OUTER HOUSE, COURT OF SESSION

[2022] CSOH 92

CA70/22

OPINION OF LORD BRAID

In the cause

LAGAN CONSTRUCTION GROUP LIMITED (IN ADMINISTRATION) AND IAN LEONARD AND STUART IRVIN AS THE JOINT ADMINISTRATORS THEREOF

Pursuer

against

(FIRST) SCOT ROADS PARTNERSHIP PROJECT LIMITED;
(SECOND) FERROVIAL CONSTRUCTION (UK) LIMITED

Defenders

Pursuer: Barne KC; Morton Fraser LLP
Defenders: McLean KC; Burness Paull LLP

20 December 2022

The issue

[1] This action turns on the proper interpretation of clause 5.5.6 of a contract (the New Works Agreement) entered into between the first defender and a joint venture formed by the pursuer and second defender. Depending upon that interpretation, the balance of monies paid by a bank under a letter of credit procured by the pursuer and called upon by the first defender falls to be returned either to the pursuer or to the joint venture (from which the pursuer has, by virtue of its insolvency, been excluded by the second defender).

[2] Clause 5.5.6 provides:

> "**5.5.6 Return of Letter of Credit Monies**
> Project Co [the first defender] shall return to the Contractor by transfer into a bank account specified by such Contractor, an amount equal to such Contractor Company Contractor Security Account Balance as soon as reasonably practicable following:
> (a) Confirmation from Project Co that it has received an Acceptable Letter of Credit procured by such Contractor Company in replacement of its previous Letter of Credit; or
> (b) The Letter of Credit Discharge Date."

[3] The Letter of Credit Discharge Date having passed, a dispute has arisen as to who is meant by "the Contractor" in the first line. Is it the joint venture, as the defenders contend? Or, as the pursuer argues, is it the Contractor Company which procured the letter of credit which was called upon and which gave rise to the monies in question? That is the issue for resolution.

[4] The balance of the monies, after deduction of sums due to the first defender in respect of defects, was £1,013,837.76, which has in fact already been paid by the first defender to the joint venture. The pursuer sues the first defender for payment of that sum, as a debt remaining due to it; failing which, it seeks recovery from the second defender on the basis that it has been unjustly enriched. Related decrees of declarator are also sought.

[5] The action called before me for debate on the correct construction of the contract. If the pursuer's construction is preferred, it is entitled (as counsel for the defender accepted) to decree for payment against the first defender. If the defender succeeds on construction, parties agree that the unjust enrichment issue can be resolved only after proof.

Background

[6] In June 2013, the pursuer and second defender entered into a joint venture agreement, creating an unincorporated joint venture between them: Ferrovial Lagan JV.

The aim of the joint venture was to be appointed to undertake upgrading works on the M8, M73 and M74 motorways.

[7] In February 2014 the joint venture was duly appointed by the first defender to undertake those upgrading works, the parties entering into the New Works Agreement (the NWA). In terms of clause 5.3.5 of the NWA, the joint venture was required to deliver to the first defender standby letters of credit procured by each of the second defender and the pursuer in favour of the first defender, which it duly did. In March 2018, the pursuer entered administration. That had consequences for both the joint venture and the NWA. By letter dated 8 March 2018, the second defender excluded the pursuer from further participation in the management and profits of the joint venture (but without releasing it from its obligation to bear its share of any loss), as it was entitled to do in terms of clause 6.7 of the joint venture agreement. Administration was also an "Insolvency" by virtue of clause 1.1 of the NWA. Under clauses 5.5.3 to 5.5.5 of that Agreement (the "Mandatory L/C Replacement Provisions"), the first defender was entitled to, and did, demand payment under the pursuer's letter of credit. The proceeds were to be paid into the "Contractor Security Account", defined by clause 1.1 as "the bank account into which payment is made in accordance with clauses 5.5.4 and 2.1A". On or around 6 April 2018 the bank which had issued the letter of credit paid £3,718,533.24 into that account.

[8] The joint venture, under the sole management of the second defender, continued to undertake the upgrading works to completion of the project. Sums were subsequently deducted by the first defender from the Contractor Security Account. Final Completion occurred on 20 June 2019, meaning that the Letter of Credit Discharge Date occurred on 20 June 2020, giving rise to an obligation on the first defender to release the remaining balance.

