OUTER HOUSE, COURT OF SESSION

[2023] CSOH 73

CA44/23

OPINION OF LORD SANDISON

In the cause

ATE FARMS LIMITED

Pursuer

against

(FIRST) (i) AW ESTATES SCOTLAND LIMITED (in Administration), and (ii) ARJOWIGGINS SCOTLAND LIMITED (in Administration) and the joint administrators thereof; and (SECOND) ADDLESHAW GODDARD LLP

Defenders

Pursuer: Dean of Faculty; BTO Solicitors LLP
First Defenders: Lindsay, KC; Addleshaw Goddard LLP

17 October 2023

Introduction

[1] In this action the pursuer, ATE Farms Limited, seeks declarator that the joint administrators of AW Estates Scotland Limited ("AWESL") and Arjowiggins Scotland Limited ("AWSL"), have breached their obligations under a deposit and exclusivity agreement entered into between the parties in March 2023. It further seeks an order requiring Addleshaw Goddard LLP, the administrators' firm of solicitors, to repay it a deposit of £300,000 currently held by that firm on trust. Addleshaw Goddard initially declined to maintain an undertaking not to pay the deposit to the administrators until the

court had ruled on the merits of the dispute, but with some judicial encouragement came to think it more prudent to agree to do so, and took no further active part in the litigation. The matter duly came before the court for a proof of two days' duration.

Background

[2] Stoneywood Mill is a former papermill on the banks of the River Don near Aberdeen Airport. Its various owners and operators have in recent years experienced difficulties in operating the business of the mill profitably, and have fallen into insolvency. The latest owners and operators, AWESL and AWSL, fell into administration in September 2022 and the administrators determined to sell the mill site belonging to AWESL and certain plant and machinery owned by AWSL which had been used for the purposes of the mill business.

[3] In early 2023, an approach was made to the administrators to purchase the site and the plant, etc., by Huntley Wood Investments Limited. On 21 March 2023, various environmental permits required for the conduct of the mill business were sent to the English solicitors acting for Huntley Wood. It was, however, at no point contemplated by anyone that Huntley Wood was going to try to operate that business; it operated in the field of demolition and remediation of sites with a view to their sale for redevelopment. It had said in its offer that it would manage the contaminants remaining on the mill site. Amongst the permits sent to it was a Waste Management Licence issued to Arjo Wiggins Fine Papers Limited (a previous occupier of the mill site) in respect of a separate landfill site called Little Clinterty where waste from the mill had historically been dumped.

[4] It was subsequently agreed that the pursuer, a company with which Huntley Wood was in a joint venture arrangement in connection with the purchase of the mill site, would be the entity with which any sale and purchase contract would be entered into. On

28 March 2023 the pursuer and the administrators entered into a Deposit and Exclusivity Agreement ("DEA") regarding the proposed purchase by the pursuer of Stoneywood Mill, together with all machinery and other assets on site.

[5] The terms of the DEA which are relevant to the present action are as follows:

> "**1. DEFINITIONS AND INTERPRETATION**
> 1.1 In this offer the following terms and expressions shall bear the following meanings:
> Date of Settlement' means the date upon which Settlement takes place, which date shall be no later than 19 May 2023 or, in the event that the Second Deposit has been paid, 16 June 2023;
> […]
> 'Exclusivity Period' means the period from (and including) the date of conclusion of the Deposit and Exclusivity Agreement to the Date of Settlement;
> 'First Deposit' means the sum of THREE HUNDRED THOUSAND POUNDS (£300,000) STERLING;
> 'First Deposit Payment Date' means the 28 March 2023;
> 'Heads of Terms' means the agreed heads of terms set out in Part 1 of the Schedule, subject to such amendments as the Seller and Purchaser may agree;
> 'Property' means (i) ALL and WHOLE the subjects known as and forming Waterton Estate, Aberdeen (otherwise known as Stoneywood Mill), being those subjects registered in the Land Register of Scotland under title number ABN61499; and (ii) all machinery and chattel assets thereon as at the date of this Deposit and Exclusivity Agreement;
> 'Purchaser's Obligations' means the obligations on the Purchaser set out in Clause 2 hereof;
> […]
> 'Second Deposit' means the sum of FIFTY THOUSAND POUNDS (£50,000) STERLING;
> 'Second Deposit Payment Date' means 19 May 2023;
> 'Seller's Obligations' means the obligations on the Seller set out in Clause 3 hereof;
> […]
> 'Settlement' means the completion of the sale and purchase of the Property and payment of the purchase price therefor in accordance with the terms of the Transaction Documents;
> 'Transaction Documents' means an unconditional contract comprising missives of sale between the Purchaser and the Seller in respect of the purchase of the Property by the Purchaser (or its nominee) with Settlement thereunder to take place no later than the Date of Settlement and that otherwise on the terms set out in the Heads of Terms;
> […]

