OUTER HOUSE, COURT OF SESSION

[2022] CSOH 4

CA9/21

OPINION OF LORD BRAID

In the cause

RILEYS SPORTS BARS (2014) LIMITED (IN ADMINISTRATION)

Pursuer

against

CGW SNOOKER LLP

Defender

Pursuer: Lake QC; TLT LLP
Defender: Barne QC; Davidson Chalmers Stewart LLP

18 January 2022

Introduction

The issues

[1] The defender is the landlord, and the pursuer the tenant, of premises at 9 Bridge Place, Aberdeen. The pursuer is in administration. It wishes to assign its interest in the lease of the premises to a new company, WPC7 Ltd (WPC7), offering as a guarantor the ultimate parent company of both the pursuer and WPC7, Weight Partners Corporate Limited (WPCL), which is a guarantor of the pursuer's obligations under the lease. The defender has refused to consent to that assignation. The first issue for decision is whether that refusal of consent is reasonable. The pursuer seeks decree of declarator that it is not.

[2] Separately, in January 2020 the parties entered into a Minute of Agreement whereby the defender agreed to contribute £425,000 towards the cost of building works to the premises to be undertaken by the pursuer, which was to use all reasonable endeavours to complete the works by 21 January 2021. The work has not yet been done. The second issue for decision is whether the defender breached its obligation of good faith under the Agreement by failing to agree plans and specifications forwarded by the pursuer, thereby preventing the pursuer from completing the works. A related but distinct issue is whether the pursuer is entitled to a force majeure extension of 6 months for completion of the works, due to Covid. The pursuer also seeks decree of declarator in respect of these matters.

The proof

[3] The action called before me for proof. Evidence was led remotely over 5 days. All of the evidence (apart from that of the pursuer's expert, Mr Peter Graham, who spoke to his reports dated 8 and 21 October 2021) was given by means of witness statement, augmented by oral questioning. To the extent that they spoke to the history of events, I found all of the witnesses generally to be credible and in the main reliable, except insofar as stated otherwise in this opinion. The controversy centres on what were the defender's reasons for refusing consent to the assignation; and on why the building work has not yet proceeded.

The WPCL group

[4] At the outset, it is helpful to say something of the Rileys business, and the corporate structure of the WPCL group of which the pursuer and WPC7 form part. The ultimate holding company and beneficial owner of all the companies within the group is WPCL. Its financial standing was the subject of much of the evidence, and I will return to it later. It is a

private equity business investor established in or about 2008 which focuses on consumer and health care services at the smaller end of the market in the UK and Ireland. It is registered with the FCA. Its sole shareholder and director is James (Jim) Weight. All of the companies in the WPCL group are managed by Weight Partners Capital LLP.

[5] In 2014, Mr Weight decided to acquire, as an investment, the Rileys sports and leisure club business from the administrators of the previous owners of that business, Rileys Sports Bars Limited. The main trading activity of the business was, and is, the operation of licensed premises: in particular, the provision of facilities to allow customers to play snooker, darts and pool and to watch sports on TV and media channels. The pursuer was incorporated on 27 November 2014 for the purpose of making the acquisition. Valley Topco Limited (VTC) was incorporated at the same time as a wholly owned subsidiary of WPCL, as the pursuer's holding company, and as the vehicle for funding the acquisition, and subsequently for funding the pursuer. As part of the acquisition, the pursuer acquired the lease of the premises by way of assignation with the consent of the defender, subject to a guarantee from both VTC and WPCL.

[6] Rileys was, until the pursuer went into administration in 2020, one of the two major investments of the WPCL group, the other being a company called Boxclever Ltd, which is the major player in the UK electrical goods rental market, mainly televisions. It is a subsidiary of WPC2, another subsidiary of WPCL. Dividends from Boxclever are in practice ultimately paid to the pursuer via WPC2.

[7] The pursuer itself went into administration in 2020, precipitated by Covid. Four new companies (WPC7 through to WPC10) have been formed by Mr Weight for the purpose of acquiring the Rileys business from the administrators, the relevant company for present purposes being WPC7, which has acquired what are seen as the pursuer's better sites. The

sale to WPC7 included an assignation of the lease of the Aberdeen premises, subject to the defender's consent, which has been withheld. WPC7 is owned by WPC10, which was at the relevant time wholly owned by WPCL.

The first issue: assignation of the lease

Introduction - summary of the issue

[8] In summary, an assignation was formally requested in a letter dated 27 November 2020 from TLT, the solicitors acting for the pursuer's administrators, to the defender's Scottish solicitors, Davidson Chalmers Stewart (DCS). Consent was refused in DCS' reply dated 15 December 2020. An application to reconsider was made by TLT on 21, and refused by DCS in their letter of 23, December 2020. It is the pursuer's contention, resisted by the defender, that in reaching the decision to refuse consent, the defender not only failed to apply the correct test under the lease, but misunderstood the factual position relating to the financial covenant of WPCL, these failures rendering its refusal unreasonable.

The witnesses

[9] For the pursuer, evidence in relation to WPCL's financial standing was principally given by Mr Weight; and by Mr Peter Graham, chartered accountant, who gave expert evidence about WPCL's financial covenant. Some evidence was also given by Thomas McMahon, the finance manager of Weight Partners, and by Philip Watkins, one of the joint administrators, but their evidence added little. For the defender, evidence was given by John Chesterman (the "C" of CGW Snooker Ltd), who acted throughout for the defender in connection with both the proposed assignation of the lease and the building

works; and by James Shaw, an accountant from whom the defender took advice at the time of the request for an assignation, but who was not proffered as an expert witness.

The law

[10] There is no dispute as to the applicable law. Parties agreed that the governing principles were conveniently summarised by Lord Drummond Young in *Burgerking Ltd* v *Rachel Charitable Trust Ltd* 2006 SLT 224 at paragraph 16, as follows: (1) a landlord may not refuse consent on grounds that are collateral to the landlord-tenant relationship; (2) the onus of proving that consent was unreasonably withheld is on the tenant; (3) the landlord's decision should be upheld if its conclusion might have been reached by a reasonable person in the circumstances of the case; (4) the landlord need generally consider only its own interests; (5) the only reasons for refusal which are relevant are those which influenced the decision maker at the time; and (6) the issue is one of fact.

[11] Several of these points require elaboration. The reasonableness test is an objective one: the decision must be measured against objective criteria (*Rachel Charitable Trust*, paragraph 18). The focus is on the substance of the decision, rather than the process by which it was reached. As Balcombe LJ (from whose judgment Lord Drummond Young derived his third principle) put it in *International Drilling Fluids Ltd* v *Louisville Investments (Uxbridge) Ltd* [1986] Ch 513, at 520:

> "It is not necessary for the landlord to prove that the conclusions which led him to refuse consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances."

Accordingly, the question is not so much, did the tenant act in a reasonable manner (*cf Aviva Investors Pensions Ltd* v *McDonald's Restaurants Ltd* [2014] CSOH 009A per Lord Malcolm at paragraph 19) as: could a reasonable person in the position of the landlord have reached the

same conclusion as the landlord did on the material provided? Further, as the reference to the circumstances of the case emphasises, each case is fact-specific and the background circumstances are relevant when assessing reasonableness. Finally, as regards the fifth principle - that the only reasons which are relevant are those influencing the decision maker at the time - the focus is on the reasons given by the landlord at the time of refusal, rather than on what else may have been in his mind or, *a fortiori*, a reason thought of later. That said, a decision letter should not be construed over strictly: the landlord may rely upon anything that can fairly be said to form part of the reasoning or a reasonable development of it, but it cannot pray in aid of refusal a reason not touched upon at all in the refusal letter: *Rachel Charitable Trust*, paragraph 19; see also *Royal Bank of Scotland Plc* v *Victoria Street (No 3) Ltd* [2008] EWHC 3052, paragraph 37.

The lease

[12] Assignation of the lease is regulated by clause 3.16, the relevant parts of which are (insofar as material):

> "[The Tenant undertakes]
>
> 3.16.1 Not to hold on trust for another, assign, sub-let or share or part with the possession or occupation of the Premises or any part of them or allow any other person to do so unless:
>
> (a) the transaction is not prohibited by clause 3.16.2;
> …
> When the following transactions will be allowed with the Landlord's consent, such consent not to be unreasonably withheld or delayed:
>
> (i) assignation of the Lease as a whole;
> …
> and if the Tenant or any sub-tenant is a company it may share or part with the occupation of the Premises or any part of them with it to a Related Company for so long only as the company concerned remains a Related Company without the Landlord's consent Provided That no relationship of landlord and tenant is created

> or security of tenure obtained and the Landlord is given written notice of the sharing parting with occupation or concession arrangements.
>
> 3.16.2 Not to effect any assignation of this Lease:
> …
> (b) to any assignee which in the Landlord's reasonable opinion is not of sufficient financial standing to enable it to comply with the tenant's obligations under this Lease; or
> (c) to a Related Company if in the Landlord's reasonable opinion the assignee is less likely to be able to comply with the tenant's obligations under this Lease than the Tenant which likelihood is judged by reference to the financial strength of the Tenant aggregated with that of any guarantor of the obligations of the Tenant the value of any other security for the performance of the Tenant's obligations under this Lease when assessed at the Date of Entry or where the Tenant is not the original Tenant the date of entry under an assignation of the this Lease to that Tenant."

"Related Company" is a defined term - suffice to say, for present purposes, that WPC7 is a Related Company of the pursuer, both having the same holding company.

Factual background

[13] The pursuer had already been planning to restructure its business, by closing certain unprofitable sites, when Covid struck. As is well known, the whole of the United Kingdom entered lockdown on 23 March 2020. The hospitality and leisure business was particularly hard hit. The pursuer furloughed all its staff. It soon entered discussions with potential administrators. It instructed Hill Property Services to act for it in connection with a possible assignation of the lease. On or about 1 April 2020, Michael Macpherson of that company spoke to Mr Chesterman by telephone. He asked if the rent for Aberdeen could be deferred. Mr Chesterman replied by email saying that it could not and called upon the guarantors (VTC and WPCL) to make payment within 7 days (which they did).

