OUTER HOUSE, COURT OF SESSION

[2019] CSOH 99

CA117/18

OPINION OF LORD DOHERTY

In the cause

(FIRST) SI 2016 LIMITED; (SECOND) HIGHLAND AND UNIVERSAL SECURITIES LIMITED; (THIRD) CORRENNIE INVESTMENTS LIMITED; and (FOURTH) SOUTER F T HOLDINGS LIMITED

Pursuers

against

(FIRST) AMA (NEW TOWN) LIMITED; (SECOND) AMA (NT) LLP; (THIRD) DR ALI BEHROOZ AFSHAR; (FOURTH) MICHAEL AFSHAR; (SIXTH) BEHNAM AFSHAR

Defenders

Pursuers: Lord Davidson of Glen Clova QC, O'Brien; CMS Cameron McKenna Nabarro Olswang LLP
First Defender: Simpson QC, Duthie; Gilson Gray LLP

3 December 2019

Introduction

[1] In this commercial action the parties disagree as to the proper construction of a Shareholders' Agreement ("SHA"). I heard a preliminary proof before answer restricted to two issues of contractual interpretation.

Background

[2] The first defender is a property development company. The second defender is a limited liability partnership. In October 2014 the third to sixth defenders were the shareholders in first defender. At that time the first defender had a number of subsidiaries. I shall refer to the first defender and its subsidiaries collectively as "the Group". As at 11 September 2014 the Group owed the Royal Bank of Scotland plc ("RBS") around £43m. The first defender owned a number of properties over which it had granted RBS securities in respect of the Group's debt.

[3] The pursuers are companies which are members of the Souter Investments Group ("Souter Investments"). From around April to October 2014 there were discussions between the defenders and the pursuers regarding the possibility of the pursuers providing refinancing to enable repayment of the debt owed by the group to RBS. By letters dated 31 July and 23 October 2014 the pursuers wrote to the third and fourth defenders expressing interest in providing the necessary refinancing.

[4] During October 2014 RBS agreed in principle that, in exchange for a payment of £21.7 million (with a £1 for £1 adjustment to this payment for any increase or decrease in the principal debt up to the date of repayment) it would assign to the second defender the balance of the Group's debt and the securities which secured that balance.

The SHA and the agreement of 18 November 2014

[5] The first, second and third pursuers and the defenders entered into the SHA on 17 November 2014. In terms thereof the first defender was "the Company" and "the Investors" were the first, second and third pursuers and any transferee from any of them of shares in the first defender or of Loan Notes issued by the first defender. The pursuers and the

defenders also entered into an agreement on 18 November 2014 in terms of which, amongst other things, the fourth pursuer was to be deemed to be a party to the SHA.

[6] Clause 1 of the SHA provided:

> **"1. INTERPRETATION**
>
> In this Agreement and in the Schedule, the following expressions shall have the following meanings:-
>
> ...
>
> **'Agreed NAV Policies and Procedures'** means the agreed accounting practices and policies as set out in Agreed Form S;
>
> ...
>
> **'B Director'** means a director appointed by a holder(s) of the majority of B Shares...
>
> ...
>
> **'B Ordinary Shares'** means the B1 Ordinary Shares and the B2 Ordinary Shares;
>
> ...
>
> **'Business Plan'** means the appraisals and cash flow to 31 December 2017 prepared by the Group in the form of Agreed Form K;
>
> ...
>
> **'Completion'** means the completion of the subscription by [the first, second and third pursuers] for 5,556 B Ordinary Shares and Loan Notes pursuant to Clause 2.1 and the due compliance with the obligations in Clause 3;
>
> ...
>
> **'Completion Balance Sheet'** has the meaning set out in Clause 4.3.4 of this Agreement;
>
> ...
>
> **'NAV'** means the net asset value of the Group at Completion based upon the aggregate value of the assets and liabilities as identified in the Completion Balance Sheet and calculated in accordance with the Agreed NAV Policies and Procedures;

...

'Relevant Percentage' means:

(a) 37.5%; or

(b) if at least £11,100,000 in principal amount of the Loan Notes shall have been repaid by no later than 14 November 2015, in which case it shall mean 27.5%; and

to the extent that the Relevant Profit is in excess of £16,000,000 if (a) above applies or £21,818,181 if (b) above applies, then the percentage to be applied to the excess Relevant Profit over such respective figures shall be 15%;

'Relevant Profit' means the amount by which the net asset value of the Group on 31 December 2017 (calculated on the same basis and in the same format as the NAV and in a consistent manner) is greater than the amount of the NAV...

...

'Sites' means the principal residential development sites comprising Phase 5 at Cramond, Springside (Block B1/3 comprising 25 flats), and the residential units at Slateford as shown in Part 6(C) (*sic*) of the Schedule...

..."

[7] In terms of clause 2 of the SHA the first, second and third pursuers agreed to subscribe for (i) a total of 21,675,000 Loan Notes in the Company at an aggregate subscription price of £21,675,000; (ii) a total of 5,556 B1 Ordinary Shares in the Company for a total cash subscription of £25,000. In terms of clause 3.4 the Company undertook to apply £21,335,947 of the subscription proceeds for the Loan Notes towards repayment of the debt owed by the Group to RBS. Clause 4 provided:

"**4. THE BUSINESS**

4.1 Nature of the Business

...

4.1.2 Each of the Shareholders undertakes to each other to use, as far as possible, their rights as a shareholder and loan note holder in the Company to promote the

interests of the Business, in accordance with the then current approved Business Plan/Budget.

4.1.3 The Shareholders and the Company each agree that their common objective, without being legally bound in this respect, is that the Business shall be carried on at all times in an efficient manner with a view to the maximisation of the value of the Sites and their onward sale to house buyers, funds or otherwise as appropriate, within a target period of not more than 3 years from the date hereof.

...

4.3 Undertakings with regard to the conduct of Business

...

4.3.3 The Company shall use its reasonable endeavours to procure new debt facilities with a reputable bank of no less than £11,100,000 prior to 14 Novemeber 2015 on terms and in such manner as may be acceptable to each of the Shareholders (acting reasonably).

4.3.4 The parties confirm that the consolidated balance sheet for the Group as at 30 September 2014 which is attached hereto has been finalised and is agreed between them. The parties agree that prior to 31 December 2014, such agreed balance sheet shall be updated and rolled forward to reflect the position as at the Completion Date (the "**Completion Balance Sheet**") using the Agreed NAV Accounting Policies and Principles. The parties shall each seek to finalise and agree such Completion Balance Sheet and will work together in good faith to do so by not later than 31 January 2014 (*sic*). Should they be unable to agree particular item(s), those items only shall then be referred to Deloitte ... for resolution within 15 Business Days and such resolution shall then be final and binding on the parties hereto. The balance sheet as at the Completion Date as so agreed (or determined) shall, subject to Clause 4.3.5 be the Completion Balance Sheet which shall therein identify the NAV for the purposes of the calculation and determination of the Relevant Profit."

[8] Section 5 of the SHA was headed "WARRANTIES AND GENERAL UNDERTAKINGS". It provided:

"...