[9] But to whom should they release it? Therein lies the rub. A dispute arose as to whether it was the pursuer or the joint venture that was entitled to specify the bank account into which, in the words of clause 5.5.6, "an amount equal to such Contractor Company Contractor Security Account Balance" should be paid. The first defender sent letters dated 26 July 2021 to both the pursuer and the joint venture, seeking confirmation of the bank account into which the balance in the account should be transferred. That turned out to be something of a pointless exercise since before the pursuer had received the letter, the first defender had transferred the sum of £1,013,837.76 into an account specified by the joint venture. It is for the joint venture to decide what should happen to that money thereafter but, the pursuer having been excluded from any right to share in profits, there is no suggestion that any part of the money will voluntarily find its way back to the pursuer (or to the bank which paid out on the letter of credit).

The NWA

[10] A number of definitions and clauses in the NWA bear closer scrutiny. The "Contractor" is Ferrovial Lagan JV. Clause 1.1 defines "Contractor Company" as "any Company forming part of the Contractor" - that is, either the pursuer or the second defender. "Project Co" is the first defender.

[11] Clause 2.2.2 provides that "All Contractor Companies shall be liable jointly and severally to Project Co in respect of the Contractor's obligations and liabilities under this Agreement".

[12] Clauses 5.5.3 to 5.5.5 of the NWA deal with Mandatory Replacement, as follows:

> **"5.5.3 Mandatory Replacement**
> If before the Letter of Credit Discharge Date has occurred:
> (a) a Letter of Credit ceases to be an Acceptable Letter of Credit; or

(b) a Letter of Credit Provider ceases to be an Acceptable Letter of Credit Provider; or
(c) an Insolvency occurs in respect of a Contractor Company and/or Guarantor, the Contractor Company who procured the relevant Letter of Credit in respect to which any of the above events relate shall notify Project Co…immediately upon becoming aware of the same and comply with its obligations under this Clause 5.5.

5.5.4 Mandatory L/C Replacement
Within ten Business Days of the circumstances set out in Clause 5.5.3 occurring in relation to a Letter of Credit, the Contractor Company who procured the relevant Letter of Credit shall:
(a) deliver a replacement Acceptable Letter of Credit or a notice of extension extending the Expiry Date of the original Letter of Credit (providing it will then be an Acceptable Letter of Credit) by at least 12 months, or until the Letter of Credit Discharge Date, to Project Co;
or
(b) instruct Project Co… to instruct the issuer of the Letter of Credit to transfer an amount equal to the Total L/C Amount into the Contractor Security Account (in which case Project Co …shall promptly comply with such instruction).
5.5.5 If a Contractor Company fails to take any of the steps set out in Clause 5.5.4 within ten Business Days, Project Co… may demand payment under that Letter of Credit for an amount equal to the Total L/C Amount and such amount shall be paid into the Contractor Security Account."

[13] In summary, upon the occurrence of one of the events specified in 5.5.3, which included, but were not restricted to, the insolvency of a Contractor Company, the Contractor Company in question (and not simply the joint venture) fell under the obligation in 5.5.4 either to procure a replacement letter of credit, or to instruct the first defender to instruct the issuing bank to transfer the total letter of credit amount into the Contractor Security Account. If it failed to take either of those steps, the first defender was entitled to demand payment of the total letter of credit amount into the Contractor Security Account - which, as set out above, it did.

[14] Since the Contractor Security Account might also receive funds in accordance with clause 12.1A, that clause, which deals with rectification of defects, should also be considered. By virtue of 12.1A.3(a) the first defender was entitled to inspect the works with a view to

preparing a schedule of defects. Where, in the opinion of the first defender, the defects were incapable of being made good 30 days prior to the expiry of "the" (*sic*) Letter of Credit, sub-clause 3(c) allowed the first defender to make a demand under "the" Letter of Credit of an amount equivalent to twice the estimated costs of the first defender making good such defects. Following such demand, the first defender was obliged to place the sum received in the Contractor Security Account. There was a proviso to sub-clause 3(c) whereby the Contractor (that is, the joint venture) could either replace "the" letter of credit with a replacement letter of credit with an expiry date which was 30 days after the anticipated date of completion of the defects; or deposit a sum equivalent to an amount equivalent (*sic*) to twice the estimated costs of Project Co of making good the defects into the Contractor Security Account. If the Contractor carried out either of those steps, then, in terms of the proviso, the first defender was not entitled to make a demand under the letter of credit. Clause 12.1A.4 set out the procedure to be followed for making good defects. Broadly speaking, if the Contractor failed to make good all the defects, the first defender could either instruct it to make a further attempt or could deduct the full costs from the Contractor Security Account. Clause 12.1A.5 then provided for what was to happen after all the defects had been made good, as follows:

> "Where pursuant to Clause 12.1A.3 Project Co holds the Contractor Security Account the balance remaining therein together with any accrued interest, less Project Co's costs in maintaining the Contractor Security Account shall be released/returned to the Contractor, subject to any extant claims which remain to be satisfied."

[15] Pausing there, it will be noted that there were three routes by which money could find its way into the Contractor Security Account. First, from the issuer of a letter of credit (ie, the bank), under the Mandatory Replacement provisions in clauses 5.5.3 to 5.5.5 which (among other things) required the bank to pay, on demand, the total letter of credit amount

into the account. Second, from the bank, under the defect rectification provisions of clause 12.1A, whereby an amount equivalent to twice the estimated cost of making good defects might be demanded under a letter of credit. And third, from the joint venture, under the proviso to 12.1A.3(c), which allowed it to deposit that equivalent amount into the account as an alternative to calling upon the letter of credit.

[16] Finally, clause 32.9 of the NWA permitted the first defender to apply set-off to sums payable to the Contractor, when released from the Contractor Security Account.

The competing constructions

[17] The principal difference between the parties is as to the meaning of "such Contractor" in clause 5.5.6. They also disagree as to the significance, if any, of clause 12.1A.5 in construing clause 5.5.6.

[18] The pursuer submits that read in the context of clause 5.5 as a whole, "such Contractor" must be read as meaning "such Contractor Company", since clauses 5.5.3 to 5.5.5 dealing with mandatory letter of credit replacement were directed towards the Contractor Company whose letter of credit was being called upon and placed specific obligations on that Contractor Company. That fell to be contrasted with clauses 5.5.1 and 5.5.2, which dealt with voluntary replacement and which allowed the Contractor to replace a letter of credit. Clause 12.1A provided for a different mechanism in a different set of circumstances and was not relevant. That said, a distinction could usefully be drawn between the obligation to "return" the balance, in 5.5.6, and the obligation to "release/return", in 12.1A.5. That reflected the fact that where the total letter of credit amount had been paid by the bank, the balance was not part of the joint venture patrimony;

whereas, where a lesser amount had been paid under the provisions of clause 12.1A, either by the bank or by the joint venture, the balance might form part of its patrimony.

[19] The defender's position is that "such Contractor" can only be a reference to "the Contractor" earlier in the same sentence; and that it is doing too much damage to the language of the clause to construe those words as referring to a Contractor Company. All other references to the Contractor in the NWA were unambiguous. The pursuer's proposed construction led to potential and insoluble difficulties where the letters of credit of both Contractor Companies had been called upon and paid into the Contractor Security Account. Guidance could be sought from clause 12.1A.5, which plainly provided for payment to the Contractor. It was inconceivable that the parties should have intended the balance of the Contractor Security Account to be paid to a Contractor Company in one set of circumstances, and to the Contractor in a different set. Such an approach would be unworkable if one letter of credit had been called upon under 5.5 and the other under 12.1A.

Approach to construction

[20] Parties referred to the following authorities: *Rainy Sky SA* v *Kookmin Bank* [2011] UKSC 50; *Arnold* v *Britton* [2015] UKSC 36; and *Wood* v *Capita Insurance Services Limited* [2017] AC 1173. The principles to be derived from those authorities were recently summarised by the Inner House in *Network Rail Infrastructure Ltd* v *Fern Trustee 1 Ltd* [2022] CSIH 32, 2022 SLT 997 at para [28] as follows. The court must strive to ascertain the parties' intention by determining what a reasonable person, having the background knowledge of the parties, would have understood by the language selected; the meaning of the words must be assessed having regard to the other relevant parts of the contract; if there are two possible constructions, the court is entitled to prefer one which is consistent with business

common sense; the language used must be balanced with the factual background and the consequences of any alternative meaning; and textualism and contextualism are not conflicting paradigms - in other words, construing a contract is a unitary exercise, not a two-stage process.