[14] On 2 April Mr Macpherson emailed Mr Chesterman alluding to the difficulties faced by the pursuer and proposing an assignation of the Aberdeen lease to an as-then unspecified

"newco", along with certain other proposed terms including a rent free period and a 5 year extension to the lease.

[15] Further communication in the form of telephone conversations and emails took place between Mr Macpherson and Mr Chesterman in the course of which Mr Chesterman requested further information about both the assignation and the building works (which were being progressed at the same time, as discussed below). On 2 June Mr Chesterman stated in an email that the only information the defender was lacking was the management accounts for the second half of 2018, from which it can be inferred that the other information which had been sought at that time was provided to the defender's satisfaction.

[16] On 9 June 2020 Mr Chesterman formally replied to the proposal for an assignation contained in the email of 2 April 2020. He acknowledged that all the information requested had been provided. He signified agreement in principle to an assignation, indicating that the proposed extension was acceptable but that the rent-free period was not. He also stipulated that "Newco's obligations are to be guaranteed by [WPCL]."

[17] Mr Macpherson did not reply to that email until 5 October 2020. In his reply of that date, he did not specifically refer to a guarantee. He agreed, on the pursuer's behalf, to the counterproposals. However his email also contained the following:

> "The above terms are on the basis the refurbishment programme as per the agreed settlement earlier in the year is extended to 21 July 2021, assuming there is no further material impact due to COVID. Given the intended longstop date of the works per the agreement was 21 January 2021 my client requests an extension on the basis of force majeure under terms clause 4 of the Agreement to 21 July 2021 (as things currently stand)."

[18] At that time, then, the pursuer was linking the assignation of the lease to a formal request to extend the longstop date for completion of the building works by a period of

6 months to 21 July 2021. However, no formal request for an assignation had yet been made, and as just observed, no guarantee was on offer.

[19] The next significant event was that on 16 October 2020 the pursuer's administrators wrote to the defender intimating that WPC7 had purchased the pursuer's business and assets as of 7 October 2020 and had been granted a licence to occupy the premises. There was no suggestion that the administrators believed the licence to be unlawful, but nor was any mention made in the letter of WPC7 being a Related Company of the pursuer.

[20] On 19 October 2020, the administrator's solicitor emailed the defender's English solicitors stating that he understood he would shortly be in a position to make a formal application for assignation of the lease (and of the Minute of Agreement). He also attached details of the building work for approval by the defender.

[21] On 20 October 2020, Mr Veneik of the defender's English solicitors (Penningtons Manches Cooper) emailed a response to the communications of 16 and 19 October. He described the occupation of the premises by WPC7 as unauthorised. He also stated: "No one issue in relation to any mater will be settled until all issues have been settled and are formally documented". After raising a query about which company would be undertaking the building work, he requested the following information regarding any application for consent:

- A business plan for the business as a whole
- If not in the business plan, cash flow, a statement of indebtedness for WPC & Group as a whole and related security granted by the Group
- Details of the board of WPC7 and of the operations team and related experience
- A solvency statement from the directors of WPC7

- A bank reference opining on (a) the likelihood of WPC7 being able to meet its obligations under the Aberdeen lease and generally for the next 12 months and (b) whether the WPC7 Group was adequately financed as against its business plan
- Confirmation of what security was being offered, if any.

As can be seen, the information requested was information about WPC7.

The formal request for consent to an assignation and the defender's response

[22] In response to that email a business plan was forwarded to Mr Veneik on 11 November 2020. A formal request for an assignation to WPC7 was then made by email of 27 November from TLT to DCS. (In the correspondence surrounding the request for an assignation, the defender's solicitors made much of the failure by the pursuer formally to request an assignation sooner but I do not consider anything turns on that.) A so-called solvency statement (being a letter written and signed by Mr Weight stating that the board of WPC7 had considered the solvency of WPC7, and confirming that the company was solvent) was attached to the email of 27 November, and the email concluded by saying that the solicitors would "follow up with whatever further information may be provided". The email of 27 November did not mention WPCL nor offer a guarantee.

[23] DCS responded on 30 November 2020, stating among other things that:

> "the request for consent to assign will only be considered upon the production of the information detailed in [the email of 20 October]. If you do not consider that any of these requests are reasonable then please confirm which… is unreasonable and for what reason."

[24] TLT replied by email on 7 December offering a guarantee by WPCL and enclosing financial statements of that company for the years ending 2013 to 2018 inclusive, and draft

accounts for the year ending 2019. Further copies of the solvency statement and the business plan were also enclosed. An offer was also made to continue the rent deposit. As regards the bank guarantee which had been requested, TLT stated that no bank would be prepared to offer a guarantee in the terms requested. Mr Weight also gave evidence to that effect, which I accept.

[25] That email was forwarded by DCS to Mr Chesterman, who in turn sought advice from Mr Shaw, an accountant who provided accountancy advice to the defender from time to time. He initially replied by email on 8 December, in which he stated that further work was required as it was difficult to assess the strength of WPCL on the draft accounts to 2019. He then drew attention to four matters. The first was the fact that the figures showed a significant impairment (reduction) in the value of the investments held by WPCL, which he attributed to operational matters rather than Covid. The second was that Mr Weight was a significant debtor to the tune of £2.8m with £800K being loaned in the current year. The third was that the intercompany balance with VTC had risen by £2,636K with the total debt owed by that company exceeding £8m. The fourth was that to his recollection Boxclever was the main asset of VTC. He went on to say, in that regard:

> "£1.6m of dividends came from this source according to the accounts. If these dividends were just added to the loan balance and were not received in cash it changes my view of the figures and the business risk."

While the first three of these statements were factually correct, the fourth was not. Boxclever was an asset of WPC2, and its dividend was received in cash.

[26] In his witness statement, Mr Shaw made reference to the first three of these matters, which he said were his concerns at the time when writing his email and in a subsequent telephone conversation which he had with Mr Chesterman and Mr Veneik on 9 December. However, he made no reference in his statement to the previous reference to Boxclever

income, not even to acknowledge that he had been mistaken in his recollection, nor to say that the error had been corrected in the course of the telephone conversation. There was no mention in the email or in Mr Shaw's witness statement of regard having been had to the ability of WPCL to satisfy the obligations under the lease out of its income and the cash available to it. Similarly there is no mention in Mr Chesterman's witness statement of the advice given by Mr Shaw on the telephone covering anything other than the three matters mentioned in Mr Shaw's statement, nor did he acknowledge the error over Boxclever. No note recording the telephone conversation has been lodged in process.

[27] Turning to the evidence given orally by Mr Chesterman and Mr Shaw at the proof, both said that the ability of WPCL to meet the obligations due under the lease was a matter which was taken into account and specifically discussed during the telephone call. Senior counsel for the defender invited me to accept this evidence, submitting that there was no reason to doubt the credibility of professional men, particularly Mr Shaw, who had no axe to grind. However, I decline to do so, for a variety of reasons. First, if it had been taken into account by Mr Shaw then one would expect that to have been in his email of 8 December. There is no indication in that email that he had considered the ability of WPCL to meet the obligations under the lease, beyond his reference to the Boxclever income about which he was making a different point. Indeed the reference to his view being changed if the dividends were not received in cash rather supports the opposite position: that his view was that WPCL *could* meet the obligations under the lease. Second, there is no suggestion in his witness statement that the advice given by telephone went beyond the advice in the email. Third, the witnesses, and in particular Mr Chesterman, must have been aware of the importance of ensuring that their witness statements were both comprehensive and accurate. It is unlikely that Mr Chesterman would have omitted a fact of such significance to

his case. Fourth, Mr Chesterman was permitted to observe the evidence, as a Webex attendee. By the time he gave his evidence he would have been aware of the questioning of Mr Graham in particular, who had carried out a comparison of the cash available to WPCL on the one hand, and the likely obligations under the lease on the other. While the absence of a contemporaneous written record of the telephone conversation does not point to the evidence given about it being wrong, the defender can hardly be heard to complain if, in the absence of such a record, oral evidence of the participants' recollection of it, nearly a year later, is not accepted. I do not require to find that Mr Shaw and Mr Chesterman are lying: simply that they are wrong, or their evidence on this point is unreliable.

[28] Nonetheless I do accept Mr Shaw's evidence that the overall tenor of his advice was that for the reasons which he did give in his evidence, more information was required about WPCL before a reasonable assessment of that company's financial substance could be made, albeit that advice was based upon his evaluation of the balance sheet rather than the profit and loss account or the cash generated.

[29] Although the matter was apparently still being discussed by the defender at the time, DCS sent an email to TLT on 8 December 2020 stating that the information provided was not acceptable to the defender and that steps were being taken to apply to the court for consent to irritate the lease. That might have been taken as an implied refusal. TLT replied to it by letter of 9 December 2020 in a letter before (this) action, stating among other things that consent was being withheld unreasonably.

