OUTER HOUSE, COURT OF SESSION

[2021] CSOH 26

CA159/19

OPINION OF LORD TYRE

In the cause

CRIMOND ESTATES LIMITED

Pursuer

against

MILE END DEVELOPMENTS LIMITED

Defender

Pursuer: Sandison QC, Reid; Lefevres
Defender: MacColl QC; Burness Paull LLP

12 March 2021

Introduction

[1] The parties to this action are two single purpose vehicles formed in connection with the development for housing of a former school known as Mile End School in Aberdeen. The shareholders and directors of the pursuer ("CEL") are Mr David Suttie and Mr Charles Ferrari. The shareholders and directors of the defender ("MEDL") are Mr Gareth Jones and Mrs Suzanne Jones. In 2013 the parties entered into an agreement in terms of which CEL agreed to provide specified "Management Services" to MEDL in exchange for an entitlement to certain specified shares of the ultimate net sale proceeds. In November 2016 MEDL terminated the agreement. The development has since been completed and the flats sold.

CEL contends that the termination of the agreement was unlawful, and sues for damages for breach of contract or, alternatively, for remuneration for services supplied. MEDL contends that the contract was lawfully terminated, and in any event denies that any sum is due to CEL. The action came before me for proof before answer.

Background to the 2013 agreement

[2] Mr Suttie is a former bank manager. He has been concerned in property development for around 15 years, his principal area of expertise being in relation to development funding. Mr Ferrari has been a property developer for 35 years, with expertise in design. In 2010 Mr Ferrari identified the former Mile End School, still then owned by Aberdeen City Council, as a development opportunity. He discussed the funding of such a project with Mr Suttie, and CEL was incorporated with a view to progressing the project. Mr Suttie and Mr Jones met at a social event. Mr Jones is a marine engineer who worked in the offshore oil industry. He had recently retired and sold the shares in his service company, and had funds to invest. Mrs Jones worked for many years in the oil industry as a finance manager. Mr and Mrs Jones decided to invest in Mr Suttie and Mr Ferrari's proposed Mile End School development project. They incorporated MEDL for this purpose. Their intention was that they would fund the acquisition of the property, and that construction costs would be funded by bank borrowing.

[3] Mr Ferrari instructed Raymond Canale, an architectural technologist, to produce plans for presentation to the planning authority and to Mr and Mrs Jones as potential investors. The property having been placed on the market, MEDL submitted a successful bid to purchase. Missives were concluded on 13 April 2012. An application prepared by CEL for planning permission in principle and listed building consent for 37 residential units

in the main building and the former janitor's house was approved on 25 July 2012. Conditional planning permission for the development was granted on 29 April 2013.

[4] As regards the structure of the agreement among the parties, Mr Suttie and Mr Ferrari had initially contemplated a form of joint venture agreement. However Mr Jones did not wish to be in a business partnership and, on legal advice, insisted that the agreement between MEDL and CEL take the form of a project management agreement. The two companies accordingly entered into an agreement, entitled "Project Management Agreement" dated 19 and 23 April 2012 ("the 2012 agreement"). It should be noted that neither Mr Suttie nor Mr Ferrari holds any formal qualification in project management, nor holds himself out as an expert in project management as opposed to project development.

[5] The 2012 agreement contained a preliminary budget, which included an estimated build cost provided by quantity surveyors. Mr Suttie and Mr Ferrari proceeded to conduct negotiations with potential lenders and agreed a facility with the Royal Bank of Scotland. A design team, including Mr Canale to provide architectural services and McLeod & Aitken, quantity surveyors, were engaged. A demolition warrant was obtained and an asbestos survey was carried out. A bill of quantities was prepared by McLeod & Aitken on CEL's instructions, and tenders were invited. Unfortunately the tenders were significantly higher than the estimated build cost in the budget annexed to the 2012 agreement (although projected sales values also increased). This required the re-negotiation of the bank borrowing and also an increased capital contribution by Mr and Mrs Jones who were concerned by the discrepancy but agreed to increase their contribution, subject to certain amendments to the parties' agreement. The effect of those amendments was:

- to amend the profit share mechanism;

- to introduce a requirement that CEL obtain MEDL's prior written authorisation for any increase in development costs or any instruction which could cause an increase in development costs; and
- to insert a right of MEDL to terminate the agreement if the development costs, or any estimate of these by a quantity surveyor, exceeded 5% of the budget, unless the increase had been agreed in advance in writing by MEDL.

The amended agreement ("the 2013 agreement"), which was also entitled "Project Management Agreement" was signed by the parties on 21 November 2013.

The 2013 agreement

[6] The following provisions of the 2013 agreement are most relevant to the current dispute. In the agreement MEDL is referred to as "the Company" and CEL as "the Project Manager". In terms of clause 2.1, MEDL appointed CEL "… on an exclusive basis to provide the Management Services set out in Part 1 of the Schedule upon the terms and conditions of this Agreement". Clause 2.3 required CEL *inter alia* to

> "2.3.1 properly and diligently perform the Management Services with all skill and care as is reasonably to be expected of a competent and prudent project manager, qualified and experienced in managing the development of a site of a comparable nature, size, scope and complexity to the Development;
>
> …
>
> 2.3.5 observe and comply with all resolutions, and all lawful orders and directions, reasonably given to it from time to time by the Company."

[7] The Management Services listed in Part 1 of the Schedule extend beyond the usual scope of project management services. They include, for example, in addition to services clearly concerned with project management:

- co-ordinating and supporting negotiations with and applications to the local planning authority and other relevant authorities to obtain planning permission and other necessary statutory consents for the development;
- liaising with banks to ensure the best deal on funding;
- responsibility for the space planning of all internals of residential units in terms of bedroom areas, bathrooms, kitchens and lounges;
- involvement in selecting fixtures and fittings for bathrooms, bedrooms and kitchens;
- co-ordinating the marketing and sale of the completed development.

It can be seen that despite the title of the agreement and the designation of CEL as "the Project Manager", this was not a standard project management agreement, but a bespoke agreement in terms of which CEL undertook a range of obligations in exchange for a share of the potential net sales proceeds.

[8] Clause 2 contained a number of provisions intended to keep control of the project, and in particular of costs, in MEDL's hands:

> "…
>
> 2.6 All activities engaged in by the Project Manager under this Agreement shall at all times be subject to the control of and review by the Company.
>
> 2.7 Subject to the provisions of clause , the Project Manager shall ensure that it will provide the Management Services under the direction of the directors of the Company or any of them.
>
> 2.8 It is a material and essential condition of this Agreement that the Project Manager shall not incur or agree to incur directly or indirectly on its own behalf or on behalf of the Company any Developments Costs without in each case prior written authorisation from the Company other than in respect of any Permitted Variation. Any Permitted Variation instruction shall be notified to the Company in writing within 24 hours of being made (time being of the essence). The Company shall be entitled at any time to withdraw its authority to allow Permitted

Variations by written intimation to that effect to the Project Manager. For the removal of doubt any Permitted Variation shall not represent an increase to the Budget unless and until approved in writing by the Company.

2.9 It is a material and essential condition of this Agreement that the Project Manager shall not without the prior written authorisation of the Company on each occasion issue any instruction to the Professional Team or the building contractor other than in respect of a Permitted Variation , and shall not otherwise engage with, communicate, instruct, represent or act in any manner of way with the Professional Team or the building contractor which has or may have the effect of increasing the Development Costs…"

"Permitted Variations" were defined in clause 1 as certain types of non-material variations whose aggregate cost did not exceed £5,000 in any calendar month.

[9] Clause 3 set out CEL's entitlement to payment, providing in clause 3.1 that the fee for the Management Services was to be "the Project Manager's Profit Share". Clause 3.3 stated:

"The Company shall apply all gross sale receipts from the Development in satisfaction of Development Costs in the first instance. The Company shall, after all loans made to the Company in connection with the Development (including the Initial Funding) have been fully repaid and otherwise all Development Costs have been met or provision has been made for same, be entitled to payment of the Priority Sum A from the Net Sale Proceeds as its own absolute beneficial payment as a priority payment before any part of the Project Manager's Profit Share is paid to the Project Manager. The Company shall thereafter be entitled to payment of the Priority Sum B from the Net Sales Proceeds as its own absolute beneficial payment following payment of any Profit Share A to the Development Manager, but before any remaining part of the Project Manager's Profit Share is paid to the Project Manager."

On the basis of this provision, and the relevant definitions in clause 1, the order of application of gross sale proceeds was to be as follows:

(i) Development Costs;

(ii) Priority Sum A, defined as £1,500,000, payable to MEDL;

(iii) Profit Share A, defined as the balance of the net sales proceeds up to a cap of £250,000, payable to CEL;

(iv) Priority Sum B, defined as £250,000, payable to MEDL;

(v) Profit Share B, defined as the remaining balance of the net sales proceeds up to a cap of £1,000,000, payable to CEL;

(vi) Any balance remaining after payment of all of the above to be divided equally between MEDL and CEL.