5.9 Undertakings of the Company

The Company undertakes to each of the Shareholders that:-

...

5.9.9 B Directors Fee

It shall pay a fee to [the first pursuer] of £30,000 (exclusive of VAT) per annum as a fee in respect of the services of the B Director ...

...

5.10 Undertakings of the Shareholders

5.13 Profit Share

5.13.1 The Company shall insofar as it is lawfully able (and the Shareholders shall procure that the Company shall) declare and pay to the Investors a dividend on 31 March 2018 equal to the Relevant Percentage of the Relevant Profit of the Group (the "Profit Payment"). Such profit shall be determined with all completed and unsold properties held by the Group as at 31 December 2017 being valued at their then market value on the assumption of an orderly market and going concern basis. Similarly all uncompleted properties held at that date will be valued at their anticipated completed market value less all of the reasonable costs to be incurred to complete and realise such properties.

5.13.2 The Company shall prepare its calculation as to the Relevant Profit and shall deliver the same, along with all relevant back up and supporting documentation to the Investors by not later than 31 January 2018. The Investors shall then have a period of 15 Business Days following upon receipt to review the same and to advise whether or not the same is agreed and if the same is not agreed to advise the Company of which particular matter they do not agree ('**Disputed Items**'). The Company and the Investors shall then seek in good faith to resolve such Disputed Items within a further period of 15 days. Should they succeed in doing so such resolution shall be final and binding on all the parties for the purposes hereof.

5.13.3 Should any matters as to valuation remain unresolved then such matters shall be promptly and jointly referred to each of Savills, Edinburgh and Jones Lang LaSalle, Edinburgh who shall each be instructed to consider such matters and to provide a written opinion as to the relevant matter ... If such matters relate to valuation or value then the parties shall take the mean point of the respective valuations...which shall then be final and binding for the purposes hereof. Any other outstanding matters, which are not resolved by the parties acting reasonably following receipt of the Savills and Jones Lang LaSalle opinions, shall be referred to the auditors for their determination...Such determination shall (in the absence of manifest error) be final and binding upon the parties for all purposes hereof.

5.13.4 Should the amount of the Relevant Profit be agreed and/or determined prior to 31 March 2018 then the Profit Payment shall be paid by the Company in full upon that date, to the Investors pro rata to their holdings of B shares. The Company may elect in writing served on the Investors to defer payment of such amount until 30 June 2018 but should it do so it will be liable in addition to make payment of

interest at the rate of 15 per centum per annum on the full amount of the Profit Payment in respect of the period between 1 April 2018 and 29 June 2018. If the Relevant Profit is not agreed and/or determined until after 31 March 2018 then payment shall be due 10 days after the date of such agreement/determination.

5.13.5 In the event that the Company is not able to lawfully make payment of the Relevant Profit by way of a dividend, the Shareholders and the Company shall do all such lawful things as are within their power and ability to enable the Company lawfully to make such distribution.

5.13.6 If and to the extent that the Profit Payment exceeds £5 million, then the parties agree that the excess may be declared as a separate dividend to be paid on the earlier of the date falling 12 months following the date of declaration and written demand from the holders of a majority of B Shares and may at the discretion of the holder of a majority of B Shares be settled either in cash or by way of a dividend in specie of completed residential properties valued for this purpose at 90% of their agreed/determined value in the NAV calculation at 31 December 2017 ...

...

5.15 **Sale of B Shares**

The B Shareholders each agree with and undertake to the A Shareholders and the Company that they will sell all of their B Shares to the Company (or as it may specify) at a price of £1 per share when so required by the Company at any time following upon the repayment in full of the Loan Notes (and the interest thereon) and the payment in full of the Profit Payment ..."

[9] Clauses 16, 18 and 25 provided:

"16. INTEREST ON LATE PAYMENT

16.1 Where a sum is required to be paid under this Agreement but is not paid on the date the parties agreed, the person due to pay the sum shall also pay an amount equal to interest on that sum for the period beginning with that date and ending with the date the sum plus accrued interest is paid ...

...

18. TERMINATION

18.1 **Full Termination**

This Agreement shall, notwithstanding Completion and subject to the provisions of Clauses 18.2 to 18.4 (inclusive) remain in full force and effect as between all the parties until the earlier of:-

18.1.1 the dissolution of the Company;

18.1.2 the Agreement of the Shareholders that it be terminated; or

18.1.3 any Shareholder or other person acquiring the whole of the issued equity share capital of the Company.

18.2 **Partial Termination**

Without prejudice to Clause 18.1 this Agreement will terminate, as between a departing Shareholder and the other parties only, upon acquisition of the departing Shareholder's entire holding of Shares, Loan Notes, interest in the Souter Loan Agreement and other interests in the Debt Documents in accordance with the terms of this Agreement and the Articles.

...

25 ENTIRE AGREEMENT

25.1 This agreement and the Articles, the Agreed Form Documents, the Debt Documents and the related documents, together constitute the entire agreement and understanding between the parties in connection with the subject matter of this Agreement and supersedes any previous agreements between the parties with respect thereto which shall cease to have any further force or effect and, without prejudice to that generality, excludes any warranty, condition or other undertaking implied by law or custom.

..."

[10] Agreed Draft S contained the Agreed NAV Policies and Procedures. It provided:

"...

The relevant balance sheet shall be prepared on the following basis, and in the order of priority shown below:

(a) in accordance with the following specific policies (**Specific Policies**):

...

(viii) Stock and work-in-progress in the Completion Balance Sheet shall be recorded as £23.5m.

(ix) Stock and work-in-progress in the 2017 Balance Sheet shall be recorded at market value prevailing at the date of the 2017 Balance Sheet ...

..."

The Settlement Agreement and the Novation and Subscription Agreement

[11] On 14 and 17 November 2014 RBS and the defenders and others entered into a Settlement Agreement in terms of which RBS agreed to assign to the second defender the Group's debt and the securities which secured it in consideration *inter alia* for a payment of £21,335,947. (The difference between the figures of £21.7m and £21,335,947 was attributable to repayments made by the first defender to RBS and interest charged by RBS in the period between the first defender reaching the agreement and completion.) The second defender duly paid RBS £21,335,947 and the debt and securities were assigned by RBS to the second defender. The unchallenged evidence of Mr Macfie was that the settlement also involved the writing off of personal guarantees for £1m which the third and fourth defenders had provided to RBS.

[12] On 17 November 2014 the first and second defenders, AMA (Cramond) Ltd and AMA (Fusion) Ltd entered into a Novation and Subscription Agreement by which the debt assigned by RBS to the second defender was capitalised into equity in the form of two A Ordinary shares in the Company.

B Shareholders

[13] In accordance with the SHA, the first, second and third pursuers were all issued with B Ordinary Shares in the Company. The fourth pursuer became one of the Investors when the second pursuer subsequently transferred 704 B1 Ordinary Shares to it.

