an operation that would have acquired global renown as a luxury hotel. He submitted that a particularly compelling piece of evidence in this regard was the un-contradicted evidence that the pursuer would have imagined a space for dining which could sit a maximum of 22 people, in a hotel with capacity for 70. If anything underlined the unreality of the

proposition, it was this. The suggestion that a client of a five star luxury hotel, tempted away from a location such as Gleneagles, would turn up for breakfast at 7.30am and be happy to be told, no doubt politely, that they should return at 9.00am is simple fantasy.

[100] The evidence of Mr Rothwell supported the position advanced by Mr Moren. Mr Dunlop said this about the evidence of Mr Rothwell. He was an extremely fair witness. At the end of re-examination, he fairly conceded that certain aspects of the 2018 plans did start to elevate the proposed hotel towards five star standards. But ultimately his expert view, with decades of experience in the industry, was that the space available simply did not permit what the pursuer argues for, namely a five star trophy asset. There was little in the way of cross-examination of Mr Rothwell, and certainly nothing that might warrant rejection of his evidence. Moreover, there was no true counter to that evidence. This was the situation because Mr Lieder, who had been set up by the pursuer as an expert on viability frankly conceded that he had not been asked to consider the proposed development; had seen no plans relative thereto; and could thus offer no evidence of assistance in connection therewith.

[101] He contended that Mr Cleaver's evidence should be rejected as amounting to no more than mere assertion.

[102] In conclusion in respect of the issues regarding buildability and viability the multiple difficulties presented by an attempt to run a 35 bedroom five star luxury hotel from the limited space available, in the way shown in either the 2017 or the 2018 plans were clear from the evidence of Messrs Moren and Rothwell. They were echoed by Mr Chess. There was from the pursuer no explanation at all, let alone a convincing one, as to how those difficulties might be overcome.

[103] Mr Dunlop next submitted that on the evidence there were clear difficulties in respect to the funding of the project. It was a necessary part of the pursuer's case that it established that the project could be funded. The pursuer's case on Record is this:

> "The sale of the housing units will accordingly generate sufficient funds for the development of Ury House without the need for additional borrowing." (See Article 5 of Condescendence).

However, the evidence did not support this averment. In elaboration of this point Mr Dunlop referred to the following evidence relative to the sale of the housing units in the future: of the 230 plots that are supposed to provide a total of £7.5 million only 85 have been sold, since 2014. Those 85 were sold in a "job lot" to Kirkwood Homes in 2014 (see: JB at page 701 paragraph 2.5 and Mr Milne's witness statement in the witness bundle at pages 6 and 7 paragraph 28). Thus no houses have actually been sold to members of the public as yet. No other sales had been achieved since 2014. The evidence clearly showed a limited market for the houses. Mr Milne, himself, only thought sales in the future of 30 per year as being realistic. Even if one were to ignore the fact that the pursuer would be in competition with Kirkwood Homes, who would be trying to sell their 85 homes, and even if one were to ignore the evidence showing that not one house has been sold by the pursuer since 2014, at best for the pursuer that would suggest a pot of only £1 million per year for five years. Moreover, the evidence suggested that this was not realistic as contemporaneous correspondence (JB at pages 2115 and 2473) clearly showed the difficulty of selling houses in the area and the consequent unreality of the suggestion that the enabling development might actually produce a fund of £7.6 million any time soon.

[104] Moreover there was a further difficulty in respect to funding, namely: the evidence showed that more than £7.6 million would be needed. Even if there was available to the pursuer as of now a pot of £7.6 million in cash, that would not be enough to build the

proposed development, when the pursuer's own quantity surveyor has build costs with an "irredeemable minimum" of at least £9 million, and where those costs will clearly not result in a completed and usable hotel, for the reasons which he was advancing in these submissions. Accordingly, the pursuer required to show access to funds elsewhere. The pursuer had not established any ability to fund the development other than via the sale of housing. Mr Dunlop in particular did not accept that Mr Milne's evidence was that funding was required only if costs reached £14 million. The evidence of Mr Clark-Hutchison showed the difficulties that would be encountered by the pursuer in that regard, and there was no realistic suggestion from the pursuer regarding funding elsewhere.

[105] Thus for the above reasons a five star luxury 35 bedroom house was not buildable, fundable or viable.

[106] It being the pursuer's case that but for the existence of the pipeline it would construct a hotel of said type that is a fatal blow to its case.

[107] Even looking beyond the above there was a further unanswered difficulty in respect to the pursuer's case. The pursuer had made no allowance for benefits which had arisen as a result of the existence of the pipeline.

[108] In assessing whether a party has suffered a loss it is necessary to take into account any gains which have accrued to the party from the same cause (see: *British Westinghouse Electric & Manufacturing Co Ltd* v *Underground Electric Railways Co of London Ltd* [1912] AC 673.)

[109] Mr Dunlop accepted that cases such as *Westinghouse* related to issues of damages and the present matter is not such a case. He, however, submitted that it did not follow that the principles explained in *Westinghouse* are not relevant to the present case. He then referred to

what he described as the general rule in any damages claim as outlined by Lord Blackburn in *Livingstone* v *Rawyards Coal Co Ltd* 1880 7 R(HL) 1 at page 7:

> The "general rule [is] that where any injury is to be compensated by damages, in settling the sum of money to be given… you should as nearly as possible get at the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

[110] Then turning to the provisions in the instant case he contended that the principle set forth by Lord Blackburn is very much mirrored by the contractual stipulation here, which grants "compensation for all losses arising". He then put forward that provisions designed to provide compensation for losses caused by wayleaves or servitudes, such as that in the instant case, have much in common with claims in damages and similar general principles of causation, onus and reasonableness apply. (See: *Arnold White Estates Ltd* v *National Grid Electricity Transmission Plc* [2014] Ch 385 at paragraph 16).

[111] Looking at the evidence in respect to this issue he submitted that it showed that a number of benefits had accrued to the pursuer as a result of the existence of the pipeline. First, absent the pipeline and the perceived restrictions caused thereby regarding the development of Ury House, the pursuer would not have received permission for a 230 house enabling development; or planning for the golf course; or planning for the development of the walled garden. He submitted that the evidence in relation to all of these matters was plain however the clearest evidence related to the last matter namely the development of the walled garden. In respect to this last issue he particularly referred to the following evidence:

- Mr Mair indicated that there would need to be a justification for the application for permission to develop the walled garden and by excluding any alternative option (JB at page 607).

- In order to address this, the pursuer instructed a heritage statement which clearly founded on the restrictions on developing Ury House as a justification for development of the walled garden (JB at page 998).
- Mr Milne himself made submissions to the same effect (JB pages 1025 – 1026).
- AC accepted those submissions (see: JB pages 1258, 1259, 1263, 1264, 1272 and 2498).
- Lastly, Mr Milne accepted himself both in his original witness statement at paragraphs 35 and 36 and in cross-examination that the walled garden was an "alternative" to the original proposal to place the bedrooms within Ury House.

[112] Mr Dunlop continued by contending that the evidential position regarding the walled garden created a further insuperable difficulty for the pursuer. He described this difficulty in the following way: he first referred to the pursuer's pleaded case, which is:

> "walled garden development… is a separate and supplementary development to the proposed hotel development at Ury House. It is not a substitute for the 35 bedroom development at Ury House which is precluded by the pipeline." (See the end of Article 5 of Condescendence).

Looking to that averment he said this: it is irrefutably not made out, and is rather entirely contradicted, by the evidence.

[113] There is then a further difficulty because presumably because of the pleaded position, the pursuer has made no attempt to show whether there is a difference between the ultimate value of the walled garden alternative as compared to the proposed 35 bedrooms in Ury House, let alone what the difference that might be. Once again that causes an insuperable difficulty in the pursuer's case. He went on to submit that even beyond the above there are further problems for the pursuer when one takes into account the fact that

the evidence also shows an interlinking with the permissions granted to build the 230 houses and the golf course.

[114] The next question raised by Mr Dunlop was this: what is to be assessed? The relevant part of the condition is this: if there is an entitlement to compensation then "compensation for all losses arising from [the defender's] decision not to divert the pipeline including, without prejudice to the foregoing generality, losses of development value".

[115] As a matter of contractual construction Mr Dunlop accepted that the pursuer would point to the width of the words "all losses". However, it is trite law that the contractual stipulation must be read as a whole. The generality contains one expressed direction as to what the assessment of compensation should include, namely: "losses of development value".

[116] There was no dispute that development value is an assessment of the extent to which the value of land is enhanced by the granting of permission to develop it in a certain way. In the present context, that would entail permission to develop the land as a luxury hotel, such as to create an income-bearing asset.

[117] Mr Dunlop then said that it was self-evident that one could not award compensation for loss of development value, and also loss based on the development assuming it actually to have been completed. This would be double counting: the assessment of development value already comprehends the potential for the land to become an interest-bearing asset.

[118] From the foregoing there were two consequences: Firstly, it shows that the approach of the pursuer, which is to ask the court to proceed on the (special) assumptions that the hotel has not only been built but is successfully trading to a pre-ordained standard, is entirely flawed. It commits the same errors exposed by the House of Lords in *Transport for London* v *Spirerose Ltd*. There, the question was slightly different: namely whether, when

planning permission was not certain but likely, the land should be assessed on the basis of full development value, or merely hope value. The House indicated that the latter was appropriate, because of the lack of certainty that the permission would have been granted. Applying that approach to the present case, it would not be appropriate to accept the pursuer's suggested method of valuation, which proceeds on the assumption that the property has been built, to the requisite standard, and is trading successfully. None of those things has happened, and there must be substantial doubt that they could ever happen. It would not be appropriate to ignore the various risks that someone embarking on a project at Ury House would inevitably entail and award compensation on that basis. That would be to pass all risk to the defenders. There is no warrant for that in the wording used in the servitude.

[119] Second, it leaves the pursuer with a substantial gap in their evidence. As a result of the valuation approach which it has adopted, it has not attempted to address development value at all**.** The only evidence before the court on development value comes from Mr Chess, and he assesses that there is no development value at all in the refusal of the 2017 permission.

[120] Another way of putting this would be to ask what it is that the court should be assessing as compensation under the contractual wording used. Two alternatives are put before the court.