2. PURCHASER'S OBLIGATIONS

2.1 The Purchaser undertakes to:-

2.1.1 pay the First Deposit in accordance with Part 2 of the Schedule;

2.1.2 only in the event that Settlement has not occurred on or prior to the Second Deposit Payment Date, pay the Second Deposit in accordance with Part 2 of the Schedule (and for the avoidance of doubt the Second Deposit shall not be due or payable in any other circumstances);

2.1.3 act towards the Seller in good faith and to diligently and expeditiously progress the negotiation and conclusion of the Transaction Documents.

3. SELLER'S OBLIGATIONS

3.1 The Seller undertakes to:-

3.1.1 comply with its obligations regarding the First Deposit and the Second Deposit in terms of Part 2 of the Schedule;

3.1.2 immediately discontinue all (if any) existing negotiations with any third party in connection with the disposal of or any other dealings with the Property (which for the avoidance of doubt does not include the Purchaser or their professional advisers) and shall not commence any new negotiations with any third party in connection with the disposal of or any other dealings with the Property during the Exclusivity Period;

3.1.3 promptly deal, or instruct the Seller's Solicitors to promptly deal, with all reasonable enquiries and requests concerning the Property raised by the Purchaser or the Purchaser's Solicitors, but the Purchaser acknowledges that this is an insolvency sale and that the Insolvency Practitioners may not have all documentation or information requested. Declaring for the avoidance of doubt, that any failure on the part of the Seller to provide such documentation or information shall not be deemed a breach of the Seller's obligations under this Deposit and Exclusivity Agreement; and

3.1.4 act towards the Purchaser in good faith and to diligently and expeditiously progress the negotiation and conclusion of the Transaction Documents.

[…]

4. TERMINATION

4.1 This Deposit and Exclusivity Agreement will terminate with immediate effect by written notice to the Purchaser on expiry of the Exclusivity Period but that without prejudice to the operation of the provisions set out in paragraph 2 of Part 2 of the Schedule.

4.2 The Seller may terminate the Deposit and Exclusivity Agreement by giving 3 days written notice to the Purchaser if the Purchaser is in breach of the Purchaser's Obligations contained in clause 2.1.1 or 2.1.2 but that without prejudice to the operation of the provisions set out in paragraph 2 of Part 2 of the Schedule. In the event that Settlement has not occurred prior to the expiry of the Exclusivity Period then in accordance with paragraph 2.3 of Part 2 of the Schedule, the balance of the Deposit Account shall be paid to the Seller,

[…]

[Schedule (in 2 parts)]

Part 1

Heads of Terms

Arjowiggins Scotland Limited ('AWS') and AW Estates Scotland Limited ('AWES') - both in administration (together 'the Companies')

Asset Purchase

• ATE Farms Limited (company number 06755964) ('ATE') has made an offer to acquire the freehold site known as Stoneywood Mill (being the whole subjects registered in the Land Register of Scotland under title number ABN61499 together with the fixtures and fittings therein and thereon and the whole common, mutual and exclusive rights of property, access and others offering thereto.

• The offer also includes all machinery and chattel assets currently remaining on the site.

Guarantee

Huntley Wood Investments Limited (company number 06860234) will guarantee the obligations of ATE in respect of their obligations (or those of any nominee purchaser) under the sale and purchase contract.

Consideration

• Subject to the provisions below, the total consideration is £4.7 million.

• A deposit of £300,000 will be paid with the balance due on completion, assuming completion occurs on or before 19 May 2023.

• If completion does not occur on or before 19 May 2023 then an additional deposit of £50,000 will be paid and the total consideration shall be increased to £4.75 million.

• No element of the consideration is deferred or conditional.

Employees

• No employees of AWS will be taken on by ATE at the point of sale.