The pleadings

[14] In the summons the pursuers seek a declarator and decree enforcing certain obligations which they aver are incumbent upon the first defender under the SHA. It is unnecessary for present purposes to say more than that about the summons. The first defender has a counterclaim in which it seeks (i) declarator that the pursuers are obliged to sell their B shares in the Company to the second defender for £1 per share and (ii) decree ordaining the pursuers to sell the shares at that price to the second defender. The first defender avers that the pursuers are obliged in terms of clause 5.15 of the SHA to sell the B shares to the second defender because the Company has offered them £1 per share and has specified that the sale should be to the second defender. It is common ground that the Loan Notes and interest have been repaid in full. However, there has been no payment of a Profit Payment. The first defender avers that the Relevant Profit was nil; and that in any case, even if it was a positive figure, a Profit Payment could not lawfully have been distributed on 31 March 2018. It avers that, accordingly, all of the requirements of clause 5.15 are satisfied.

The two issues which formed the subject matter of the preliminary proof

[15] The first issue is whether or not on a proper construction of the SHA the Company was entitled to make the deduction which it has made from the market value of stock and work-in-progress when ascertaining the Group's net asset value as at 31 December 2017. In Statement 8 of the Counterclaim the first defender explains the deduction as follows:

> "The net asset value of the Group at Completion based upon the aggregate value of the assets and liabilities as identified in the Completion Balance Sheet and calculated in accordance with the Agreed NAV Policies and Procedures was calculated as follows: (i) ascertain the market value of stock, (ii) calculate the amount ('the Excess') by which this exceeds the amount required to achieve settlement of the debt due to Royal Bank of Scotland ..., and (iii) deduct the Excess from the market value of stock … Accordingly, Relevant Profit is likewise to be calculated by deducting the

> Excess from the value of the stock to be recognised in ascertaining the Group's net asset value as at 31st December 2017."

The pursuers maintain that on a proper construction of the SHA the Excess does not fall to be deducted from the market value of stock and work-in-progress when ascertaining the Group's net asset value as at 31 December 2017.

[16] The second issue is whether, *esto* the Company could not lawfully have paid the Profit Payment in whole or in part on 31 March 2018, it has a contingent obligation to pay the Profit Payment as and when it is able to do so. The pursuers maintain that it does, whereas the first defender maintains that it does not.

The evidence

[17] Before the proof commenced Lord Davidson and Mr Simpson each objected to the admissibility of certain of the evidence which the other proposed to lead. Lord Davidson objected to evidence of the actings of the parties after the conclusion of the contract which the defenders proposed to lead with a view, *inter alia*, to relying upon it as an aid to interpretation. Mr Simpson objected to the admissibility of evidence relating to pre-contract negotiations. In each case I allowed the evidence to be adduced under reservation as to its competency and relevancy.

[18] The pursuers led two witnesses. Andrew Macfie is the managing director of Souter Investments, and he and his family control the third pursuer. Calum Cusiter is an investment director with Souter Investments. Both witnesses are qualified chartered accountants. The first defender led evidence from five witnesses. Dr Ali Afshar and Michael Afshar were the co-founders of the Company and are its joint managing directors.

Martin Cairns is a chartered accountant. He was employed by the Company as financial controller until March 2017. (He was also the Company secretary.) After that date he has had continued involvement in relation to the 2017 Balance Sheet and the Profit Payment. Christopher Caterall is a chartered certified accountant. Since 5 June 2017 he has been employed by the Company as financial controller. Until 30 April 2015 Kevan McDonald was a partner in Dickson Minto working in that firm's corporate law team. He acted for the defenders in relation to the negotiation and execution of the SHA and the transaction with RBS.

[19] There was no material dispute as to the circumstances in which the defenders required to seek substantial replacement finance in 2014. The Group had outstanding loan funding from RBS of about £43m. RBS regarded the loan as a distressed non-performing loan and it was managed by the bank's Global Restructuring Group ("GRG"). RBS was not satisfied with the rate at which the Group was achieving sales and making payments to it. In early 2014 it indicated to the Group that it wished to obtain a substantial repayment of the loan, and that if that was done there was an opportunity to obtain some loan forgiveness ("a haircut"). RBS engaged Savills to review the Group's property data and values and it also engaged KPMG's insolvency team to advise it on its options.

[20] The defenders sought refinancing to enable a repayment to be made to RBS. Discussions began with the pursuers and with other possible funders. So far as other possible funders were concerned, the only discussions which reached the stage of a terms sheet being issued were with R. On 30 May 2014 R's indicative terms for a 30 month loan of £30m were (i) 15% per year interest (19% per year if in default); (ii) a profit share of 50%; (iii) a minimum total return of £15m. R's term sheet defined "Property" and "Profit" as follows:

> "**Property:** St Vincent Place, Succoth Heights, Craigmillar Park, Cramond, Slateford Road, Logie Green Road, Springside, and any other properties currently encumbered by the Royal Bank of Scotland ...
>
> ...
>
> **Profit**: Profit to reflect the cash flow, based on:
>
> 1) The gross sale and rental proceeds from all Properties (for the avoidance of doubt this includes all Properties listed in the Property definition), plus any income;
>
> 2) Less the agreed construction/development costs in order to complete Cramond Phase 5, Springside B1/3 & B1/4, and Slateford Road Residential;
>
> 3) Less the Loan Amount plus Interest; and
>
> 4) Prior to any other management and overhead expenditures (the "Overhead Costs")."

The defenders were not attracted by R's terms (though they thought that it may have been possible to negotiate better terms had they chosen to pursue the opportunity). The pursuers were the preferred lender. Negotiations with RBS were carried on in tandem with negotiations with the pursuers.

[21] Mr Macfie, Mr Cusiter, Dr Ashfar, Mr Ashfar, Mr McDonald and Mr Cairns spoke to the negotiations between the pursuers and the defenders and they referred to some of the relevant documents and correspondence. They expressed views as to their understandings of the terms of the agreement which was being negotiated. Mr Macfie, Mr Cusiter, Dr Ashfar, Mr Ashfar, and Mr McDonald confirmed that the pursuers' offer letter of 23 October 2014 (C75 of the Joint Bundle) was signed on behalf of the first defender. It had effectively become heads of terms which provided a basis for the preparation of the draft SHA. That draft was the subject of further negotiation before it was executed. The pursuers' witnesses and several of the first defender's witnesses expressed views as to the meaning of

those parts of the heads of terms relating to profit share. They also indicated how they understood the profit share provisions in the SHA ought to be interpreted.

[22] On 2 February 2015 the parties agreed the Completion Balance Sheet. Mr Cusiter and Mr Cairns were the key personnel involved in reaching the agreement. Rather confusingly, the document was headed "Opening Balance Sheet". It contained four columns. The first column described and listed assets and liabilities. One of the assets listed was "Stock". The second column noted the values assigned to each of those items in the Group's unaudited accounts as at 14 November 2014. The value ascribed to Stock was "43,102,230". The third column was headed "Deal adjustments". The figure "- 21,402,230" appeared in the same horizontal line as "Stock" and "43,102,230". The fourth column was headed "Opening Balance sheet", but in fact it set out the NAV and its constituent elements. The figure "21,700,000" appeared in this column on the same horizontal line as the entries for "Stock", "43,102,230" and "–21,402,230". The fourth column also showed a further entry of "1,800,000" representing an addition to stock and work-in-progress, giving a total stock figure of "23,500,000". The Excel version of the Completion Balance Sheet disclosed a formula for arriving at the debt adjustment, *viz* fx = 1,700,000 – C13. It was common ground that C13 represented 43,102,230 (the stock figure in the Group accounts). Both Mr Cusiter and Mr Cairns confirmed that the figure of £23,500,000 for total stock in the Completion Balance Sheet came from specific policy (a)(viii) of the NAV Agreed Policies and Procedures. They agreed that the debt adjustment figure of -21,402,230 represented the sum of 21,700,000 which RBS was prepared to accept for its secured debt minus the figure of 43,102,230.