The response of 15 December 2020

[30] The first formal response refusing consent to assign came in a letter from DCS dated 15 December. Since much turns on the reasons given, I propose to narrate the material parts of the letter in full:

> "**Request for Consent to Assign**
> As our clients see matters, the situation your clients now find themselves in is of their own making. You admit in your letter that, as far back as 2 April this year, your clients knew that they would be in administration and what that would entail for their occupation of the Premises. Despite that, and despite repeatedly being called upon by our clients' agents to clarify the position, your client chose not to formally request consent to assign the Lease until 27 November. Indeed, as late as 11 November, it was specifically noted that no formal request was being made to assign the lease, despite the proposed assignee, WPC7 Limited, having been in occupation of the premises since 16 October.
>
> Against that background, any prior knowledge that our clients may or may not have had regarding the identity of the proposed assignee is irrelevant; no request to assign had been made until 27 November and our clients were not in a position to consider the details of the proposed assignee until that time. Now that a request has been made, our clients have considered the information provided, the financial status of the proposed assignee and the financial backing being offered to that proposed assignee and have found that it does not satisfy them that the proposed assignee is in a position to satisfy the obligations of the RSB under the lease and, acting reasonably, are not prepared to grant consent to that request at this time. The information provided in connection with the proposed assignee and the financial backing of that assignee is little more than historic information that our clients could have obtained from Companies House and does nothing to satisfy them of their ability to satisfy the obligations of your clients under the Lease in future. Absent current financial information on the proposed guarantor it is unreasonable to expect a landlord to arrive at a decision on the adequacy of the guarantor's covenant and therefore the adequacy of the security package, a fact which is only amplified by the fact that the guarantor's profit and loss and balance sheet both appear to have been in decline in recent years and 2020 is unlikely to have reversed this trend. Our clients (*sic*) apprehensions in this regard are also made against the background of these Premises, which have seen several rounds of administrations and years of poor management, none of which provides our clients with any confidence that the proposed assignee will fare any better than previous assignees of the Lease that arose out of previous administrations.
>
> It remains the position that the only party that has any long-term interest in the procuring of the works is now WPC7 Limited. Your clients are in administration. It is not in your clients' interests to procure the works. Indeed, it is absurd to think that, in circumstances where the business and assets of your clients has been sold to

> WPC7 Limited, that the administrators would procure the works, particularly where the cost of those works far outweighs any contribution that our clients have agreed to pay in terms of the Minute of Agreement. That being the case, and with the business and assets of RSB having been sold to WPC7 Limited on 7 October, and WPC7 Limited having been in occupation of the premises since 16 October, the question remains: why was no request to consent to any assignation of the Lease made before 27 November? The unavoidable conclusion is that your clients and WPC7 Limited were trying to ride two horses here: they did not want to request consent for an assignation to WPC7 Limited unless they and WPC7 were satisfied that our clients were going to have to pay the agreed contribution to the works. It is for that reason that you are now seeking to conflate these two very separate issues where our clients, quite rightly, will not engage in any discussion regarding the works until such time as they are satisfied as to the ability of the proposed assignee to fulfil the obligations of RSB in terms of the Lease."

[31] TLT replied to that letter by letter of 21 December 2020, stating that they considered the refusal to be unreasonable. They stated in particular that the financial status of the proposed assignee was better than the current covenant of RSB and "backed by the guarantor demonstrates an ability to more than adequately perform the tenant's obligations under the lease." They enclosed further financial information, namely, a cash flow extract showing that WPCL had received £1.966m in dividend income in cash for the 11 months to November 2020, leaving net income, after expenses, of just under £1.9m. The letter invited the defender to reconsider its decision to refuse consent.

[32] The final refusal came in DCS' letter of 23 December 2020. Again, I will set out the relevant part in full:

> "**Request for consent to assign**
> The current covenant of RSB, a company in administration, is entirely irrelevant to the consideration of the covenant of the proposed assignee. It is quite obviously not reasonable simply to offer that the proposed assignee, being in a better financial position than the tenant, is therefore entitled to an assignation of the lease from RSB; our clients are entitled to satisfy themselves as to the financial covenant of the proposed assignee and their ability to satisfy the obligations of the tenant under the lease.
>
> It is not unreasonable for a landlord to expect to be provided with up-to-date financial information as to each covenant being put forward in support of an application for consent to assign and, where a covenant is of little standing in

> its own right, to understand the legal and contractual arrangements in place to support the covenant. This all the more so at the end of a year such as 2020 and having regard to the uncertainties we may face in 2021. To that end, accounts to 31 December 2019 offer little comfort.
>
> The guarantor of the proposed assignee has a deteriorating profit and loss account and balance sheet over each of the last three years (taking the draft year ended 31 December 2019 accounts at face value). The profit and loss account has been in the red for each of those years, with the direction of travel being -£156,000, -£761,000, and -£3,679,000; you will no doubt appreciate our clients' concern that this position is not likely to be improved at the end of 2020.
>
> When an assignee is an SPV managed by the same people as managed the company in administration and with whom the landlord has had a course of dealing, it is not unreasonable for the landlord to have regard to that course of dealing. The individuals named in the business plan and the forecast therein provide no comfort to our clients that the proposed assignee will fare any better than the current tenant.
>
> Our clients' concerns in this regard are well known to you and to your clients. It is for these reason that the landlord, in anticipation of an applicator for consent to assign, set out its information request back in October. To make an application a month after those concerns were made clear to your clients without providing all of the information requested to alleviate those concerns does little to assuage our clients' concerns and rather reinforces the need for those requests to be answered.
>
> In all of the circumstances, we consider that our clients are entirely justified in rejecting the application for consent to assign on the basis of the information currently provided."

Mr Chesterman's evidence about the reasons

[33] Mr Chesterman sought to elaborate on those reasons in his witness statement, listing 14 factors which he said had been taken into account in deciding whether the defender should

> "notwithstanding the lack of financial capacity of WPC7 and the prohibition in terms of clause 3.16.2 of the Aberdeen lease, nonetheless give consent to the assignment of the Aberdeen lease to WPC7 in terms of clause 3.16.1 and, if so, subject to what conditions".

Since, as I record below, it is not immediately obvious what the reasons for refusal were, it is not altogether a straightforward exercise to separate those factors which are an elaboration

or development of what is in the letter, and those which are entirely new, but I am content to have regard only to the factors given by Mr Chesterman which senior counsel for the pursuer submitted were covered by the letter. These were (adopting Mr Chesterman's numbering, and summarising): (1) no meaningful financial information about WPC7, suggesting it had no real substance in its own right; (2) the 2019 accounts were merely in draft and did not reflect the impact of Covid-19; (3) the draft showed a significant balance sheet decline from 2018 (£17.672m) to 2019 (£13.916m); (7) losses in 2018 (£761,000) and 2019 (£3.679m); (9) the Riley's business having failed four times and the number of clubs having shrunk from over 100 to fewer than 18; and (13) the difficult relationship between the parties recognising that WPC7 would continue under the stewardship of WPC. While the significance attached to some of those factors was a matter of dispute, all were factually correct. Having listed these (and other, irrelevant, factors), Mr Chesterman's conclusion was that "even if we were prepared in theory to look beyond the terms of clause 3.16.2 of the lease, consent should not be given."

The information available to the defender

[34] As already noted, the defender had a copy of WPC7's business plan which contained some of the information requested in the email of 21 October, albeit as senior counsel for the defender pointed out, it was already out of date by December 2020. However, it was a business plan for the business as a whole, and contained details of the relevant personnel. The defender also had a document intended to be a solvency statement (it was accepted by Mr Weight that the letter was more of a comfort letter; not even the pursuer asserted that much weight could be attached to it, although the defender appears to have accepted the

letter without comment). Financial statements of WPCL were provided, discussed below. No statement of group indebtedness was provided, nor up-to-date management accounts.

The financial statements of WPCL

[35] Much time was devoted at the proof to examination of WPCL's financial statements. Mr Weight's contention was that the accounts had not been understood by the defender. He explained that they were done with "fair value accounting": this meant that the balance sheet showed the current market value of the investments. The movement on the profit and loss account was any increase or decrease in the value of the investments, a decrease appearing as a loss. Consequently, the accounts did not show trading profits (or losses) and the profit and loss account was not a reflection on the cash flow of the business. Mr Weight said in his witness statement that the accounts showed that WPCL received £2m-£4m per year, (modified in his supplementary statement to £1m-£3m). Thus, while no issue was taken with Mr Chesterman's assertion that the balance sheet value of the company had declined, and that the accounts showed a loss in each of the 3 years to 2019, Mr Weight's fundamental point was that, properly analysed, the accounts showed a trading profit and cash generation of up to £3m per year. This was well able to finance a rental obligation of £70,000 per annum.

[36] Much, although not all, of Mr Weight's evidence was supported by Mr Graham, who had analysed the accounts for 2017 and 2018, and the draft accounts for 2019, with a view to assessing whether or not, in his opinion, WPCL was able to meet the tenant's obligations under the lease. He began by calculating what those obligations were, arriving at an annual figure of just over £119,000 per annum. His reports included various tables, all of them demonstrably derived from information in the accounts. In particular, he noted that the

income received by the company was either dividends or interest receivable. There was a regular income from Boxclever Ltd by way of dividend, being £2.7m in 2017; £2.2m in 2018; and £1.6m in 2019. He confirmed that while the statement of comprehensive income in the accounts (that is, the profit and loss account) showed a loss in each financial year, that was explained by a downwards revaluation in the fair value of investments. That was a paper exercise and did not impact the bank account nor did it necessarily impact upon the company's ability to generate cash.

[37] A further table compiled by Mr Graham showed cash generated from operations, of £3.204m in 2017; £1.391m in 2018; and £1.040m in 2019. Although that was a declining trend he concluded that as the company generated at least £1m in cash each year, it had more than sufficient cash to enable it to cover the obligations of WPC7 under the lease if necessary.

[38] Yet another table prepared by Mr Graham illustrated that the cash generated was used to fund investments. While the cash at year end 2019 was only £4,000 that was essentially a meaningless figure, being a snapshot of the cash taken at the end of a particular day, which was not a reliable indicator of the amount of cash coming into the company during the year.

[39] None of the foregoing figures was disputed by the defender (other than that Mr Chesterman suggested that the annual obligations were higher, although not to a material extent in the context of the figures being discussed). To the extent that the defender's witnesses, in particular Mr Chesterman, had placed weight on there being only £4,000 in the cash account at the end of 2019, they appeared to accept in the course of the evidence that it was indeed a meaningless figure (as it would have been had the account contained £4m).