• Following payment of the deposit the Administrators are happy for ATE to hold discussions with AWS staff around any possible future employment or consultancy arrangements after their redundancy on exit of the site by the Administrators.

• The administrators will be indemnified against any liability arising from any approaches made by ATE to AWS staff following their redundancy.

Permits/licences

• ATE and the Companies will use reasonable endeavours to transfer the permits for Pollution Prevention Control, Controlled Activities Water Use, Waste Management and Reservoirs to ATE on completion of the deal. ATE have stipulated that they have experience in all these areas and do not anticipate any issues with SEPA as a result.

• The Joint Administrators will move to cancel the Greenhouse Gas Emissions Permit alongside the transaction and have already surrendered the Radioactive Substances Permit (pending final confirmation of the cancellation from SEPA). Final confirmation of the cancellation of these permits will not be a condition of completion as this is not in the Joint Administrators' control.

• The Joint Administrators will use reasonable endeavours to maintain the electricity export licence until completion and in any event will not take any steps to cancel this.

Other

• All assets are sold 'as seen', i.e. the Joint Administrators will provide no warranties, representations, guarantees or indemnities, including to title (albeit will

provide access to Addleshaw Goddard and to all relevant documents to enable ATE to form their own conclusions).

Part 2
Deposit
1. The Purchaser shall pay the First Deposit and, if due and payable, the Second Deposit to the Seller's Solicitors (who are irrevocably authorised by the Seller to receive the same) on or prior to the First Deposit Payment Date and, if appropriate, on or prior to the Second Deposit Payment Date respectively, by bank transfer of cleared funds from the Purchaser's Solicitors' Bank Account into the Seller's Solicitors' Bank Account. Receipt of the First Deposit and the Second Deposit by the Seller's Solicitors in accordance with this paragraph shall be a good and valid discharge of the obligations of the Purchaser to pay the sum in question to the Seller.
2. The Seller and the Purchaser hereby jointly instruct the Seller's Solicitors to:
2.1 hold the First Deposit and, if paid, the Second Deposit (in each case together with any interest accruing thereon) in the Deposit Account in trust jointly for Seller and the Purchaser;
2.2 if Settlement occurs prior to expiry of the Exclusivity Period, treat the balance of the Deposit Account as a part payment to account of the purchase price for the Property under and apply the balance of the Deposit Account in accordance with the terms of the Transaction Documents;
2.3 if Settlement has not occurred prior to expiry of the Exclusivity Period, pay the balance of the Deposit Account to the Seller upon expiry of the Exclusivity Period (being 19 May 2023 unless the Second Deposit has been paid in which case it will be 16 June 2023) which balance shall be deemed forfeit to the Seller absolutely;
2.4 pay the balance of the Deposit Account to the Seller on 19 May 2023 unless the Second Deposit has been paid in which case it will be 16 June 2023 if this Deposit and Exclusivity Agreement has been terminated by the Seller under Clause 4.2 of the Deposit and Exclusivity Agreement which balance shall be deemed forfeit to the Seller absolutely; and
2.5 if Settlement has not occurred prior to the expiry of the Exclusivity Period (being 19 May 2023 unless the Second Deposit has been paid in which case it will be 16 June 2023) as a result of a breach by the Seller of its obligations under this Deposit and Exclusivity Agreement or the Transaction Documents, pay the balance of the Deposit Account to the Purchaser.
3. No payments shall be made from the Deposit account except in accordance with paragraph 2 above."

[6] Summarising its salient terms, and at the risk of some over-simplification, the DEA required the pursuer to put a deposit of £300,000 into the hands of Addleshaw Goddard, to act towards the administrators in good faith and to diligently and expeditiously progress the negotiation and conclusion of an unconditional contract for the sale of the subjects, with settlement in terms of that contract to take place by 19 May 2023, which failing 16 June 2023,

the contemplated contract to be otherwise on the terms set out in the Heads of Terms document previously agreed between Huntley Wood and the pursuer on the one hand and the administrators on the other, and appended to the DEA.

[7] The administrators bound themselves in terms of the DEA to discontinue any existing negotiations, and not to start any negotiations, with any other party in relation to the sale of the subjects until 19 May 2023, which failing 16 June 2023, and to act towards the pursuer in good faith and to diligently and expeditiously progress the negotiation and conclusion of the unconditional agreement just described.