[121] For the pursuer, it seems to be said that the court should imagine a world in which the land has been fully and successfully developed to a very specific level, ignoring all risks that this might never have happened or be achieved to the standard assumed, and award compensation on that assumption.

[122] For the defender, a more conventional approach is adopted: any assessment of compensation should be designed to represent an amount, in money's worth and as at the date of the award, compensating the pursuer for any diminution in value of the pursuer's land caused by inability to develop it in a particular way.

[123] He submitted that the defenders' approach is plainly the correct one. It fits with the usual method of assessing compensation which builds in the risk that certain things may or may not happen (see: *Allied Maples Group Ltd* v *Simmons and Simmons (a firm)* 1995 1 WLR 1602). It avoids speculation. It avoids over or under-compensation by looking to present actuality and not future contingency (see: *Transport for London*). It means that the court will not commit the error of attempting to award "compensation" for consequences which are too remote (see: *Director of Building and Land* v *Shun Fung Ironworks* 1993 2 AC 111). It ensures, as parties surely, looked at objectively, must have intended, that the defender "should not require to pay as compensation a larger amount than the owner could reasonably have obtained for his land in the open market in the absence of the" pipeline (see: *Logan* v *Scottish Water* 2006 SC 178 at para 107).

[124] There can be no sensible quarrel with an approach which measures the loss to the pursuer occasioned by refusal of planning permission by reference to the contractually stipulated loss of development value. And if there is no development value, there is no loss.

[125] The pursuer's difficulties did not however cease. There were further difficulties and these arose from the evidence on the costs of the development. Mr Dunlop began his detailed submissions under this head by emphasising that the pursuer had not chosen to put before the court evidence of what would be the costs of development, by which he meant the sum of money needed to get the property to the state at which the pursuer asks that it be valued, namely: fully built and successfully trading. Mr Moir accepted, that he had only

costed the development to a point at which the shell of the building was completed, but, crucially, (a) not yet with the spa or conference facilities which the pursuer insists are crucial to the viability of the operation; (b) not yet with any connection, in the form of sewers, or water, or electricity, or gas, or telecommunications, or roads, to the outside world; (c) not yet with a garden of any sort, and (d) not yet with any of the fixtures, fittings or equipment that would be necessary to operate a luxury hotel.

[126] Looking at Mr Moir's evidence and that given by Mr Robinson it was evident that Mr Moir, who was the only witness qualified to comment on the full cost plan tendered on behalf of the defender, responded to Mr Robinson's report in an entirely benign manner. He agreed Mr Robinson's methodology, and offered minor comments in response thereto. In his evidence, he offered no suggestion that Mr Robinson was in any way "off beam". He accepted in terms that he had not valued the fixtures and fittings at all, and for that reason could offer no comment or critique in respect thereof. In cross-examination he accepted that the total build cost would be at least £12.3 million.

[127] The pursuer's only response to the above was an aggressive cross-examination of Mr Robinson. Mr Robinson was plainly discomfited by his treatment in the witness box. That was not intended as a criticism of the pursuer's counsel, who was simply doing his job. But no amount of such cross-examination can make up for the gaps which he had identified in the pursuer's evidence. Mr Dunlop reminded the court that it was the pursuer's claim and it was for it to establish what it would cost it to build the hypothetical hotel and to show that it could do so for less than that asset would ultimately be valued. In summary given the absence of proof that build costs would be less than ultimate value then even on its own approach to assessment of compensation the pursuer has failed to make good its claim.

[128] Moreover, Mr Dunlop submitted, the cross-examination of Mr Robinson required Mr MacColl not for the first time in this case, to attempt to ride two horses. On the one hand, it was sought to be put forward that the hypothetical hotel would be a trophy asset, attractive to rich clientele from across the world, ranked among the best in Scotland and with a value per room which equated to that of Edinburgh's Waldorf Astoria. On the other, however, it was said that this could be done "on the cheap", with a few beds from John Lewis and some waste paper bins from Ikea. These stances he submitted were mutually irreconcilable: if the hotel was to be a trophy asset, it would require to be furnished as such.

[129] In respect to the evidence of Mr Robinson Mr Dunlop conceded that at the best for the pursuer, Mr Robinson's assessed costs may be slightly high such as for example in the mistaken understanding that the spa would be housed in an extension. But what the cross-examination of him did not do was to detract from the acceptance by Mr Moir that build costs would be at least £12.3 million. Nor could it: Mr Moir's own "irreducible minimum", with the various stated exclusions, was just shy of £9 million. On any view, the costs of making the necessary connections, carrying out the various site works, constructing the spa and fitting out the hotel would add at least £3.5 million, a figure which is less than 50 per cent of what Mr Robinson costed these items at. Accordingly, Mr Moir was plainly correct to concede a build cost of at least £12.3 million and in reality it would probably cost more than that, particularly given the luxury trophy standard that the pursuer insists is necessary and on which its valuation is predicated.

[130] It did not assist the pursuer's case to argue, as Mr MacColl did, that certain of the costs would be accounted for by other parts of the development on the pursuer's subjects. Again Mr Dunlop reminded the court that it was the pursuer's case. It alone knew what it

comprehended in such other developments. Multiple attempts to obtain information as to viability had been made by the defender, using commission and diligence. It would not do for the pursuer to say "some of these costs would be borne elsewhere": it is for the pursuer to prove what costs would be borne elsewhere, and how. That the pursuer had not done.

[131] With build costs of that sort of magnitude, it can be seen that there is no loss of development value, even if it is appropriate to pass all risk in the project to the defender and value it on the basis of special assumptions, as have Colliers; and even if it is appropriate to ignore the plain fact that the hotel simply could not operate at the required level for the reasons already explored. With build costs of at least £12.3 million and a valuation which stands, at best and only using special assumptions, at £12.4 million, there is simply no development value at all. No one in their right mind would spend £12.3 million on the wing and a prayer hope that they might, eventually and with a following wind, end up with £12.4 million.

[132] Once one bears in mind that the true valuation of the property is actually far lower, for the reasons given by Mr Chess, it can be seen with certainty that there is no loss here. The pursuer might have been able to put a "nice" 35 bedroom hotel into Ury House, but it would have been one which was worth no more than £4.6 million. There is no evidence suggesting that this could have been achieved for costs of less than £4.6 million.

[133] Finally Mr Dunlop submitted that the pursuer relies on the £7.6 million figure as set out in the section 75 agreement. Mr Dunlop's response to this was as follows: as Mr Milne correctly pointed out, that is not "free" money. There is no obligation on the pursuer to build the 230 houses envisaged by the section 75 Agreement. Here again there is a disconcerting absence of evidence: the refusal of the pursuer to exhibit the "Restoration Works" programme referred to in the section 75 Agreement is unexplained, and

inexplicable. But leaving that to one side, the section 75 Agreement creates a complex arrangement of obligations and benefits. Put shortly, the pursuer will require to expend significant sums and effort to "win" the £7.6 million that they envisage. There are requirements imposed, for example, regarding affordable housing – which one would reasonably assume might be less profitable for the pursuer.

[134] Mr Dunlop then asked the question: what, then, is the court to do with the supposed pot of £7.6 million? One thing is clear: it does not presently exist, and may never do so. It must be borne in mind that the £7.6 million will only ever be achieved if the pursuer can build and sell 145 houses on a site which has not seen a sale since 2014. Colliers were not asked to take account of this hypothetical fund in providing valuation advice. In oral evidence, Mr Pratt said it would be taken into account, but not how. More importantly, Mr Chess explained just how difficult it would be to take account of this factor – and ultimately the pursuer has simply not provided enough evidence for this to be done. It is for the pursuer to show the extent to which this money should be taken into account in valuing the property. It cannot simply be a case of saying "we have £7.6 million for free" (as they do not, and as Mr Milne explained the money does not yet exist and would certainly not be free), it would be wrong simply to credit the pursuer with £7.6 million. But no other approach is advocated, and the evidence does not allow the court to make any assessment of what, if anything, this money might mean for the claim.

[135] In conclusion Mr Dunlop said: for all of the above reasons, no loss had been proven by the pursuer. The contractual stipulation under consideration envisages compensation for loss of development value. No such loss had been proven, and accordingly no entitlement to compensation was made out.

[136] Lastly Mr Dunlop addressed condition 25(f) in the servitude. It was his position that if necessary he relied on this particular provision which provides that compensation will not be payable if planning permission "has been or would have been refused for the proposed development on grounds unrelated to the existence of the pipeline". He then asserted that even if the pipeline had not been in existence the refused application would have been refused. It did not contain the necessary information, as explained by Mr Handley and as accepted by Mr Slipper. The application would not have been granted regardless of the pipeline, and on that further basis the claim failed.

Discussion

Witnesses

Preliminary Issues

[137] In respect to a number of witnesses it was asserted that for various reasons I should either hold their evidence inadmissible or disregard their evidence in its entirety. Given these submissions it is perhaps appropriate at this point, before turning to look at the evidence in detail, to consider these submissions.

[138] In respect to the pursuer's witnesses it was submitted by Mr Dunlop that I should discount the evidence of Mr Lieder for the reason that very early in his cross-examination the witness had said:

> "I can only speak to the walled garden project".

This answer was followed up by this question by Mr Dunlop:

> "Can you offer any assistance as to what Ury House offers?"

Which was answered:

> "Not looked at that in detail."

[139] There was no further cross-examination. Mr Dunlop's position became this: the witness had not considered the matter in issue, namely: the development of a luxury 5 star 35 bedroom hotel in Ury House, but something entirely different, namely: the development of a 35 bedroom hotel within the walled garden of Ury Estate.

[140] Mr MacColl's position was that this was going too far for the reasons which he advanced.

[141] I do not believe that Mr Lieder's evidence can be entirely discounted when regard is had to the whole terms of his witness statement and his supplementary witness statement. I think in the course of these he does comment on the viability of a 5 star luxury 35 bedroom hotel in Ury House as well as the walled garden development. In particular he deals with the issue of the viability of a 5 star luxury 35 bedroom hotel in Ury House when contrasted with the viability of a five bedroom hotel in Ury House at paragraphs 11 and 12 of his witness statement. He also considers the issue of the viability of a 5 star luxury 35 bedroom hotel in Ury House by comparing it to the development of the walled garden as a hotel at paragraph 16 of his witness statement. In his supplementary witness statement it is evident he is commenting on the views of Mr Rothwell and Mr Moren in respect to the viability of a 5 star luxury 35 bedroom hotel in Ury House (see for example paragraph 6). He in addition makes further comments on the viability of a 5 star luxury 35 bedroom hotel in Ury House at paragraphs 7 and 11 of his supplementary witness statement.