[21] Other authorities have elaborated, or explained, those fundamental principles. Thus, in *Grove Investments Ltd* v *Cape Building Products Limited* [2014] CSIH 43 it was said that the common law can often serve as a benchmark against which considerations of fairness can be measured, and that if a particular construction of a contractual term achieves a result radically different from the rules of the common law, that may in some circumstances indicate that that construction is commercially unreasonable: Lord Drummond Young, para [12].

[22] Senior counsel for the pursuer seized upon this in submitting that in construing clause 5.5.6, assistance could be gained by identifying what the position would be at common law in relation to the letter of credit. It was an autonomous contract between the pursuer and its bank, separate from and unaffected by the NWA. The bank's undertaking to the beneficiary (the first defender) had been to pay out so long as documents were presented in accordance with its terms and conditions, as it had done. There subsequently required to be an accounting between the first defender and the pursuer, and if the amount received under the letter of credit exceeded the true loss sustained by the first defender (as it had done), the pursuer, as the party who provided the letter of credit, was entitled to recover the overpayment: *Cargill International SA* v *BSFIC* [1998] 1 WLR 461; [1998] 2 All ER 406. The obligation to account existed by virtue of an implied term to that effect in the underlying contract, in this case the NWA: *Wuhan Guoyu Logistics Group Co Ltd* v *Emporiki Bank of Greece SA (No 2)* [2013] EWCA Civ 1679 at [21].

[23] Further, the form of the Letter of Credit was prescribed by the NWA. It was to be subject to the International Standby Practices 1998, International Chamber of Commerce Publication No 590 (ISP98). Rule 8.01 of ISP98 provided for the issuer's right to reimbursement against the applicant; in other words, to the bank's right to be indemnified by the pursuer.

[24] Senior counsel for the defender did not dispute what the common law regarding letters of credit was, but submitted that it was of no assistance in determining how the NWA should be construed. *Cargill* made clear at 465G that the obligation to account was subject to the absence of clear contractual words to different effect. The NWA over-rode the common law, and no term could be implied which was inconsistent with an express term of the NWA. In any event, if an accounting for any overpayment to the first defender under the NWA was required, there had been one, in that the first defender had accounted to the joint venture for the balance in the Contractor Security Account. The joint venture was the party with which it had contracted, and which had been under an obligation to deliver the letters of credit. The defender's construction did not result in a clash with the common law.

Decision

Introduction

[25] Whichever proposed construction is correct, clauses 5.5.6 and 12.1A(5) are not happily drafted whether considered in isolation or together. On the pursuer's construction, "Contractor" in lines 1 and 2 of clause 5.5.6 should have read "Contractor Company"; on the defender's, "such" Contractor in line 2 should simply have been "the" Contractor. The clause refers to the "Contractor Company Contractor Security Account Balance", which is not a defined term and which appears nowhere else in the NWA. Clause 12.1A(3) seems to

have been drafted on the premise that there is only one letter of credit, provided by the Contractor: one cannot help surmising that a style has perhaps been borrowed from a case where it was the contractor itself which provided the letter of credit, rather than, as was the case here, a letter of credit being procured by each of two members of an unincorporated joint venture. Whereas clause 5.5.6 refers to "return" of the money in the account (or, more precisely, "an amount equal" to the balance: another puzzle), clause 12.1A.5 refers to the balance being "released/returned". If the defenders are correct, and both clauses are intended to achieve payment of the amount in the Contractor Security Account to the Contractor, it is unclear why clause 5.5.6 requires the Contractor to specify the account into which the money is to be paid, and clause 12.1A.5 does not. On any view, the two clauses do not mesh together well.

Are there two possible constructions of clause 5.5.6?

[26] The first question to consider is whether the language used in clause 5.5.6 is such that it truly has two possible constructions. Only if it does may the court then have regard to commercial common sense in ascertaining its meaning. If the language used has only one possible meaning, the court must give effect to that meaning, no matter how commercially undesirable it may appear.