[23] The pursuers' witnesses accepted that the agreed value of £23,500,000 for stock to be inserted in the Completion Balance Sheet reflected its "fire sale" or "break-up" value, ie the sum of £21,700,000 paid to RBS plus £1,800,000 for other work-in-progress. While a debt adjustment had been noted on the Completion Balance Sheet to show how one got from the stock in the accounts to £21,700,000, it was the combined effect of the SHA and specific policy (a)(viii) of the Agreed NAV Policies and Procedures that had instructed that £23,500,000 be taken as the stock figure. The going concern value for the stock at the time of the SHA would have been greater than that, but Mr Macfie and Mr Cusiter had been more pessimistic about the Edinburgh property market in 2014 than the authors of the Jones Lang La Salle report (C42) had been. The £23,500,000 stock figure was used because the Group's RBS debt had had a haircut. It had always been the intention that the pursuers and the Company should share the benefit of the haircut because the pursuers' investment would enable the Company to complete the developments and unlock a potential profit. There had not been an immediate Relevant Profit. Relevant Profit did not arise until 31 December 2017. Property values could have fallen by then. The parties had always known that the profit share might be a substantial part of the pursuers' return. During the negotiations the defenders had proposed that the profit share be a fixed fee of £4m, but the pursuers had rejected that because they were prepared to take the risk that the profit share might be higher or lower than that figure. The pursuers were equity investors and they would not have been interested in investing if the only return was to have been the 15% coupon on the Loan Notes. They looked for a better upside return than that on investments. On the first defender's interpretation of the profit share provisions the pursuers would never have been likely to have obtained anything near the sort of Profit Payment which the parties knew the pursuers were targeting – ie from £4m to £6m or £7m.

In order to get anything approaching the sort of figures used in the worked examples which the defenders' solicitors produced on 11 November 2014 (C5) phenomenal growth in property prices before 31 December 2017 would have been required.

[24] Dr Ashfar, Mr Ashfar, Mr McDonald and Mr Cairns maintained that the going concern value of stock on 17 November 2014 was no lower than the stock value in the accounts, and that it had never been the intention that the pursuers should share the benefit of the haircut. The pursuers' interpretation meant that there would have been an immediate and substantial Relevant Profit. That had never been the intention. The coupon on the Loan Notes was high.

[25] At the time of the SHA the defenders had anticipated that after a year they would obtain cheaper finance from another funder and repay £11,100,000 of the Loan Notes. In the result, they were unable to do that. They did obtain some alternative finance during 2016 from three funders (Co-op Bank, Airdrie Savings Bank, and the Housing Growth Partnership ("HGP")) and some substantial repayments of principal were made. However, sales of stock were slower than had been projected in the Business Plan. In the period from 17 November 2014 until 31 December 2017 sales were £42m rather than the £62m which had been projected. The Company also failed to comply with the schedule for repayments of principal and interest on the Loan Notes. The upshot of the slower sales, the failure to refinance half of the Loan Notes at the 12 month point, and the later repayments, was that the total interest paid by the Company was about £2m higher than had been projected (about £7m rather than about £5m).

[26] In the Notes to the Financial Statements within the Company and Group accounts for the year ending 31 December 2014 note 16 described the refinancing which had taken place. Note 17 was in the following terms:

> "17. PROFIT SHARE AGREEMENT
>
> As part of the investment, Souter Investments Ltd is also entitled to a profit share based on an incremental net asset value calculation over a three year period. The parties have agreed that where lawfully possible that the profit share will be paid by way of a distribution."

That note was not repeated in the 2015 or 2016 accounts. There was no reference in those accounts to the profit share. The Company changed its auditors between the 2014 and 2015 accounts. Mr Cusiter was (and remains) the B Director nominated by the pursuers to serve on the Company's board. In that capacity he was involved in discussions relating to the preparation of the 2015 and 2016 accounts. He was also involved in board discussions relating to the obtaining of the alternative finance from the Co-op Bank, Airdrie Savings Bank and HGP. He had not raised the issue whether reference to a possible liability to make a Profit Payment should be made in the 2015 or 2016 accounts; and he had not flagged up that it might be appropriate to draw it to the attention of the lenders offering new funding. It was not until a meeting of the board of directors of the Company on 7 June 2017 that Mr Cusiter had indicated that a Profit Payment may be due. Until then no-one from the pursuers had made such a suggestion. Indeed, there had been at least some indications (from Mr Cusiter and his colleague Mr McCallion) that it rather looked like it was unlikely that a Profit Payment would be due. Every six months the pursuers prepared internal valuations of their investment in the Company. The notes appended to the internal valuations as at 31 March 2016, 30 September 2016 and 31 March 2017 included the statement "The profit share is unlikely to be material."

[27] A number of the defenders' witnesses proffered the view that if Mr Cusiter had considered that a significant Profit Payment might become due it was surprising that he did not at least raise the question whether there should be a note mentioning the entitlement to a

profit share in the 2015 and 2016 accounts and that he did not flag up that the Company might require to let the new funders know about it. It was equally surprising that the pursuers' internal valuations had not included any value for the Profit Payment and that the valuations of 31 March 2016, 30 September 2016 and 31 March 2017 had included the statement that the profit share was unlikely to be material. It was suggested that the reason why these things were not done was that Mr Cusiter and his colleagues were proceeding on the basis that there was unlikely to be any Relevant Profit. That was because everyone thought that the relevant difference was the difference between the market value of the stock on 31 December 2017 and the book value of the stock on 17 November 2014, with the result that Relevant Profit would be a negative figure.

[28] Mr Macfie's evidence was that because of the first defender's poor sales and repayment performance, the pursuers' concern until about mid-2017 had been very much focussed on whether the Company would repay the Loan Notes. As a result the pursuers had not applied themselves to the question of the profit share. Mr Cusiter's evidence was to the same effect. Mr Macfie indicated that the internal valuations tended to be cautious. The time to ascertain whether there was a Relevant Profit had been 31 December 2017. Property values could have fallen before then. Mr Cusiter's evidence was that before June 2017 he had not forgotten that the SHA made provision for a profit share, but that he had forgotten how it was to be calculated.

Counsel for the pursuers' submissions

[29] Lord Davidson submitted that the pursuers should be absolved from the defenders' counterclaim.