[10] Development Costs were listed in Part 4 of the Schedule. In addition to costs of site acquisition and planning approval, construction costs, professional fees, and sales and marketing costs, there were included *inter alia*:

> "… any interest and fees payable on and/or incurred in relation to any loan obtained by the Company for the funding of the acquisition of the Site and the Development;
>
> a facility fee representing the sum equivalent to the deemed cost of money of the Initial Funding [ie loans to the Company] for the period that same is utilised calculated at the same percentage as the interest payable in respect of the loan obtained by the Company for the funding of the Development per annum from the date of receipt of the Initial Funding by the Company until the date of repayment of same;
>
> …
>
> any insurances, rates, outgoings and other taxes applicable to the Site and/or Development during the Term;"

[11] CEL's entitlement to receive any profit share was subject to clause 3.6, which stated:

> "In the event of there being either (i) any Cost Overrun and/or (ii) any Warranty Claims as at the Termination Date the total amount or value of same shall be deducted from Profit Share A and (to the extent not satisfied) from Profit Share B, and the Profit Share A Cap and/or the Profit Share B Cap shall then be reduced by a corresponding amount (the amount of the Development Costs to the extent that it includes Cost Overrun being increased accordingly for this purpose in calculating Project Manager's Profit Share to avoid any double counting of same), and in the event that the amount or value of the Cost Overrun and any Warranty Claims exceed the sum of ONE MILLION TWO HUNDRED AND FIFTY THOUSAND POUNDS(£1,250,000) STERLING (the amount of such excess not accordingly deducted from Profit Share A and/or Profit Share B being hereinafter defined as 'the Shortfall') then the Shortfall shall be deducted from the Profit Share C or, if the Profit Share C is nil or less than the Shortfall, the Project Manager shall pay the Shortfall to the Company within 5 working days of agreement or determination of same by the parties …".

"Cost Overrun" was defined as the amount of any Development Costs incurred in relation to the Development which were in excess of the provision made in the Budget for them or in relation to which no provision had been made, and which resulted in a higher total amount of Development Costs being incurred than provided for in the Budget. The Budget was in turn defined as

> "the budget in relation to the Development a copy of which is annexed as Part 2 of the Schedule, as it may be supplemented, varied and/or updated subject always to any supplementation, variation or updating being first approved in writing by the Company (it being acknowledged that any supplementation, variation and/or updating must be signed on behalf of the Company by a director for this purpose)."

[12] CEL's entitlement to be paid its profit share was also subject to clause 3.9, which provided:

> "For the removal of doubt the Project Manager acknowledges that no Project Manager's Profit Share shall be payable unless and until (i) all of the Development Costs incurred or to be incurred relative to the Development have been fully accounted or provided for (irrespective of the stage of progress of the Development as at the Termination Date it being the express intention of the parties that where insufficient Net Sale Proceeds have been generated at the Termination Date to cover all Development Costs incurred or to be incurred and the Priority Sum A that no Project Manager's Profit Share shall be payable) and (ii) the Company has received payment of the Priority Sum A in full. Where at the Termination Date adequate provision has not or cannot reasonably be made for all Development Costs incurred or to be incurred in order to ascertain the Project Manager's Profit Share the Company shall be entitled to defer determination of the Project Manager's Profit Share until completion of the Development by the Company or such earlier date on which adequate provision can reasonably be made for all Development Costs. At the discretion of the Company, provided it is demonstrably prudent to do so, the Company may make payments to account of the Priority Sum A, the Priority Sum Band the Project Manager's Profit Share."

[13] Clause 6, entitled "Term and Termination" provided that the agreement would last until the earliest of (1) 1 July 2018, (2) the date when all residential units had been constructed and sold and payment received, or (3) the date on which it was terminated under clause 6.2. The circumstances in which the agreement could be terminated by either party, on giving 30 days' written notice, included the following:

"6.2.1 the other party is in material breach of this Agreement and fails to rectify such breach within ten working days after being required in writing so to do by the other party;

…

6.2.7 if the Development Costs or any reasonable estimate of same prepared by the Professional Team Quantity Surveyor for the Company from time to time exceed the Budget by 5% or more, and such excess has not been previously approved in writing by the Company;"

[14] Returning to clause 3, the following provision was made in clause 3.12 for remuneration of CEL in the event of the agreement being terminated under clause 6.2.1 or 6.2.7 without any profit share being payable to CEL:

"In the event of termination of this Agreement by the Project Manager in terms of clause 6.2.1 or by the Company in terms of clause 6.2.7, the Project Manager shall, in the event that no Project Manager's Profit Share is due to the Project Manager following the application of any part of this clause 3, be entitled upon completion of the Development. and subject always to the application of Clause 3.9, to such reasonable remuneration for its services up to the Termination Date, such remuneration to be based on the open market rate for a project manager carrying out the management of a development similar to the Development (but which remuneration shall not in any event exceed the amount of the Profit Share A Cap), and failing agreement to be fixed by the Adjudicator."

[15] Finally, in terms of clause 4, MEDL was entitled to appoint a project monitor at its own cost to oversee the provision of Management Services by CEL.

Overview of progress of the development project

[16] The development project did not run smoothly. Unforeseen problems were encountered from the outset. Demolition works began in late 2013. This included asbestos removal and it became apparent that the work required was more extensive than specialist reports had indicated. Lead was stolen from the roof, resulting in water ingress and damage to timber. Other unexpected problems were discovered as the building, a Victorian school, was stripped back. As a result of the asbestos issue and inclement weather, the start of work

by the main contractor, Bancon Construction Ltd ("Bancon"), was delayed from December 2013 until February 2014. At this time Mr Jones instructed McLeod & Aitken to provide, in consideration of an additional fee, an enhanced service including fortnightly rather than monthly cost reporting, and monthly client meetings to review progress and cost. He also approved the appointment of Mr Derek Braidwood, a chartered quantity surveyor employed at that time by McLeod & Aitken, to act as project monitor in relation to the development.

[17] Further delays ensued. Old ventilator shafts were discovered which needed to be infilled. A brick chimney flue was discovered and had to be removed. Mr Canale granted the contractor delays and the completion date was revised on several occasions. By February 2015, the works were delayed by six months. By June 2015, all parties were aware that there were substantial cost overruns. The first flats were sold and occupied in November 2015, but large amounts of snagging remained to be addressed. At this time two new and serious problems emerged. It was discovered that many of the slates on the roof had been single-nailed instead of double-nailed. Extensive remedial works were required. Manufacturing defects were found in large glazed units which had to be replaced. Although sales and occupations proceeded, practical completion was not achieved until January 2017. Even then a considerable amount of snagging, especially in relation to electrical works by the subcontractor referred to below, remained to be remedied.

[18] On 18 November 2016, a notice of termination was served by MEDL's solicitors on CEL's solicitors, under reference to clause 6.2.7 of the 2013 agreement, on the ground that Development Costs exceeded the Budget by 5% or more without such excess having been previously approved in writing by MEDL. Despite the termination, Mr Suttie and, to a

lesser extent, Mr Ferrari, continued to carry out work in relation to snagging and sales, until Mr Jones sent an email in April 2017 instructing CEL to stop all work.

[19] Against that background, the first issue for determination is whether MEDL was entitled to terminate the agreement. CEL contends:

- that MEDL was not entitled to invoke clause 6.2.7 because, firstly, there were no excess costs and no Cost Overrun as the Budget had been increased by agreement from time to time and, secondly, any excess costs had been approved in writing by MEDL;
- if and to the extent that costs were not approved in writing by MEDL, the conduct of the parties was such that it could only be explained as indicating that approval in writing was not required;
- alternatively, MEDL had waived its right to invoke the clause because it had allowed CEL to continue to provide services under the contract for 17 months after the Cost Overrun was identified.

Dependent upon the determination of these issues, further questions arise in relation to CEL's entitlement to damages for breach of contract and the quantification of such damages; CEL's alternative entitlement to reasonable remuneration and the quantification of such remuneration; and CEL's entitlement to recompense for work done after termination and the quantification of such recompense. I address these matters later in this opinion.

Assessment of evidence given at the proof

[20] Evidence at the proof took the form of witness statements and oral evidence. On behalf of CEL, factual evidence was given by:

- David Suttie

- Charles Ferrari
- Nicholas Stewart, a chartered quantity surveyor employed by McLeod & Aitken, who was the Mile End project quantity surveyor;
- Peter Edgeler, a financial adviser formerly employed by the Royal Bank of Scotland who was the bank's relationship manager with Mr Suttie and Mr Jones between 2013 and 2016;
- Scott Burness, a relationship director at RBS who at the material time was Mr Edgeler's superior;
- Ms Ray Baxter, a property manager with Peterkins, solicitors, who were instructed to market the flats for sale; and
- Stephen McKnight, a wealth manager with St James' Place, Aberdeen.

Expert evidence was given by Mr Douglas Garden, chartered surveyor, a partner in Ryden LLP and head of its building consultancy department in Aberdeen. Mr Garden was asked to provide an opinion as to reasonable remuneration for the services provided by CEL both before and after the termination of the agreement.

[21] On behalf of MEDL, factual evidence was given by:

- Gareth Jones;
- Suzanne Jones;
- Richard Goodfellow, solicitor, a partner in Burness Paull and previously Paull & Williamsons, whose clients included Mr Jones and also Mr Suttie and Mr Ferrari;
- Derek Braidwood; and
- Raymond Canale.