[40] As regards future income, and cash, while Mr Weight gave some evidence that another investment, Trinity Insurance, which was a leading broker of personal lines insurance to members of the British Armed Forces, was also a source of income, the evidence focussed mainly on the Boxclever income and the extent to which it would continue into the future; and interest on investments. Mr Weight extolled the merits of Boxclever. It provided first class customer service. It catered for that section of the population which could not afford to purchase electrical goods. It was the major player of scale in its field. Although it had a declining customer base, which he estimated at 10% per annum compounding, it excelled in managing that decline. It had never failed to deliver budgeted income. Although Boxclever was owned by WPC2, the cash it received was moved around the group as necessary and would be available to meet the obligations under the lease if need be. Mr Graham, for his part, noted that the Boxclever income for the first 11 months of 2020 had increased to £1.966m. If trade and other creditors, and trade and other debtors, remained broadly as they had been in 2019, he had prepared a possible profit and loss account for 2020 bringing out an operating profit of £1.684m. In preparing that, he had assumed that interest on loan investments would be nil (the worst possible case), to reflect the fact that no future interest was likely to be paid by VTC. As far as the effects of Covid were concerned, there was no sign of the income having been adversely affected in 2020.

[41] Mr Graham made two concessions in cross-examination which were significant. First, he agreed with the suggestion put to him that the downward valuations indicated some distress on the part of one or more of the companies in question, most likely caused by trading losses, and in that sense the downward valuations in the WPCL accounts were not necessarily mere paper losses. Second, when it was put to him that Mr Shaw's point was that more information was required, he acknowledged that the 2019 accounts raised

questions. Nonetheless he adhered to his view that the accounts showed that WPCL was capable of meeting the tenant's obligations under the lease.

[42] Mr Chesterman's main concern about the Boxclever income (other than the fact that it was declining) was that no guarantee was being offered by Boxclever and that the dividends were payable to a subsidiary of WPCL rather than to WPCL itself. While as noted, he eventually accepted that the £4,000 of cash at the year end was essentially a meaningless figure, he remained concerned at the extent to which cash was moved around.

[43] The real controversy over the accounts (and the source of the defender's concerns) was the balance sheet. As already noted, the concerns expressed by Mr Shaw in his advice to the defender were (1) the VTC loan and (2) the loan to Mr Weight. As to the latter, Mr Weight said the loan was made for tax purposes as an alternative to paying dividends and that he was good for repayment, a matter which would have been investigated by Ernst and Young in auditing the accounts. There was no suggestion that the loan was anything other than a *bona fide* tax efficient measure, and I accept Mr Weight's evidence, although of course, being "good for repayment" and actually repaying are not necessarily one and the same thing. Nonetheless I accepted Mr Weight's evidence that he would not wish to see WPCL going into liquidation over a debt of only £119,000.

[44] As regards VTC, its loan from WPCL was £8.278m, although it remained unclear on the evidence how much of that loan was reflected in the balance sheet as an asset. Mr Weight's evidence on this last point appeared to differ as between his witness statement and his oral evidence. In evidence, he drew a distinction between the book value of the loan owed by VTC (£8.278m) and the amount of that loan which was included in the balance sheet as an asset (which was unclear). He pointed out that note 10 to the draft accounts for 2019 showed that the total group debtors in the balance sheet amounted to £1.922m,

which he took as support for his claim that the amount to be written off in respect of VTC should not exceed that figure. However, his evidence in that regard was not supported by Mr Graham and I discount it. Further, as was pointed out later in the evidence, the £1.922m figure appeared from note 15 in the accounts to be made up of the sums owed by two other group entities. I preferred the more cautious approach taken by Mr Graham, who had prepared an alternative balance sheet showing the effect of writing off the loans from VTC and Mr Weight in their entirety. This brought out a net asset balance of £2.195m. Mr Chesterman's concern about this was that it showed a continued downwards trend.

The impact of Covid

[45] Mr Graham said that to the extent that Covid had caused the Rileys administration, and that the VTC debt and interest had been written off in his projected figures, the Covid effect had been taken into account in his assessment. Beyond that, the subsidiaries from which WPCL derived its income, principally Boxclever, did not operate in the hospitality sector. For his part, Mr Chesterman thought that Boxclever income might well be affected by Covid, given that it was so heavily reliant on the most deprived members of society who were likely to have been hardest hit by the pandemic. Ultimately, this is all a matter of speculation but it can hardly be denied that Covid has led to economic uncertainty, which the defender was entitled to consider in its deliberations.

Credibility and reliability

[46] I have referred elsewhere to my reasons for not accepting Mr Chesterman and Mr Shaw as reliable in relation to whether the obligations under the lease were discussed in considering the covenant of WPCL. More generally, the accuracy of the witness statements

of both Mr Weight and Mr Chesterman was sometimes open to question. This is illustrated by the minor spat over the willingness or otherwise of the WPCL group to grant a guarantee when the pursuer sought an assignation of the lease in 2015. Mr Chesterman said in his witness statement that no guarantee was offered until late in the day. That was patently not the case, as a guarantee from VTC was on offer from the outset. Mr Chesterman explained the contradiction by saying that he had meant no *meaningful* guarantee was offered, VTC itself being a new company - which was true. Mr Weight meanwhile accepted in his evidence that his instructions to his advisers were not to offer a guarantee from WPCL unless it was necessary to do so, but was vague as to when it became necessary. None of this is relevant to the issues involved in the case but I mention it for two reasons. First, it illustrates a certain lack of precision in Mr Chesterman's witness statement; nonetheless I accept his evidence as fundamentally true - no guarantee by WPCL was offered until late in the day. Second, it highlights the commercial hard-headedness and, to an extent, brinksmanship, of both the principal protagonists. Mr Weight's statement attracts the same criticism: it too contained examples of statements that did not withstand scrutiny in the cold light of day, at least when read literally, for example his assertion, in relation to the building works, that the "contractor was ready to go" in around September 2020, which it patently was not. Mr Weight tended to evade difficulties in his evidence by saying he had not been at the "coal face". As with Mr Chesterman, I also accept the bulk of Mr Weight's evidence as fundamentally true (even when not necessarily in his own interests, such as when he proclaimed with perhaps rather too much glee that WPCL had entered into another guarantee which it considered to be unenforceable).

Mr Shaw's evidence

[47] Other than as stated above, I found Mr Shaw to be generally credible and reliable. However, as already noted, he was adduced as a witness solely to give evidence of fact about what advice he had given to the defender about the accounts of WPCL in December 2020. Consequently, to the extent that his evidence at the proof went beyond that and contained evidence of his present opinion about WPCL's accounts and financial standing, I have ruled it inadmissible and have not had regard to it. Into this category, for example, falls Mr Shaw's evidence about the dividend income of £1.966m, since that was not something considered by him at the time of his advice.

Submissions

Pursuer

[48] The submissions for the pursuer were predicated upon a somewhat rigid approach to the construction and application of clause 3.16 of the lease. Senior counsel submitted that clause 3.16 provided a two-stage test. The landlord must first consider whether the transaction was prohibited by clause 3.16.2, which in this case involved a consideration of the test in clause 3.16.2(c), because the assignee was a Related Company. That necessarily involved a comparison between the tenant's obligations under the lease, and the ability of the assignee to meet those obligations. While clause 3.16.2 properly construed did not require the landlord to consider the financial covenant of any proposed guarantor, the reasons given made it clear that the defender had in fact done so, and it could not now argue otherwise. If the transaction was not prohibited, the landlord went to stage two, which was to consider whether to grant consent under clause 3.16.1. At that stage, financial considerations were not relevant. In deciding whether to grant consent (or in forming an

opinion as to financial standing) the landlord had to act reasonably. Senior counsel described the tests at stages one and two respectively as the financial standing test, and the consent test, and I am content to adopt that nomenclature.

[49] Developing his theme, senior counsel submitted, correctly, that, in assessing reasonableness, the court could look only at the reasons given at the time. Those reasons related purely to WPCL's financial standing. The defender had applied the financial standing test in relation to WPCL but in so doing, it was plain that it had erred in two respects. It had not applied the correct test, since it had not compared WPCL's finances with the tenant's obligations under the lease. Further, it had applied the wrong inputs to the test, insofar as it had not properly considered, or understood, WPCL's income and cash flow, and it had omitted to take account of the Boxclever 2020 income. It had misunderstood WPCL's accounts. It could not rely on Mr Shaw's advice, since it was flawed by failing to have regard to these matters, and by making a mistaken assumption about the Boxclever income. Judged objectively, the financial standing test under 3.16.2(c) was clearly met, since the assignee's financial strength was at least as strong as that of the pursuer in administration. Even if the test in 3.16.2(b) had to be applied, it too was clearly met. The defender had not reached the stage of considering the consent test. Having erred in reaching its opinion that WPCL lacked sufficient financial standing, its decision to refuse consent, based upon that opinion, was not reasonable.

Defender

[50] Senior counsel for the defender submitted in response that (as the pursuer had ultimately accepted) clause 3.16.2 required the landlord to consider only the financial covenant of the assignee, not that of any guarantor, and that was what the defender had

done, as its reasons made clear. It had not been aware that WPC7 was a Related Company, so could not have been expected to give any consideration to the test in clause 3.16.2(c). That test was not met in any event as the correct comparison was between the financial strength of the tenant at the time of its entry into the lease and that of the assignee at the date of the assignation, and there was simply no evidence of the former. The defender had clearly applied its mind to whether to grant consent under 3.16.1 and it was entitled to have regard to the whole financial standing of WPCL in considering that matter.

[51] Further, the pursuer's argument depended upon showing that the defender had in some way waived the financial standing test but that was not part of the pleadings, and there was no evidence that it had done so. The letters of 15 and 23 December 2020 plainly showed that it had exercised that test in relation to WPC7. There was no dispute that WPC7 did not have sufficient financial standing in its own right to pass that test. The defender had nonetheless gone on to consider the consent test and in so doing had regard to the whole financial picture of WPCL. It was entitled to have regard to Mr Shaw's advice, and he in turn was entitled to form the view that further information was required. More information could have been provided but was not, such as up-to-date management accounts or information about the contractual arrangements within the group. Since the transaction was prohibited under clause 3.16.2, the landlord was entitled to refuse consent even if the view it had reached on the financial standing of WPCL was an unreasonable one. In requesting information about WPCL, and thereafter considering that information, the defender had been considering the consent test, not the financial standing test.