The basic principles of contractual construction

[30] The basic principles of interpretation of a written contract were well established. The court was concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It did so by focussing on the meaning of the relevant words in their documentary, factual and commercial context (*Chartbrook Ltd* v *Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, per Lord Hoffmann at paragraph 14; *Arnold* v *Britton and others* [2015] AC 1619, per Lord Neuberger PSC at paragraph 15). In the present case the SHA ought to be interpreted principally by textual analysis, because it was a sophisticated and complex agreement which had been negotiated and prepared with the assistance of skilled professionals (*Wood* v *Capita Insurance Services Ltd* [2017] AC 1173, per Lord Hodge JSC at paragraph 13). As the contract contained an entire agreement clause, it must be taken to set out all of the express contract terms: Contract (Scotland) Act 1997, s 1(3).

[31] The actions of a party after a contract was concluded were irrelevant to its interpretation: *Whitworth Street Estates (Manchester) Ltd* v *James Miller & Partners Ltd* [1970] AC 583; *L Schuler AG* v *Wickham Machine Tool Sales Ltd* [1974] AC 235; *SSE Generation Ltd* v *Hochtief Solutions AG* 2018 SLT 579, per the Lord President at paragraph 258. The objection to the first defender's proposed use of post contract actings for that purpose was insisted upon.

Credibility and reliability

[32] Lord Davidson did not attack the credibility of any of the first defender's witnesses, but he did maintain that some of their evidence was not reliable. Mr Simpson had not

attacked the credibility of Mr Macfie, but he did attack the credibility of Mr Cusiter's evidence that until June 2017 he had been focussed on recovering the Loan Note principal sum and interest and had forgotten about the detail of the profit share provisions. Lord Davidson submitted that the court should accept Mr Cusiter's explanation, and that it should accept the evidence of both Mr Cusiter and Mr Macfie as being credible and reliable.

The first issue

[33] Lord Davidson submitted that the definition of "Relevant Profit" (clause 1.1) looked to the difference between the Group's net asset value at Completion "calculated in accordance with the Agreed NAV Policies and Procedures", and the Group's net asset value on 31 December 2017 "calculated on the same basis … as the NAV and in a consistent manner". The net asset value on 31 December 2017 was to be calculated in accordance with the Agreed NAV Policies and Procedures. Those Policies and Procedures were not directed solely at the Completion Balance Sheet. They also contained explicit directions about the 2017 Balance Sheet (eg specific policies (a)(iv)-(vii), (ix)-(xiv) and (xvi)-(xx)). Specific policy (a)(ix) was concerned solely with the 2017 Balance Sheet. The Agreed NAV Policies and Procedures did not provide for the debt adjustment deduction which the defenders suggest ought to be made. Rather, specific policy (a)(viii) directed that "Stock and work-in-progress in the Completion Balance Sheet shall be recorded as £23.5m." The Completion Balance Sheet had been prepared and agreed accordingly. It was nothing to the point that £23.5m was lower than the £43,102,230 value which had been ascribed to stock and work-in-progress in the Company's unaudited accounts. Specific policy (a)(ix) directed how stock and work-in-progress were to be calculated for the purposes of the 2017 Balance Sheet (ie at the market value prevailing at the date of the 2017 Balance Sheet). It clarified what was

meant by "market value" (in terms which were mirrored in clause 5.13.1 of the SHA). The parties had agreed how the stock and work-in-progress figures should be arrived at in preparing the 2017 Balance Sheet. The SHA and the Agreed NAV Policies and Procedures were detailed, professionally-drafted documents. There was no suggestion in them (let alone a direction) that a debt adjustment was to be made to the 2017 market values of stock and work-in-progress. Indeed, they were wholly inconsistent with such an adjustment being made.

[34] So far as the surrounding circumstances at the time of contracting were concerned, it was clear on the evidence that RBS had wanted a substantial repayment quickly. KPMG had been instructed to consider all the options, including insolvency. There was no doubt that the defenders had been under pressure to find refinancing quickly and to enable them to make an offer to RBS. Equity investors such as the pursuers looked for both interest and a profit share on investments. R's suggested terms had been less attractive to the defenders than the pursuers' terms. R had wanted a minimum £15m return and a profit share of 50%. From the outset of negotiations between the pursuers and the defenders it had always been clear that a profit share was to be a material part of the deal and that the pursuers were looking for a return of millions of pounds in that regard. The defenders had sought to negotiate a fixed profit share of £4m but the pursuers had preferred to take their chances. The worked examples of profit share provisions (C5) (which was one of the documents which the parties signed and attached to the SHA) were consistent with the pursuers' construction. They were very difficult indeed to reconcile with the first defender's construction. It had always been understood that if the defenders obtained a debt haircut the pursuers would share the benefit of that. It had been clear from the pursuers' offer of 23 October 2014 (C75)(which had become the heads of terms) that the net asset value of the

properties which were subject to the RBS facilities were to be valued at £21.7m instead of at their higher book value; whereas at exit all properties were to be valued at their then open market value. The opening net asset value indicated in the offer of 23 October 2014 was £0.719m

The second issue

[35] For there to be a Profit Payment, there had to be a Relevant Profit - ie, the Company's net asset value, calculated according to the agreed methodology, had to have increased between Completion and 31 December 2017. The central thrust of clause 5.13 was that the pursuers were to receive an agreed proportion of that increase. The right to a profit share was a very material part of the agreed return for investing in the Company. As a matter of commercial common sense it was inherently unlikely that the contracting parties' intention had been that the pursuers would only obtain that part of their return if a lawful distribution of a dividend could be made on 31 March 2018.

[36] Clause 5.13.1 provided that a Profit Payment should be made on 31 March 2018 if it was lawful to pay it by way of a dividend on that date. However, the pursuers' entitlement to the profit share part of the return was not extinguished on 31 March 2018 if a dividend could not lawfully be paid on that date. On a proper construction of the SHA the first defender had to make the Profit Payment as soon as it became lawful for it to do so.

[37] The other provisions of the SHA were consistent with that interpretation of clause 5.13.1. The SHA contemplated several circumstances where the Profit Payment would be agreed and/or paid before or after 31 March 2018. Clause 5.13.4 provided for the Profit Payment to be paid at an earlier date if the amount had been agreed by then. It allowed the first defender to defer payment until 30 June 2018 and to pay interest to

compensate for the deferral. It also allowed for the possibility that the Relevant Profit had not been agreed and/or determined until after 31 March 2018, in which case "payment shall be due 10 days after the date of such agreement/determination". That allowed for the possibility that - as had happened here - the Relevant Profit was not agreed in time for the 31 March 2018 deadline to be met. Clause 5.13.5 obliged the Shareholders and the Company to do everything within their power to enable the Company to lawfully make a distribution(s) in order to pay the Profit Payment. Clause 5.13.6 provided for the Profit Payment to be paid as two separate dividends if its amount exceeded £5 million, with the second dividend being paid after 31 March 2018. It would be irrational if the liability to pay that second dividend were tied to the distributable reserves as at 31 March 2018. Clause 16.1 provided for interest to be payable where any sum due under the SHA was not paid on the due date.