Expert evidence was given by (i) Mr Keith Strutt, a chartered construction manager and chartered quantity surveyor employed by the Driver Group, who provided an opinion as to the standard of services reasonably to be expected of a project manager, and the reasonable remuneration of CEL for the services that they carried out, both before and after termination of the agreement; and (ii) Mr Jolyon Aldous, chartered accountant, a partner in Baker Tilly, who provided an opinion as to whether the development costs, estimated at November 2016 and at January 2020, exceeded the budget by more than 5%, and as to CEL's profit share based on the 2020 cost estimate.

[22] Subject to what I have to say regarding Mr Suttie and Mr Jones, I found all of the factual witnesses credible and generally reliable. I found the evidence of Mr Stewart and Mr Canale helpful in providing a more objective perspective than that of the parties' principals. As regards the expert witnesses, I am satisfied that they understood their duties to the court and did their best to assist the court in relation to the matters referred to them for their opinion. I comment further on their evidence below.

[23] Mr Suttie's evidence presented difficulties because of his reluctance to answer questions directly. Despite being asked more than once to answer the questions put to him, he persisted in attempting to avoid giving direct answers if he thought that they might be misconstrued as admissions against his interests. His approach was to attempt to identify what he thought was the underlying purpose of each question and to address that instead of the question put to him. His position, repeatedly stated, was that every decision that was taken, including in particular every decision involving the incurring of cost, was taken by Mr Jones, and that the provisions of the 2013 agreement regarding approval in writing were entirely disregarded. The fact that he simply reiterated this position instead of giving direct

answers to questions about specific matters means that in some cases I have simply had to interpret the absence of an answer as a negative response to that particular point.

[24] Mr Jones's evidence appeared to me to be coloured by an attitude that whenever anything did not go according to plan, someone (other than himself) must have been at fault. In relation to the Mile End development he attributed most of the blame to CEL but his criticism extended to the contractors, sub-contractors and professional team members. Despite explaining that he had insisted on the agreement taking the form of a project management agreement so that he could be his own boss, he refused to accept responsibility for having made decisions that resulted in increased cost. On more than one occasion his recollection was demonstrated to be inconsistent with contemporaneous evidence; an example was his refusal to accept that RBS had made the involvement of Messrs Suttie and Ferrari a condition of its funding, which was apparent from the documentation and confirmed by the evidence of the RBS witnesses. He frequently expressed suspicions that important matters had been concealed from him; there was no credible evidence to support any of these assertions. His attitude to CEL had hardened as a consequence of having formed the view that an electrical subcontractor, with family connections to Mr Suttie that he considered had been concealed from him, had been appointed without going through a proper tender process. The evidence as a whole does not suggest that there was anything untoward about the process of appointment of this subcontractor. Having regard to Mr Jones's dogmatic approach, I was unable to accept him as a wholly reliable witness and have treated his testimony with caution where not supported by other evidence.

Was MEDL entitled to terminate the agreement in November 2016?

The Budget

[25] In part 2 of the schedule to the 2013 agreement, the projected cost of the project, including bank interest, was £11,710,383. It is a matter of agreement that certain variations to the Budget were approved (by email dated 6 February 2015) by Mr Jones. These resulted from a decision to amend the design to provide for four large penthouse apartments in place of the six apartments originally planned. The total projected cost of the variations was £402,290, which if added to the cost according to the Budget annexed to the 2013 agreement, gives a total of £12,112,453.

[26] Mr Aldous produced a calculation of Cost Overrun, estimated as at November 2016, based upon figures provided by Mrs Jones of actual costs incurred to November 2016 and projected costs to completion. Mr Aldous's calculation produced a total project cost as at January 2020 of £14,349,618, including corporation tax, which was £2,237,165, ie 18.5%, higher than the Budget. Excluding corporation tax reduced Mr Aldous's total project cost to £13,928,236 which was £1,815,783, ie 15%, higher than the Budget. CEL disputes some of the figures in the calculation, but even when allowance is made for the disputed figures, there appears to be no doubt that the total development cost, including projected costs to completion, as at the date of termination of the agreement was more than 5% in excess of the 2013 Budget (as increased for the penthouse variations). The question, in determining whether clause 6.2.7 was validly invoked by MEDL, is whether that is the correct comparison to make.

Decision-making during the construction period

[27] I have already noted that the projected cost of the development increased after the 2012 agreement was entered into. This was a matter of concern to Mr and Mrs Jones, and in addition to insisting upon the changes embodied in the 2013 agreement, Mr Jones sent an email on 18 October 2013 to Mr Canale and to Mr Duncan Moir (McLeod & Aitken's director) which stated:

> "Suzanne and I have carried out a review of all matters regarding this project and have decided that we will take a greater hand in all its activities going forward. Please therefore do not carry out any work without seeking our direct instructions and ensure we are copied on all correspondence, including email correspondence connected to this project."

Thereafter Mr Jones (and to a lesser extent Mrs Jones) became closely involved in the day-to-day progression of the development. Mr Jones attended monthly site meetings with the professional team and the contractor's representatives. At each of these meetings, the contractor provided a report and progress towards completion was discussed. Decisions were taken on technical and design matters with a view to their inclusion in architect's instructions. On some occasions the CEL representatives put forward cost saving proposals. Anything unexpected that had arisen was discussed and noted by Mr Stewart so that any additional cost could be reflected in the next cost report. Those reports included a breakdown of the financial position, showing *inter alia* the amount of overall net additions to the contract sum. Their purpose was to give the client not only an account of costs incurred but also the most accurate anticipated final account figure at that time. Once approved by Mr Jones, they were forwarded to the bank's monitors. Mr Suttie also used the reports to produce cash flow projections in the same format as the Budget annexed to the 2013 agreement.

[28] It was the clear position in evidence of Mr Suttie, Mr Ferrari, Mr Stewart and Mr Canale that decision-making authority rested with Mr Jones. Cost reports were sent for approval to Mr Jones by Mr Stewart, accompanied by an email highlighting the major items added or omitted. Mr Stewart held meetings with Mr Jones at which he was able to provide any explanations sought by Mr Jones. The cost reports could not be issued unless approved by Mr Jones. The increasing cost of the project could clearly be seen from these reports. By the time of issue of cost report 17 dated 3 November 2015, overall net additions amounted to over £1,000,000. The cost reports were not, of course, of themselves instructions by Mr Jones to incur the costs reported in them, but they did, according to the evidence of Messrs Suttie, Ferrari, Stewart and Canale, record decisions taken at meetings at which Mr Jones was present and in respect of which he had had the final say.

[29] Equally, any "value engineering" proposals by CEL or anyone else, ie suggestions of ways to save money on the Budget, required Mr Jones's approval. Often such approval was refused, in relation, for example, to omission of the repointing of a boundary wall in the car park, the railings on the perimeter wall, and the omission of some high level kitchen units in three apartments. In relation to one matter, namely the substitution of sarnafil for asphalt roofing, Mr Jones was persuaded by CEL and Mr Canale to agree reluctantly to a change in specification.

[30] In his evidence to the court, Mr Jones denied that he had known of and approved every material change, describing this as a "fantastic concept". He agreed that the cost reports had made him aware of cost overruns, but considered that he was protected from responsibility for them by the terms of the 2013 agreement. I reject Mr Jones's evidence that he did not approve, whether in writing or otherwise, the carrying out of works which he was or ought reasonably to have been aware would result in increased cost. It is clear from

the evidence of the other witnesses that that is indeed what happened, as a result of Mr Jones's insistence that no decisions were to be taken, or architect's instructions issued, without his agreement.

[31] It is undoubtedly the case that Mr Jones continued to express his concern about the cost overruns. In an email dated 16 February 2015, following upon a meeting at which Messrs Suttie and Ferrari had drawn his attention to the rising costs, he noted that there would be significant cost overruns "in addition to those already incurred", and stated his view that in terms of the contract all of these extra costs, other than for the penthouse upgrades, would be borne by CEL. He suggested the possibility of amending the contract to share some of the burden of the extra costs but this was not taken further because CEL did not agree with Mr Jones's interpretation of the contract. On 1 June 2015, a meeting took place between Messrs Jones, Suttie and Ferrari with Mr Goodfellow present as an observer at Mr Jones's invitation. According to Mr Goodfellow's account, Mr Jones expressed his concern that the project was well over budget and emphasised that CEL's responsibility was to deliver the project with the agreed specification on budget. He stated that whilst he would support the project for the time being, he was reserving his position on how to deal with the cost overruns and whether MEDL would in consequence terminate the agreement.

Did MEDL approve changes to the Budget?

[32] On behalf of CEL, it was submitted that by means of the process described above, MEDL approved changes to the Budget. It was clear from the definition of Budget in the 2013 agreement that parties had envisaged that it could be varied, provided that MEDL's written approval was given. There was nothing to require that approval to be given prior to the incurring of the costs: the Budget was concerned with the overall picture rather than the

costs themselves. The cash flow projections and schedules of professional fees maintained by Mrs Jones, taken together with the cost reports, represented variations to the Budget as the financial position of the project changed. In so far as this process did not amount to approval "in writing" as specified in the agreement (including being signed on behalf of MEDL by a director), the conduct of the parties was such as could only be explained by approval being given otherwise than in accordance with the formalities in the agreement.