[8] Read short, the arrangements for the £300,000 deposit were as follows: The DEA required the payment of the deposit to Addleshaw Goddard as trustees for all parties. In the event that settlement of the anticipated contract took place prior to 19 May 2023, which failing 16 June 2023, the deposit (augmented by £50,000 if matters had run on past 19 May) was to be applied to the purchase price. If settlement had not taken place by 16 June, the deposit was to be forfeited by the pursuer and paid to the administrators, save that if settlement had not occurred by then as a result of a breach of the DEA by the administrators, the deposit and any accumulated interest were to be paid to the pursuer.

[9] Negotiations to settle the terms of the contract for the sale of the subjects were entered into by the parties' respective solicitors. Various matters were the subject of discussion, but the principal bone of contention was a clause which the administrators' solicitors put in their first draft of the intended contract, dated 4 April 2023, in the following terms: "The Purchaser will indemnify AWESL, AWSL and the Insolvency Practitioners in respect of all (if any) liability under the Environmental Protection Act 1990". That clause was deleted in its entirety by the pursuer's solicitors in their first redraft of the contract, on 27 April 2023. On 4 May the administrators' solicitors reinstated the clause, observing that

"This is non-negotiable and must be retained. Your client has accepted the position on the basis that the risk of liability has been factored into the purchase price."

[10] Correspondence then followed between the parties' respective solicitors about various terms of the draft contract, including the requirement for environmental liabilities. The pursuer's solicitors queried the statement that the pursuer had accepted that it would grant what was being demanded, doing so on 4 May and again on 5 May. On 10 May the administrators' solicitors, in response to a further such enquiry, referred to a telephone call that had taken place between the parties that morning and asserted that the pursuer had at that meeting acknowledged the administrators' "absolute requirement" that they be kept clear of any liability in respect of any potential contamination issues and had accepted the position. The pursuer's solicitor in turn described that as a "deal breaker". On 12 May the pursuer's solicitor asked if there was any scope for amending the wording of the clause, and on 15 May asked if the clause could be limited to the property actually being purchased. No concession was made in that regard and on 15 May 2023 the pursuer's solicitors wrote to the solicitors for the administrators giving notice that settlement of the anticipated contract would not take place prior to 19 May 2023, or indeed ever, and alleging that that was a result of the administrators' breach of the DEA constituted by their insistence, contrary to their obligation to act towards the pursuer in good faith, on an acceptance of environmental liabilities on a basis not comprehended within the Heads of Terms. The letter asked for a return of the deposit or at least an acceptance that it would not be paid to the administrators until the dispute was resolved. On 17 May the matter was brought before the court, and an undertaking was given by Addleshaw Goddard that the deposit would be retained in the meantime, which undertaking has since remained in force.

[11] On 19 May 2023 the administrators' solicitors emailed the pursuer's solicitors and accepted that the Waste Management License Permit for Little Clinterty would remain with the administrators. However, the pursuer was not prepared to continue with the negotiations and there matters rest.

The evidence

Pursuer's case

[12] Philip Curle (50) is a solicitor with the incorporated practice of Curle Stewart Limited, the pursuer's agents. In the affidavit forming his principal evidence, he explained that he had over twenty-five years' experience in advising clients in large scale development site acquisitions and disposals. He had been instructed in the present matter on or around 2 March 2023 by Rob Brough, a commercial manager with Euro Demolition, a group of companies trading in site clearance and demolition services who had been introduced to him by Steve Barnett of Shepherd Chartered Surveyors. He was informed that an agreement to purchase Stoneywood Mill from the administrators had been agreed. The precise entity which was to purchase the site had yet to be decided. He was informed that the requisite funds were, if need be, available without recourse to a lender, but that it was intended to source some bank funding. Title deeds for the site for sale were provided by Addleshaw Goddard and a review of them was commenced.

[13] The DEA was then negotiated, at the insistence of the administrators, between 16 and 28 March 2023. The administrators had at first demanded a non-refundable deposit, but that had been refused. The negotiations had covered amendment of the proposed Heads of Terms to be annexed to the DEA, the identity of the purchasing entity and requirement for a guarantor, and an extension of the period for conclusion of missives. Addleshaw Goddard

had meantime been pestering the pursuer for payment of a deposit, which was paid only upon conclusion of the DEA.