Counsel for the first defender's submissions

[38] Mr Simpson moved for dismissal of the action and for declarator in terms of the first conclusion of the counterclaim. Alternatively, if the court concluded that the pursuers were right on the first issue but wrong on the second issue, proof would be required as to (i) what, if anything, the shareholders and the Company could lawfully have done as at 31 March 2018 to create distributable reserves; and (ii) the amount of the Profit Payment which could thereby have been created.

[39] While evidence of the surrounding circumstances at the time of contracting was relevant and admissible in order to construe the contract, evidence of pre-contract negotiations and the parties' subjective understandings of the meaning of the contract's provisions were irrelevant and inadmissible (*Bank of Scotland* v *Dunedin Property Investment*

Ltd 1998 SC 657, per Lord Rodger at pp 661E-H, 665D-G; *Rainy Sky S.A.* v *Kookmin Bank* [2011] 1 WLR 2900, per Lord Clark of Stone-cum-Ebony JSC at p298C-D; *Wood* v *Capita Insurance Services Ltd, supra,* per Lord Hodge JSC at paragraph 10).

The first issue

[40] Relevant Profit meant the amount by which the net asset value on 31 December 2017 "calculated on the same basis and in the same format as the NAV and in a consistent manner" was greater than the NAV (clause 1.1). The consistency requirement applied to each of the constituent elements of the 2017 calculation. In the Completion Balance Sheet rather than taking the book value of stock in the Company's accounts (£43,102,230) plus the net value of other stock/work in progress (£1,800,000), the stock value stated had been £23.5m. It was plain on the evidence that the £23.5m figure had been arrived at by using the sum paid to RBS to write off the loans (£21.7m) instead of the book value for the stock, and by adding £1.8m for the other stock/work in progress. Since £21,402,230 ("the debt adjustment") had been deducted from the book value for stock when the Completion Balance Sheet was prepared, the same deduction had to be made from the market value stock figure when calculating the net asset value of the Group on 31 December 2017. Unless the debt adjustment was made the net asset value of the Group on 31 July 2017 would not be calculated on the same basis as the NAV and in a consistent manner. The defenders' approach gave proper effect to clause 5.13 and to the definition of Relevant Profit in clause 1.1. Mr Simpson suggested that there may be some significance in the fact that clause 5.13 referred to the properties being valued at market value whereas specific policy (a)(ix) directed that stock and work-in-progress be recorded at market value. As I understood the submission, he suggested that both provisions had to be construed

consistently with the definition of Relevant Profit in clause 1.1. He maintained that neither provision precluded the making of the debt adjustment.

[41] Both Mr Cusiter and Mr Cairns had agreed that the debt adjustment had been made in order to arrive at the stock figure in the Completion Balance Sheet. The fact that it had been made was part of the relevant surrounding circumstances to which the court could have regard when construing the contract. Other relevant circumstances were that in early 2014 RBS indicated that it wanted the debt to be refinanced by the end of the year. There was an opportunity for obtaining significant loan forgiveness if that was done. The defenders had not been in desperate need of the funding which the pursuers offered. There had been other possible funders. There had not been any real risk of RBS putting the Group into insolvency. In so far as the pursuers' and the first defender's witnesses differed on this matter the evidence of the first defender's witnesses should be preferred. Having regard to the high coupon on the Loan Notes, it would not have made commercial sense for the Company to have obliged itself to pay a profit share which would be likely to give the pursuers not just a share of the increase in the value of the Group's net assets between 14 November 2014 and 31 December 2017 but also a share of the value of the haircut. The market value of the Group's assets at the time of the SHA was greater than their book value. However, even on the basis of the book value, after allowing for overheads and corporation tax as a result of the haircut there would have been an immediate contribution towards Relevant Profit of about £16 million. That would have produced a Profit Payment of about £5.5 million if the Relevant Percentage was 37.5%; or of about £4 million if the Relevant Percentage was 27.5%.

[42] The better view was that the conduct of contracting parties after a contract was executed could be an aid to construction where the contract was ambiguous or uncertain

because express provision had not been made on a particular question (*Hunter* v *Barron's Trustees* (1886) 13 R 883, per Lord Justice-Clerk Moncrieff at p890, per Lord Craighill at p892; *Baird's Trustees* v *Baird & Co* (1877) 4 R 1005, per Lord Justice-Clerk Inglis (in a dissenting opinion) at pp1016-1017; McBryde, *The Law of Contract in Scotland* (3rd ed), paragraphs 8-30, 8-32). Mr Simpson accepted that there was a tension between *Hunter* and *Baird's Trustees* and later House of Lords authorities such as *Whitworth Estates (Manchester) Ltd* v *James Miller & Partners Ltd*, but he suggested that those cases ought to be distinguished because they had not dealt with the construction of provisions which were ambiguous or uncertain.

[43] Here, the first defender's primary position was that there was no ambiguity or uncertainty as to the proper construction of the provisions which were relevant to the first issue. However, if there was uncertainty then it was appropriate to look to the parties' post contract actings as an aid to construction. The pursuers' internal valuations as at 31 March 2016, 30 September 2016 and 31 March 2017 had indicated that any profit share was unlikely to be material. Mr Cusiter had not raised any question of a claim to a profit share until June 2017. If the pursuers' construction was correct, then from day one it was on the cards that there would be likely to be a significant profit share. Yet Mr Cusiter had never queried whether reference to the profit share ought to be noted in the Group's accounts or disclosed to funders. His explanation - that his concern had been focussed on recovering the principal sum and interest under the Loan Notes and that he had forgotten about the mechanism for calculating the profit share - was incredible.

The second issue

[44] On an ordinary reading of clause 5.13.1 the Company was only obliged to pay the pursuers a Profit Payment if it was lawfully able to do so by declaring and paying a

dividend on 31 March 2018. In terms of clause 5.13.5 the Shareholders and the Company had to do all such lawful things as were in their power to enable the Company to lawfully make such distribution on that date; but if, despite having done that, the Company was not lawfully able to make a distribution on that date then it was not obliged to make any Profit Payment at any time thereafter. Those were the ordinary and natural readings of clauses 5.13.1 and 5.13.5. There was nothing in any of the other provisions of the SHA which pointed to the pursuers' construction being correct. Clause 16 was a general provision. It was neutral. It provided no assistance on the second issue. The first defender's construction was a commercially sensible one whereas the pursuers' construction was not. It would make no commercial sense that the defenders would agree to a Profit Payment being made out of future profits of the Company. It had not been intended that the pursuers should share in such profits.

Decision and reasons

Credibility and reliability

[45] The only witness whose credibility was put in issue was Mr Cusiter, and the attack related to his explanation for not raising the profit share issue earlier than he did. However, as I shall explain later, I accept that on that issue - and in his evidence as a whole - he was doing his best to assist the court. It was common ground, and it coincides with my impression, that all of the other witnesses did their best to assist the court. Except in so far as my findings indicate otherwise, I have treated all of the witnesses evidence as being reliable on all material matters.

