**OUTER HOUSE, COURT OF SESSION**

**[2022] CSOH 19**

**CA48/21**

OPINION OF LORD CLARK

In the cause

THE SCOTTISH MINISTERS

Pursuer

against

(FIRST) SCOT ROADS PARTNERSHIP PROJECT LTD; (SECOND) FERROVIAL CONSTRUCTION (UK) LIMITED; AND (THIRD) LAGAN CONSTRUCTION GROUP LIMITED (IN ADMINISTRATION)

Defenders

**Pursuer: MacNeill QC, van der Westhuizen QC; Anderson Strathern LLP**
**Defender: McLean QC, Tyre; Burness Paull LLP**

17 February 2022

**Introduction**

[1] This case concerns what is known as the M8, M73, M74 motorway improvement project (the MIP). The main issues raised in the pleadings concern the construction of a specific contractual term and, in the alternative, whether that term should be rectified by adding certain words. A proof before answer is required to resolve the case. However, there are two discrete matters suitable for resolution at debate: firstly, whether averments by the first and second defenders about actings of the parties after the contract was entered into are relevant for the purposes of construing the contract; and, secondly, whether the first

and second defenders have made relevant averments about third parties being affected by the proposed rectification. The case called before me for a debate on those matters. The third defender has not entered appearance. The first and second defenders were represented by the same counsel and joint submissions on their behalf were made.

**Background**

[2] On 13 February 2014, the pursuers and the first defender entered into an agreement in relation to the MIP. The agreement was described as a design, build, finance and operate agreement (the DBFO agreement). Under the DBFO agreement, the first defender had to design, build and finance the works required for the MIP, and thereafter to operate and maintain that part of the road network for 30 years until 15 March 2047. In consideration for performing its obligations, the first defender receives payments from public funds. The first defender sub-contracted the construction works to a joint venture, comprised of the second and third defenders. On 13 February 2014, the first defender and the joint venture entered into a contract known as the New Works Agreement, in terms of which the joint venture, described as the New Works Contractor, was to provide certain works and services to the first defender in relation to the MIP.

[3] As the MIP proceeded, the progress of works across the site was noted to be slower than required to satisfy the construction programme. Various issues arose and disputes began to block progress of the MIP. Following discussions, the parties entered into an agreement for general settlement (the AGS). The pursuers seek, in their first conclusion, declarator that the effect of Clause SIXTH of the AGS is that all pecuniary claims by the first defender against the pursuers, with some limited exceptions, have been waived. This is based upon what the pursuers say is the proper construction of the clause. If that argument

fails, in the alternative the pursuers seek rectification of Clause SIXTH to add certain words. The first defender has lodged a counterclaim seeking declarator that only claims arising out of circumstances pre-dating the execution of the AGS were waived by Clause SIXTH, and that claims arising from circumstances post-dating the AGS are unaffected thereby. In short, the dispute to be resolved after a proof before answer is about whether all pecuniary claims, other than the specified exceptions, have been waived (the pursuers' position) or whether only pre-AGS claims have been waived (the defenders' position).

[4] In order to provide all of the relevant background, Clause SIXTH, the conclusions in the summons and the disputed averments are quoted below. They each make some reference to certain contractual terminology. Where any such terminology requires to be explained in order to follow what is said, that is done in very brief terms. However, for the purpose of understanding parties' submissions and my decision and reasons on the issues at this debate, it may suffice to note the following headline points. The first challenge by the pursuers is to the relevancy of averments by the defenders about the parties' actings after the date of the AGS. In simple terms, the averments refer, among other things, to the pursuers having at least for a period of time after the AGS adhered to the terms of the DBFO. This is taken by the defenders to indicate that the pursuers knew that not doing so would result in being liable to the first defender in any claim it made for a breach. That conduct is said to support the defenders' position that waiver of claims in Clause SIXTH was in respect only of claims arising prior to the AGS, and not continuing into the future. The averments are also said to demonstrate the unlikelihood of the pursuers' interpretation being correct, when one has regard to what the results of that interpretation might be as to the actual commercial outcome for the parties. The pursuers argue that as a matter of law actings after a contract is entered into are not relevant for the purpose of construing its

terms. The defenders argue that there is case law supporting the opposite view and they also contend that the averments are relevant to the issue of rectification. The second challenge made by the pursuers is to relevancy and specification of the defenders' averments about third parties being affected by the proposed rectification. The defenders say that these averments meet the requirements of the relevant statutory provision and in any event are relevant to the rectification issue in general.