[142] Against that background I am not prepared entirely to discount his evidence. I will deal with the issue of my detailed assessment of his evidence at a later stage in this opinion.

[143] Secondly it was submitted by Mr MacColl that I should hold the evidence of Mr Handley as not being admissible. It was not contentious that Mr Handley had been an

actor in the factual issues that were live before the court, in that he had acted for the defender as a paid advisor in relation to the refused application. At that time he put forward certain views in respect to the refused application, which he repeated in the course of his evidence in court, where these views were being put forward on the basis that he was an expert witness.

[144] It was not contentious that an expert witness requires to be independent and impartial and provide independent assistance to the court by way of objective unbiased opinion. An expert may not act as an advocate for a particular party's cause.

[145] Mr MacColl's submission in short was that this witness did not meet the said requirement.

[146] I do not believe that simply because Mr Handley acted as a paid advisor for BP in respect to the factual matters before the court that this necessarily renders his evidence as inadmissible having regard to the foregoing test. Rather the proper question for the court to ask is: when giving his evidence did Mr Handley understand that his duty to the court was to provide independent and impartial assistance to it? I formed the view that in giving his evidence to the court Mr Handley understood his overriding duty to provide such independent assistance. Nothing in the way he gave his evidence or the content of that evidence caused me any concerns about this essential issue of his independence and impartiality. I accordingly hold his evidence to be admissible.

[147] Mr MacColl also sought to have the evidence of Mr Stuart Robinson excluded as he had not shown the necessary objectivity required of an expert witness.

[148] A number of arguments in support of that position were put forward by Mr MacColl. It appeared to me that the first matter which had to be considered when looking at the evidence of Mr Robinson and examining the submission of Mr MacColl was this: Mr Moir

who was the witness on behalf of the pursuer in relation to the matters upon which Mr Robinson was giving evidence first agreed the methodology which had been adopted by Mr Robinson and secondly I believe that Mr Dunlop fairly assessed Mr Robinson's evidence when he said that there had been no suggestion by Mr Moir that Mr Robinson in his reports was "off beam". The attitude of the pursuer's own expert tends very much to suggest that there is no substantial basis for the argument being advanced by Mr MacColl.

[149] Secondly, it appeared to me that Mr Robinson had sought, insofar as he was able, to validate the figures which he had produced. As I understood it many of the figures which he produced were from his company's database of figures from real developments in relation to which they had been involved of a similar type to that which had not been able to go forward at Ury House. I am persuaded that this is an entirely acceptable method of approach to providing costings.

[150] Thirdly, he was instructed to prepare his costings from first principles and therefore in respect of work already done at Ury House he did not use the actual figures but did, as he was asked, look at what figures he believed were reasonable for that part of the development. When this was the approach he was asked to take when preparing his report, I do not regard it as a valid basis for criticising him that he followed this approach. In addition it is noteworthy that when his figures prepared from first principles are compared to the actual figures there is no material difference.

[151] Fourthly, he accepted that there might be items for which he had provided costs which an owner might decide at some later stage he did not wish or he wished to put in some slightly cheaper alternative. However, given that he was preparing his cost analysis at a very early stage in the development and the only information he was provided with were the plans and that the proposed development was a 5 star luxury 35 bedroom hotel I find his

concessions hardly surprising. I do not believe these concessions undermine his independence or objectivity. On the evidence such alterations by an owner were entirely normal. There was nothing in his evidence which made me think that he was seeking to deliberately inflate the cost figures. There were perhaps a few instances of double counting, however, again given the number of separate items he was required to cost I did not find this surprising and it did not lead me to form an adverse view of this witness's evidence as a whole.

[152] Lastly, in respect to this issue of whether I should have any regard to his evidence I do note the point made by Mr Dunlop that in approaching the figures he discounted a very substantial figure which had in fact been put forward by the pursuer and I think it is proper to say that this reflects the general fairness of his approach.

[153] Overall I am not prepared to exclude Mr Robinson's evidence. I think he could properly be regarded as an expert witness.

[154] I was also asked by Mr MacColl to disregard in its entirety the evidence of Mr Moren and Mr Clark-Hutchison. I reject these submissions and will give my reasons for my view when I look in detail at the evidence of these witnesses.

[155] As I consider the various issues and the witnesses who gave evidence regarding each issue I will comment upon my assessment of their evidence. I observe at this point that in respect of all of the witnesses who gave evidence I believe they were credible witnesses, in the sense that they sought to do their best to tell the truth.

The issues

[156] The primary requirement in terms of condition 25 is that the pursuer genuinely wishes to develop Ury House into a five star luxury 35 bedroom hotel. It is argued by

Mr Dunlop that that is the natural reading of the first sentence of the condition. No alternative construction was put forward by Mr MacColl.

[157] Mr Milne is the controlling mind of the pursuer. Accordingly, this issue turned to a very large extent on his evidence. In his witness statement between paragraphs 13 and 24 he sets out the lengthy planning history relative to Ury House and his wish over a considerable period of time to have a hotel in Ury House to go alongside a Jack Nicklaus golf course.

[158] At paragraph 24 he explained that the five bedroom planning permission for Ury House which he had was: "unlikely to be financially successful". He follows this by saying the following at paragraph 25 of his witness statement:

> "We thus sought to explore that with Aberdeenshire Council's planning team, and to discuss the possibility of a 35 bedroom hotel. It was clear to me from the outset that the constraints on use of the land caused by the pipeline were going to be a problem. As I note above, the castle is in the inner blast zone according to HSE's PADHI guidance and it was difficult to see how it would be possible to create a 35 bedroom hotel with all bedrooms in the castle."

[159] He then turns to the refused application and says this at paragraph 26:

> "Nonetheless, we made a formal application for planning consent for a 35 bedroom hotel with all bedrooms located in the castle… We did so as it was the only way of evidencing the difficulties which the location of the pipeline was causing for the development we envisaged at Ury Castle. We were criticised by BP in a previous court action prior to the application for planning consent for a 35 bedroom hotel being made for not being able to show that the pipeline was the reason for our inability to create a 35 bedroom property. I felt we had no alternative but to apply for planning consent even though I recognised it was likely to be recommended for refusal. It was not a huge surprise to me when consent for a 35 bedroom proposal was in fact refused."

[160] Accordingly, it is clear that at the date of the making of the refused application Mr Milne was aware it was likely to be refused in light of HSE's well understood position regarding the building of such a hotel within Ury House due to Ury House's position in relation to the pipeline. However, it does not necessarily follow that Mr Milne did not genuinely wish to develop Ury House into a luxury five star 35 bedroom hotel. The lengthy

planning history, the work done regarding the golf course, the putting in place of the section 75 agreement (the enabling development), the substantial money spent on Ury House and the lack of commercial viability of a five bedroom hotel in Ury House strongly support a genuine wish on his part to develop a five star luxury 35 bedroom hotel in Ury House.

[161] Mr Milne in his evidence did not accept the lack of viability or buildability of a five star luxury 35 bedroom hotel in Ury House. I thought that he was genuine in his belief that the proposed development could be built and was viable. Nothing surrounding the issues of buildability and viability caused me to believe that he did not have a genuine wish to develop such a hotel within Ury House.

[162] Lastly, he accepted that the plans submitted with the refused application had certain problems, the most obvious being a lack of matching staircases between the ground and first floor. However, it was his position that the points highlighted in respect to the plans could be dealt with at a later stage. I believed he was genuine in his view on this.

[163] As regards the plans which were submitted with the refused applications it is correct that they were produced in house and by the use of a stamp were "passed off" as being from Mr Morgan's firm (the pursuer's retained architect) and basics such as the marrying of staircases had not been achieved. However, I do not think that it follows the application was not genuine, rather it suggests that it was a somewhat hurried application made following the problems with the first action. I think it is noteworthy that despite the points made regarding the plans the application was not rejected by AC because either the documentation accompanying the plans was insufficient or the plans themselves were such that consideration of the application could not proceed. This again is suggestive of a genuine application.

[164] So far as Mr Milne's failure to follow up the suggestion of AC that the existing permissions would allow additional bedrooms. First I believe that the email from Mr Mair in which this matter was raised shows the genuineness of the refused application. He is someone who was well aware of the whole planning history relative to the pursuer's subjects and he, with that knowledge, appears to believe the refused application to be genuine otherwise he would not be writing an email in these terms. Secondly, Mr Milne does respond to the suggestions made in the email. In his reply to AC's email at P1207 JB he gives reasons why he does not believe that the course suggested by AC should be followed. In particular he has concerns about the likelihood of a change in HSE's established position and, as I understand it, he has concerns, detailed in the second last paragraph, of the viability of developing a 5 bedroom hotel and thereafter altering it to a 35 bedroom hotel once the 5 bedroom hotel had been implemented. His attitude to ACs suggestions appears reasoned and it is not just a blank rejection of AC's suggestions without any consideration which might have suggested a lack of genuineness in the application. Thus I believe this correspondence does not support the contention that the refused application was not a genuine one. As I said at the outset this issue turned very much on the credibility of Mr Milne. I found Mr Milne to be a reasonably impressive witness. I thought at all times he was doing his best to tell the truth and in particular I believe he was doing this in respect to this issue.

[165] In conclusion it seemed to me that Mr Milne was genuine in his wish for a luxury five star 35 bedroom hotel to be built at Ury House. I accepted his evidence on this issue. I believed his evidence was credible and reliable. His evidence was supported, I felt, by the surrounding circumstances. The particular factors relied on by the defender when analysed I do not think supported the position Mr Dunlop was advancing. I accordingly find that

there was a genuine wish on the part of the pursuer to develop a five star luxury 35 bedroom hotel within Ury House.

[166] The next point to consider is this: it is a requirement in terms of clause 25 that the proposed development was "prevented [by] the existence of the pipeline". Accordingly the next issue becomes: was the proposed development prevented by the existence of the pipeline?

[167] This issue turned on what was a sound construction of the existing planning permissions. In particular the question was: did the existing planning permissions place a restriction on the number of bedrooms permitted at Ury House, namely: five?