Pre-contract negotiations and admissible surrounding circumstances

[46] In my opinion most of the evidence relating to pre-contract negotiations (including the evidence that the defenders proposed a fixed profit share of £4m) is irrelevant and inadmissible as an aid to the construction of the contract. In my view the various views which witnesses expressed as to the meaning of the provisions which are in issue are also irrelevant and inadmissible. I stress that this is not a case of any of the defenders' representatives having declared to the pursuers during the negotiations that they understood that either of the provisions now in issue had the meanings which the first defender now contends they have, and of that being unchallenged by the pursuers. I should add, for completeness, that I did not find these chapters of the evidence to be of any real assistance when it came to assessing the credibility and reliability of any of the witnesses.

[47] However, it does appear to me that there are admissible surrounding circumstances. These involve the circumstances in which the defenders found themselves requiring to obtain refinancing; the sort of refinancing which was likely to be available; and the commercial purpose of the contract. Accordingly, I sustain both of the objections to admissibility except in so far as the evidence relates those circumstances.

[48] I think it clear that the defenders found themselves in a difficult position in the period leading up to the contract. The Group's debt to RBS was £43m. The debt was being treated by GRG as a non-performing loan. RBS wished to recoup as much of the debt as it could as soon as it could. It obtained advice from KPMG's insolvency team on its possible options - including insolvency options. It was open to settling at a reduced figure, giving significant debt forgiveness, if the defenders came forward with an acceptable funded proposal quickly. However, had the defenders not done that, then RBS was very likely to have exercised another option - such as a sale of the debt at a discount to a third party, or

going down an insolvency route. The other options would have meant that the Company would not have the opportunity to trade out of its difficulties and to benefit from obtaining potentially higher going concern prices for its stock. That was not the only risk so far as the third and fourth defenders were concerned if a satisfactory settlement with RBS was not achieved. Both were personally at risk because of the guarantees which they had granted to RBS.

[49] In 2014 funding for housebuilders was in short supply. RBS and many other banks were not interested in lending to that sector. It was likely that replacement finance of the kind required could only have been obtained from hedge funds or from equity investors such as the pursuers or R. Those lenders required higher returns than banks. Here, R was the only other potential lender who got as far as issuing a terms sheet. The sheet indicated that were R to make an offer of a loan it would wish simple interest of 15% pa, a default rate of 19% pa, a 50% profit share, and a minimum total return of £15m (on a loan of £30m for a term of 30 months). Of course, if the loan had been for £21.7m one would have expected the minimum total return to have been a lesser sum: on a simple *pro rata* approach it would have been £10.85m. R's suggested method for calculating profit appears to me to be more akin to the way the pursuers say that Relevant Profit falls to be calculated than to the first defender's approach (but the percentage share (50%) is higher than the Relevant Percentages (27.5%, 37.5% and 15%) in the SHA). Whether or not my impression on that matter is correct, in my opinion there can be no doubt that the effect of the minimum return provision would have been very likely to ensure that R's total return would be very much more than the total interest on the loan. Broadly speaking, I think it is fair to say that R was not seeking less of a return than the return which the pursuers say the Company contracted to provide.

[50] The commercial purpose of the contract was to provide funding to the defenders which would allow them (i) to settle with RBS so as to obtain significant loan forgiveness; and (ii) to complete and sell the Group's stock with a view to obtaining going concern market prices. In return for facilitating that the pursuers were to obtain 15% pa interest on the Loan Notes and a profit share.

Actings after the date of the contract

[51] The general rule that a contract should not be construed by reference to the subsequent conduct of the parties is well settled (*James Miller & Partners* v *Whitworth Estates (Manchester) Ltd, supra*; *L Schuler AG* v *Wickham Machine Tool Sales Ltd, supra*; *SSE Generation Ltd* v *Hochtief Solutions AG, supra,* per the Lord President at paragraph 258; McBryde, *supra,* paragraph 8-30). In my opinion the general rule falls to be applied here. I prefer to reserve my opinion as to whether in cases of ambiguity (whether arising from express terms or the lack of a term) the consistent actings of parties since the contract may be a legitimate guide to interpretation. Ultimately, Mr Simpson did not maintain that there was any ambiguity in the provisions upon which the first issue turned. I agree with that assessment. Nonetheless, he submitted that the different positions taken by the parties were indicative of there being some uncertainty, and that that was enough to permit a departure from the general rule. I disagree. I do not think that there is any authoritative support for such an exception.

[52] I should make it clear that I found Mr Cusiter's explanation for not raising the claim earlier than June 2017 to be credible. I do not think it unlikely that the details of the profit share mechanism were not in the forefront of his mind during the period when the Group was toiling to meet its obligations under the Loan Notes. The focus of his attention and of his colleagues' attention was on ensuring that the principal sum and interest were repaid.

Whether or not there was a Relevant Profit would depend upon the position as at 31 December 2017. In those circumstances it is not implausible that before June 2017 no detailed consideration was given to the precise terms of the profit share provisions and to how they would be applied when the time came. In the whole circumstances, even if the evidence of post-agreement actings had been admissible, I do not think that the evidence upon which the first defender founds takes it nearly far enough to suggest that it should be a legitimate guide to the meaning of the provisions upon which the first issue turns.

The first issue

[53] The SHA sets out how Relevant Profit is to be calculated. In my opinion, on a proper construction of the SHA and the Agreed NAV Policies and Procedures, no debt adjustment falls to be made when calculating Relevant Profit.

[54] In terms of clause 4.3.4 of the SHA it was agreed that the parties would agree a Completion Balance Sheet which would identify the NAV. The NAV is the base net asset value which is to be deducted from the net asset value as at 31 December 2017. In terms of clause 1.1:

> "**NAV**" means the net asset value of the Group at Completion based upon the aggregate value of the assets and liabilities as identified in the Completion Balance Sheet and calculated in accordance with the Agreed NAV Policies and Procedures;"

Specific policy (a)(viii) of the Agreed NAV Policies and Procedures provided that stock and work in progress in the Completion Balance Sheet should be £23.5m. The parties followed that direction, and £23.5m was stated in the Completion Balance Sheet as the figure for stock and work in progress.

[55] The next step is to calculate the net asset value of the Group on 31 December 2017. On an ordinary and natural reading of the definition of Relevant Profit in clause 1.1, the net

asset value of the Group on 31 December 2017 is to be calculated on the basis, *inter alia,* of those of the Agreed NAV Policies and Procedures which are applicable to the 2017 valuation. One such policy is specific policy (a)(ix). In terms thereof stock and work-in-progress are to be valued at their market value on the assumption of an orderly market and on a going concern basis. That is consistent with, and is confirmed by, the terms of clause 5.13.1.