Decision

Which test was the defender obliged to apply?

[52] The starting point is to bear in mind that a landlord is entitled to satisfy itself as to the soundness of its tenant, even if it has guaranteed financial backing from a guarantor or indeed the original tenant (as in *Royal Bank of Scotland* v *Victoria Street (No 3)*, above, paragraph 31). Thus, counsel for the pursuer was correct to concede during the hearing on submissions (contrary to the position adopted in his Note of Arguments) that the lease in this case reflects that commercial reality, in that, properly construed, the financial standing test in 3.16.2 involves a consideration only of the financial covenant of the assignee, excluding that of any proposed guarantor. However, the effect of this concession is that the pursuer's argument loses much of its potency, since the only context in which the landlord can take into account the financial standing of a guarantor is when considering the so-called consent test under clause 3.16.1. That latter exercise allows a broader consideration of financial standing than is demanded by clause 3.16.2, and in particular, does not restrict the landlord to assessing whether or not the guarantor is able to meet the tenant's obligations under the lease. Rather, the landlord may have regard to financial standing in a more general sense.

[53] It follows that I do not agree with the submission of senior counsel for the pursuer that the structure of the clause is such that financial standing, particularly financial standing of a guarantor, can never be a relevant consideration when considering the consent test. The authority cited in favour of that submission was *Homebase Limited* v *Grantchester Developments (Falkirk) Ltd* 2016 SCLR 45. In that case there was, as here, a two-stage test in the lease, but without any requirement of reasonableness in relation to the landlord's opinion as to the financial standing of the assignee. Lord Tyre observed that if the financial

test was met (as it was in that case), one passed to the second stage where the landlord's consent could be withheld only if withholding was reasonable, and that there may be good reasons, unconnected with financial standing, why a landlord might wish to refuse consent. I do not disagree with any of that but it does not follow that if the financial standing test is failed, the landlord may not, for commercial reasons, go on to consider in any event whether to grant consent, which is essentially what the defender did in the present case. It would be illogical on that scenario if the landlord could not then have regard to the financial standing of a proposed guarantor in considering consent (just as it could do if clause 3.16.2 or its equivalent did not exist and there was only a one-stage test).

[54] Accordingly, I do not agree that the defender was of necessity applying the financial standing test in the present case in relation to WPCL, far less that it applied that test wrongly. However, for completeness, I also reject the submission that it should have concluded that the "Related Company" test in clause 3.16.2(c) was met. First, I agree with senior counsel for the defender that the defender could not be expected to apply that test if unaware that the assignee was a Related Company, and, on the evidence, the pursuer did not make the defender aware of that fact, although it would have been a simple matter for it to have done so. Second, the correct comparison is not between the financial strength of both parties at the present day, but between the financial strength of the tenant (plus guarantor) at the date of entry into the lease, and that of the assignee at the present day. There was no evidence about the former and consequently, on any view, the pursuer has not succeeded in showing that the defender unreasonably concluded that this test was not met.

[55] It follows from the above that much if not all of the substratum of the pursuer's argument - that the wrong test was applied because the defender did not measure the financial strength of WPCL against the obligations under the lease - is simply swept away.

However, it remains necessary to consider the reasons which the defender gave in order to determine whether its decision was in fact reasonable. Before doing that, I have two further observations to make. First, a discussion arose at the hearing on submissions as to whether the prohibitions in clause 3.16.3 were alternative or cumulative. Standing what I have said in the preceding paragraph, it makes no difference in the present case which construction is correct since the defender did not and could not consider the Related Company test in any event; but I incline to the view that the use of the word "or" suggests that an assignee which is known to be a Related Company must pass both branches of the test, if the transaction is not to be prohibited. Standing the stringency of the Related Company test, it may make little practical difference. Second, the phrases "financial standing" (which appears in clause 3.16.2(b)) and "financial strength" (in 3.16.2(c)) tended to be used interchangeably at the proof although no submissions were made as to whether the variation in wording carried some significance, and, if so, what. For what it is worth, I use the term "financial standing" since that is the term the lease uses in relation to an assignee.

Reasonableness

[56] It is necessary to consider what the defender's reasons were, to assess whether its decision was unreasonable. As *Rachel Charitable Trust* makes clear, this involves a consideration of the reasons given at the time. The decision will not be held unreasonable if it is one which might have been arrived at by a reasonable person in the position of the defender, armed with the information it had. (Senior counsel for both parties agreed with that encapsulation of the reasonableness test, although senior counsel for the defender did so only in relation to the landlord's exercise of the consent test, and not to the financial

standing test. However, I do not see why that should be so: there is no good reason for such a distinction.)

[57] The defender's reasons were intimated in the two letters from DCS dated 15 December and 23 December 2020. I accept the submission of senior counsel for the defender that those letters should not be construed as if they were conveyancing documents, although the force of that is lessened to an extent by the fact that the letters were not written by the defender itself but by solicitors acting on its behalf, who might be taken to be well aware of the terms of the assignation clause, and the need for precision in a letter intimating refusal, the more so when the decision to refuse was taken, according to Mr Chesterman, after a consultation with counsel. It is not altogether easy to discern, at least on a first reading, what the reasons for refusal were.

[58] Nonetheless, if one reads beyond the hyperbole, the first letter includes this:

> "our clients have considered the information provided, the financial status of the proposed assignee and the financial backing being offered to that proposed assignee and have found that it does not satisfy them that the proposed assignee is in a position to satisfy the obligations of the [pursuer] under the lease and, acting reasonably, are not prepared to grant consent to that request at this time."

That passage indicates that the defender's decision to refuse consent was based upon its view that WPC7, being the proposed assignee, was not in a position to satisfy the obligations under the lease. This finds its echo in Mr Chesterman's first reason. I do not accept the submission of senior counsel for the pursuer that the passage does no more than state that the defender is not satisfied and will not consent. The point might be made that the sentence could have ended after the word "lease" in which case it would have been clear beyond doubt that consent was being refused under reference to the prohibition in clause 3.16.2; perhaps even more so if the letter had stated that the transaction was a prohibited one. The following reference to acting reasonably adds a degree of confusion. Nonetheless the letter

can be read as a refusal on the ground that in the reasonable opinion of the defender, WPC7 did not have sufficient financial standing (and thus that the transaction was prohibited). It is not disputed that such an opinion was reasonably formed.

[59] The letter goes on to state that:

> "Absent current financial information on the proposed guarantor it is unreasonable to expect a landlord to arrive at a decision on the adequacy of the guarantor's covenant and therefore the adequacy of the security package, a fact which is only amplified by the fact that the guarantor's profit and loss and balance sheet both appear to have been in decline in recent years and 2020 is unlikely to have reversed this trend."

Here it is being stated that current financial information on WPCL is required before the adequacy of its guarantee could be assessed. The statement that the guarantor's profit and loss account and balance sheet had both declined in recent years was factually correct, and standing the pandemic, the view that 2020 was unlikely to have reversed the trend cannot be stigmatised as unreasonable. Having regard to Mr Graham's evidence that the balance sheet losses might reflect trading losses by one or more of WPCL's subsidiaries, and that the 2019 draft accounts raised questions, it cannot be said that the defender's view that more information was required was not one which could have been reached by a reasonable person in its position, armed with the information it had, and bearing in mind that the reasonable opinion had already been formed that the covenant of the assignee itself was insufficient. I go back to the point made at the beginning of para [52] that a landlord is entitled to satisfy itself as to the soundness of its tenant, even if it has guaranteed financial backing from a guarantor.

[60] There is nothing in the letter of 15 December 2020 which supports the pursuer's argument that the defender was in fact considering the financial standing test in relation to WPCL, nor is there any basis in any of the other evidence for finding that is what they did.

Mr Chesterman's evidence is that he was aware of the terms of clause 3.16, which I accept. In particular it cannot be inferred from a request for a guarantee, or the consideration of the financial information provided about WPCL, that the defender was considering the financial standing of WPCLunder clause 3.16.2, whether (b) or (c). Nor can that be inferred from Mr Chesterman's acknowledgement in cross-examination that the covenant of WPCL would be taken into account. Thus, the defender did not apply the incorrect test, nor was it unreasonable for it to consider the information provided about WPCL with a view to deciding whether its financial strength was such as to over-ride the inadequacy of WPC7's covenant and to conclude that it was not, for the reasons which it gave. As of 15 December 2020, then, it cannot be said that the defender's refusal was unreasonable.

[61] Turning to the request to reconsider, the only new information provided was the cash flow extract setting out the dividend income from Boxclever. It is true that DCS's response of 23 December 2020 made no mention of that, mainly repeating and embellishing the points previously made, and making reference to the losses sustained in each year. That may indeed betray a failure fully to understand the fair value basis upon which the accounts were prepared and had WPCL been the proposed assignee (or had the Boxclever income been payable to WPC7) that might have posed a problem for the defender. However, in the broader context in which it was considering WPCL, and having regard to the selective nature of the information provided, the decision not to reconsider its original decision to refuse consent cannot be characterised as unreasonable.

[62] I do not consider that any of the foregoing is undermined by the defender's correspondence or attitude earlier in 2020, in particular the condition that Mr Chesterman stipulated on 9 June that any new company's obligations would require to be guaranteed by

WPCL. That was before the 2019 accounts had been seen. Covid gave rise to (and continues to give rise to) a great deal of uncertainty.