**The AGS**

[5] Among other things, the AGS provided for the New Works Contractor to receive substantial additional sums of money and for the waiver of certain claims. Clause SIXTH of the AGS provides:

> "In consideration of this Agreement and sums due thereunder being paid to the Company [ie the first defender] and the New Works Contractor, the New Works Contractor and the Company waive the right to all claims of any nature whatsoever (other than those which may flow from a Scottish Ministers Change or a Qualifying Change in Law) which the New Works Contractor and/or the Company may have at the date of this Agreement or in the future against or in respect of the Scottish Ministers and/or the Company relating to the New Works."

A Scottish Ministers Change or a Qualifying Change in Law are, in broad terms, changes which affect the works and for which the first defender is entitled to payment.

**Orders sought by the pursuers**

[6] The following orders are sought in the first and second conclusions in the summons:

> "1. For declarator that on a proper construction of stipulation or clause (hereinafter clause) SIXTH of the Agreement for General Settlement entered into between the Pursuers, the First Defender and Ferrovial Lagan JV on 15 September 2016 ('the AGS'), the Pursuers having paid to the First Defender the sums due under the AGS, the First Defender has waived its right to any and all pecuniary claims of any nature whatsoever that it may have had as at 15 September 2016 or that may otherwise have arisen thereafter, against or in respect of the Pursuers, relating to the

> New Works under the design, build, finance and operate agreement between the Pursuers and the First Defender dated 13 February 2014 ('the DBFO Agreement'), other than those that flow from a Scottish Ministers Change or a Qualifying Change in Law or that arise as the result of the operation of the DBFO Agreement, Schedule 6 (Payment Mechanism);
>
> 2. In the alternative to Conclusion 1 above, for an order for rectification of Clause SIXTH of the AGS, in terms of section 8 of the Law Reform (Miscellaneous Provisions) Scotland Act 1985, by (i) the insertion of the words 'pecuniary' immediately before the words "claims of any nature" in the first paragraph thereof and (ii) the insertion of the words "or which may arise as the result of the operation of the DBFO Agreement Schedule 6 (Payment Mechanism)" immediately after 'Qualifying Change in Law'."

Schedule 6 of the DBFO agreement deals with certain rights to payment and it covers, among other things, the right of the first defender to monthly payments from the pursuers (including what is described as a Monthly Unitary Charge) during the further thirty year period of the DBFO.

**The pursuers' first challenge**

***Averments sought to be excluded***

[7] The first and second defenders (in answer 30 in each of their answers) make the following averments regarding events that occurred after the date of the AGS, said to be relevant to the construction of Clause SIXTH:

> "The AGS was seen by the parties as a temporary remedy to allow the DBFO Agreement to survive and operate as planned for the future in all respects. In that regard it initially worked well, allowing rapid progress from September 2016 to May 2017 during which period approximately 40% of the New Works were built. Once Permits to Use had been issued at the end of May 2017, however, the Pursuers reverted to a more obstructive approach to management of the MIP leading to an extensive delay to Final Completion, during which period the Pursuers were entitled to withhold 5% of the Monthly Unitary Charge from the First Defenders at no risk to themselves. In relation to the Pursuers' 'more obstructive approach' following May 2017, for example, having been prepared previously to accept Company Notices of Change ('CNCs') for suitable design changes, the Pursuers did not accept a single Company Notice of Change that was related to design following the issue of Permits to Use, other than (e.g.) a very minor change to allow a woodland footpath to be

> diverted to avoid a badger's sett (CNC 66). They also stopped accepting CNCs for proposals for closure of carriageways of a type which had been acceptable to them between September 2016 and May 2017. Reference is made to a letter from the New Works Contractor to the First Defender dated 4 December 2017 setting out some examples of the problems caused by the Pursuers' obstructive approach to such matters after Permits to Use had been issued. A copy of said letter is produced and its terms held as incorporated herein *brevitatis causa*. Such obstructive behaviour was in breach of Clause 76.1 of the DBFO Agreement (entitled 'Scottish Ministers not to Hinder Company') and of the Pursuers' obligations under the initial paragraphs of the AGS to work together with the other parties thereto in a spirit of mutual trust and co-operation to ensure that the terms of the AGS and the DBFO Agreement were honoured and their aims achieved."