[14] Negotiations on the terms of the sale contract had begun with Addleshaw Goddard sending a first draft to Curle Stewart Limited on 4 April 2023. Various matters had been dealt with, and the revised draft was returned to Addleshaw Goddard on 17 April. The original draft had included a clause relating to environmental liabilities which was an amendment to the style for such clauses provided by the Property Standardisation Group (an independent organisation set up to formulate and publish generally-accepted standard term templates for various kinds of property transaction). The PSG template style limited environmental liability to the property being purchased, whereas what was proposed by Addleshaw Goddard required the pursuer to take on all environmental liabilities of the administrators, AWESL and AWSL, even if these were not in respect of the property being purchased. Mr Curle had never encountered such a clause in all his years of practice, assumed it was an error, and deleted it in its entirety from his revised draft.

[15] On 4 May 2023 Addleshaw Goddard returned a further revised version of the draft contract, reinstating the environmental clause as originally drafted and stating that it was non-negotiable and had been accepted by the pursuer. That remained the only real issue in dispute. Addleshaw Goddard claimed that it was not possible for the administrators to retain any liability and that the pursuer had accepted that from the outset. Mr Curle indicated that the proposed position was not acceptable to the pursuer and on 12 May asked if there was scope for amendment of the proposed clause. He later enquired whether there was scope for restricting liability for environmental matters to those arising out of the site being purchased only, and the existence of Little Clinterty and the potential liabilities attaching to it had then emerged. He had had no discussions with Addleshaw Goddard

about Little Clinterty, but thought it an important matter. On 15 May Addleshaw Goddard had confirmed that the clause as proposed by them was to remain. The pursuer had then instructed him to serve a notice terminating the DEA, which he had done on 15 May.

[16] In cross-examination, Mr Curle stated that he had previous experience of property sales by insolvency practitioners, but did not accept that such sales usually involved the grant of indemnities of the sort demanded here. The pursuer had costed out how it would deal with contaminants at the mill site, but nowhere else, in deciding what price it was willing to pay. The provision of the various SEPA permits, including the Waste Management Licence in respect of Little Clinterty, to Huntley Wood's English solicitors was not something that he considered ought to have raised the prospect that environmental indemnities in respect of that site would be demanded. This was not a sale of all the assets of an insolvent company, merely a site and plant purchase. His firm's letter of 15 May had been intended to terminate the DEA. While Addleshaw Goddard's email of 19 May had been an olive branch, in that it removed Little Clinterty from the scope of the indemnities sought, the indemnities still being demanded extended beyond the mill site itself, which was not what the pursuer would have been prepared to accept. He had no knowledge of the pursuer having any funding gap in connection with the proposed purchase.

[17] Robert Brough (31) swore an affidavit as his principal evidence. He was employed by EDD Contracts Limited as a commercial manager. EDD was part of a group of related companies, including Huntley Wood Investments Limited. He oversaw new commercial projects for his employer and associated companies, including site acquisitions. Their general line of business was to buy sites, demolish buildings on them and remediate them, obtain planning and other consents and then sell them to third parties as development opportunities.

[18] The site in question had first came to the attention of his employer around 4 years previously, when its then owner went into administration, but on that occasion there had been a management buy-out and the site had been taken off the market. However, insolvency had again occurred and administrators had been further appointed around October 2022. An initial offer from his employers to buy the property and all plant and machinery at a price of £6 million had been made, subject to investigation of contaminants on the site. However, the administrators had decided to separate the sale of the property from that of the plant and machinery and had rejected the offer.

[19] A further offer in December 2022 to buy the plant and machinery owned by AWSL from the Stoneywood site for £2 million and from another of its sites in Chartham for £500,000 had also been rejected, but in February 2023 the administrators had contacted him to say that a combined sale of the site, together with the plant and machinery, was again on the cards, and inviting him to a site visit which took place on 14 February 2023. Steve Barnett from Shepherd Chartered Surveyors had been appointed by his employers to negotiate the purchase and to produce Heads of Terms. He had offered £4.5 million subject to a full refurbishment and development asbestos survey. The offer was not subject to further environmental investigations, and his employers agreed that they would manage all remaining contaminants on site, but not more widely. The price reduction in comparison with the original offer of £6 million was due to a large dip in relevant markets, including the commodity and residential property markets, in the last quarter of 2022. It was not due to any environmental considerations. His understanding was that the only environmental issues were a heavy oil spill in one area of the site, contamination at the effluent treatment plant and asbestos throughout the site. The administrators had advised that they intended

to remove some 1,000-litre chemical containers from the site. None of those issues represented any cause for concern to him.