[33] On behalf of MEDL, it was submitted that as at 18 November 2016 the only written authorisation for costs beyond the Budget provided by MEDL was the email approving the cost of the enhanced penthouses. In relation to all other costs, knowledge of Mr Jones that the Budget was being exceeded did not amount to written or indeed any approval or authorisation of those costs.

[34] In my opinion a distinction falls to be drawn between approval of additional costs and variation of the Budget. I agree with CEL's submission that the Budget, which was of course a defined term in the agreement, is concerned with the overall picture rather than the costs themselves. I do not, however, agree that approval of an unbudgeted cost implies agreement to variation of the Budget. It is simply a Cost Overrun which, as has been seen, is recognised and has consequences in terms of the agreement. In my view approval by MEDL of a cost report disclosing net additions to the contract sum amounted to no more than an acknowledgement that Cost Overruns had occurred. It is relevant in this connection to observe that the only admitted variations (in relation to penthouse enhancements) were expressly authorised and acknowledged by Mr Jones to constitute variations to the Budget. If all that was required to constitute approval of a variation was agreement of a cash flow statement showing additions to the contract sum, it is difficult to see how there could ever have been a Cost Overrun.

[35] CEL drew attention to two matters in particular where cost was incurred as a consequence of decisions of Mr Jones, made in the knowledge that the cost was not in the Budget. The first of these was the engagement of Mr Braidwood which, although expressly permitted in the agreement, was not provided for in the Budget. This was done solely at MEDL's initiative, and although Mr Jones considered that it ought to have been budgeted for, he was aware that it had not. The second was the engagement of a solicitor with Burness Paull to address issues related to Bancon. In my opinion neither of these matters constituted an approved variation of the Budget. Both fell within the definition of Development Costs in the agreement, and the definition of Cost Overrun envisaged that Development Costs might not have been provided for in the Budget. I do not therefore consider that the mere fact that MEDL incurred these costs in the knowledge that they were unbudgeted constituted approved variations.

Were the excess costs approved for the purposes of clause 6.2.7?

[36] Clause 6.2.7 requires a comparison to be made between the Budget on the one hand and, on the other, total actual and estimated Development Costs except in so far as "previously" approved in writing by MEDL. Clearly this comparison envisages the possibility that costs will have been approved otherwise than by variation of the Budget. Senior counsel for CEL submitted that the word "previously" qualified the general right to terminate at the beginning of clause 6.2: in other words it applied to costs approved prior to the date of termination as opposed to approved prior to having been incurred. I agree with this interpretation which, as senior counsel submitted, would prevent MEDL from relying upon a cost increase that they had approved as a reason for termination.

[37] As regards the requirement in clause 6.2.7 for approval in writing, CEL submitted that this should be read in the context of ensuring that consent was given by MEDL to increased costs, rather than imposing a requirement purely of form, against the background of Mr Jones becoming closely involved in the day to day administration of the contract. The approach set out in Mr Jones' email of 18 October 2013, ie that all instructions for work were to be approved by him, was that which was followed throughout the project, and was a significantly greater level of control and involvement than had been envisioned in the provisions of the 2013 agreement. The process for approval of costs (described above) satisfied the requirement of clause 6.2.7 that there had been approval of the excess costs prior to termination. Insofar as that process did not constitute approval "in writing", the present case was one where the facts and circumstances of the implementation of the contract were "explicable only on the basis that there was an express or implied agreement" that the requirement for writing had been dispensed with. Reference was made to the observations of Lord Justice-Clerk Cullen in *Minevco Ltd* v *Barratt Southern Ltd* 2000 SLT 90. It was clear that every cost was being approved, irrespective of the mechanism set out in the 2013 agreement.

[38] On behalf of MEDL it was submitted that none of the actings relied upon amounted to approval of the excess costs, far less written approval. With the exception of the penthouse enhancements, no written authorisation was provided by or on behalf of MEDL for costs beyond those contained in the Budget forming part of the 2013 agreement. The quantity surveyors' cost reports were snapshots of the development position from time to time, and the receipt and subsequent forwarding of those reports to the bank monitors was not and could not be regarded as the provision of written approval of excess costs for the purposes of clause 6.2.7. At no stage did MEDL give any indication to CEL that it was

giving up any contractual rights that might have arisen as a result of the cost increases. The 2013 agreement did not impose any timescale within which the clause 6.2.7 right was to be exercised. The trigger for the service of a termination notice had been met as at 18 November 2016.

[39] In my judgment there is overwhelming evidence that MEDL, principally via Mr Jones, gave its agreement to the incurring of the expenditure that caused the Budget to be exceeded. Prior to and throughout the construction period, Mr Jones made it clear that no decisions with cost implications were to be taken without his approval. Matters giving rise to increased costs were discussed at site meetings and recorded in minutes and in email correspondence. Proposals by CEL for cost savings were also discussed, and in some instances rejected by Mr Jones on the ground that the design specification was not to be compromised. None of the witnesses spoke to any occasion upon which Mr Jones's view was overruled. Mr Canale confirmed that architect's instructions were issued only following upon agreements reached at site meetings. It is accepted on behalf of MEDL that Mr Jones was aware throughout the construction period that costs were increasing as a result of delays and unforeseen difficulties. It may be that when presented with the circumstances as they developed Mr Jones had little choice but to agree to courses of action that resulted in further cost increases, but it cannot in my view be said that he did not agree to them.

[40] As regards the reference in clause 6.2.7 to previous approval in writing (and the reference in clause 2.8 to prior written authorisation), I reject CEL's submission that the process that was followed (decisions at site meetings or in email correspondence reflected in cost reports and cash flow statements approved in due course by MEDL) amounted in effect to approval in writing. I am, however, satisfied that this is indeed a situation in which the

contractual requirement was varied by the actings of the parties. As Lord Justice-Clerk Cullen observed in *Minevco Ltd* v *Barratt Southern Ltd* (above):

> "It is not in question that a clause of a written contract cannot be varied or altered by verbal agreement. However, the position may be different if there are facts and circumstances which are explicable only on the basis that there was an express or implied agreement. As Lord Robertson observed in *Baillie* v *Fraser* (1853) 15 D 747 at p 750: 'It is a delicate thing to infringe on the terms of a written contract, but when the parties have been acting so as to alter it by their conduct, then we must give effect to the change'."

The evidence in the present case was of a consistent practice in relation to the taking of decisions with consequences for the overall cost of the project. There was no evidence of any contemporaneous insistence by MEDL that only written approval would permit the matter discussed to proceed, nor of anyone, whether it be CEL or Mr Canale, requesting written approval in order that an instruction could be issued to the contractor. In these circumstances it is in my view quite clear, in Lord Robertson's words, that the parties acted so as to alter the terms of the 2013 agreement in relation to clause 2.8 by removing the requirement for *written* authorisation of the incurring of Development Costs. That being so, it follows that the reference in clause 6.2.7 to previous approval *in writing* was also departed from. If it were otherwise, then it would be open to MEDL to found upon costs that they had agreed to be incurred as a reason for terminating the agreement, which would not accord with commercial common sense. The agreement provided MEDL with other protections.

[41] I do not regard the fact that written authorisation was given of the costs relating to the penthouse enhancements as casting doubt on what I have said. I have already expressed my view that the effect of that authorisation was to vary the Budget, and for that reason the cost increase was excluded from the clause 6.2.7 calculation. In that regard the parties

adhered to the terms of the agreement, but they did not do so in relation to the incurring of Development Costs more generally.

[42] In these circumstances I hold that MEDL was not entitled to terminate the contract on 18 November 2016, and was in breach of contract in so doing.

[43] Senior counsel for CEL presented an alternative argument that even if every cost was not approved, and the Budget was not varied, the costs relied upon by MEDL did not produce an overrun of 5% of the Budget (ie 5% of £12,112,453, or £602,622.65). It was submitted that the following amounts should be excluded from the calculation of overrun:

(i) construction cost overrun of £700,982, on the ground that there was no overrun in the sense used in the 2013 agreement because the costs were approved by MEDL;

(ii) corporation tax of £530,708, on the ground that corporation tax was not a Development Cost in terms of the agreement;

(iii) professional and site agent fees overrun of £203,311, and council tax and factoring costs of £54,911, again on the ground that these costs were approved by MEDL;

(iv) security costs of £32,616, on the ground that the correct figure was £20,760; and

(v) interest overrun of £847,940 on shareholders' loans by Mr and Mrs Jones, on the ground that this expenditure was authorised and in any event because the interest had been compounded without justification, the correct figure being £586,608 as calculated by Mr Suttie.