The AGS provided for Permit to Use (PTU) dates, that is, for certain phases of the works to be achieved by 31 May 2017. The PTU date for each phase is the date on which the pursuers acknowledge the issue by the first defender of substantial completion certificates and confirm that the phase of the works is to be made available for public use with immediate effect. A Company Notice for Change is, in broad terms, a change in respect of the works, proposed by the first defender.

***Submissions***

*Pursuers*

[8] These averments were irrelevant to the question of the meaning of Clause SIXTH which must be judged as at the date the AGS was entered into, namely 15 September 2016. A contract cannot be construed by reference to the subsequent conduct of the parties: *James Miller & Partners Ltd* v *Whitworth Street Estates (Manchester)* Ltd [1970] AC 583, Lord Reid at 603 D-E, Lord Hodson at 606 E, Viscount Dilhorne, at 611 D-E, and Lord Wilberforce, at 614 H to 615 A; *L. Schuler AG* v *Wickman Machine Tool Sales Ltd* [1974] AC 235, Lord Reid at 252 C-F, Lord Morris of Borth-y-Gest, at 260 G, Lord Wilberforce at 261 C, Lord Simon of Glaisdale at 268 E to 269 D, Lord Kilbrandon at 272 D-G, and Lord Simon at 269 C-D. In

*McBryde*, The Law of Contract in Scotland, (3rd ed., 2007), at paragraphs 8-30 to 8-32, the author barely cast doubt on the rule, although mentioning some potential exceptions. None of these exceptions applied in the present case. The rule has been applied without question by, among others, the Lord President in *SSE Generation Ltd* v *Hochtief Solutions AG*, 2018 SLT 579, at [258]. Moreover, this court, when considering this very contract, had determined that actings subsequent to the AGS are not admissible as an aid to its construction: *Scot Roads Partnership Project Ltd* v *The Scottish Ministers* [2019] CSOH 113, paragraph [38](iii). This position had been urged on the court in that action on behalf of the first defender in the present action (as narrated at paragraph [33]).

[9] In any event, aside from the inadmissibility of evidence that would be required to prove these averments, the defenders' position (that the subsequent conduct of the parties indicates that Clause SIXTH was intended to waive future claims) was obscure. None of the pursuers' conduct was prayed in aid to support any inconsistency between that conduct and the pursuers' interpretation of the clause. The pursuers' actings since September 2016 have all been wholly consistent with their position that the waiver in the clause was of claims then existing and in the future.

*Defenders*

[10] The court should apply commercial common sense when determining the interpretation of Clause SIXTH, and should avoid an unconscionable and inequitable (and therefore unlikely) construction, or an outcome where one party is in a position to break its contract with impunity: cf *Ashtead Plant Hire Co Ltd* v *Granton Central Developments Ltd* 2020 SC 244, paras [10] to [17]; *Van Oord UK Ltd* v *Dragados UK Ltd* 2021 SLT 1317, para [20]). To that end, the court is entitled to consider the likely commercial outcomes of the

interpretations being advanced by the parties. In that context, what actually happened after conclusion of the AGS may be the best evidence of, and the best illustration of, the inequity that may result from the pursuers' construction. It was accepted by the defenders that the general rule is that a contract should not normally be construed by reference to the subsequent conduct of the parties. There are, however, exceptions. It had repeatedly been held, including at appellate level, in Scotland that in a situation where there is ambiguity in a contract the court may look at the actings of the parties post-execution of the contract as an aid to construction: see e.g. *Baird's Trs* v *Baird & Co* (1877) 4 R 1005, Lord Justice-Clerk Moncrieff 1016-7, 1019; *Scott* v *Howard* (1881) 8 R (HL) 59, Lord Watson at 67; *Hunter* v *Barron's Trs* (1886) 13 R 883, Lord Craighill at 892; *Boyle & Co* v *Morton & Sons* (1903) 5F 416, Lord Justice-Clerk Macdonald at 421, Lord Young at 422, Lord Trayner at 422, Lord Moncrieff at 423; *Welwood's Trs* v *Mungall* 1921 SC 911, Lord President Clyde at 926; and *Scottish Residential Estates Development Co Ltd* v *Henderson*, 1991 SLT 490, Lord Dunpark at 492. The practical utility of doing so in appropriate cases was discussed by Professor McBryde in his commentary on the case of *Cameron (Scotland) Ltd* v *Melville Dundas Ltd* 2001 SCLR 691, at 696. The present case fell to be included in that category of exception. There was obvious and accepted ambiguity: the parties to the action all agree that the wording of Clause SIXTH does not mean what it says, but they disagree on what it is meant to mean. In those circumstances how the parties acted subsequent to entering into the agreement may be a useful guide as to what they mutually thought the agreement was intended to achieve, whatever they may now say.