[63] The pursuer's position is that the defender should have focussed more upon the cash available to WPCL, in particular from Boxclever, and upon the fact that even stripped of the loans to Mr Weight and VTC, the balance sheet still brought out a net worth of just under £3m. However that does not undermine the defender's stated reason of requiring more information. Mr Weight made a throwaway remark in the course of his evidence that WPCL's stake in Boxclever had been increased. That was not information which the defender was asked to consider and so in that sense is irrelevant, nor is it even clear when the stake was increased; however, it is a neat illustration of the sort of additional information which might have been made available. As for the balance sheet, in the context of a lease with some 15 years to run (taking the extension into account), the defender's concerns about the steep decline over a relatively short time cannot be dismissed as unreasonable. The issue after all is not who is right, but whether the defender's decision was objectively reasonable, and I consider that it was.

[64] Finally, and for completeness, the question of waiver was canvassed at the proof. That is a red herring. It was not addressed in the pleadings. I have not decided the case on the basis of waiver, nor in any event was it clear precisely what would have been waived or when. I have decided the case solely by reference to a consideration of the reasons given in the context of the provisions of the lease, as enjoined to do by senior counsel for the pursuer.

Disposal of refusal to consent to assignation claim

[65] For all the above reasons, I find that the defender has not unreasonably withheld consent to the assignation of the lease to WPC7. I will sustain the defender's second, third

and fourth pleas-in-law, repel the pursuer's second plea-in-law, and grant decree of absolvitor in favour of the defender in respect of the first and second conclusions.

Postscript

[66] Lest it be thought I have overlooked certain matters, I should make clear that I have taken all of the evidence and submissions into account. I will comment briefly on the following matters, for completeness.

Previous disputes between the parties

[67] These were mentioned in the witness statements of both Mr Weight and Mr Chesterman. I have already mentioned the dispute over when WPCL first offered a guarantee in respect of the pursuer's obligations, relevant only in the context of assessing credibility and reliability. I did not find the evidence of previous disputes to be of any assistance in resolving the consent issue.

The rent deposit

[68] There was some evidence about the rent deposit account. Mr Chesterman's position was that it was empty, money having been taken from it to meet charges which, on the defender's position, the pursuer was obliged to pay in terms of the lease. However the contemporaneous correspondence clearly showed that the pursuer disputed its liability to pay those charges. Nonetheless, the defender did not refund the money, Mr Chesterman's somewhat unsatisfactory explanation being that it did not make commercial sense to litigate it, which somewhat misses the point that if the defender did not wish to litigate it ought to

have returned the money to the pursuer. However, the amount in the rent deposit account, and the dispute about it, have no significance to the issues relevant to consent.

The second issue - the Minute of Agreement - breach and force majeure

Introduction

Background

[69] It is necessary to say something of why the Minute of Agreement was entered into, to give context to the issues now before the court. In 2019, two disputes between the parties bubbled over into litigation. One concerned premises leased by the pursuer from the defender in Twickenham, the other the Aberdeen premises. I need not go into the details of the Twickenham dispute but in broad terms the defender re-took possession of those premises, which the pursuer challenged in court proceedings in England. In relation to Aberdeen, the issue was whether the pursuer had undertaken dilapidation works which it was obliged to do. The defender raised a Court of Session action contending that it had not. The parties settled the Twickenham action on the steps of the court on the basis that the defender would pay £850,000 to the pursuer in settlement of its claim. The sum of £425,000 was payable immediately and the other £425,000 was to be spent on the Aberdeen premises as a contribution to building works to be commissioned by the pursuer. The Court of Session action was discontinued. The parties' respective obligations regarding the building works were set out in Minute of Agreement dated 21 January 2020. In broad terms, the pursuer was to use all best endeavours to complete the works by 21 January 2021, which works were to encompass both the outstanding dilapidations work which had been the subject of the Court of Session action, and refurbishment work, all in accordance with, among other things, plans and specifications "to be agreed" between the parties.

The issues

[70] As a matter of fact, the plans and specifications have not been agreed and none of the work has been done. This has given rise to two issues. The first is whether the defender is in breach of an obligation of good faith arising under the Agreement, by preventing the pursuer from carrying out the works, as the pursuer contends. This breach is said to have arisen due to a failure to agree the plans and specifications. The second issue is whether the pursuer is entitled to a 26 week extension by reason of force majeure due to Covid. The pursuer seeks decree of declarator on both of those matters. At the outset, I observe that it is not immediately obvious what benefit there would be to the pursuer in having the defender declared to be in breach of contract since it does not seek any other remedy. However, senior counsel explained that a declarator would be a shield against any future contention that the pursuer had breached the contract by not completing the work by 21 January 2021. As far as force majeure is concerned, the court is effectively being invited to award an extension, rather than make an order declaratory of an existing entitlement, and the basis upon which it can competently do so is unclear.

[71] I do not think it is misrepresenting the position of either senior counsel (neither of whom, as I understand it, was responsible for the pleadings) to say that they acknowledged that this aspect of the litigation was to a degree pointless, since it would not resolve the parties' differences. Whereas throughout 2020 both parties appeared to proceed on the premise that there was an obligation to complete the works by 21 January 2021, and the litigation prior to the proof was conducted on that footing, counsel acknowledged that the obligation to use all reasonable endeavours, rather than the imposition of a deadline, meant

that whatever the outcome of this aspect of the action, the pursuer remained under an obligation to complete the work, and the defender to contribute to the costs.

The proof

[72] Much of the evidence at the proof, or at least the cross-examination of the pursuer's witnesses, was directed towards whether the pursuer could have progressed the work more quickly than it did. That is of no direct relevance to whether the defender was in breach, although it is potentially relevant to the questions of causation and force majeure. Evidence was given, for the pursuer, by: Mr Weight, although as he declaimed several times that he was not "at the coal face", he did not have direct knowledge of much of the detail of what was going on and consequently his evidence on the Minute of Agreement issues is of little moment; Craig Mayes, the pursuer's chief executive; Greg Jones, previously employed by the pursuer as a project manager, and thereafter instructed on a consultancy basis to project-manage the works; Nigel Hodgson, director and founder of Inventive Design Associates (IDA), instructed by the pursuer to undertake design work in connection with the proposed building works; and Adrian Dallison, owner of a consultancy business, instructed by Weight Partners in September 2020 to provide project management services in relation to the building works. For the defender, in addition to Mr Chesterman, evidence was given by Eric Beavan, a surveyor from whom the defender took advice in relation to the building works proposed by the pursuer.

[73] I have already commented on the evidence of Mr Weight and Mr Chesterman. As regards the remainder of the pursuer's witnesses on this issue, I found them to be generally credible and reliable. Mr Beavan was the least satisfactory of all the witnesses. To what extent this was down to his evident discomfort at giving evidence remotely it was hard to

say but he appeared at times like a rabbit trapped in the headlights, finding it difficult to formulate the answers to questions which he clearly had not been expecting. I deal with his evidence more fully below, but in summary, most of it was beside the point, since he did not direct himself to the proper questions.

The Minute of Agreement

[74] Clause 3.1 of the Agreement provided what the pursuer (the Tenant) had to do:

> "3 Tenant's Building Obligations
>
> 3.1 The Tenant shall carry out the Building Works:
> …
> 3.1.3 in accordance with:
> (a) all Consents;
> (b) all applicable Statutory Requirements;
> (c) the agreed plans and specifications to be agreed between the Landlord and the Tenant and
> (d) all relevant codes of practice and regulations current at the time of undertaking or installing the Building Works."

[75] "Building Works" was a defined term, meaning all and any of the following:

> "(a) 'the works marked 'Agreed Works' identified (*sic*) Column F of the FG Burnett Table as have not been undertaken as at the Commencement Date and the following (so far as these are not Deferred Works);
>
> (b) to the extent not included within the definition of Agreed Works where required works of replacement of the mechanical and electrical services and health and safety plant and equipment (all together 'the services') in the Premises so as to ensure that the services satisfy all applicable Statutory Requirements and a general refurbishment of all parts of the Premises other than the third floor of the Premises; and
>
> (c) (the replacement of or addition to the fixtures, fittings, equipment contents and external signage at the Premises for use in connection with the Tenant's operations from the Premises,
>
> such that save for any furniture or snooker or pool tables the Premises and its fixtures, fittings, equipment and contents, and external signage shall have been repaired, refurbished, refitted, equipped and furnished to a standard, specification and performance at least as high as that deployed in the Tenant's sports bar Rileys

> Liverpool Grand Central…in 2019 following the repair and replacement works to that sports bar in 2019 and such that the Premises is adequately heated, cooled and ventilated".

The evidence was that the FG Burnett Table had been prepared in the course of the dilapidations dispute as works the pursuer was required to do in the premises.

[76] "Consent" and "Statutory Requirements" were defined terms, meaning respectively:

> "…in relation to signage only an Acceptable Planning Permission and any other approval, permission, authority, licence, order, or other relevant form of approval on terms acceptable to the Tenant required for the implementation of the Building Works"

and

> "(i) any statute, statutory instrument, regulation, rule or order made under any statute or directive having the force of law which affects the relevant works or performance of any obligations under this Agreement and (ii) any regulation or bye-law of any local authority or statutory undertaker which has any jurisdiction with regard to the relevant works or with whose system the relevant works are, or are to be, connected, including in the case of both (i) and (ii) any decision of a relevant authority made under any such provision."

[77] Clause 4 set out the agreed Programme for the Building Works as follows:

> "4 Programme
> 4.1 No later than two months from the date of this Agreement the Tenant shall deliver to the Landlord a detailed programme for carrying out the Building Works, and will provide the Landlord with updated versions of that programme from time to time if it shall change to a material degree.
> 4.2 The Tenant shall subject to timeous receipt of the Consents following the Tenant's application therefor, and suitable extensions for reasons of force majeure use all reasonable endeavours to procure that the Building Works are completed no later than twelve months from the Commencement Date [21 January 2020].
> 4.3 The Tenant shall keep the Landlord informed of any delay to the programme."