[27] It has to be acknowledged that the clause begins in an unambiguous manner: the first defender's obligation is seemingly to pay "the Contractor". The mode of payment is to be into an account specified by "such" contractor, which can more naturally be read as the Contractor just referred to, than as a Contractor Company identified in a previous clause. If that were all that the clause said, it is hard to see room for any other meaning than that the first defender was to pay the joint venture. However, the clause does not end there.

Confusion is cast upon who is to receive payment by the two subsequent references to "such Contractor Company". The clause, read as a whole, is ambiguous. It, and the NWA, contain a number of features capable of supporting either construction.

The pursuer's proposed construction

[28] The first point favouring the pursuer is that where there is only one Contractor, but two Contractor Companies, the reference to "such" Contractor is, at the very least, clumsy and unnecessary. "Such" might be a necessary adjective to distinguish one Contractor Company from the other, but not so where there is only the one Contractor. "Such" therefore makes more sense if it is a reference back to 5.5.4 (or to 5.5.3 to 5.5.5 as a whole) and to the Contractor Company which procured the relevant letter of credit. Second, although the term "Contractor Company Contractor Security Account Balance" is not defined, that expression could be read as an amalgam of two terms which are defined, viz, Contractor Company, and Contractor Security Account Balance, suggesting that the drafter may have proceeded on the basis that there would be a Contractor Security Account Balance for each letter of credit which was called upon, which in turn suggests that it was the Contractor Company whose letter of credit had been called upon which was to receive return of the balance in the account. Third, the reference later in 5.5.6, in sub-clause (a), to "such Contractor Company" is a further indicator that the recipient of the balance in the account was to be the particular Contractor Company which procured the letter of credit (and the acceptable replacement letter of credit), rather than the Contractor. If "such Contractor" does indeed mean the Contractor, the reference to "such Contractor Company" makes no sense. A related point is that, fourth, the identity of the recipient is to be the same whichever of sub-clause (a) or (b) triggers the right to return of the money. Where it is (a) -

confirmation from the first defender that it has received an Acceptable Letter of Credit procured by "such" Contractor Company in replacement of its previous Letter of Credit - it is hard to read the clause as intending anything other than that the balance in the account should be paid to the Contractor Company whose letter of credit it was. Since there is no suggestion in the clause, nor was it contended by the defenders, that the Contractor was entitled to payment under clause 5.5.6 in some circumstances but not others, it must follow that it was also the Contractor Company which was entitled to the balance in the account where, as here, the right was triggered by (b), namely the Letter of Credit Discharge Date. Fifth, the obligation to "return" the monies suggests that the balance is to go whence it came, and falls to be contrasted with "release/return" in 12.1A.5. Sixth, the requirement to specify an account - absent in 12.1A.5 - perhaps tends to suggest that the payment is to be made to the Contractor Company: why should the joint venture, being the other party to the NWA, require to specify a bank account when there is no such requirement in 12.1A.5? Finally, the right to apply set-off to sums due to the Contractor might support the view that payment was to be made to a Contractor Company, since otherwise the right to apply set off would exist without having to be expressed.

The defender's proposed construction

[29] Turning to the features about the clause and the contract as a whole which support the defenders' proposed construction, first, "Contractor" is a defined term, and "such Contractor", although clumsy, can be read as referring to the Contractor. Second, the definition of "Contractor Security Account" as "a" bank account into which payment is made in accordance with clauses 5.5.4 and 12.1A suggests that there is to be only one such account whichever clause is in play. That is reinforced by the definition of Contractor

Security Account Balance as the aggregate amount paid out under each letter of credit into "the" Contractor Security Account. Thus the reference to "such Contractor Company Contractor Security Account Balance" is meaningless. Third, clause 12.1A.6 provides for payment to be made to the Contractor, not to a Contractor Company; and it might be thought that the parties would not have provided for different regimes depending on whether clause 5.5.6 or 12.1A.5 was in play (although, as pointed out above, clause 12.1A does not betray any appreciation that there were any Contractor Companies whose interests might require to be considered); in addition, real difficulties could arise if different sums had been paid into the account at different times under each letter of credit (or, by the joint venture, to avoid a letter of credit being called upon). (That said, those difficulties might dwindle, or evaporate altogether, if the defenders' argument that there must necessarily be only one Contractor Security Account is wrong and if a separate account were in fact operated for each letter of credit called upon. The NWA certainly envisages that there may be other accounts into which the amount due under a letter of credit might be paid. The court should also strive to give some meaning to the term "Contractor Company Contractor Security Account Balance" if it can, rather than ascribing it no meaning at all.) Fourth, the entitlement of the first defender to apply set off in relation to sums due to the Contractor might equally support the view that it is the Contractor which is to receive payment. Finally, the obligation to "return" the money, could also be seen as consistent with the defenders' construction, bearing in mind that it was the Contractor which had the obligation to deliver the letters of credit, albeit they were procured by the Contracting Companies.