[44] I return below, in the context of calculation of net profit, to the questions of (a) allowability of corporation tax as a Development Cost, and (b) the appropriate method of

calculation of interest on Mr and Mrs Jones's loan. For the purposes of the present argument, however, it is sufficient to say that I reject the proposition that the construction cost overrun, the professional fees overrun and the council tax and factoring costs should be excluded from Cost Overrun because they were approved. As I have explained, it does not in my view follow from the fact that a particular cost was approved that it does not form an ingredient of the overall Cost Overrun. Aggregating these three figures, together with the lower figure for security costs, produces a total of £979,964, which is already well above 5% of the Budget. That is sufficient for this argument to be rejected.

Did MEDL waive its right to terminate under clause 6.2.7?

[45] In the light of my decision that MEDL's termination of the contract was unlawful, this question becomes academic. I shall, however, briefly express my view upon it.

[46] On behalf of CEL it was submitted that MEDL's actions constituted an implied waiver of their right to rely on unapproved excess costs as a reason for termination under clause 6.2.7. Reference was made to the observations of Lord Keith of Kinkel in *Armia Ltd* v *Daejan Developments Ltd* 1979 SC (HL) 56. It was not necessary to identify a specific instance of waiver; the whole circumstances had to be looked at. On MEDL's hypothesis, the right to terminate had arisen by, at the latest, June 2015, when a cost report disclosed over £700,000 additional costs (in addition to the penthouse enhancements). There was then a period of 17 months before notice of termination was given. During that time, as MEDL was well aware, CEL continued to provide the services that it had contracted to provide. MEDL continued to authorise and approve works and further costs. When MEDL terminated the agreement, it sought to rely upon increased costs which it had approved, having informed CEL and others concerned with the project that its system for approvals had to be followed,

and having allowed CEL to rely on and to work to that system for a period of three years. This was to CEL's clear prejudice on termination: it put CEL at risk of committing very significant time to the project and receiving no payment.

[47] On behalf of MEDL, it was submitted that CEL had not established the abandonment by MEDL of its right to serve a notice of termination at any time when the circumstances in clause 6.2.7 subsisted. Waiver required the clear abandonment of a right by the party entitled to it. All that CEL offered to prove was that MEDL could have exercised its contractual termination right earlier. That did not amount to a waiver of MEDL's entitlement to exercise the right when it did.

[48] I have to consider the issue of waiver on a factual hypothesis, contrary to my findings above, that the excess cost over Budget was not approved by MEDL. On that hypothesis I would not have been persuaded that the circumstances amounted to implied waiver. In *Armia Ltd* v *Daejan Developments Ltd*, Lord Fraser of Tullybelton quoted with approval (at page 69) the observation of Lord Hailsham LC in *Banning* v *Wright* [1972] 1 WLR 972 at 979 that: "… the primary meaning of the word 'waiver' in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted". Lord Fraser continued:

> "In the present case the reason why the plea of waiver fails is not that the respondents suffered no prejudice (although in my opinion that is true) but that the appellants never abandoned their right to refuse the title offered, and the respondents never conducted their affairs on the basis that they had. The respondents' position all along was that the appellants did not have the rights which they claimed."

The situation in the present case appears to me to be analogous: since at least February 2015, Mr Suttie and Mr Ferrari had disputed Mr Jones's assertion that all Cost Overruns were to

be laid at the door of CEL. There is nothing in the evidence to suggest that they acted at any time during the 17 months between June 2015 and November 2016 on the basis that MEDL had had a right under clause 6.2.7 which they had subsequently abandoned.

CEL's claim for damages

[49] Mr Suttie's calculation of CEL's claim is based upon the difference between (a) total income, including future sales estimated as at the date of termination and (b) total Development Costs. It takes as its starting point a figure of £3,071,870 for "closing bank balance" contained in the cash flow schedule and sales projections produced in January 2017, being the closest available to the date of termination. To this figure Mr Suttie added (i) £96,500 in respect of loss claimed to have been sustained to the project as a consequence of Mr and Mrs Jones and their family having initially concluded missives to purchase three flats but later having decided not to proceed with the purchases, (ii) £100,000 in respect of a payment believed by Mr Suttie (though not by Mrs Jones) to be due by Bancon as a consequence of its time overrun, and (iii) £50,000 in respect of the cost of employing Mr Broadwood, on the ground that this was not a Development Cost, producing a total of £3,318,370. From this amount, Mr Suttie deducted (i) £586,608 in respect of outstanding interest on Mr and Mrs Jones's shareholders' loan, (ii) MEDL's Priority Sum A amounting to £1,500,000, and (iii) MEDL's Priority Sum B amounting to £250,000. That leaves (i) CEL's Profit Share A amounting to £250,000 and the balance of the profit amounting to £731,562 payable as CEL's Profit Share B. The total sum due to CEL in respect of damages for MEDL's breach of contract, according to Mr Suttie's calculation, is therefore £981,562.

[50] MEDL's calculation is very different. The most important difference is that it uses actual sales figures instead of figures projected as at November 2016. Because the oil industry was undergoing a downturn during 2017 and 2018, the sales figures actually achieved were lower than the November 2016 projections. Mr Aldous produced a calculation based on Mrs Jones's computation of sales achieved and costs incurred both before and after November 2016, and of a small amount of estimated costs to completion as at January 2020. He noted that the definition of "Net Sales Proceeds" in the 2013 agreement appeared to envisage that only sales proceeds received prior to the termination date would be taken into the calculation, yet the whole Development Costs incurred or to be incurred would be taken into account. In the circumstances of the present case, that would produce no net profit at all. Mr Aldous considered that this did not represent a like-for-like comparison, and so he also produced a calculation using total gross sales and total project costs. In so doing, he largely accepted the figures supplied to him by Mrs Jones, although he removed from her computation a sum of £200,000 included in the Budget as additional development contingency costs. Mr Aldous's calculation used total gross sales proceeds of £15,069,955, and total project costs of £14,349,618 (including corporation tax in Development Costs) or £13,928,236 (excluding corporation tax). These figures give a net development profit of £720,337 if corporation tax is included, and £1,141,719 if it is not. On either calculation the profit does not exceed MEDL's Priority Sum A, and there is no profit share for CEL.

[51] The question whether damages should be valued at the date of the breach of contract, without reference to actual outcome, is one of law. On behalf of CEL, it was submitted that the normal rule, where a contract is terminated unlawfully, is for parties' rights to be valued as at the time of termination. In *Golden Strait Corpn* v *Nippon Yusen*

Kubishika Kaisha (The Golden Victory) [2007] 2 AC 353, Lord Bingham (dissenting) stated, under reference to a number of authorities, at paragraph 11 that it was "a general, but not an invariable, rule of English law that damages for breach of contract are assessed as at the date of breach". Reference was also made to a recent summary of the law by Blair J in *The Hut Group Ltd* v *Nobahar-Cookson* [2014] EWHC 3842 (QB) at paragraphs 184-5, in the course of which Blair J stated that:

> "(t)he normal rule is to make that comparison [in that case a comparison between the warranted value of shares and their actual value] as at the date of the breach, which is the date of the contract, taking account only of events up to that date".

No circumstances had been identified in the present case to justify departure from the breach date rule. The damages sought by CEL related to the profits which were projected to be made had the project continued under their management after November 2016. MEDL's approach sought to substitute a figure derived from the proceeds of sale achieved under their supervision between 2016 and 2020. Such an approach did not compare like with like, nor place CEL in the position in which it would have found itself had there been no breach. Following termination, CEL was no longer in a position to work to maximise the profits on the development: the ability to do this, together with the risk (or reward) of decreased or increased profits was with MEDL.

[52] In response, senior counsel for MEDL submitted that assessment of damages should be approached in the traditional Scottish way, applying "but for" causation rather than an English rule-based approach. The assessment should be grounded in the real world. There was no evidence that sale prices would have been higher if the agreement had not been terminated.

[53] I am not persuaded that the authorities relied upon by CEL require me to value its claim under reference to sales values estimated as at the date of the breach. In *The Golden*

Victory, Lord Bingham went on, immediately after the statement quoted above, to observe (at paragraph 12):

> "While not, I think, challenging the general correctness of the principles last stated, the charterers dispute their applicability to the present case. Their first ground for doing so is in reliance on what, from the name of the case in which this principle has been most clearly articulated, has sometimes been called 'the *Bwllfa* principle': *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd* v *Pontypridd Waterworks Co* [1903] AC 426. It is that where the court making an assessment of damages has knowledge of what actually happened it need not speculate about what might have happened but should base itself on the known facts. In non-judicial discourse the point has been made that you need not gaze into the crystal ball when you can read the book. I have, for my part, no doubt that this is in many contexts a sound approach in law as in life, and it is true that the principle has been judicially invoked in a number of cases …"

Lord Bingham went on to cite a number of cases in which the *Bwllfa* principle had been applied. He observed that "none of them involved repudiation of a commercial contract where there was an available market", but that is not the situation with which the present case is concerned.

[54] Delivering one of the majority judgments, Lord Brown of Eaton-under-Heywood observed (paragraph 78):

> "Must the judge really shut his eyes to the known facts and speculate how matters might have looked at some earlier date? Again, not without compelling reason and none appears to me. Lord Bingham, at para 12, and Lord Carswell, at para 65, have already explained the '*Bwllfa* principle'… There is no need to repeat it. Suffice it to say that I see no good reason to depart from it here."