[11] The defenders offer to prove that, in light of the intention of all parties to "reset" the DBFO agreement to allow Permits to Use to be issued, parties entered into the AGS. The defenders also offer to prove that their interpretation of Clause SIXTH of the AGS is correct.

In order to determine that, averments about the parties' conduct following execution of the AGS were relevant. The averments also demonstrated the unlikelihood of the pursuers' interpretation being correct, when regard is had to what the results of their interpretation might be in relation to the actual commercial outcome for the parties, which in turn is relevant when the court comes to consider the application of commercial common sense.

[12] Averments of parties' actions after the conclusion of a contract may have an additional role to play when the court comes to consider whether rectification of that contract should be ordered, in terms of section 8 of the 1985 Act: *Patersons of Greenoakhill Limited* v *Biffa Waste Services Limited* 2013 SLT 729, Lord Hodge at [43]. For that reason also, the averments objected to should be allowed to remain on record.

***First challenge: decision and reasons***

[13] It was argued for the defender that these averments illustrated *inter alia* that in the period from the execution of the AGS in September 2016 to the issue of Permits to Use in May 2017, the pursuers did not act in a manner which suggested that they felt themselves to be able to breach their contractual duties at will without any risk of a pecuniary claim being made against them, and are therefore potentially relevant to the question of whether there was any antecedent agreement between the parties to that effect.

[14] In Scots law, the general rule is that actings after the date of the contract are not relevant for the purposes of construction. That is now well-established: see eg *SSE Generation Ltd* v *Hochtief Solutions AG*, Lord President (Carloway) at [238], and *SI 2016 Ltd and Ors* v *AMA (New Town) Ltd and Ors* 2019 CSOH 99, Lord Doherty at [51]. This follows the position taken in English cases by the House of Lords: *James Miller & Partners v Whitworth Estates (Manchester) Ltd*; *L Schuler AG* v *Wickham Machine Tool Sales Ltd*.

[15] While Professor McBryde has expressed his own views on the point, in his textbook (*supra* at paragraph 8.30) he expressly acknowledges the general rule. He goes on to describe the main exception as being "some cases of ambiguity (whether arising from express terms or the lack of a term)". It is correct that the case law may provide some support for that view (see eg *L Schuler AG* v *Wickham Machine Tool Sales Ltd* at 261 D) but the important point, made by Lord Wilberforce in that passage, is that it is elementary law that an ambiguity in this context is not to be equated with difficulty of construction. For such an ambiguity, there needs to be a word or phrase that, read literally or on its face, can be understood in more than one way; that is, has more than one possible meaning. In contracts, such genuine ambiguities are quite rare. What tends to occur in a contractual dispute about meaning is not precisely what the word or phrase means, but how it is to be understood in the particular context. A good example of such an ambiguity might be *Hunter* v *Barron's Trs* in which the use of "Whitsunday" could have been either a reference to the date formerly used for Whitsunday (26 May) or the date that had come to be used (15 May) with the use of that term varying across the country.

[16] Senior counsel for the defenders relied upon a number of decisions in Scottish cases which pre-dated the very many modern authorities that have come to lay out the approach to contractual construction. It was submitted that in recent cases in which the court had reiterated the principle that evidence of actings after the contract was entered into is not relevant to construction (*Scot Roads Partnership Project Limited* v *The Scottish Ministers* [2019] CSOH 113 and *SSE Generation Ltd* v *Hochtief Solutions AG*) the authorities now founded upon by the defender were not put before the court. In my view, it would have made no difference to the outcomes. Ultimately, however, senior counsel relied upon there being an exception to the general rule when an ambiguity existed. It was submitted that

Clause SIXTH was obviously ambiguous, given that the pursuers said there was a need to construe it as restricted to pecuniary claims. Along with the alternative proposal to rectify, that was an admission of ambiguity. The reference to "in the future" was said to be a highly ambiguous clause.