Commercial common sense

[30] The drafting of the NWA is such that it is impossible to determine what was intended by the parties on a purely textual analysis. In order to decide which of the two competing constructions should be preferred, it is appropriate to have regard to commercial common sense, and to the factual matrix. The starting point is to consider the purpose of the funds in the Contractor Security Account. There is a sharp divergence between the parties.

[31] Senior counsel for the defenders submitted that although the primary purpose of the funds was to provide security for the first defender, there was a secondary purpose, namely, that any balance should be available for the remaining Contractor Company in the event that the other had entered insolvency, as had happened here. It would have been self-evident to the parties at the time of conclusion of the NWA that if one of the Contractor Companies were to become insolvent during the project, that would place significant financial and practical stress on the other as it attempted to complete the works alone, without the anticipated financial and practical support from the other Contractor Company. Had the roles been reversed, and it had been the second defender which had become insolvent, the pursuer would surely have wished the funds from the second defender's letter of credit to have been available to it.

[32] Senior counsel for the pursuer submitted that the sole purpose of the Contractor Security Account was to provide security for the first defender as the project company, not to provide a source of funds for Contractor Companies in the event of financial stress. The whole tenor of those provisions of the NWA which provided for the Contractor Security Account was to ensure that the project was completed and that the first defender was able to recover the cost of making good defects. There was nothing in the NWA which suggested that the Contractor Security Account was for the benefit of a Contractor Company.

[33] On this matter, I prefer the pursuer's submissions. The only party which had the right to call upon a letter of credit was the first defender. Neither Contractor Company was entitled to insist that a letter of credit be called upon in the event of the insolvency of the other (*cf* clause 5.5.4, which obliged a Contractor Company to instruct the first defender to call upon the letter of credit in the event of its *own* insolvency, not that of the other Contractor Company). In theory at least, the joint venture was bound to complete the project even if the first defender had not called upon the pursuer's letter of credit. Further, as counsel for the pursuer pointed out, the circumstances in which a letter of credit might be called upon were not restricted to the insolvency of either Contractor Company but included, for example, the insolvency of a guarantor, or the letter of credit ceasing to be acceptable. Against the background, known to both parties, that there was an obligation to account to the bank for any sums which remained after satisfying any sum payable to the first defender, I do not accept that the funds were intended to have the dual purpose contended for by the defenders. It is beside the point to ask what the pursuer would have wished had the positions been reversed. The flaw in that approach is that it focuses on what the parties to the joint venture would have had in contemplation as between themselves, rather than on what the parties to the NWA would have contemplated. As counsel pointed out elsewhere in his submissions, neither the pursuer nor the second defender was party to the NWA. For my part, I cannot see why the first defender would have had any interest in making the balance of the Contractor Security Account available to the remaining solvent contractor, after any defects had been paid for, and other sums due to it paid. It must be taken to have been aware that there was an obligation to account to the bank for the balance which remained.

[34] This feeds into the consideration of which of the competing constructions makes more commercial sense. Once it is understood that the sole purpose of the funds was to provide security to the first defender, and that it was no part of that purpose to provide financial succour to the other Contractor Company, it is not commercially reasonable that the balance of the funds simply be paid to the joint venture, which itself has no obligation to reimburse the bank. The second defender's argument was predicated on the basis that it was the innocent, and the pursuer the defaulting, party, and that fairness somehow dictated that it be allowed to scoop the jackpot, as it were; but that argument founders on at least two grounds. First, the funds in the account need not have arisen from any default, or insolvency, on the part of the pursuer itself. Second, if one were to consider the hypothetical situation where *both* Contractor Companies had become insolvent and both letters of credit had been called up, it makes no sense that the funds be retained by the joint venture, effectively preventing both parties from fulfilling their obligation to reimburse their respective banks.