Lord Brown went on at paragraph 79 to explain the true ambit of the breach date rule:

> "Essentially it applies whenever there is an available market for whatever has been lost and its explanation is that the injured party should ordinarily go out into that market to make a substitute contract to mitigate (and generally thereby crystallise) his loss. Market prices move, both up and down. If the injured party delays unjustifiably in re-entering the market, he does so at his own risk: future speculation is to his account – 'the buyer's decision is (in the vernacular) down to him': per Bingham LJ in *Kaines (UK) Ltd* v *Ősterreichische Warrenhandelsgesellschaft* [1993] 2 Lloyd's Rep 1, 11."

No question arises in the present case of there being an available market for what CEL lost, ie their entitlement to share in the profits of the Mile End project. In my opinion there is no reason to apply the rule to circumstances in which the breach consists of depriving the claimant of an opportunity to share profits yet to be crystallised.

[55] I prefer to find guidance in the familiar observations of Lord President Emslie in *Haberstich* v *McCormick & Nicholson* 1975 SC 1. Having noted at page 6-7 that:

> "At the hearing of the appeal before us the appellants and the respondents were at one in informing us that the law as to damages for breach of contract was clear. When damages are claimed for breach of contract it is the aim of the law to ensure that a person whose contract has been broken shall be placed as near as possible in the same position as if it had not (Gloag on Contract, 2nd ed, 690; *Chaplin* v *Hicks* [1911] 2 KB 786). In particular it was accepted that, as was stated in the case of *Hadley* v *Baxendale* (1854) 9 Exch 341 at 354: 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it'",

Lord President Emslie concluded at page 10:

> "In my opinion each case must be considered on its own facts and circumstances, and in each the question of damages which remains a question of fact, must be resolved upon the proper application of the well-known general principles which both parties to this appeal accepted as the starting points of their separate arguments."

[56] In the circumstances of the present case, it seems to me that the most appropriate method of assessment of damages is to apply the *Bwllfa* principle and have regard to the known outcome of the property sales. There appeared to be consensus among the witnesses that the reason why the flats did not realise as much as had been estimated was because of what was described by Ms Baxter as "the property crash" in Aberdeen in 2018 caused by an oil industry downturn. There was no evidence to suggest that the sale prices would have been affected in any way if CEL had remained involved throughout the process of

realisation of the final properties to sell. As a matter of fact they did continue to provide services for some time after the date of termination, mainly in relation to snagging. Marketing and sale of the flats was the responsibility of Peterkins. In my opinion the aim of the law to place CEL in as near as possible to the same position as if the agreement had not been broken is best achieved by using actual sale prices rather than relying on the parties' forecast at the time of termination.

[57] For these reasons, I hold that the method of quantification of loss adopted by Mr Aldous is the correct one. It is necessary next to look at certain figures in that quantification which were challenged by CEL. I have already noted that Mr Aldous used figures supplied to him by Mrs Jones. He was also, however, provided with invoices in respect of most of the costs which satisfied him that they should properly be included in the calculation. With one exception he was not challenged on the accuracy of the figures, and I accept his calculation. The exception was the figure of £32,616 in respect of security costs. Mr Suttie stated that this was an error and that the correct figure was £20,760. Mrs Jones agreed. Project costs are accordingly overstated in Mr Aldous's calculation by the difference of £11,856.

[58] CEL also challenged the amount (£847,940) included by way of interest on Mr and Mrs Jones's shareholder loans. Again this figure was provided by Mrs Jones. In terms of paragraph 6 of part 4 of the schedule to the 2013 agreement, "Development Costs" included

> "a facility fee representing the sum equivalent to the deemed cost of money of the Initial Funding for the period that same is utilised calculated at the same percentage as the interest payable in respect of the loan obtained by the Company for the funding of the Development per annum from the date of receipt of the Initial Funding by the Company until the date of repayment of same".

Mrs Jones calculated the interest on the shareholder loans by applying the rate at which RBS lent to MEDL, namely RBS base rate plus 3.5% per annum. It was not disputed that

allowance had to be made for interest on the shareholder loans; however, it was contended that there was no basis in the agreement for applying the compounding that Mrs Jones had applied in her calculation. Mr Suttie's calculation, without compounding, produced (as already mentioned) a figure of £586,608 and therefore a difference of £261,332. The point is not ultimately of critical importance, but in my opinion the agreement, properly construed, did provide for compounding in that it included the words "per annum" as well as specifying the percentage by reference to the bank funding. I therefore find that the figure of £847,940 was properly included.

[59] MEDL's inclusion of corporation tax in the calculation of net sales proceeds is founded upon the inclusion within Development Costs, by paragraph 10 of part 4 of the schedule to the 2013 agreement, of "any insurances, rates, outgoings and other taxes applicable to the Site and/or Development during the Term". "Site" is defined in the agreement as "the subjects known as Mile End School, Midstocket Road, Aberdeen registered in the Land Register of Scotland under Title Number ABNl14950". "Development" means "the acquisition and development of the Site to comprise flatted residential units and the sale of such flatted residential units". On behalf of CEL it was submitted that corporation tax ought not to be included as it falls to be regarded as a liability of MEDL rather than a cost applicable to the Site or the Development. I agree. In my view paragraph 10 is concerned with incidental costs incurred during the course of the development, including local taxes applicable to the site. MEDL's liability to corporation tax, if any, will have emerged after the realisation of profits and not as an outgoing during the development period. It is not analogous to the other items in the paragraph and is not properly to be included in the calculation.

[60] The result of this analysis is that only £11,856 falls to be added to Mr Aldous's calculation of net development profit under exclusion of corporation tax, producing a net profit figure of £1,153,575. Unfortunately for CEL, this means that as a result of the property downturn that occurred before most of the flats had been sold, the profit from the development project is absorbed entirely by MEDL's entitlement to Priority Sum A, and there would have remained no profit share for CEL if the agreement had not been terminated. Even if the difference calculated by Mr Suttie as caused by compounding of interest on the shareholder's loans were added back, the total would still not reach £1,500,000. I hold therefore that no damages are payable in respect of MEDL's wrongful termination of the agreement.

[61] Finally in this chapter it is necessary to consider the effect, if any, of clause 3.6, set out at paragraph 11 above. The matter is not entirely academic because, although I have held that CEL would not have received any profit share, clause 3.6 envisages certain circumstances in which a payment would have to be made by CEL to MEDL. No claim for payment has been made by MEDL. I have found clause 3.6 somewhat difficult to understand and have concluded that this is because it contains a drafting error. The purpose of the sub-clause appears to have been to ensure that the amount of any Cost Overrun would deplete each of CEL's profit shares in turn before having any effect on MEDL's entitlements, regardless of the order of division of profits that would otherwise apply in terms of clause 3.3. The difficulty arises with the words in parentheses, ie

> "(the amount of the Development Costs to the extent that it includes Cost Overrun being increased accordingly for this purpose in calculating Project Manager's Profit Share to avoid any double counting of same)".

It seems to me that if the aim of these words was to prevent double counting of the Cost Overrun, they would in fact have the opposite effect because the overrun would be included

three times: once in the Development Costs as calculated, again as a Cost Overrun, and again as an increase in the amount of the Development Costs by the Cost Overrun. In order for the aim of avoiding double counting to be achieved, the word "increased" requires to be amended to "decreased". Read thus, the agreement provides for the Cost Overrun to enter the calculation once only, while achieving the goal of allocating the risk of Cost Overrun entirely to CEL. Such a reading accords with commercial common sense. I noted above (paragraph 44) that there was a Cost Overrun of at least £979,964. There was, however, no evidence that there was a total Cost Overrun of more than £1,250,000, and therefore no evidence to support any claim for payment by MEDL. I therefore conclude that, clause 3.6, correctly construed, does not affect the outcome of the case.

CEL's alternative claim for reasonable remuneration

[62] CEL's alternative claim, for reasonable remuneration for its services, is founded upon clause 3.12, set out at paragraph 14 above. A claim under clause 3.12 may be made "in the event of termination of this Agreement by [CEL] in terms of clause 6.2.1 or by [MEDL] in terms of clause 6.2.7". MEDL terminated the agreement in reliance upon clause 6.2.7. Although I have held that that termination was unlawful, it was not contended that a finding to that effect would preclude a claim by CEL for reasonable remuneration. It would indeed be somewhat odd, and contrary to commercial common sense, to interpret the agreement as providing for a claim to be made where the termination was lawful, but not where it was unlawful. In my opinion the clause is sufficiently wide to apply to a termination of the agreement by MEDL under clause 6.2.1 whether that termination was lawful or not.

[63] Read short, clause 6.2.1 applies where (as I have held) no profit share is found to be due to CEL following the application of any part of clause 3. It entitles CEL, on completion of the development, and subject to clause 3.9 (which qualification I address below), to "such [sic] reasonable remuneration for its services up to the Termination Date, such remuneration to be based on the open market rate for a project manager carrying out the management of a development similar to the Development". The entitlement is subject to a cap of £250,000. Neither party has sought to have the matter determined by adjudication.