[168] I am persuaded that on a sound construction of the existing planning permission that the part of each of the permissions which is in the following terms: "and in accordance with the plan(s) docquetted as relative hereto and the particulars given in the application… Grant full Planning Permission" cannot simply be ignored. The whole terms of the planning permission have to be had regard to and not just parts of it.

[169] The next question is this: what is the effect of these words in respect to the issue before the court?

[170] The evidence in respect to this question is fairly limited and came from Mr Mair, Mr Handley and to a limited extend from Mr Slipper who in the joint note of meeting of the experts on planning issues said this: "That internal alterations do not require planning permission but would require listed building consent" (see: notes of meeting no 37 of process page 3).

[171] Looking to the evidence of Mr Mair and Mr Handley they were in agreement as follows: the above wording in the planning permissions was not an absolute prohibition on the pursuer building a 35 bedroom hotel in Ury House.

[172] There is an indication at an early stage that it was Mr Mair's view that the foregoing was his understanding of the position. In an email from him to Mr Milne of 7 March 2017 (JB 1208) (to which reference has already been made) he said this:

> "I do think it is worth sitting down with HSE. I explained to HSE on the phone what I did to you at the end of last week – Ury House has been granted change of use to a hotel. So in the future (once the use as a hotel has been implemented), you could form additional rooms without the need for consent. They weren't too fussed by it. But, in terms of them balancing the 'what you could do and what they would let you do', I would imagine that they would be pragmatic and seek to approve this application while it is still something they can control."

[173] The context of this email is that the refused permission was still under consideration at that point.

[174] Mr Mair gave evidence in respect to this issue and said this in his supplementary statement at page 234 of the joint bundle:

> " • It is correct that, in theory, once the hotel had been built as the 5 bedroom development (that permission had been granted for) and commercial operations had begun, that there could then be internal changes to the layout and number of rooms (subject to listed building consent or any further consents required for external works). That is what I meant in the email that is quoted by Mr Handley at paragraph 3.11.
>
> • There is also the argument that even if the 5 bedroomed hotel had been built and was operational that increasing the number of bedrooms from 5 to 35 could constitute a material change of use and fresh planning permission would be required. There would be a number of things to consider in making that the assessment about whether or not the increase was material or non-material.
>
> • However, if building had begun for the development of the house into a hotel based on the 5 bedroom consent (but the hotel had not, yet, become operational) and at that stage the owner decided that they wanted to change it from 5 to 35 bedrooms – then that would not be permitted without additional planning permission. The council would be entitled to take an enforcement action (either at the stage where a listed building wall had been altered without consent or when the 35 bedroom hotel had become operational). When the 2017 application was submitted there was no permission in place for 35 bedrooms to be built and, as above, unless the 5 bedroom hotel had been built and then become operational the owner could

> not simply change the 35 bedrooms as there would be no established use to rely on at that stage."

[175] There appears to be a degree of backtracking in his evidence from the very positive and uncaveated view which he expressed in his email. However, he did not depart from the core of his position that the existing permissions did not per se prevent the use of Ury House in the future as a hotel with more than five bedrooms without the pursuer requiring further planning permission.

[176] The uncaveated view expressed in the said email was in summary also the view of Mr Handley.

[177] The issue that separated the evidence of Mr Handley and Mr Mair on this question was this: in terms of the planning legislation at what point did implementation occur. As Mr Mair made plain his view was that implementation occurred once the use of Ury House as a hotel had been established. With this position Mr Handley disagreed. It was his position that implementation took place when development began.

[178] In respect to this issue my attention was directed by Mr Dunlop to section 27(1) of the 1997 Act which provides:

> "Subject to the following provisions of this section, for the purposes of this Act development of land shall be taken to be initiated—
>
> (a) if the development consists of the carrying out of operations, at the time when those operations are begun;
> (b) if the development consists of a change in use, at the time when the new use is instituted;
> (c) if the development consists both of the carrying out of operations and of a change in use, at the earlier of the times mentioned in paragraphs (a) and (b)."

Here the existing permissions allow for "Alterations and Reinstatement of Derelict Mansion House for Use as Hotel".

[179] Accordingly I believe the provisions at subsection (1)(c) of the above are engaged and therefore development begins or is initiated at the date operations begin, that being the earlier date in the present case, operations having already begun on Ury House to put it into a wind and watertight state. I was not directed to any other provision of the 1979 Act by Mr MacColl in relation to this question.

[180] Some support for this being the correct understanding of the position is found in consideration of what happened in 2018 when the pursuer made the 2018 application for planning permission. The extent of the difference between the existing permissions and the 2018 application together with HSE's views on this are summarised in a letter from Mr Reston of HSE at page 717 of the joint bundle (witness statements) where he says this:

> "The proposals in APP/2018/0826 seek to redevelop all four floors of Ury House. The upper floor proposals are for five large bedroom suites with the remaining three floors allocated for a range of leisure and indoor uses (gym, pool, dining room, lounge x 3 x bar x 3 x function hall x conference suite x 5). HSE assesses these to be two distinctive development types. The upper floor for the five bedroom suites is SL1 hotel (DT2.2) and the remaining three floors DT2.4.>25m² is SL2. HSE advises against significant > 250m² indoor use by the public (SL2) in the inner zone of any major hazards like on a pipeline."

It is clear from the above that there are very substantial differences between the 2018 application and the existing permissions in relation to Ury House.

[181] Despite the extent of the differences between them AC advised that there was no need for this application as it only involved internal alterations at Ury House. It was, as I understand it, withdrawn. The hotel in Ury House was not at this point trading, however, there was no suggestion that it needed to be trading for the pursuer to proceed with these substantial and material alterations to their existing permissions without further planning permission. Beyond that, I observe the pursuer was in addition, if it proceeded with what

was proposed in the 2018 application not acting in accordance with the docquetted plans in the existing permissions.

[182] As argued by Mr Dunlop there was no evidence and no explanation as to why the position would be any different in respect to internal changes relative to the number of rooms. The effect of the changes would be the same, namely: increasing materially the use of Ury House by members of the public.

[183] Moreover, I observe there is a conditions section within the permission documents and no condition appears limiting the number of rooms to be built. I believe if the planning authority wished to prevent the pursuer developing a hotel with more than five bedrooms without seeking further planning permission then it needed to attach a specific condition or restriction to the planning permission. It did not do so.

[184] In conclusion on a proper construction of the existing permissions there is no condition which limits the use of Ury House to only five bedrooms.

[185] The phrase "in accordance with the docquetted plans" for the reasons I have already detailed does not prevent a hotel with more than five bedrooms being developed at Ury House. There is no need to obtain further planning permission in order to develop a 35 bedroom hotel within Ury House once development has occurred, which in the context of the present case is on the commencement of operations and these operations have commenced.

[186] I believe the following consequences flow from my above conclusions regarding the proper construction of the existing permissions.

[187] First, the pursuer is entitled from the relevant date in terms of section 27(1) of the 1997 Act to develop a 35 bedroom hotel in terms of the existing permissions and the relevant date is the commencement of operations, which has happened. Accordingly, a 35 bedroom

hotel in Ury House could be developed on the basis of the existing permissions and therefore such a development is not "prevented [by] the existence of the pipeline" thus for this reason the pursuer's action must fail.

[188] Even if I am incorrect in my above conclusion in respect to the date at which the development has been implemented and Mr Mair's view that implementation does not occur until the start of operation of a five bedroom hotel I consider that Mr Dunlop is correct, for the reasons which he advances, that there is no basis in the evidence upon which loss may be assessed. In summary no evidence has been led on behalf of the pursuer providing a proper comparator upon which an assessment of loss could be carried out. I believe that the proper comparator must be as suggested by Mr Dunlop and no such evidence was led.

[189] Beyond that, even if I am wrong in respect to both of the above conclusions and the various caveats put forward by Mr Mair require to be taken into account, I am not satisfied, on the evidence before me that a five star luxury 35 bedroom hotel in Ury House has been prevented by the existence of the pipeline. It was not a contentious matter that the onus in proving the foregoing was on the pursuer. Thus it was for the pursuer to prove that the issue of "material change" referred to by Mr Mair would arise and if it did arise that it could not be overcome. I have heard no evidence which would entitle me to hold that either of those factual matters has been established.

[190] Thus on any possible scenario the pursuer has not persuaded me that it has satisfied the said requirement in the provision. It follows that for these reasons the pursuer's case must fail.

[191] There is one further matter with which I should deal before leaving this issue of the proper construction of the existing planning permissions. It was put forward on behalf of

the pursuer that even if as a matter of law the pursuer is not prevented by reference to the docquetted plans to confining any development at Ury House to 5 bedrooms that nevertheless no reasonable developer would proceed in the whole circumstances to develop a 35 bedroom hotel and therefore the development of such was prevented by the existence of the pipeline. I do not believe that argument is sound. If the pursuer genuinely wishes to proceed with the proposed development there is for the reasons that I have set out a sound legal basis upon which he can proceed. He cannot simply say I will not adopt that course.

[192] There is also I believe a further fundamental and separate difficulty in relation to the position advanced by the pursuer which arises from the issue of the 2018 application above discussed.

[193] That difficulty arises in a number of guises. First so far as the evidence led by the pursuer in relation to quantum this has regard to what is contained in the 2018 application. Thus the valuation upon which the pursuer relies includes among others a valuation of a hotel with a spa and a conference facility which do not form part of the refused application, rather they appear in the 2018 application.

[194] Accordingly I do not believe that the valuation supports the case advanced by the pursuer which is averred to be this "… the development of a 35 bedroom hotel at Ury House (as proposed in application APP/2017/0241) was readily buildable, from both a commercial and practical perspective" (see: Article 6 of condescendence).

[195] The valuation produced by Colliers is one which does not reflect the refused application and therefore does not reflect the pursuer's pleadings. Rather it reflects something which is substantially different. Accordingly it is not apt to support the pursuer's pleaded case.

[196] Moreover this particular stance of the pursuer highlights an underlying conflict in the approach of the pursuer. On the one hand the pursuer contends that the existing permissions do not allow the building of a 35 bedroom hotel in Ury House because of the docquetted plans, however, the refused application, if granted, would somehow have permitted them to have a spa and conference facilities not contained in the docquetted plans. This tends to support the view I have reached in regard to the proper construction of the existing permissions.