[78] Force majeure is a defined term as follows:

> "fire, storm, tempest, other exceptionally inclement weather conditions, war, hostilities, rebellion, revolution, insurrection, terrorist action of whatever nature and with whatever effect, military or usurped power, civil war, labour lock-outs, strikes, local combination of workmen and other industrial disputes, riot, civil commotion, disorder, decree of Government, non-availability of materials or equipment, loss or damage by any one or more of the risks insured against under this Agreement provided that each and every such event:

> (a) adversely affects the performance of the obligations on the part of the Tenant in this Agreement;
> and
> (*sic*) cannot reasonably be avoided or provided against by the Tenant;"

[79] Clause 5.1.2 provides:

> "The Tenant…shall … provide to the Landlord before the Building Works commence copies of detailed design drawings, specifications, consents, calculations and other detailed design information sufficient to allow the Landlord to understand the detail and performance specification of the Building Works."

[80] Clause 12 provides, insofar as material and founded upon:

> "12. Good faith
>
> 12.1 Each Party will act in good faith with the other at all times throughout the duration of this Agreement, and will co-operate with the other when required to further the purposes of this Agreement; no Party will do anything which materially prejudices the interests, goodwill or reputation of the other, or place the other Party at any disadvantage at any time…"

Parties' respective rights and obligations under the Agreement

[81] Before looking at what parties did or did not do, I propose to summarise the effect of the foregoing provisions as to the parties' respective rights and obligations under the Agreement, since that may serve to shorten the discussion which follows.

[82] Under clause 3, the pursuer was under an obligation to carry out the Building Works as defined. On the evidence, those works included both the outstanding dilapidations, and refurbishment: the latter to be carried out to the standard achieved in the pursuer's Liverpool premises, of which both parties were aware. The defender's further consent to the Building Works was not required, but the pursuer was under an obligation to carry out the work in accordance with all Consents, Statutory Requirements, all relevant and current codes of practice and regulations (all of which together contained a degree of overlap) and, significantly, "the agreed plans and specifications to be agreed between the [defender] and

the [pursuer]". (I suggested to parties that one reading of that phrase was that the plans had already been agreed, and that only the specifications remained to be agreed, but neither was enthusiastic about that construction, perhaps because on the evidence no plans had in fact been agreed when the Agreement was entered into; and the better construction is that the first "agreed" is superfluous and merely indicative of careless drafting.)

[83] It follows that the pursuer could not begin the works until the plans and specifications had been agreed, and the relevant consents and permissions (including a building warrant) had been applied for and obtained. Further, it would make no sense if the pursuer was obliged to apply for a building warrant or other permissions before the plans and specifications had been agreed. The premise underlying the obligation to agree the plans and specifications was that such agreement would be at a high, in other words a general, level. That is underscored by the subsequent provision in clause 5.1.2 that the pursuer must provide to the defender, before the work commenced, copies of *detailed* design drawings, specifications, consents, calculations and other detailed design information sufficient *to allow the defender to understand* the detail and performance specification of the works [emphasis added].

[84] At least two things follow from that provision. First, it is a matter of necessary implication that the level of detail which the defender was entitled to see before agreeing the plans and specifications was less than that to which it was entitled before the work commenced. If it had already seen detailed design drawings at the clause 3 stage of agreeing the plans and specifications, there would be no need for the Agreement to provide for it to be given again before the work commenced. Second, the Agreement proceeds upon the basis that the pursuer will comply with its obligations not only to apply for all necessary Consents but to do the work in accordance with such Consents and the Statutory

Requirements. Clause 5.1 merely gives the defender the opportunity to check that has been done and the right to understand what is being done before the work commences, but notably does not require the pursuer to obtain the defender's agreement at that stage before commencing the work. The defender's right is to understand the work, rather than a right of veto: the defender does not need a right of veto, because the pursuer is already under a contractual obligation (and for that matter, a statutory one) to carry out the work in accordance with building and other statutory regulations, and it is in its own interests to do so. Doubtless, if the defender formed the view that the pursuer was in some way not complying with its obligation to do the work in accordance with the clause 3 requirements, it could intervene on the basis that the pursuer was in breach of contract, but that is a different issue.

[85] As far as timing is concerned, clause 4 required the pursuer to use all reasonable endeavours to complete the works by 21 January 2021, but that was expressly made subject to two things: timeous receipt of the Consents; and suitable extensions for reasons of force majeure. Since, as I have found, the pursuer was under no obligation to apply for the Consents until the plans and specifications had been agreed, the pursuer was unable to procure the Building Works (and therefore under no obligation to use all reasonable endeavours to procure that they be completed) until, among other things, agreement in relation to the plans and specifications had been reached. Only then could the Consents be applied for, and only once they had been received could the work commence. Thus, any delay in reaching agreement on the plans and specifications would inevitably have a potential impact on the likelihood of the pursuer being able to complete the works by 21 January 2021. Putting this another way, the parties cannot have intended that any delay in reaching agreement on the plans would result in the pursuer being in breach of its

obligation to use all reasonable endeavours to complete the work by 21 January 2021. Taking that to its extreme, if agreement was not reached by that date (which in fact turned out to be the case), then that date to all intents and purposes is meaningless. The Agreement does not contain any mechanism for it to be extended in those circumstances.

[86] The Agreement does however provide for extensions to the completion date by reasons of force majeure, although who is to grant such extensions is left unclear. It is unlikely that parties intended that it be done by an action in the Commercial Court. The Agreement contains a dispute procedure, which might have been used, but neither party has invoked it. Putting that to one side for the moment, the only force majeure event contended for is decree of government, in the form of the lockdown imposed due to Covid.

[87] The final clause of the Agreement to which my attention was drawn was 12.1, which imposes a duty of good faith on both parties. It is this clause which the pursuer maintains the defender has breached, by withholding its agreement to the plans and specifications.

Events after 21 January 2020 - a brief chronology

[88] As I have said, much of the evidence about what the pursuer did is irrelevant in considering whether or not the defender was in breach. The key dates are: 6 May 2020, when plans and specifications were first forwarded; 19 October 2020, when further information was provided; then, crucially, 14 November 2020 when Mr Dallison sent a drop box link to Mr Chesterman, with some new information. However, in case I am wrong in the view I have taken on the construction of the contract (and in holding ultimately, that the defender did not prevent the pursuer from completing the work through any breach on its part) I will set out the facts which I found established on the evidence in a little more detail.

[89] The pursuer took steps immediately to comply with the Minute of Agreement. Greg Jones was engaged on a consultancy basis to project manage the planning of the work. Mr Hodgson of IDA, who had already prepared some drawings in 2019, was instructed to design the works. He attended a site visit on 24 and 25 February 2020 at which he carried out a 3D scan and survey. On 6 March he issued the scan to (among others) Pacific Building, the builders who had refurbished the Liverpool premises and who were ultimately the preferred contractor here. On 9 March he made enquiries about the existing heating system and its suitability and requested estimated costs for kitchen equipment upgrades. On 13 March he emailed various parties involved in the project, attaching existing and proposed drawings and requesting costings for various items of work including electricals.

[90] On 23 March 2020 the whole of the United Kingdom went into lockdown due to Covid. IDA (whose clients operated in the hospitality sector) furloughed all of its staff. For about 4 weeks, no further work was done to advance the building works. In Scotland, lockdown lasted until 28 May.

[91] On 21 April 2020 Mr Mayes emailed Mr Hodgson instructing him to prepare an un-costed schedule of works, which Mr Hodgson did, forwarding it to Mr Mayes by email on 1 May 2020. The documents forwarded included a draft programme previously prepared, spanning the period from 16 March to 28 August (allowing a period of 4 weeks for landlord approval). This programme was for the dilapidation works only but Mr Hodgson said in evidence that the refurbishment works would have continued alongside those works, there being a great deal of overlap between the two.

[92] On 6 May 2020 Mr Macpherson emailed Mr Chesterman attaching information about the proposed building works including copies of the draft programme and of the drawings.

[93] Mr Hodgson continued to progress the scheme between June and October 2020. In June and July, he issued the written schedule of works and drawings to potential contractors, requesting budget costs. No detailed design work was done at that stage. Other than Mr Hodgson, the other IDA staff were still on furlough.

[94] Following a request by Mr Mayes that he produce them as soon as possible, Mr Hodgson then prepared detailed design drawings which he emailed to Mr Mayes and Mr Jones on 15 September. Throughout September, Mr Hodgson obtained quotes from various suppliers of fixtures and fittings such as signage, audio and visual equipment and fire extinguishers. Also during September, contractors were invited to tender to be principal contractor for the refurbishment project. On 21 September 2021, Mr Hodgson sent the tender summary to Mr Jones.

[95] Around that time Adrian Dallison entered the scene, having been appointed by Mr Mayes to take over the management of the project. The need to apply for a building warrant was expressly discussed for the first time around then, although Mr Hodgson was already aware that this was a requirement in Scotland.

[96] The pursuer did not begin to apply for the necessary Consents and permits until mid-October. The building warrant application was lodged on 15 October 2020. On 19 October, details of the proposed work were sent to the defender's agents by email. On 29 October the local authority responded to the building warrant application with a list of 35 points for clarification and three additional points relating to structures. The pursuer, through Mr Hodgson, managed to satisfy the council on the points it had raised and a building warrant was granted on 16 December 2020.

[97] Meanwhile, on 30 October, Pacific issued a "no constraints" programme, showing that if the work started by 16 November 2020, it could (assuming no constraints) be

completed by 28 January 2021. That programme was colour coded, identifying which works required a building warrant and which did not.

[98] On 14 November 2020, Mr Dallison emailed Mr Chesterman a Dropbox link to various materials relating to the building works together with a summary by him. This included some material which Mr Chesterman had previously seen and some new material. Mr Dallison told Mr Chesterman that he would have seen the general specifications before but had wished also to see better information around M&E installations and other elements. There was no indication in the email that Mr Dallison considered that agreement should have been given to the plans and specifications before that date, or that the defender was acting unreasonably in not having agreed them or in requesting more information.