[64] Expert evidence in relation to reasonable remuneration was given on behalf of CEL by Mr Garden and on behalf of MEDL by Mr Strutt. The two experts had held a discussion by video conference and produced a helpful joint note setting out matters upon which they agreed, and summarising their differences of opinion. It is worth highlighting one particular matter of agreement, namely that the normal approach to valuing normal project management services in circumstances such as those found here is to apply a fee percentage to the project value.

Mr Garden's evidence

[65] In his written report, Mr Garden confirmed that the services that CEL had undertaken to provide did not follow the typical pattern of services prepared by a regulating body such as the Royal Institution of Chartered Surveyors. Mr Garden noted the wide range of activities performed by CEL between July 2011 and November 2016, much of the work having been done before either of the 2012 and 2013 agreements had been entered into. He considered that a time estimate in the region of 6,000 hours spent on the project during that period was a reasonable one in view of the scope and duration of CEL's involvement.

[66] Mr Garden based his opinion as to a reasonable rate of remuneration on fee rates applied by his firm across a variety of sectors in recent years. He found an average project management fee rate of 2%, but this rate applied to projects of a value of around £20 million. He considered that 3.25% was a more realistic rate to charge for a project of the value of the Mile End development. To that percentage he added a further 1.95% by way of reasonable remuneration for the services provided by CEL in addition to project management, in terms of the 2013 agreement. The figure of 1.95% was made up as follows:

- 0.5% for liaising with banks to secure funding. This figure was obtained from a financial consultant.
- 0.15% for selection of fittings and fixtures. This figure was obtained from an interior designer.
- 0.75% for internal space planning. This figure was based upon the difference between Canale Architects' fee for the project and the typical fee rate for a full architectural design service.
- 1.25% (applied only to site purchase cost) for initial site finding and development consultancy work. This was based upon information from another Rydens partner regarding finding and introduction work, uplifted by 0.25% because CEL had done more than mere introduction.

Applying these percentages to the project costs (or, in the case of the finding and introduction fee, to site purchase cost), Mr Garden's calculation produced a fee of £383,422.58. Although useful as a cross-check, the number of hours said to have been spent on the project did not form part of his calculation. Mr Garden was not asked to, and did not, undertake any consideration of the standard or quality of the project management

services supplied by CEL. He did not disagree with the general observations of Mr Strutt (below) in relation to the standard of service of a competent project manager.

[67] In cross-examination, Mr Garden accepted that the total project costs might have included costs incurred after November 2016, but he understood that the work carried out thereafter was not construction-related. He was unable, due to client confidentiality, to provide details of any of the projects used as comparators, and he accepted that as they were larger projects they were not exactly comparable. He accepted that the figure of 3.25% was probably one that he had had in mind, that it was not based upon personal experience of a comparable project, and that there was no comparator evidence for it. As regards the additional services, he saw nothing wrong with applying the percentages to the total cost of the project even though the services identified related only to a specific part of it. The percentages used for securing finance, fixtures and fittings, and finding and introduction were based entirely on information obtained from the individuals whom he had consulted. He accepted that there was no comparator evidence for the percentage of 0.75% used for internal space planning, and that Canale Architects had not in fact charged on a percentage basis.

Mr Strutt's evidence

[68] Mr Strutt was asked to provide his opinion on:

(i) the services expected of a project manager appointed under the 2013 agreement;

(ii) whether the services carried out by CEL up to the date of termination aligned with the level of service expected under the agreement; and

(iii) the reasonable remuneration that a project manager might properly and reasonably be expected to be paid for those services, considering open market rate and the level of service provided.

It will be apparent that this was a different remit from that of Mr Garden, because it took account of the quality of the project management service actually provided by CEL.

[69] In relation to standard of service, Mr Strutt made the following general observations:

- For a project manager, as opposed to someone who is generally involved in project development, delivering a project requires a systematic approach. Being an experienced project developer is not the same as being an experienced project manager.
- The general requirement for a competent project manager is one who identifies objectives and plans to deliver these to the budget set, by the time required and at the quality defined.
- The plan for this has to be developed by the project team under the direction of the project manager, approved by the client, and effectively communicated to the project team. The project is then tracked against these objectives and regularly reported on. Corrective action should then be taken when the reports indicate that the project is deviating from the plan.
- To deliver a project cost and time effectively without writing the plans down is, essentially, impossible for all but the simplest of projects. The development in question here did not fall into the category of the simplest of projects.
- A set of drawings and a specification is not a design brief. A quantity surveyor's construction cost report is not a project budget cost plan. A

> contractor's works programme is not a project master programme for the development. Not preparing any assessment of risk and having no systematic process for identifying and reducing risk, is not the conduct of a reasonably competent project manager.

[70] In Mr Strutt's opinion, CEL had provided a very low standard of delivery of project management services. His rating for the most critical activities – cost plan and budget; programme and progress tracking; monitoring the team – was either "low" or "none". There had been an apparent lack of identification of, or attempt to control, project risks generally. Carrying out tasks *ad hoc* with no defined plan or delivery strategy was not sufficient to constitute project management, and was not efficient or risk free. Project management was systematic: it was the identification of objectives, then planning to deliver them, tracking the delivery, adapting to circumstances to control cost, quality and delivery. It was the identification of risk, taking steps to avoid, transfer, insure, or allow for the consequences of risk. CEL had not provided a systematic service. There was no overall project cost reporting, no project-wide risk register and minimal reporting or identification of risks, no project programme, no adequate cost control procedures, no project quality plan, and no matrix of reports and meeting records.

[71] As regards the rate of remuneration for project management services, there was little published guidance. Mr Strutt's own experience suggested a fee of 2% to 3% of development cost for a small development. In his view, the Mile End development would attract more than the basic level of time to deliver, and therefore the fee percentage was likely to be around 2.5%. Mr Strutt calculated the development cost to be £8,473,265.12. A fee of 2.5% would amount to £211,831.63. Having regard, however, to his assessment that the quality of the service delivered by CEL was on average no more than 10% of what was

required, he considered that reasonable remuneration would be £21,183.16. Alternatively, if the level of delivery were to be calculated by reference to the reporting in contemporaneous documents of tasks undertaken, the average level of delivery would be 34%, producing a fee (34% of £211,831.63) of £72,022.75. In Mr Strutt's view, that would overvalue the project management services supplied.

[72] In cross-examination, Mr Strutt confirmed that he had sought to identify services usually regarded as project management. The Mile End project had been sufficiently large and complex to require all of the critical project management activities that he had identified. He acknowledged that CEL had had a more substantial role than that typically performed by a project manager, but only to a limited extent. His selection of a percentage fee of 2.5% took account of those additional functions. In order to arrive at his "middle" figure, ie the one using a 34% level of delivery, he had gone through the minutes and other documents looking for work to value. This basis of valuation was done without reference to the effectiveness of the work done. He was unable to identify any particular problem that was directly caused by a failure by CEL to perform a particular project management function, but the probability was that if there had been no system in place there would have been adverse consequences.

Decision

[73] Dealing firstly with the evidence of Mr Strutt, I find no reason to reject his view that the quality of CEL's project management services failed to meet the standard ordinarily to be expected of a project manager. His opinion is fully explained and vouched by reference to the contemporaneous documentation. Senior counsel for CEL submitted that the opinion was unfounded in fact because Mr Strutt had only seen a small proportion of the project

documentation, as supplied to him by MEDL's agents. Although Mr Strutt acknowledged (as is obvious) that sight of more documents could impact upon his opinion, I accept his view that he saw enough to enable him to conclude that there was an absence of the systematic approach to project management that he (and indeed Mr Garden) regarded as appropriate for a project such as the Mile End development. It was not submitted that one might have found, among documents not made available to Mr Strutt, the project cost reports, risk register, project quality plan or other analytical documents that he considered critical to such a project. Although I readily accept that this was a complex project involving an old building whose renovation and refurbishment threw up many unforeseen difficulties, I must accept Mr Strutt's view that the resolution of those difficulties was not assisted by the lack of systematic project management.

[74] Having said all of that, I am of the view that none of it is relevant to the assessment of CEL's entitlement under clause 3.12. There is, quite simply, nothing in that sub-clause that requires or permits the standard or quality of the project management services to be taken into account. It is common ground, confirmed by the joint view of the expert witnesses, that project management services are normally remunerated by applying a fee percentage to the project value. It was not suggested that the normal method of remuneration required an assessment of the standard of service delivered. In my opinion, it accords with commercial common sense to construe the word "reasonable" in clause 3.12 as a reference to the rate to be applied, ie to the reference to "the open market rate for a project manager carrying out the management of a development similar to the Development". If the parties had intended that, contrary to the usual method of calculation of remuneration, the standard or quality of the project management service provision was to be taken into account in determining CEL's fee, then in my opinion the agreement would have had to

make that clear and to provide a methodology by which it was to be done. As CEL submitted, assessment of quality would be an enormously laborious exercise with almost unlimited scope for disagreement. It would introduce unacceptable uncertainty as well as a need for the application of subjective judgment in relation to every aspect of the service provision. The task faced by an adjudicator appointed to fix the remuneration in absence of agreement would, in the absence of an agreed methodology, be an extremely difficult and controversial one. In order to avoid all of this – and the concomitant expense – the agreement adopted the objective measure of an open market rate.