[197] There is I consider a further difficulty with the Colliers valuation. I note from page 2 of their initial report that what they have valued includes: "planning permission for 32 bedrooms to be developed in the walled garden". In the pursuer's written submissions it contended as follows:

> "This sum is the difference in the value between a luxury five star thirty five bedroom hotel with Jack Nicklaus golf course at Ury House (being £12,400,000) which would be developed in the absence of the Pipeline and a luxury five star bedroom hotel (with the same facilities) there (being £800,000), which is all that can be developed at Ury House under the extant planning permission, less the further sum of £716,810, being the additional build cost for a thirty five bedroom hotel at Ury House over a five bedroom hotel there."

That is not what Colliers have valued. In addition they have valued the 2018 planning permission. This does not reflect the pursuer's pleaded position or the position that it advanced in submissions. Again, this shows that the valuation is not apt to support the position advanced by the pursuer.

[198] Moreover in respect to proving that in terms of Clause 25 the proposed development was "prevented by the existence of the pipeline" it is a further necessary element for the pursuer to prove that the proposed development was achievable as a matter of practical reality.

[199] This raises a number of issues:

- Whether what is proposed is buildable?
- Whether what is proposed is affordable? In other words is the pursuer in a position to fund the proposed development?
- Is the proposed development viable, namely: could the proposed hotel trade at an appropriate level to be financially viable?

[200] The above considerations are also of relevance in respect to the question of the pursuer's entitlement to compensation for "all losses arising from (the defender's) decision not to divert the pipeline".

[201] I turn to the first question which is this: Is what the pursuer intends to create, namely: a five star luxury hotel with 35 bedrooms in Ury House buildable? This question to some extent overlaps with the issue of financial viability.

[202] I have already commented on the difficulty for the pursuer's case that Colliers in valuing the hotel take into account not just the refused application, but the material changes proposed in the 2018 application . There is a further difficulty with Colliers' valuation which is this: At page 2048 and 2049 of the witness joint bundle in the course of its report Colliers' values a hotel with 35 bedrooms arranged within Ury House as follows:
18 bedrooms on the first floor 17 on the second floor and accompanying this is a table setting out the sizes of each room.

[203] However, in the course of evidence Mr Pratt accepted that none of the plans which were before the court reflected such an arrangement of bedrooms. When it was put to him that none of these plans reflected bedroom sizes as contained in his report he replied that he had not measured the room sizes.

[204] Where the question of how the proposed number of rooms could be fitted into Ury House was an issue and where room size was also an issue it is I believe a material flaw in

the valuation evidence presented on behalf of the pursuer that it does not accurately reflect any particular plans far less the 2017 or the 2018 plans in the foregoing respects. The answer by Mr Pratt was to the effect that what he was valuing was a 35 bedroom hotel and that the layout of the rooms within Ury House and their specific size did not have an effect on that valuation. It did not appear to me that this provided an acceptable answer to these points. Room sizes and layout did appear to be significant issues when the issues of buildability and viability were being considered and I did not think that this point could be appropriately put aside by simply saying that what was being valued was a 35 bedroom hotel.

[205] In summary my view is that "the proposed development of the land (which has been) prevented" can, on a proper understanding of condition 25, only be that contained in the 2017 plans not that contained in the 2018 application or some development which is not vouched in any plan. It is the 2017 plans which underpin the refused application. I consider it correct that the court should be valuing what was refused planning permission in 2017 not something which is substantially different. Accordingly the pursuer's evidence in relation to the issue of proving that a 35 bedroom five star luxury hotel could be hosted within Ury House and if so what loss flows therefrom fails at this first hurdle as it is not tied to the 2017 plans, which was what was refused.

[206] Beyond that it seems implicit in the approach of the pursuer that it is accepted that the 2017 plans would not produce a buildable and viable hotel. Thus its wish to have valued by Colliers something which includes elements from the 2018 plans.

[207] Assuming I am wrong in my above conclusion relative to what should be valued I turn to consider the development which has been valued by Colliers which is a combination of the refused application and certain elements of the 2018 application and the walled garden permission.

[208] The defender led two witnesses in relation to the issue of buildability and viability: first Mr Dexter Moren. He had considerable expertise in the design and space planning of luxury hotels and had completed several hundred such projects.

[209] He made the following points about the buildability of a five star luxury 35 bedroom hotel within Ury House.

- Guest and service circulation within the proposed design were not kept separate and this is a requirement in order to achieve a five star luxury feel to a hotel.
- The bulk of the rooms were less than 30m^2 and were accordingly of insufficient size to support a luxury five star hotel. He based this view on his experience working with many five star luxury hotel brands and in particular had regard to their requirements that rooms in such hotels should have a minimum size of 30m^2 and often required a minimum of 35m^2.
- There were insufficient suites for a five star luxury hotel. What was said to be a suite was not a suite in that in order to get into the public area of the suite you had to go through the bedroom area.
- There was insufficient linen space.
- There were level difficulties in bedrooms 9 and 12.
- The dining room was of insufficient size. Too little space was given to each guest who was dining there. What was regarded as an appropriate figure for the area required by a diner in a five star luxury hotel was between 3 and 4m^2. In this dining room there would only be 2.5m^2. Moreover, the dining room could only seat 22 persons a wholly insufficient number given that there were 35 bedrooms.
- There was insufficient assembly space for the proposed conference facility.

- The kitchen was relatively small.
- In order to serve food in the lounge and bar plates had to be taken through the reception area (this was simply not five star luxury standard).
- The lower ground floor area had inadequate space to bring goods into the hotel.
- The bar storage area which would be required in a five star luxury hotel in order to have considerable storage for wines was wholly inadequate.
- The staff canteen was of inadequate size given the likely number of staff required to support a five star luxury hotel.
- The design of the leisure/pool facilities was not appropriate as it required persons in swimwear to walk along past the spa reception.
- He also highlighted at pages 2391 and 2392 of his report various difficulties in the plans submitted which in summary he stated made the "2017 application … incomprehensible and unbuildable as submitted".

[210] There was criticism of Mr Moren by Mr MacColl that he was dogmatic and tended to offer *ipse dixit* opinion. I do not believe that these criticisms were justified. I found the witness to be reasonably impressive. He gave clear and fully reasoned evidence in support of the conclusions he reached regarding the issue of buildability and viability. In particular his views regarding the size of the rooms required for a five star luxury hotel he based on considerable experience of designing hotels in this specific category. He in particular founded on the requirements of operators of hotels in this particular class. He gave his evidence in a trenchant manner, however, I believe overall that his evidence was balanced and soundly based. Mr MacColl also said there was nothing to show that the witness was an architect of world renown and he had no experience in the Scottish market. The witness asserted that he had certain experience. I saw no reason why I should reject that evidence.

On the basis of that evidence he was clearly able to give expert evidence. No positive evidence that he did not have the necessary experience was led. So far as his experience of the Scottish market was concerned I do not understand that what in Scotland would be classed as a five star luxury hotel would be different from other parts of the UK.

[211] The second witness led on behalf of the defender regarding this aspect of the case was Michael Rothwell.

[212] Mr Rothwell had 32 years' experience in the hotel field and in particular in the management of hotels. He now operated hotels through his company on behalf of other owners. He had done this for approximately 10 years. I found that his views largely echoed those of Mr Moren.

[213] I observe that he agreed with Mr Moren's view as to the minimum size of a standard five star luxury hotel room as being 30m^2 and that superior rooms which would be expected in such a hotel would have a minimum size of 35m^2.

[214] He made the following additional points:

- There was only sufficient room for one suite which was inadequate for this type of hotel.
- The corridors were too narrow for a five star luxury hotel.
- Storage facilities on bedroom floors were inadequate.
- The plans only had one lift. For a hotel of the proposed standard he felt two were required.
- There were insufficient restaurants for a five star hotel.
- The kitchen size he described as woefully inadequate.

- Back of house facilities were inadequate as they did not provide the space to support the level of service required of a five star luxury hotel. He detailed these matters further at pages 2437 to 2440 in the joint bundle.

[215] I found this witness's evidence to be thoughtful, fair and well-reasoned. Where possible he referred to standards to back his evidence. Otherwise he relied upon his considerable experience to found his views. I believe he was perfectly entitled to do so.

[216] It seemed to me that the essential fairness of his evidence was shown by his observations at 4.6 of his report where he accepted that the AA had become less prescriptive in respect to the size of rooms when considering the issue of granting five star luxury accreditation. The carefulness of his report was also shown by his having taken further steps to check the position by having an informal meeting with a senior member of the AA regarding this issue (see: paragraph 4.1 of his report).

[217] In my view these two impressive witnesses presented a powerful and consistent body of evidence to the effect that the proposed development could not turn Ury House into a 35 bedroom five star luxury hotel.

[218] In response to this evidence the pursuer relied on the following witnesses, first Mr Norbert Lieder. This witness had considerable experience in hotel management and in particular through his management company ICMI presently managed, among others, the following hotels: Cromlix House, Greywalls and Inverlochy Castle Hotel. His management company had entered into a management agreement with the pursuer to manage a hotel on the Ury Estate.

[219] In his witness statement he does not in any detail cover the type of issues which Mr Moren and Mr Rothwell cover in their reports and in their evidence. His statement only gives very general evidence on the issue with which the court has to grapple. In his

supplementary witness statement he seeks to deal with the issue of the minimum room size and at paragraph 6 of this makes certain observations. He does accept the "general principle that rooms should be of an acceptable size" but says that many country house hotels in buildings such as Ury House will not be able to produce uniform room sizes and not all rooms may meet the minimum requirements referred to by Messrs Moren and Rothwell but still achieve 5 star accreditation. However, he does not comment in detail on the size of the rooms presently proposed for Ury House as Messrs Moren and Rothwell do. In the following paragraph he comments that his agreement to operate the hotel was entered into "when detailed plans for the hotel were not yet agreed" and he has "not been involved, at this point in detailed consideration of the plans of the hotel" (see paragraph 10). It appears to me that this witness's evidence is of limited value to the court due to not having considered the plans in detail and therefore not being able in detail to comment on the raft of criticisms made by Messrs Moren and Rothwell. The evidence of this witness was too broad brush and insufficiently detailed properly to counter the evidence of the defender's experts. Overall I was of the view that he had not given adequate consideration to the issues of buildability and viability of a 5 star luxury 35 bedroom hotel within Ury House. Moreover, it did seem, as he accepted himself in the course of cross-examination that his thoughts were in large part directed to consideration of a hotel in the walled garden. I believe the evidence of Messrs Rothwell and Moren has for these reasons to be preferred to the evidence of Mr Lieder.