[20] There was some negotiation about price, which resulted in an improved offer of £4.7 million. It was proposed that the pursuer would be the purchaser, in substitution for Huntley Wood, which had been originally suggested. Proof of funding was supplied; it was a mixture of £3.08 million from Together Finance, for which an offer to lend existed, and the pursuer's own ready funds. The administrators were satisfied with that and matters proceeded to the negotiation of Heads of Terms.

[21] During that process, he had been provided with various environmental permits. It had been mentioned that there was a waste management licence for the Stoneywood Mill site but at no point had the administrators disclosed that that was for an external landfill site. He would never had agreed to accept any liability in connection with a landfill operation, because there would have been no way of calculating the extent of any potential liability and no knowledge of what exactly had been dumped there. Ongoing monitoring for around 60 years would have been required. The existence of any liability for an external landfill site would have been of major relevance to the purchase of the site and he would have expected it to be mentioned explicitly in the Heads of Terms and during discussions, which it was not. Had he known about the landfill site, the price offered would have been drastically reduced.

[22] Once Heads of Terms had been agreed, Mr Curle had been instructed to act for his employers. It became apparent that the administrators were not in fact going to remove the chemical containers on site. That caused some discussion about a moderate price reduction, but ultimately it had been agreed that the chemicals would remain to be dealt with by the pursuer and there would be no price reduction.

[23] During the negotiation of the anticipated sale contract, Mr Curle had intimated that the administrators were trying to include a clause that would pass to the pursuer all environmental liabilities, not just those at the site. That was not what had been agreed and Mr Curle had been instructed to reject it. Alison Camp of the administrators had called him on 4 May 2022 to discuss the proposed guarantee of the environmental liabilities by Huntley Wood. He had told her that the pursuer would be prepared to assume liability for the oil spillage and effluent plant contamination. There had been no mention of a separate landfill site, and no agreement to deal with environmental liabilities in any such connection.

[24] On 10 May 2023 he had had a call with SEPA and with the administrators to discuss the environmental permits. It was SEPA who raised the existence of the landfill site at Little Clinterty. That was the first that he had heard of it. After he reported the matter to higher management, Mr Curle had been instructed that no liability for an external landfill site could be accepted. On 11 and 12 May 2023 he had, at his own request, been provided with further information about Little Clinterty by the administrators and AWSL. It was not possible to reach agreement about the landfill site as the pursuer was not willing to accept the relevant liability. Mr Curle had been instructed to terminate the DEA on that account. After that had been done, the administrators had offered to remove the potential landfill liabilities from the deal, but by that point the DEA had already been terminated.

[25] In cross-examination, Mr Brough stated that Huntley Wood and the pursuer had entered into a joint venture and that was why the pursuer had become the intended purchaser in substitution for Huntley Wood. The companies were otherwise unrelated. He had no prior experience of acquiring property from insolvency practitioners. After the pursuer had ceased to be interested in the acquisition, Huntley Wood had decided to pursue it by itself, but needed funding. The pursuer had had the requisite funding in place. He had

never told the administrators that the pursuer would accept all environmental liabilities, merely that it would deal with the contaminants on the mill site. After the termination of the DEA on 15 May, he had been advised by solicitors not to speak further with the administrators. By that stage the matter was out of his hands.

First Defenders' case

[26] Alison Camp (47) swore affidavits that she was a Chartered Accountant and had been employed by the administrators for two years, with 13 years' previous relevant experience. She specialised in advisory assignments, business review projects and insolvency solutions for under-performing businesses, and regularly assisted with the sale of properties and plant and machinery on behalf of businesses which had entered into an insolvency process.