[75] It was further submitted on behalf of CEL that the approach adopted by MEDL was wrong in law. A distinction fell to be drawn between a claim for remuneration for services on the one hand, and any counterclaim for defective performance which might be set off against such remuneration on the other: *Ballantyne* v *East of Scotland Farmers* 1970 SLT (Notes) 50, and the authorities there cited. I agree that that approach would be appropriate here, and that if it were to be adopted, MEDL would require to identify the loss said to have been caused by the defective performance. Mr Strutt's view was that that would be an impossible exercise because the defective performance of itself removed the evidence of the link to any specific loss. While I see the force of that observation, it appears to me to add further weight to the conclusion that parties could not have intended that the fixing of remuneration would necessitate inquiry into standard of performance.

[76] On the basis of Mr Strutt's calculation, it follows that the remuneration due to CEL in terms of clause 3.12, properly construed, for work carried out prior to the termination date would be £211,831.63, ie 2.5% of project cost, without any percentage discount for quality. For the sake of completeness, I should add that if I had accepted that the agreement provided for the remuneration percentage to be discounted for quality of delivery of service,

I would have seen no reason to reject Mr Strutt's opinion that CEL's project management services were properly valued at 10% of the above figure.

[77] Turning to Mr Garden's opinion, senior counsel for MEDL submitted, under reference to the observations of Lord Reed and Lord Hodge in *Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59 at paragraphs 52 and 53, that I should treat Mr Garden's evidence as inadmissible on the ground that he failed to act as an independent expert. His evidence as to remuneration rates was no more than assertion. He had relied upon unvouched statements by the directors of CEL. I accept that *Kennedy* v *Cordia* makes clear that independence and impartiality are to be regarded as issues of admissibility and not merely weight, but I did not consider that Mr Garden's evidence demonstrated a lack of either of those requirements. It was also stressed in *Kennedy* v *Cordia* (at paragraph 48) that unsubstantiated *ipse dixit* evidence is worthless: I do not understand the court to go so far as to say that it is inadmissible, although in Scottish procedure where rulings on admissibility are not usually given prior to the proof, the point may often be academic.

[78] In my judgment, Mr Garden's view as to the appropriate rate of remuneration for CEL's services falls to be rejected. In the first place, I do not consider that there is any contractual basis for his addition of 1.95% in respect of services provided by CEL in addition to project management. Again, that is not what clause 3.12 provides. As I have already observed, the 2013 agreement was a bespoke contract with a number of unusual features. It was entitled a project management agreement, and CEL were designated as "the Project Manager", even though (a) it was common ground, and known to all parties at the time of contracting, that neither Mr Suttie nor Mr Ferrari professed expertise in project management as opposed to project development; and (b) the list of Management Services in part 1 of the schedule to the agreement extended beyond what are generally regarded as the services of a

project manager. Clause 3.12 must be applied according to its terms, and it is specific in conferring an entitlement to remuneration at the open market rate for a project manager carrying out the management of a development similar to Mile End. It does not, for example, provide for remuneration at a rate appropriate for carrying out "the Management Services", and I see no basis for reading into it that CEL are entitled to an elevated percentage because their duties encompassed matters other than project management.

[79] I also reject Mr Garden's evidence that 3.25% was an appropriate percentage to apply for project management. This evidence did seem to me to fall within the *ipse dixit* category. Mr Garden's purported comparators were not true comparators, being much larger projects, and in any event did not support his 3.25% rate. In the end my impression was that that figure was no more than one that felt right to him, and he produced no reasoning or evidence to support it. It was further unclear from Mr Garden's evidence what the source was of the figures for construction costs that he had used in his calculation.

[80] Finally in this chapter it is necessary to consider the effect, if any, of the phrase "subject always to the application of clause 3.9" which appears in clause 3.12. Clause 3.9 is set out at paragraph 12 above. It was submitted on behalf of MEDL that, applying both commercial common sense and an approach which gave content to the phrase, the proper construction of those words was that any claim for reasonable remuneration under clause 3.12 would only be paid once the Development Costs have been provided for *and* MEDL had been paid its Priority Sum A in full. I agree that the court should give content to the phrase if it can. It is important to note, however, that clause 3.9 bears to apply specifically to CEL's Project Manager's Profit Shares, as defined in the agreement. Reasonable remuneration under clause 3.12 is not within the definition of the Project Manager's Profit Share, and for that reason I reject MEDL's interpretation of the phrase. It

seems to me to be much more likely that parties intended the phrase to refer to the second part of clause 3.9 which provided for the deferral of any payment to CEL until all Development Costs had been ascertained and paid or provided for. That, in my view, would accord with commercial common sense and gives content to the phrase. As it was not suggested that the total Development Costs remained unascertained or unprovided for at the date of the proof, it follows that, in the circumstances, the phrase has no practical consequence.

[81] For these reasons, I hold that CEL is entitled in terms of clause 3.12 to payment of £211,831.63 by way of remuneration for its services up to the termination date.

Work done after termination

[82] I have already noted that, following upon the service of notice of termination in November 2016, CEL continued to carry out work in relation to the project. In his witness statement, Mr Suttie described this as "continuing to work as normal" under the instruction of MEDL, including liaising with purchasers, dealing with snagging, and negotiating the sale of an apartment. He calculated that during this period he and Mr Ferrari had spent a total of 734 hours on the project. In his oral evidence he was vague about how CEL had been instructed to continue to work, insisting that everything just went on as before. For his part, Mr Jones asserted that he did not see CEL doing very much. He had told Mr Suttie that no further work by CEL was needed. Mr Canale was dealing with snagging.

[83] Mr Garden proceeded in his report on the basis that CEL was entitled to be remunerated on the basis of an hourly rate for 734 hours work. He considered that a rate of £100 per hour, being the commercial rate for a "senior surveyor" in the property

consultancy arena in the Aberdeen area, was conservative. That produced a figure for post-termination remuneration of £73,400.

[84] Mr Strutt continued his approach of assessing CEL's entitlement to remuneration by reference to the level of its delivery of effective project management services. He found very little, if anything, being reported upon during the post-termination period. He considered that a period of 4-6 weeks rather than 20 (full time equivalent) weeks would have been enough for project management. He then discounted, in the same way as before, for what he considered to have been a low level of delivery of service. Finally, he considered that an hourly rate of £100 was too high, applying instead (after a correction intimated in the note of the joint meeting) a rate of £85 per hour. After all of these adjustments, he calculated that CEL's project management services after the termination date were properly valued at a maximum of £1,269.93.

Decision

[85] CEL's claim for payment for work carried out post-termination is based on recompense: in other words it is made under the law of unjustified enrichment and not the law of contract. The measure of a claim for recompense is the extent to which the other party has been enriched (*quantum lucratus*). I have had considerable difficulty identifying evidence of the extent, if any, to which MEDL was enriched by work carried out post-termination by Messrs Suttie and Ferrari. I accept that, as a matter of fact, some work continued to be carried out, and I am also satisfied that Mr Jones was aware that this was happening. It seems likely that Messrs Suttie and Ferrari were proceeding on an assumption that, regardless of the notice of termination having been served, they would still, at the end of the day, receive a profit share. On any view they were not providing services

gratuitously. I consider that CEL's claim for recompense can relevantly be made, but assessing the extent, if any, of MEDL's enrichment is another matter.

[86] Mr Garden's quantification falls to be rejected. Apart from the fact that it is based upon the unvouched figure of 734 hours' work, it is in essence a *quantum meruit* claim that would be appropriate for implied contract, but not for recompense. It does not address the issue of enrichment at all.

[87] As regards Mr Strutt's calculation, I make two observations. Firstly, in contrast to the assessment of pre-termination remuneration under clause 3.12 of the agreement, there is no reason why, in relation to the post-termination period, the level and quality of the service provided should not be taken into account as he has done. The concept of enrichment requires consideration of whether the services provided were indeed such as to leave MEDL better off. Secondly, however, there is no justification in principle for restricting the assessment of enrichment to the provision of property management services alone. The description by Mr Suttie of work carried out post-termination suggests that project management was by then of lesser importance: it is sales and snagging that are said to have taken up CEL's time. The problem for the court is that I have been provided with no evidence of the benefit to MEDL from CEL's continued involvement in these matters. It is not admitted by Mr Jones that MEDL derived any benefit at all. The point has been made that Mr Canale was dealing with snagging and Peterkins were responsible for marketing and sales. In the absence of any evidence of enrichment of MEDL arising out of the carrying out by CEL, post-termination, of activities other than project management, I am unable to find CEL entitled to any payment at all in respect of such activities.

[88] That leaves Mr Strutt's assessment of the value to MEDL of CEL's post-termination project management activities. I am satisfied that the methodology is sound and, in the

absence of any contrary evidence, I accept his figure of £1,269.93 as the measure by which MEDL was enriched.

Disposal

[89] I shall sustain CEL's third plea in law and grant decree for payment of £211,831.63. I shall also sustain CEL's fifth plea-in-law and grant decree for payment of £1,269.93. *Quoad ultra* I shall repel both parties' pleas. I shall put the case out by order for submissions on interest and expenses.