[17] In my opinion, there is no ambiguity in the provisions in Clause SIXTH. The fact that, having regard to the context, purposiveness or commercial common sense, different interpretations might be argued does not indicate that there is an ambiguity. No words or phrases were identified that could, applying the concept of ambiguity in its proper sense, have more than one meaning. The expression "in the future" is not ambiguous. On the issue of ambiguity, I respectfully agree with the view expressed by Lord Doherty in *SI 2016 Ltd and Ors* v *AMA (New Town) Ltd and Ors* (at [51]), that is, reserving my position on whether actings after entering into the contract can be a legitimate guide to interpreting an ambiguous term. Senior counsel for the pursuer also argued that the post-contractual actings could be taken to illustrate what the parties had in mind as regards commercial common sense. There is no authority for that proposition. It is commercial common sense at the time of the contract that is to be considered, including, no doubt, foreseeable consequences.

[18] The pursuers' further challenge is that in any event the averred actings of the pursuers after the AGS was entered into are not in any way inconsistent with the construction put forward by the pursuers and hence are irrelevant in the most general sense. That issue does not arise, in light of the decision I have reached on exclusion of such evidence for the purposes of construction. However, had it arisen, while it is not entirely clear how the averments would assist the defenders on construction, evidence would have been required to reach a final view on the point.

[19] As to the relevancy of these averments in relation to rectification, the pursuers argued that in the way they are drafted and included in the defences, it was not the defenders' intention to rely on them regarding rectification. For that to be so, it was submitted, the averments ought to have been repeated elsewhere in the pleadings. There is obviously a conventional approach when pleading on a particular issue in answers to make reference to averments in a different answer which are also to be relied upon for that issue, but I would have been unable to find the averments irrelevant simply on the basis of where they appear in the answers.

[20] The pursuers' further point is that these averments are in any event entirely irrelevant to the rectification point, because all of the claims to which the defenders refer are pecuniary claims and the insertion of the words proposed in the second conclusion would make no difference to the defenders' position. In other words, post-contractual actings which relate to pecuniary claims cannot affect a proposed rectification to include such claims. I accept that submission. It is very difficult to see how the averments in question can affect the proposed rectification, which seeks to restrict the scope of the waivers in Clause SIXTH to pecuniary claims. Moreover, there is obviously no suggestion for the defenders that they wish the reference to claims that are waived to include non-pecuniary claims; on the contrary, the defenders view Clause SIXTH as a waiver only of pecuniary claims, although they say it was just pre-AGS pecuniary claims. In *Patersons of Greenoakhill Limited* v *Biffa Waste Services Limited*, Lord Hodge (at [43]) explained that it may also be relevant when dealing with rectification to consider the conduct of the parties after they signed the impugned contractual document, as that may cast light on parties' intention when they entered into the contract and the weight to be attached to such conduct will vary depending on the nature and quality of the pre-contractual evidence. There is nothing in the

averments quoted above that casts any light on the parties' intention when they entered the contract, so far as the proposed rectifications are concerned.

[21] I therefore conclude that the averments are irrelevant, both in respect of construction of the contract and the claim for rectification, and fall to be excluded from probation.

**The pursuers' second challenge**

***Averments sought to be excluded***

[22] In answer 39, having averred that the AGS does not require to be rectified in any way, the first and second defenders go on to make the following averments:

> "Under reference to Section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, interests of various persons would be adversely affected to a material extent by the Pursuers' proposed rectifications, including the First Defender's funders. Said funders include: (i) third party shareholders of the group holding company of the First Defender, who provide equity support to the First Defender, including: PiP Management Limited; Meridiam Infrastructure Finance Sarl; Amey Ventures Asset Holding Limited; and Cintra Infrastructures UK Limited; (ii) senior debt providers, namely European Investment Bank and Allianz Global Investors GmbH; and (iii) bondholders managed by Allianz Global Investors GmbH. Such parties have relied on the First Defender being able to recover financially in relation to Compensation Events for breaches of the DBFO Agreement on the part of the Pursuers in relation to the New Works subsequent to the AGS. There is a significant risk that, if the rectification proposed is made, then the rating of the MIP may fall below a threshold rating, leading to possible lock-up of shareholders' disbursements. The other parties to the AGS and the other persons so affected do not consent to the proposed rectifications."