[220] In addition the pursuer relied on the terms of the second Collier report prepared and spoken to by Mr Pratt and Mr Cleaver. At section 2.3 of this report certain of the shortcomings of the proposed plans advanced by the defender's witnesses are commented upon.

[221] The point is made that to achieve the standard of a five star luxury hotel not every room needs to be 30m^2 and that generally there is a degree of subjectivity applied when for example the AA is applying its rating system. As I have already mentioned this was a matter that was accepted by Mr Rothwell. The report of Colliers also relies on the STR hotels database in Scotland and its rating system for five star luxury class hotels and believed that the proposed development would achieve such a rating on this site.

[222] The report goes on to say that its compilers are aware of five star hotels which have narrow corridors, no lifts and do not offer a variety of dining options. It says that other operational issues could be dealt with by way of non-material amendments to any planning permission at a later stage.

[223] In regard to the question of certain matters being dealt with by non-material amendments I accept it may be possible to deal with certain matters such as the stairways not meeting in the plans to be dealt with in this way. However, the particular problems arising from the size limitations of the building and seeking to place within that building all of the requirements for a five star luxury hotel I judge cannot be dealt with by such minor amendments.

[224] The pursuer also led Mr Morgan, a very experienced architect, who had since about 2001 been involved in the development of the pursuer's subjects and had experience with two companies in the hotel sector. The broad thrust of the defender's experts' criticisms were put to him in cross-examination and in summary he maintained that a 5 star luxury hotel with 35 bedrooms could be built within Ury House. In respect to room size he was not able to give the precise size of rooms in the proposed development, however his position was this: 5 star accreditation was not wholly down to square metres, rather it depends on standard of fit out and service given to customers.

[225] Looking to the evidence on this issue as a whole, I have already set out that I did not find Mr Leider's evidence of any real assistance. So far as Mr Cleaver is concerned (who was the witness from Colliers who principally gave evidence on this issue) I accept that he has considerable relevant experience with regard to the issue before the court. I reject the criticisms that his evidence was *ipse dixit*. Where possible he supported it by reference to objective standards and otherwise based his views on his wide experience. However, I did not find his evidence regarding the practicability of achieving a 5 star luxury 35 bedroom hotel in Ury House convincing. It did not I believe answer the essential question of taking all of the criticisms of the proposed development cumulatively advanced by the defender's experts, would the proposed development have the feel of a 5 star luxury hotel and would guests have a 5 star luxury experience: given *inter alia* the size of many of the rooms; the problems in fitting out that size of room to give it a 5 star luxury feel; the lack of dining options and the very small size of the single restaurant when taken together with all the other criticisms. His approach in response was to say: there are 5 star luxury hotels with rooms under 30m^2; there are such hotels which have only one dining room and so on. This did not however, provide an adequate answer in respect to a hotel which did not just have one such problem but had all these problems.

[226] I do not think that Mr Morgan added very much on this issue. He has considerable knowledge of Ury House, but I did not think he had any great experience and certainly not as much experience in respect to the 5 star luxury end of the market as the defender's witnesses. In particular I do not believe he was able to speak with the same knowledge of that sector of the hotel industry regarding many of the criticisms made by the defender's experts.

[227] In conclusion for the reasons set out I preferred the evidence of Messrs Moren and Rothwell who I found to be impressive witnesses, who provided clear, fully reasoned and supported evidence.

[228] Overall when the evidence on this issue is looked at in the round the clear impression I have formed is that the proposed development is trying to put a quart into a pint pot. It appears to be seeking to achieve a five star luxury hotel of a certain size in a space which will simply not accommodate it. Ury House is simply not of sufficient size to incorporate all the necessary elements for it to be accredited at the level of a five star luxury hotel. Moreover, because of this overall problem of inadequacy of space which has been identified it is I believe on the evidence not possible for the proposed development to offer the feel of a five star luxury hotel, which was identified at all hands to be the critical point. So not only do I feel that it would not be accredited at the appropriate level I do not believe it would be able to offer the feel and experience of a hotel at the requisite level. The proposed development will simply not produce what the pursuer intends, a 5 star luxury hotel with 35 bedrooms within Ury House. The clearest example of the problem of size constraints was in respect to the dining room. It was clearly of an inadequate size for a five star luxury hotel of this size. The defender's evidence on this issue was in no way countered by any evidence led on behalf of the pursuer.

[229] Accordingly I believe that in respect to this issue of buildability and viability a 35 bedroom five star luxury hotel in terms of the proposed development is simply not achievable. For this further reason the pursuer's case must fail as the buildability and viability of the proposed development is fundamental to its case.

[230] Beyond the above there is the issue of funding. The pursuer's case on record was that the sale of the houses in terms of the section 75 agreement would provide sufficient funding to carry through the proposed development.

[231] On no view of the evidence was the foregoing made out.

[232] There are 230 housing plots provided for in terms of the section 75 agreement and that is supposed on the sale of these to provide a total sum of 7.6 million pounds. However, on the evidence there seemed to be substantial difficulties in achieving the sale of these properties.

[233] From 2014 to the date of proof only 85 had been sold and these had required to be sold in a single lot. No actual sale to the general public had been achieved by the date of proof. The only evidence led on behalf of the pursuer regarding the likelihood of future sales of this housing came from Mr Milne who said that 30 houses per annum would be sold. He offered no evidence to support that assertion and given the sales to date I think it highly unlikely that this annual sales figure would be met. There is in essence other than Mr Milne's say so nothing to suggest that this figure is achievable. In putting forward this figure I do not believe Mr Milne's evidence was reliable. Even if he is correct it would take some five years to achieve the sales and therefore funding to the sum of £7.6 million is not immediately available.

[234] I conclude the enabling development is unlikely to produce the first tranche of money necessary to carry forward the development, namely: the £7.6 million.

[235] Moreover, there is a further significant problem in respect of funding which is this: on the evidence of the pursuer's own quantity surveyor a minimum of at least £9 million is necessary for the proposed development. Thus approximately an extra £1.4 million is

required over the sum that would be obtained from the section 76 agreement, should that even be achievable.

[236] Further this figure of £9 million does not take account of certain material costs which are undoubtedly necessary to put any hotel built within Ury House into the position upon which the pursuer bases its valuation, namely: as a successful going concern. The costs of providing these necessary elements for the hotel, which it is accepted at all hands have not been costed by the pursuer will, on any view of the evidence led, add a very significant figure onto that base sum of £9 million.

[237] Thus on the evidence the pursuer's averment that the £7.6 million from the enabling development is sufficient to finance the proposed development and that no borrowing will be required is clearly not established. It was suggested by Mr MacColl in the course of submissions that in cross-examination Mr Milne's position had been that external funding would only be required if costs went beyond £14 million. It was specifically challenged by Mr Dunlop that any such evidence had been given. Accordingly I have considered Mr Milne's statements and my own notes of his evidence and I can find no such evidence. In particular when Mr Milne dealt with funding in his statement and supplementary statement at respectively paragraphs 28 and 2 his position is that the £7.6 million will provide the funding and there is no reference to £14 million being available. When specifically asked in cross-examination as to how he would finance costs beyond £7.6 million he said he would borrow funds. I am satisfied that on the evidence the pursuer would have to borrow if costs went beyond £7.6 million. If it were to be said that any further money could be raised from the sale of the section 75 properties beyond the ring fenced sum of £7.6 million that is subject to the same difficulties I have already referred to.

[238] The question is therefore where, according to the pursuer, the necessary funding is to be obtained.

[239] In his evidence Mr Milne asserted that, if more than £7.6 million was needed then the pursuer would need finance. His position was that he thought he could borrow money for the proposed development although he also said that he was not presently looking for funding. He did not elaborate as to how this borrowing was to be obtained; the amount of the borrowing to be obtained; when it was to be obtained or the terms on which it was to be obtained. No independent expert evidence was led on behalf of the pursuer which supported Mr Milne's position that such borrowing could be made available. Looking to the evidence of Mr Milne on this issue I do not believe that it was reliable. It seemed to amount to little more than a pious hope. I gained the impression that no particular thought had been put into this issue by Mr Milne. Thus looking to the evidence led on behalf of the pursuer I believe that there is no acceptable evidence that this development can be funded. It is in my view an extraordinary gap in the pursuer's evidence that nothing was produced by way of expert evidence as to how this clear funding gap, which on any view was of a significant amount, could be bridged.

[240] In order to seek to fill this gap in the evidence the pursuer to some extent sought to place reliance on the evidence of the defender's expert on this issue, namely Mr Clark-Hutchison. This appeared to me a somewhat odd position given that in submissions I was asked by Mr MacColl to reject his evidence as he had not in his evidence presented a full and impartial picture.

[241] I am not persuaded by Mr MacColl's argument that I should entirely put to one side the evidence of this witness. I do not agree with the submission that Mr Clark-Hutchison's evidence was that he had provided the defender with a further written report which was

significantly more favourable to the position of the pursuer and which had not been disclosed to the court.

[242] Looking to the whole of Mr Clark-Hutchison's evidence when this issue was put to him in the course of cross-examination I understood his position to be as follows: he referred to a later brief report in which he had commented that the enabling development (upon which he did not comment in his primary report which was produced to the court as, at the time of preparation he was unaware of it) was a positive in respect to the pursuer's funding position, however, critically in order for it to be of significance in respect to the issue of funding it was necessary for that sum to be in the bank, (ie, as I understood it the houses had been sold and the £7.6 million was available to the pursuer), before it could be used when seeking funding from other lenders. This did not seem to me to be a significantly more favourable position to the pursuer than that expressed in the original report. What was being said it appeared to me was that if that £7.6 million funding had been raised through the sale of the houses then yes that would have been a positive point which would have required to have been considered when looking at the pursuer obtaining funding. However, it has never been the case that the £7.6 million is in the bank, the vast preponderance of it has not been raised. Thus this further report is not in any real sense favourable to the pursuer's position. I am unaware as to why this brief report was not lodged. However, what I am clear about is that I did not gain the impression that the witness was seeking to hide anything by it not having been lodged. Rather I gained the impression that this witness was entirely honest and that he was at all times fully aware of the duties which he owed to the court and that he properly fulfilled these. He produced a fully reasoned report and I thought his evidence both credible and reliable. There was no positive expert evidence put forward on behalf of the pursuer which countered his position.