[56] In my opinion neither the SHA nor the Agreed NAV Accounting Policies and Procedures direct that there should be a deduction of £21,402,230 (a) from the 2017 market value of stock and work-in-progress; or (b) from the 2017 net asset value figure. The direction in the definition of Relevant Profit that the 2017 net asset value is to be "calculated on the same basis and in the same format as the NAV and in a consistent manner" does not instruct the making of any such deduction. What it does direct is that the calculation of the 2017 net asset value should be in accordance with those of the Agreed NAV Policies and Procedures which are relevant to that calculation (just as the calculation of the NAV was to be in accordance with those of the Agreed NAV Policies and Procedures which were relevant to the 2014 calculation). Some of the Agreed NAV Policies and Procedures apply to both the NAV calculation and to the calculation of the 2017 net asset value. Others only apply to one or other of the valuations. So far as the valuation of stock and work-in-progress is concerned, policies (a)(viii) and (a)(ix) are in the latter category. Policy (a)(viii) makes specific provision for the NAV valuation, and policy (a)(ix) makes specific provision for the 2017 valuation.

[57] While it seems clear that the £23.5m stock figure in specific policy (a)(viii) represented the sum of the £21.7m payment to RBS and the £1.8m adjustment, in my opinion the origins of the £23.5m are neither here nor there. The simple fact is that £23.5m was stock

figure which the policy directed was to be used in the Completion Balance Sheet. Similarly, in my view it is of no moment that the debt adjustment column (containing the debt adjustment of -21,402,230 and the formula fx = 21,700,000 - C3) was included in the Completion Balance Sheet. What was important was the fourth column. It contained (i) the £23.5m figure which specific policy (a)(viii) required be the stock figure; and (ii) the 2017 net asset value.

[58] Accordingly, in my opinion the ordinary and natural meaning of the language which the parties used favours the pursuers' construction. That is a very important consideration indeed especially where, as here, the agreement is a detailed written contract which was drafted by the parties' legal advisers.

[59] In any case, I am not at all persuaded by the submission that the pursuers' construction does not accord with commercial common sense. Had it not been for the refinance the defenders risked losing the opportunities (i) to benefit from loan forgiveness (and, in relation to the second and third defenders, to remove the risk that RBS might enforce the personal guarantees); and (ii) to achieve going concern sales prices (as opposed to fire sale prices) for the Group's properties. In those circumstances I do not find it surprising that commercially sensible parties might agree to share the benefits of the loan forgiveness and of future increases in net asset value, with the greater share of the benefits going to the borrower. If the defenders refinanced half of the Loan Notes within 12 months (as had been contemplated) the shares would have been 72.5% to the Company and 27.5% to the pursuers (but capped at 15% for any part of the Relevant Profit which exceeded £21,818.181); failing which the shares were to be 62.5% to the Company and 37.5% to the pursuers (with the 15% cap applying to any part of the Relevant Profit over £16,000,000).

The second issue

[60] In my opinion it is important to keep in view that Relevant Profit is the difference between the net asset value at 31 December 2017 and the NAV, and that the *tempus inspiciendum* for ascertaining whether there was a Relevant Profit was 31 December 2017. Clauses 5.13.2 and 5.13.3 provide a detailed procedure for the parties reaching agreement as to the Relevant Profit figure, or failing agreement for disputed matters to be determined. It is noteworthy too that the agreement or determination of the Relevant Profit figure is not in any way dependent upon whether or not a Profit Payment may lawfully be made on 31 March 2018.

[61] I think it is also material that the SHA provides that the B Shareholders will have a B Director, and that the B Shareholders and the B Director are given significant powers to exercise influence and control over the Company's activities. That is to remain the position until the pursuers have received the entirety of the return which they are entitled to. The B Shareholders are not required to sell their shares to the Company until the Loan Notes and interest have been repaid and the Profit Payment has been paid (clause 5.15).

[62] Clause 5.13.5 is an important term. In my view, it makes express provision for what is to happen where there is a Relevant Profit but the Company is not lawfully able to make a Profit Payment by way of a dividend. In those circumstances the Shareholders and the Company are obliged to do all such lawful things as are within their power and ability to lawfully make such a distribution. The obligation is not qualified or restricted to enabling the Company to lawfully make a distribution on 31 March 2018. In my opinion the Shareholders remain bound by the obligation until all of the Profit Payment has been lawfully distributed.

[63] Clause 5.13.1 requires to be construed having regard to clause 5.13.5 and the other provisions of the SHA. In my opinion the words "on 31 March 2018" are not a resolutive condition. If (as the first defender maintains) the Company was not lawfully able to declare and pay a Profit Payment on that date, that circumstance did not release it from its obligation to share the Relevant Profit by paying the Profit Payment when it became lawfully able to do that.

[64] In my opinion, on a proper construction of the contract the defenders agreed that the Company is obliged to pay a Profit Payment to the pursuers (i) in the event of there being a Relevant Profit; and (ii) if and insofar as the Company is lawfully able to make the payment by declaring a dividend on or after 31 March 2018.

[65] In my view that is the interpretation which accords best with the ordinary and natural meaning of the language of clauses 5.13.1 and 5.13.5, reading those provisions in the context of the agreement as a whole.

[66] I consider that it is also the interpretation which accords best with commercial common sense. It is clear from the terms of the agreement (eg the definition of Relevant Profit in clause 1.1) that it was contemplated that the Relevant Profit might be very substantial indeed. The contract provided that the Profit Payment was to be a defined share of Relevant Profit rather than a defined share of distributable profits. It is not hard to see why. The parties had identified the difference between the net asset value in 2017 and the NAV (in 2014) as being the Relevant Profit. The stock element of the net asset value in 2017 attributed value to all properties, both complete and incomplete. How quickly or slowly after 31 December 2017 the properties were sold, or completed and sold, does not affect the Relevant Profit. However it might have a very material effect on the profits which could be distributed as dividends at any particular moment. It would have flown in the face of

business common sense (and in my view would have been irrational) for a lender in the position of the pursuers to have agreed that its ultimate right to a return by way of an agreed share of the Relevant Profit would be extinguished if the Company had insufficient distributable profits on a date 3 months after the date as at which the Relevant Profit fell to be ascertained. It would not have been a commercially sensible way for a lender to make provision for payment of the agreed Relevant Percentage of Relevant Profit. On the other hand it seems to me that it accords with business common sense that a borrower in the position of the defenders would have agreed that the pursuers' share of the Relevant Profit should to be paid by way of dividend or dividends as and when the Company had distributable profits. There was a benefit to each side in the Profit Payment being distributed as a dividend. The benefit to the Company was that it would only have to make payments when it had distributable profits. For the pursuers, while there was the disadvantage of not being able to demand immediate payment, there was a tax benefit if the payment(s) was (were) dividends.

[67] Finally, it seems to me that the pursuers' construction gives better effect to the whole commercial purpose of the agreement than the first defender's construction does. The right to obtain a Relevant Percentage of Relevant Profit was a key part of the commercial purpose. The first defender's suggested construction undermines, rather than gives effect to, an important part of the commercial purpose.

Conclusion and Disposal

[68] I find in favour of the pursuers on both the first and the second issues.

[69] I incline to the view that the appropriate disposal ought to be that the pursuers' first plea-in-law in their answers to the counterclaim (a plea to the relevancy of the first

defender's averments in the counterclaim) should be sustained and that the counterclaim should be dismissed. However, I will put the case out by order to discuss (i) an appropriate interlocutor to give effect to my decision; (ii) further procedure; and (iii) any motion for expenses which may be made.