The primary form of Compensation Event is a breach by the pursuers of their obligations under the DBFO agreement. In broad terms, the "threshold rating" is arrived at having regard to debts and "lock up" means that money intended to be paid to shareholders is set aside, for example to deal with debts, and is not distributed to them.

***Sections 8 and 9 of the 1985 Act***

[23] For present purposes, the relevant provisions of sections 8 and 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 are as follows:

> "8. - Rectification of defectively expressed documents
>
> (1) Subject to section 9 of this Act, where the court is satisfied, on an application made to it, that—
>
> (a) a document intended to express or to give effect to an agreement fails to express accurately the common intention of the parties to the agreement at the date when it was made;…
>
> it may order the document to be rectified in any manner that it may specify in order to give effect to that intention.
>
> (2) For the purposes of subsection (1) above, the court shall be entitled to have regard to all relevant evidence, whether written or oral...
>
> 9. – Provisions supplementary to section 8: protection of other interest.
>
> (1) The court shall order a document to be rectified under section 8 of this Act only where it is satisfied –
>
> (a) that the interests of a person to whom this section applies would not be adversely affected to a material extent by the rectification; or
>
> (b) that that person consented to the proposed rectification.
>
> (2) Subject to subsection (2A) and (3) below, this section applies to a person (other than a party to the agreement or the grantor of the document) who acted or refrained from acting in reliance on the terms of the document, with the result that his position has been affected to a material extent."

***Submissions***

*Pursuers*

[24] The persons whom the defenders identified are the first defenders' funders, said to "include" certain entities, some of whom are named and others not. They say these persons have "relied" on the ability of the first defender to recover for post-AGS Compensation Events, but not what they have done or not done in such reliance. The defenders do not say how the position of these persons has been affected, let alone affected to a material extent.

They do not state which element of the proposed rectification would adversely affect the said persons. It is not stated what it was in the clause that they were relying on or when they acted or refrained from acting. Without an articulation of each of the above elements, the averments in relation to section 9 were irrelevant.

[25] In any event, the rectifications sought were irrelevant to the question of the ability of the first defender to make financial recovery for Compensation Events arising after the date of the AGS. The defenders appeared to have confused the rectifications sought in the second conclusion with the construction sought in the first conclusion. They were really saying that the third parties relied on the construction of Clause SIXTH that they contend as being the correct one (although they still do not say what they did or did not do in such reliance). The averments are therefore irrelevant to the question of rectification. Furthermore, the averments demonstrated the undesirability of embarking on a lengthy inquiry into these points.

*Defenders*

[26] It was not apparently contested by the pursuers that these are third parties capable of having relevant interests in the proposed rectification. The proposed rectification seeks to insert the word "pecuniary'" immediately before the words "claims of any nature" in Clause SIXTH. That insertion could, if allowed, have a clear impact on the first defender's third party shareholders, senior debt providers and bondholders as set out in the averments. It was obviously implicit in the averments that these third parties have maintained their investments in the first defender in reliance on the first defender being able to make financial recovery as averred. The rectification proposed will have an inevitable impact on the financial standing of the first defender, which in turn will have impacts upon the named

persons, and that cannot at this stage be quantified unless and until rectification takes place. The position of the shareholders was, however, particularly highlighted, in that the consequence of possible lock-up of shareholders' disbursements is narrated. Accordingly sufficient had been averred in the circumstances to permit the interests of these third parties, and at least the first defender's shareholders, to be considered for the purposes of section 9 of the 1985 Act and for the relevant averments to be remitted to proof before answer.

[27] The pursuers' contention that the rectifications sought are irrelevant to the question of the first defender's ability to make financial recovery was patently incorrect. The insertion of the word "pecuniary" would have wide-ranging consequences for the defenders and, as a result, the third party funders. Section 9(1) provided safeguards for the interests of third parties: *McClymont* v *McCubbin* 1994 SC 573, Lord Murray at 581. In light of these averments, therefore, it is incumbent upon the pursuers to lead evidence to demonstrate that the interests of these third parties would not be adversely affected to a material extent by the proposed rectification.

[28] Further, even if the terms of section 9 were not engaged directly by, for example, a third party appearing and seeking to resist rectification (as in *Norwich Union Life Insurance Society* v *Tanap Investments VK Ltd (No 3)* 1999 SLT 204, on appeal 2000 SC 515), the decision of the court under section 8 of the 1985 Act as to whether to order rectification is always a discretionary one: *Bank of Scotland* v *Brunswick Developments (1987) Ltd* 1997 SC 226. Lord President (Rodger) at 230H-231G. In exercising its wide discretion on whether to rectify, and if so on what terms, the court will wish to have before it relevant information as to the likely consequences of the making of the rectification proposed on third parties, such as those listed by the defenders in the criticised averments: see section 8(2) of the 1985 Act.