I could see no reason why I should not accept this evidence subject to accepting the evidence of the defender's other experts who produced figures which he used in his opinion and which I will comment upon later.

[243] Turning to the substance of his report Mr Clark-Hutchison accepted that his opinion that a lender would decline to advance any debt facility in respect to the proposed development was based on the various figures provided to him by the defender's experts and if these were wrong his opinion might have to be altered. However, I did not understand him at any point in his evidence to accept that on the basis of any particular figures produced on behalf of the pursuer that they would cause him to alter his fundamental opinion as to whether lending could be obtained. Beyond that, looking to the various figures which he produced and the various criteria which he applied in his report, they do not seem to support an argument that on the basis of any view of the various relevant figures I was prepared to accept that a lending body would lend a sufficient sum to fund this project.

[244] I conclude for the above reasons that the pursuer is not in a position to fund the proposed project and therefore for this further reason its case must fail.

[245] Moving on, the next issue which arose sharply between the parties was whether any benefits arising from the existence of the pipeline should be had regard to in respect of the calculation of losses for which compensation should be awarded in terms of the condition. Secondly, if the answer to that question is yes there was an issue between the parties as to whether any such benefits had as a matter of fact and law accrued and the extent of these.

[246] As to the first question this turns on a proper construction of condition 25 and the critical wording in this context is: "pay compensation for all losses arising from their decision not to divert the pipeline".

[247] If the decision not to divert prevents the pursuer from proceeding with one development but nevertheless as a direct consequence allows another development to proceed, which could not otherwise have proceeded, then I am persuaded on a sound construction that requires to be had regard to in the calculation of loss arising from the decision.

[248] On an ordinary and natural reading of the word loss it means the diminution resulting from the said decision. If the said decision has therefore also produced a benefit that has to be taken account of in calculating if there is in fact any loss and the amount thereof. Or put another way, no loss arises from the decision if benefits directly resulting from that decision outweigh the negative effects of the decision.

[249] Not to approach the assessment of loss in the manner described would I think be to construe loss in such a way that it loses its essential meaning.

[250] Equally the ordinary and natural meaning of the word "compensation" namely: the counterbalancing of a deficiency tends to support the view that what is to be calculated is the global position having regard to both the negative and positive effects of the decision not to move the pipeline.

[251] To apply the construction contended for by the pursuer would not compensate the pursuer but grant the pursuer a windfall. It would be granted a windfall in that it would be compensated for the entire negative effects of the decision not to move the pipeline but no regard would be to the positive effects of the same decision. I am clearly of the view that the wording of the condition cannot be read so as to produce a result which provides a windfall of this nature for the pursuer.

[252] I consider that the principle enunciated by Lord Blackburn in respect to damages to which I was referred by Mr Dunlop can with due respect to the ordinary and natural

meaning of the language in condition 25 be read across as applying to the said condition. I believe support for that position can be found at paragraph 16 in the observations in the *Arnold White Estates Ltd* v *National Grid Electricity Transmission Plc* to which I was referred by Mr Dunlop.

[253] Having expressed my view as to the sound construction of the condition and therefore what I believe the proper approach in respect to the assessment of loss; namely having regard to accruals as well as losses resulting from the decision, I turn to consider whether any such benefits have accrued.

[254] First I consider it is reasonably clear that planning permission for the walled garden development would not have been granted but for the existence of the pipeline and the decision not to move it.

[255] In considering this issue the appropriate starting point is a letter from Mr Milne to Mr Mair at page 1025 of the joint bundle dated 12 December 2018 where he says this:

> "A major unseen constraint on the development proposals for the main building has been the proximity of the BP Forties pipeline that crosses within 30m of the building. This has meant that the main building can only accommodate a limited amount of bedrooms. …
>
> The proximity to the pipeline has meant the bedrooms in the main building are not sufficient and as you know we have been greatly restricted in developing this part of the main building. The hotel annex which is approved for 120 rooms is too far away from the main building to operate as a five-star luxury resort experience.
>
> After much deliberation the only possible location for the additional hotel rooms was in the walled garden, this location meant rooms could be hidden behind the existing walls and the garden could be reused for supply of produce for the hotel kitchen."

[256] It is quite clear from the terms of the said letter that Mr Milne is using as a justification for obtaining planning permission for the walled garden the existence of the pipeline and its limitations on the use of Ury House.

[257] There is then the report of handling of AC relative to the application regarding the walled garden.

[258] It is clear from the document as a whole but in particular having regard to the terms of pages 1258, 1259, 1263, 1264 and 1272 in the joint bundle that the justification for the granting of the planning permission is the existence of the pipeline and the effect this has had on the number of bedrooms which could be built within Ury House. In particular I note these comments first at page 1259 in the joint bundle under the heading "Supporting Information":

> "Limitations on the use of Ury House as a hotel from the Forties pipeline have been known for some time and were fully explored in the recent APP/2017/0241 which saw a proposal for 32 bedrooms within Ury House refused due to the health and safety risk from having so many overnight guests in close proximity to the pipeline. The inability to provide the hotel rooms in Ury House, where the space does exist, has led to exploration of alternatives and this final proposal coming forward to provide the required rooms to make the hotel use at Ury House viable."

[259] Secondly at page 1264 in the joint bundle this is said:

> "The need for the hotel rooms is accepted, and has been long established in previous consents for the wider resort development at Ury Estate. The location of the rooms within the walled garden has been justified through outlining alternative sites in close proximity to Ury House as being restricted by the pipeline, proposed golf course, topography and prominence. The tourist accommodation is compliant with policy B3 of the LDP, and will enhance the previously consented proposals at Ury House."

[260] The above passages appear to me to be an explicit acceptance that in the absence of the pipeline there would not be a justification for the walled garden proposal.

[261] I would also refer to the area committee report of AC at page 2498 of the joint bundle at paragraph 6.3 which is to the same effect.

[262] Moreover, Mr Milne in the course of giving evidence accepted that:

> "The walled garden [was] an alternative way to get 35 bedrooms."

And when asked whether: "[the] difficulty in getting 35 rooms in Ury House assisted him in getting planning permission for the walled garden" he answered: "I think so".

[263] Mr Milne put forward the same position in his witness statement at paragraphs 35 and 36.

[264] I am persuaded by the above evidence that the walled garden development planning permission resulted from and would not have been granted but for the existence of the pipeline and the position regarding the use of Ury House as only a 5 and not 35 bedroom hotel which was the perceived consequence of the decision not to move the pipeline. The granting of the walled garden planning permission is thus dependent upon or looked at in another way conditional upon the refused application and thus the existence of the pipeline. Mr MacColl made the point that Mr Mair was not asked about this matter by Mr Dunlop. However, that does not diminish the effect of the above evidence which I believe leads clearly and directly to the conclusion I have arrived at.

[265] Two difficulties for the pursuer's case flow from the above.

[266] On record the pursuer avers as follows:

> "the walled garden development … is a separate and supplementary development to the proposed hotel development of Ury House. It is not a substitute for the 35 bedroom development at Ury House which is precluded by the pipeline" (see the end of article 5 of condescendence).

[267] The pursuer has not proved this averment. On the contrary on the evidence it has clearly been established that this is not a supplementary development but an alternative development allowed only because of the existence of the pipeline and which would not otherwise have been allowed. Beyond that and critically in reference to the issue of loss, the pursuer, as argued by Mr Dunlop, has failed to establish that there is a difference between the ultimate value of the walled garden development as compared to the value of the

proposed development of a 35 bedroom hotel within Ury House and has not shown what is the difference.

[268] The failure to prove that there is a loss and if such a loss does exist the extent of that loss must again be fatal to the pursuer's claim.

[269] It was in addition contended by Mr Dunlop that the permission granted to build the 230 houses and the golf course were so interlinked to the existence of the pipeline that they equally could be regarded as accruals and required to be taken into account in respect to the existence of any loss which required to be compensated. This argument was not however developed in any meaningful way by Mr Dunlop. I am not persuaded that these two permissions fall into the same category as the walled garden permission, namely, that they were only granted because of the existence of the pipeline and the decision not to move it.

[270] The next issue to be considered is what is to be assessed?

[271] In arriving at a sound construction the whole terms of the clause have to be had regard to. Looking at the whole terms of the clause the purpose of it is to compensate the pursuer for all losses which flowed from the failure to obtain planning permission due to the refusal to move the pipeline. What flowed from that decision in the present case is an inability to take forward a proposal to develop Ury House as a luxury five-star 35 bedroom hotel. What, it appears to me, the pursuer has not lost is the value of such a hotel which is up and running and operating successfully. The pursuer has not sustained such a loss.

[272] The approach to the issue of loss adopted by the pursuer is to look into the future and say: a definite result will be produced, namely a 35 bedroom hotel at a five-star luxury level which is successful. I believe that cannot on a sound construction of the clause be a proper approach.

[273] Such an approach to assessment of loss is not appropriate as it has no regard to the risks that a fully operating five-star luxury hotel will not be achieved or that the hotel will not operate at the appropriate level.

[274] Having regard to the whole wording of the condition and its context this cannot be a sound approach to the assessment of loss. That it is not the correct approach to assessment of loss is confirmed by considering the following situation: planning permission is refused on the basis of the existence of the pipeline for some proposed development which has no real prospect of being carried out to fruition and if carried forward has no real prospects of success. A valuation is thereafter obtained on the assumptions that the project will be carried forward and will be successful. In those circumstances it cannot be correct to assess loss on the basis of that valuation. Equally, in the much less extreme circumstances of the present case, it cannot be correct to approach the matter without having regard to the issue of risk which I have identified.

[275] It appears to me for the reasons advanced by Mr Dunlop that the approach to valuation adopted by the defender reflects the wording of the clause. Beyond that it fits in with the usual method of assessing compensation which builds in the risk that certain things may or may not happen. Thus as contended by Mr Dunlop it avoids over or under compensation by looking to present actuality and not future contingency and means that the court will not commit the error of attempting to award "compensation" for consequences which are too remote. It ensures, as parties surely, looked at objectively, must have intended that the defender should not require to pay as compensation a larger amount than the owner could reasonably have obtained for his land in the open market in the absence of the pipeline.