[99] On 15 November, at Mr Chesterman's request, Mr Dallison forwarded access details to the Dropbox to Mr Veneik and Mr Beavan.

Defender's reasons for not agreeing the plans

[100] At this point, the focus switches to the defender, and why at no time did it agree the plans and specifications. As emerges from the foregoing chronology, there were two obvious points at which agreement might have been given. The first was after 6 May 2020, when Mr Macpherson emailed some information to Mr Chesterman. However, that email was sent in the context of the request for an assignation and did not specifically request agreement to the plans and specification for the purpose of the building work. The second was on 14 November 2020, when Mr Dallison sent Mr Chesterman the link to the Dropbox.

[101] Mr Chesterman's response to that was to ask Mr Beavan for advice on the documents. He had already requested advice from Mr Beavan. On 6 November 2020, he had asked for his opinion as to whether the pursuer could argue force majeure and Covid

restrictions as a reason to "push back the deadline" of 21 January 2021. Since, as I have pointed out above, there was no deadline of 21 January 2021, Mr Beavan's task was skewed from the outset.

[102] On 10 November Mr Beavan expressed the view that the pursuer would find it hard to argue force majeure. In particular, he thought it difficult to justify an extension of longer than the length of the original programme. As senior counsel for the pursuer pointed out, that reasoning was flawed, in that the time taken to do the works has nothing to do with the length of any force majeure extension: if (say) works had been delayed by 6 months for force majeure reasons, then a 6 months extension would be appropriate even if the works might only take 2 weeks. Mr Beavan sent another email to Mr Chesterman on 12 November, questioning aspects of the design, including the absence of any mention of fire installation design and of reference to the need for a building warrant. On 14 November, he sent another email, again raising various queries in relation to matters such as building warrant, whether or not there was an asbestos survey, cost control and whether or not there was an updated programme, concluding "There is plenty of other information that would be useful to consider but this largely depends upon the tack you want to take." Finally, on 17 November, after he had seen the documents in the Dropbox folder, Mr Beavan emailed in a similar vein, highlighting what he perceived to be flaws in the pursuer's approach. His email included the sentence: "It is clear they have been intending to start the work not requiring Building Warrant but of course you would need to consent to those elements of work". That betrays another error: the defender's consent was not required.

[103] In his witness statement, Mr Beavan highlighted the matters which caused him (and through him, the defender), concern. The first of these was that in his view, the pursuer had not considered the need to obtain a building warrant. His next concern was that much of the

works had not been designed and were to be designed by contractors; without designs, the defender ought not to agree the plans and specifications. Next, there was no detailed fire installation design. He listed a further litany of areas where he considered further information was required, and summarised his view at paragraph 18 of his statement where he stated "I would not advise that the defender agree to the works on the basis of the information I have been provided with…"

[104] Senior counsel for the pursuer urged me to disregard Mr Beavan's evidence on the basis that he was essentially acting as an advocate for the defender rather than as an independent expert; but I consider that his evidence falls to be disregarded, or at least to attract no weight, on a more straightforward basis, namely, that his views were based on a misunderstanding of the parties' respective rights and obligations under the Minute of Agreement as I have outlined them above. As became apparent from his cross-examination, he appeared to proceed on the basis that the level of detail which was required was that set out in clause 5 of the Agreement: incorrect. He had also been told that there was a deadline of 21 January 2021: incorrect. He also considered that the defender's agreement to the works was required: incorrect. He thought that the pursuer did not know it required a building warrant: incorrect. He expressed concerns about the absence of a written contract but that was not his, or the defender's concern. Most of his focus was on whether or not the pursuer might have achieved completion of the works by 21 January 2021, and on force majeure, rather than on whether agreement should be given to the plans and specifications. To be fair to Mr Beavan, he was undertaking the task which Mr Chesterman initially asked him to undertake and did not have access to the Minute of Agreement, neither of which was his fault. However that cannot detract from the fact that nothing he said in evidence was of any value in helping me to decide the issues in the case.

[105] Be that as it may, the outcome of Mr Beavan's advice was that the defender's consent to the work was not given, and the work was not instructed. The pursuer argues that the defender was in breach of its duty of good faith under the Agreement by applying the wrong test. While I agree that it applied the wrong test, and acted under the misapprehension that there was a deadline of 21 January 2021 when there was none, so too did the pursuer. The question is whether it can be said that the defender breached its obligation of good faith.

Good faith

[106] The law as to what a contractual obligation of good faith requires is conveniently summarised by Nicklin J in *Health and Case Management Ltd* v *Physiotherapy Network Ltd* [2018] ESHC 869 at paragraphs 108 and 109. The following principles emerge:

(i) "Good faith" means playing fair, that is, observing reasonable commercial standards of fair dealing.

(ii) It requires parties to adhere to the spirit of the contract and to be faithful to the agreed common purpose.

(iii) The construction of the relevant contractual term is fact-sensitive.

(iv) A party subject to a good faith clause need not subordinate its own interests so long as the pursuit of those interests does not entail unreasonable interference with the enjoyment of a benefit conferred by expressed contractual terms so that such enjoyment is rendered nugatory.

(v) Unless a party has acted in bad faith, it cannot be in breach of a duty of good faith, subject to the rider that a party can act in bad faith without being dishonest.

[107] I do not find the last of those particularly helpful, since whether or not a person has acted in good faith or bad faith is a binary question; by definition a person who is not in good faith will be in bad faith; and *vice versa*. However, applying the other principles to the facts of this case, I cannot find that the defender was not acting in good faith. While it had evidently misunderstood the significance of the 21 January 2021 date, and for that matter, what exactly it was that had to be agreed, it did not do so wilfully. The pursuer laboured under the same misunderstandings, as is evident from the repeated references to the 21 January deadline, and from Mr Dallison's email of 14 November 2020. Where both parties share the same misunderstanding about their contract, it cannot be said that one party is not playing fair, or was paying undue regard to its own interests. It therefore cannot be said that the defender was not in good faith by refusing to agree to the building work, particularly as the detail which was wrongly requested under clause 3 would in any event have to have been provided under clause 5. Where a contract requires both parties to agree something - in this case, the plans and specifications - a failure to reach agreement does not lead to the conclusion that one party is in bad faith: in most cases, that will not be the case, agreement being a bilateral process.

[108] Even if that is wrong, and the defender did breach its duty of good faith, it can, on the facts, only have done so after 14 November. On any view, it would have been allowed a reasonable time for considering the information provided. The original draft programme allowed 4 weeks for landlord approval. The pursuer has not established that any breach after that date prevented it from doing the works. At that time no building warrant was available. Further, on the evidence, it did not carry out the works sooner for a whole variety of reasons, which included Covid-related delays in putting the matter out to tender and through not having applied for a building warrant sooner than it did. Moreover, given that

the pursuer itself had conflated the issue of the consent which it sought for the building works, with consent to an assignation of the lease, which, as I have found, was reasonably refused in December 2020, it is not clear to me that the pursuer would have carried out the building works even if the plans had been agreed by the time the building warrant was granted. There was discussion at the proof as to whether the works could theoretically have been completed by 21 January had they started in mid-December. On the basis of Pacific's email of 17 November that the work would only be 60% completed by then, that seems unlikely although given sufficient manpower I have no doubt that there was a possibility of achieving that date. But, as I have pointed out, that date was essentially meaningless by that stage. At best for the pursuer, the defender's insistence on receiving further information before consenting to the works had the effect that in no way could the pursuer be said to be in breach of its obligation to use all best endeavours to complete the work.

Decision on breach of contract claim

[109] In summary, both parties share the responsibility for the work not having proceeded, due to their inability to reach agreement and their mutual failure to address in a more focussed way, the need to agree the plans and specifications. Either one of them could have tried to break the deadlock by utilising the dispute procedure in clause 9 but neither did so. For the reasons stated above, the defender did not breach its obligation of good faith; and even if it did, any such breach did not cause the pursuer to fail to procure that the work was completed by 21 January 2021. I will therefore refuse the declarator sought in the third conclusion. It must be understood that in doing so, that in no way suggests that the pursuer is in breach of its own obligation. It is not.

Force majeure

[110] While senior counsel for the defender conceded at the proof that the court could competently grant the declarator sought, I remain of the view that there is a fundamental difficulty with the conclusion for a 6 month extension, which is that highlighted earlier, namely that the court has no power to extend the contractual date for completion.

[111] In my view the only order I could competently grant would be a declarator that the pursuer had been entitled to a force majeure extension for a specified period from 21 January 2021, rather than from the date of the interlocutor. Such a declarator would be of no practical use.

[112] As to whether even such a declarator should be granted, the only force majeure event relied upon is government decree, in other words, the secondary legislation enforcing lockdown. That legislation had the effect of stopping construction work, and enforcing home working. While I take the point that post-lockdown, it took some time to return to some semblance of normality, the reference to government decree does, I think mean that a strict approach falls to be applied. Had I been pronouncing a declarator of entitlement to an extension, that would have been for a period of 9 weeks, being the period between lockdown, and the date when construction sites reopened.

[113] However, all of this is doubly academic, given that as I have pointed out above, the date of 21 January 2021 is now of no contractual significance standing the parties' failure to agree the plans and specifications by that date. Although the pursuer remains under an obligation to do the work, and the defender to contribute to the cost, the work still cannot commence until the plans and specifications have been agreed. That has nothing to do with force majeure. A 6 month force majeure extension would be of no value, if the parties still could not agree the plans and specifications.

Disposal of breach of contract and force majeure claims

[114] For the reasons given, I will refuse the declarators sought in the pursuer's third and sixth conclusions (and the fourth and fifth conclusions, which are no longer insisted upon). I will repel the pursuer's third and fifth pleas (the fourth not being insisted upon). I will sustain the defender's sixth plea-in-law. I will however repel its fifth plea, partly because it is directed towards the fourth and fifth conclusions and in any event has not been made out.