Accordingly, even if the court considered that the terms of section 9 may not have been precisely met, then the averments remained relevant under section 8.

***Second challenge: decision and reasons***

[29] The reason for the second conclusion being sought was not made absolutely clear to the court. Senior counsel for the pursuers explained that the second conclusion (and to an extent the first) anticipated that the defenders might run an argument which reflected an adjudicator's decision in an adjudication involving the parties. In that decision, the adjudicator appeared to conclude that, on the pursuers' approach to construction, all of their obligations under the DBFO relating to the New Works would become unenforceable. He saw that as unacceptable and therefore adopted a much narrower approach to construing Clause SIXTH. The pursuers' proposed construction in this case would not have that result. However, should that proposed construction not be accepted, in the alternative the rectification sought to make it clear that the defenders were not giving up all of their rights and that it was just pecuniary claims that were being given up, with some exceptions not given up. As I understood the pursuers' position (which is also the defenders' understanding) Clause SIXTH, as rectified, would have the meaning argued in relation to the first conclusion. So, in short, the pursuers appear to seek rectification in case Clause SIXTH is construed as having very wide effects which could be seen as unacceptable and which might allow the defenders' alternative position on construction, in the absence of rectification, to be favoured.

[30] But whatever is the purpose of the pursuers' conclusion for rectification, the issue for the court is the relevance of the defenders' averments as quoted above. It is notable that the averments are made expressly under reference to section 9 of the 1985 Act. It is stated that

they concern an allegedly material adverse effect on the named third parties. There is no suggestion that evidence based upon these averments would have any impact upon the question of whether Clause SIXTH fails to express accurately the common intention of the parties to the agreement at the date when it was made. I therefore reject the subsidiary contention for the defenders that even if irrelevant for the purposes of section 9, the averments would be relevant in respect of section 8.

[31] Turning then to section 9, for present purposes the starting point is whether the third parties named in the defenders' averments acted or refrained from acting in reliance on the terms of Clause SIXTH with the result that their position has been affected to material extent. There require to be clear averments to that effect. No express averment is made about any of the third parties acting or refraining from acting in reliance on those terms. There is a general averment to the effect that those parties relied on the first defender "being able to recover financially in relation to Compensation Events for breaches of the DBFO Agreement on the part of the Pursuers in relation to the New Works subsequent to the AGS". However, there is no averment that this is based upon what they understood Clause SIXTH to mean or about what actings they carried out, or refrained from carrying out, in reliance on Clause SIXTH. It cannot be taken, as was suggested on behalf of the defenders, as obviously implicit that these third parties have maintained their investments in the first defender in reliance on the first defender being able to make financial recovery in terms of Clause SIXTH. These averments are therefore irrelevant also in respect of section 9.

[32] Senior counsel for the pursuers made the further point that there is no explanation of why, with the insertion of the word "pecuniary" before the word "claims" and the express insertion to reserve payment under the payment mechanism, the interests of the third parties would be adversely affected to a material extent by the rectification. I see force in

that contention. Rectification would result in the waiver being restricted to pecuniary claims, so not waiving, for example, claims for declarator or interdict. The express reservation of the payment mechanism makes clear that the first defender is not waiving its right to payment in the normal course of the contract. Thus, the rectifications are intended to clarify the limits of the waiver. It does appear to be the defenders' position that, if the third parties relied on Clause SIXTH (although that is not averred) they proceeded on the basis of the defenders' construction of Clause SIXTH, that is, that only the pre-AGS claims were waived. That position is not affected by the proposed rectification, because whether that is the correct construction of the clause, if rectified, will remain in issue. It was not suggested that the words proposed to be added have any impact on whether or not it is only pre-AGS claims that are waived. For that reason also the averments quoted above are irrelevant.

**Disposal**

[33] I shall therefore sustain the sixth and eighth pleas-in-law for the pursuers. However, as senior counsel for each side raised certain minor points about how the pleadings would be affected by my conclusions, I shall fix a by order hearing to deal with those points, reserving in the meantime all questions of expenses.