[35] The defenders also argued that since the letters of credit had been delivered by the joint venture, in implement of its obligation to do so, it was reasonable, and made commercial sense, for the funds to be paid to it. However, that argument ignores that the Contractor Companies themselves had certain obligations under clause 5.5.4, including the obligation to instruct the first defender to call upon the letter of credit. Further, it might have made sense for the funds to be paid to the joint venture had it then been under an obligation to account to the bank; but it was not submitted by the defender that the joint venture had any such obligation, indeed, it was the joint venture's ability to retain the funds for its own benefit (and ultimately the benefit of the second defender) that underscored the defenders' argument. Expressed differently, the defenders' position is that funds provided

by the bank under a letter of credit should, to the extent not required by the party for whose benefit they had been paid, be made available to a different party which had no obligation to account to the bank: such an outcome is not commercially reasonable. Finally, in the situation where the funds were being released because sub-clause (a) of 5.5.6 had been triggered, viz, the procuring of an acceptable replacement letter of credit, it makes no commercial sense whatsoever that the balance in the account be paid to the joint venture.

[36] Conversely, it is commercially reasonable that the funds be returned to the person - in this case, the pursuer - which does have an obligation to account to the bank for them. It is nothing to the point that in reality the bank (unless it holds a floating charge) might not receive a dividend in insolvency. The common law rules about letters of credit provide useful confirmation that the pursuer's construction is more commercially sensible than the defenders', but it is not essential to have regard to the common law in reaching that view, since the style letters of agreement in the NWA themselves reflected the common law.

[37] That is merely one aspect of commercial common sense. There remains the defenders' argument that clauses 5.5.6 and 12.1A.5 should achieve the same outcome, and that since clause 12.1A.5 clearly provides for payment of the balance in the Contractor Security Account to the joint venture, clause 5.5.6 should be construed in the same manner. Otherwise, the two clauses would each achieve a different outcome, which would make no commercial sense. The first point to be made about that argument is that in the context of the present dispute, it is merely a theoretical objection, no funds having found their way into the Contractor Security Account through the operation of clause 12.1A. That aside, any inconsistency seems to me to be a product of poor drafting rather than anything else, particularly in relation to clause 12.1A where, as already highlighted, the drafter appears to have been unaware that there were two letters of credit, one procured by each Contractor

Company rather than a single letter of credit procured by the joint venture itself. However, the fact is that the court is not being asked to reach a definitive view on how clause 12.1A.5 properly falls to be construed. That a different clause which has not been invoked might have led to a different outcome is not, in itself, a reason for departing from what I consider to be the proper construction of clause 5.5.6. The point might also be made that where the funds in the Contractor Security Account have arrived there via clause 12.1A, they might have come directly from the joint venture. In that context, the commercial considerations in play are different from those in relation to clause 5.5.6, where the funds can only have come from a bank paying a letter of credit. Accordingly, I do not accept that the clauses are necessarily irreconcilable or lead to a commercially unreasonable inconsistency.

[38] Finally, I must also deal with the submission made by senior counsel for the defenders that its construction be preferred because it involved doing least damage to the wording of clause 5.5.6: it did no damage to the wording to read "Contractor" as meaning just that; whereas the pursuer's construction required the word "Company" to be read in. I do not accept that the defender's construction necessarily does involve doing less damage to the wording, because, as previously pointed out, the subsequent reference to "such Contractor Company" then makes no sense. More fundamentally, the submission is tantamount to an invitation to the court to prefer a textual analysis to a contextual one, which runs counter to the principles derived from the authorities that contractual construction is an iterative process. Read as a whole, clause 5.5.6 makes more sense when construed as the pursuer proposes.

Conclusion

[39] For all of the foregoing reasons, I conclude that the pursuer's construction is the correct one. Clause 5.5.6 did require the first defender to transfer an amount equal to the balance of funds in the Contractor Security Account, £1,013,837.76, to an account specified by the pursuer and it remains under an obligation to do so, notwithstanding that it happens to have paid that amount to the second defender.

Disposal

[40] I will sustain the pursuer's first, second and third pleas-in-law (the last mentioned, to the extent that it refers to the sum of £1,013,837.76 being a debt due) and grant decree in terms of the first and second conclusions, reserving all questions of expenses.