[276] I consider Mr Dunlop is correct in advancing the argument that there are two possible constructions of the clause and that the defender's conventional approach in using loss of development value is the sound construction in that it fits with the wording of the condition. It is difficult to see a tenable argument that the use of a measure of loss expressly referred to in the condition is an unsound approach.

[277] In holding as above I am not saying that the sole measure of loss that can be had regard to is loss of development value. The foregoing would clearly not be a sound construction of condition 25. It would mean that the words "all losses including but without prejudice to the said generality" would be rendered devoid of any meaning. Rather, I am saying that the basis of assessment of loss relied upon by the pursuer is not one which on a sound construction is available to it.

[278] An example of an approach other than loss of development value which may have been open to the pursuer, on a proper reading of the condition, would have been to assess its loss on the basis of a loss of a chance. Such an approach would I believe fall within the terms of the clause and would take account of the type of risks to which I have made mention and thus be an appropriate form of assessment of loss. The pursuer sought in its submissions as a fall-back position to adopt this approach to assessment of loss and I will consider these submissions later.

[279] On the other hand the form of assessment put forward by the defender clearly falls within the definition of loss which can be compensated in terms of condition 25 in that it is the single form of loss which is specified. When one considers the definition of development value as set out by Mr Dunlop, it makes it even more unlikely that the approach of the pursuer is one which falls within condition 25 for the reasons advanced by Mr Dunlop.

[280] Accordingly having held that the pursuer's approach to the assessment of loss is not an appropriate one having regard to the terms of condition 25 and having held that the assessment of loss advanced by the defender is an appropriate one, this presents insuperable difficulties for the pursuer. Given my above decision there is no proper assessment of loss presented by the pursuer. Beyond that there is no countervailing evidence to that given by Mr Chess on behalf of the defender that there has been no loss of development value.

[281] I found Mr Chess to be an impressive witness who had prepared a careful and fully reasoned report. In his report there was a single mistake, which he quickly corrected at the outset of his evidence. That single mistake did not cause me to reject the analysis of the question of development value presented by him. Equally he conceded that he had a difficulty dealing with the section 75 sum of £7.6 million. He explained the nature of this difficulty and this explanation seemed reasonable. His position regarding this did not cause me to reject his evidence. Lastly there was a criticism that certain elements of the report had been prepared by a colleague who did not give evidence. As I understood his evidence Mr Chess had checked this preparatory work and was in a position to speak to it. I do not think that this argument in any way undermines his evidence. I had no difficulty in accepting his evidence and therefore in holding that there was no development value. This conclusion is also fatal to the pursuer's case.

[282] Further it seems to me clear that the valuation of any loss occurring to the pursuer has to start from a consideration of the cost of the proposed development.

[283] It was suggested by Mr Dunlop that it was an oddity of this case that the pursuer, upon whom the onus lies to establish loss and its level, has not put before the court a calculation of what the cost would be to put in place a successful operating hotel which is what it contends should be valued. The evidence presented by the pursuer in this context

came solely from Mr Moir and he accepted that he had not put forward any costing in relation to the following material elements in the putting together of such a hotel: he has only costed the development to a point at which the shell of the building was completed, but, crucially, (a) not yet with a spa or conference facility which the pursuer has had valued; (b) not yet with any connection, in the form of sewers, or water, or electricity, or gas or telecommunications, or roads, to the outside world; (c) not yet with a garden of any sort; and (d) not yet with any of the fixtures, fittings of equipment that would be necessary to operate a luxury hotel.

[284] On the other hand the expert witness for the defender, Mr Robinson gave evidence of costing and in particular costed the various elements not commented upon by Mr Moir. I have already observed that I do not accept Mr MacColl's submissions that all or at least a very large part Mr Robinson's evidence should be rejected.

[285] Generally I thought both Mr Robinson and Mr Moir were reasonably impressive witnesses who at all times sought to be of assistance to the court. In respect to the elements of the costings where they both commented and they disagreed I believe first it would be appropriate to prefer the real world figures for work done to date rather than the worked up cost figures advanced by Mr Robinson. As regards to the other elements on which they both commented and disagreed, these disagreements seemed to be the types of disagreement likely to be found between two experts commenting on figures of this type. There appeared to be no clearly identifiable reason why I should prefer one figure over the other. Both witnesses appear to have approached the matter in a reasonable fashion and there was no real disagreement about the basis upon which they had approached the matter. It seemed to me against that background that the adoption of a figure halfway between the figures

provided by each witness would most accurately reflect the best estimate for the cost and I have adopted this approach.

[286] In relation to the elements costed by Mr Robinson but not by Mr Moir as earlier identified I consider that the basis upon which Mr Robinson has carried out the valuation is a reasonable one for the reasons which I have referred to earlier when considering whether his evidence should as a whole be rejected. I also observe that in respect to these figures there is no real contrary evidence.

[287] However, although in general his evidence on this appeared sound I believe his final figure for these elements should be reduced on a broad axe approach by 20% to allow for the following: (a) he accepted that the hypothetical owner might decide later in the building process to leave out certain items he had costed or to choose a slightly cheaper alternative (b) there was to some extent some double counting identified and (c) the factor referred to by Mr Dunlop relative to the spa.

[288] The above matters, however, do not detract from the soundness of his overall approach and the broad reliability of the figures he arrived at for these elements. I do not accept Mr MacColl's position that there should be a reduction of the extent to which he submitted.

[289] On a consideration of the whole evidence what cannot on any basis be disputed is that the irreducible minimum build cost is £8,992,779, which is a figure contained in Mr Robinson's report at page 2327 of the witness statements joint bundle to which I understand Mr Moir in cross-examination assented to. This figure does not take account of the excluded items which I have earlier identified. In the course of cross-examination Mr Moir was taken through Mr Robinson's report and in particular all of Mr Robinson's costings for excluded items. At the end of cross-examination he accepted a total cost figure

inclusive of the excluded items of £12.3 million. Mr MacColl submitted that had not been Mr Moir's positon in evidence. However, on looking at his evidence he did appear to assent to this figure towards the end of his cross-examination. It is clear on the basis of these figures alone that even applying the special assumptions and using the pursuer's valuation of the property there is no loss. The position is even more stark when Mr Chess's figures are had regard to when taken with the higher figure based on my view of Mr Robinson's evidence. This I believe is a further basis upon which the pursuer's case fails.

[290] Turning to the fall-back position of the pursuer who founded on loss of a chance: it is contended that the court should take a figure of 80% of its primary proposed figure as an appropriate figure for loss of chance.

[291] Before considering that point in detail I observe that there is no reference in the pleadings to such a fall-back position. Even allowing for this being a commercial action the pursuer has to give proper notice in its pleadings of a particular position which it intends to put forward in support of its case; here there is none. Therefore I do not think it appropriate to have regard to these submissions given that there are no averments on which they can be put forward.

[292] Assuming I am wrong in my above view, I do not think given the views which I have expressed in respect of the other issues regarding loss that any figure to compensate for a loss of a chance is justified. Even if I am wrong in that view I am not persuaded that an 80% figure comes anywhere near reflecting the level of risk that this hotel would be built and then operated successfully as a five star luxury hotel. I find it impossible on the evidence and in particular having regard to the various factors that I have referred to when considering the issues of buildability, fundability and viability to give a figure even on a broad axe approach which would in any way approach the figure contended for by

Mr MacColl. Further, I do not believe there is sufficient acceptable evidence before me to give any figure for the loss of a chance, particularly having regard to the various difficulties regarding the evidence to which I have already referred. Accordingly even were I with the pursuer on the substantive merits I would not make an award on the foregoing alternative basis.

[293] Lastly, the defender relied on the terms of part (f) of condition 25. I do not believe on the evidence that the argument advanced under this head and developed by Mr Dunlop was correct. His position was that the planning permission would have been refused in any event as it was not in proper form; not accompanied by the proper documentation; and due to the difficulties with the plans to which I have referred. On looking to the evidence of Mr Mair that position is not made out. On his evidence the only basis for refusal was the existence of the pipeline and no other. I had no difficulty in accepting his evidence on this matter and it provides a complete answer to Mr Dunlop's argument.

Conclusion

[294] For the foregoing reasons the pursuer's case in terms of the first conclusion fails.

The pursuer's secondary case

[295] Beyond the above the pursuer also sought a declarator in the following terms:

> "For declarator that the first defender is liable to make payment to the pursuers of all professional charges reasonably incurred by the pursuer in connection with the claim for compensation which he has made against the first defender under and in terms of the Grant of Servitude recorded in the General Register of Sasines for the County of Kincardine on 26 August 1977, and whether arising both before or after the commencement of the present court action"

The pursuer's position in respect to this was a short one and was this: the pursuer has a clear entitlement to payment of professional fees reasonably incurred in relation to its compensation claim. The defender has refused to acknowledge this throughout the present dispute. As such declarator should be pronounced as second concluded for.

[296] Mr Dunlop argued as follows in his written submission:

> "Finally, the defenders note the terms of the second conclusion, which seeks declarator that the defenders are liable to make certain payments to the pursuers. That conclusion is inept, and should be rejected as entirely inappropriate. The remedy open to a party who claims that someone else is liable to make payment to him is to sue for payment, not to sue for declarator. Nothing to which the declarator might attach has been put before the court, and a bare declarator to the effect contended for would be of no moment or effect whatsoever. If there are costs that have been incurred thus far, they should have been claimed in the action and established at proof. If there are costs that will be incurred in the future, then they will have to be the subject matter of their own action, if competent. The pursuers cannot decline to prove what has been or will be spent, and rest merely on a bare declarator. That runs counter to 'the well recognised stand taken by the Court that, except in certain unusual circumstances, they do not entertain a bare declarator with no executive conclusions appended: and that especially where the declarator which alone the Lord Ordinary is to be asked to pronounce is (a) hypothetical, and (b) to be pronounced *ab ante*'."

This part of the action fails for the same reasons as the principal part of the action. In any event I believe that Mr Dunlop is correct for the reasons he advances and for this further reason I would not have granted the declarator.

Disposal

[297] For all of the above reasons I assoilzie the defender from the first and second conclusions of the submissions. I have reserved the position in respect of expenses upon which I was not addressed.