[27] Administrators had been appointed to AWESL and AWSL on 22 September 2022. A decision had been taken to sell Stoneywood Mill, which was owned by AWESL, and the plant and machinery and other moveable items owned by AWSL. A marketing process had been begun, which had resulted in a formal offer by Steven Barnett of Shepherd Chartered Surveyors on 21 February on behalf of Huntley Wood Investments Limited. The proposal included a condition that Huntley Wood would deal with all remaining contaminants on site. That was taken by the administrators to mean that Huntley Wood would be the sole party responsible after the sale for any environmental obligations relating to the subjects being sold. It had subsequently been agreed that the purchasing entity would be changed to the pursuer.

[28] The relevant title deeds had been sent to the pursuer's solicitors on 2 March 2023 for their perusal, and the DEA had been entered into on 28 March and the deposit paid. The

solicitors acting for the parties commenced negotiations on the anticipated sale and purchase contract. A problem with the environmental liability clause put forward by the administrators' solicitors was made known to her on 28 April 2023. She was surprised about that, because it was accepted industry practice that, in a property sale by insolvency practitioners, such liabilities would be built into the sale in order to allow the insolvent estate to free itself of them and thus to distribute the proceeds from the sale to the creditors. Furthermore, it was very difficult to deal with environmental liabilities when the property to which they related had been sold. The parties' solicitors had continued to correspond on the matter, but it remained outstanding. On the morning of 4 May 2023 she had telephoned Mr Brough to discuss various matters relating to the sale, including the environmental liabilities. During that call, Mr Brough confirmed that the pursuer would accept all environmental liabilities. That was consistent with the position which had been put forward by Steven Barnett on 21 February 2023. On 10 May, Mr Brough had been on a call with her, environmental consultants for the administrators and the pursuer, and a representative of SEPA. The transfer of the environmental permits and the impending sale scheduled for 19 May 2023 had been discussed on that call and at no point had Mr Brough suggested that the pursuer had concerns over the completion of the sale.

[29] On 11 May, the pursuer's solicitor was maintaining that the environmental liability provisions remained in dispute. On 15 May, she had been informed by Addleshaw Goddard that Curle Stewart had issued a letter that outlined that the pursuer remained opposed to the administrators' proposed provisions on environmental liabilities. This was contrary to the position Mr Brough had agreed during the phone call on 4 May, during which he had been clear that the pursuer would accept the responsibility for environmental liabilities on completion of the sale. The administrators had gone back with a further

compromise to try to conclude the transaction, but it had been rejected. She would have then expected that all parties would have joined a call to agree the final outstanding points on the transaction and to reach a negotiated position. However, Addleshaw Goddard informed the administrators that the pursuer's principals refused to attend such a call.

[30] In her supplementary affidavit, Ms Camp noted that Addleshaw Goddard had sent the pursuer's English solicitors, SC Legal, an email on 21 March 2023 which had attached to it copies of the various environmental permits relevant to the proposed sale, including a copy of Waste Management Licence WML/N/20070, which clearly related exclusively to Little Clinterty. Information about that landfill site had accordingly been made available to the pursuer's solicitors in connection with the proposed sale in advance of the DEA being entered into.

[31] Further, the terms of the DEA allowed the pursuer to extend the negotiation period to 16 June 2023 in return for £50,000. No request for an extension of time had been made. Had they been requested to do so by the pursuer, the administrators would have agreed to an extension to 16 June and would have waived their right to the additional £50,000 deposit. That would have allowed further time for parties to attempt to negotiate the issues around the environmental indemnities. The administrators wanted the deal to be done, but the pursuer did not wish to negotiate and simply shut down the conversation. As at 15 May, she was operating on the basis that the negotiations were still ongoing and that the deal would conclude on 19 May 2023 as scheduled. She had attempted to speak to Mr Brough on 15 May, both before and after the letter sent by the pursuer's solicitors on that day, but he had not made any substantive response to those attempts.

[32] In cross-examination, Ms Camp stated that she had understood from Huntley Wood's offer that it was offering to undertake all environmental liabilities.

Mr Brough had confirmed that position to her when they spoke on 4 May, although Little Clinterty had not been mentioned at that point. She was not sure if indemnities had been discussed in terms at that stage. On 10 May, Little Clinterty had been raised by SEPA. Mr Brough may have been surprised and had questions about that, but had not expressed concerns as such. The Heads of Terms annexed to the DEA referred to the use of best endeavours for the transfer of environmental permits, but such a document would not necessarily set out all the terms which an insolvency practitioner would be looking for in a sale. Her practice as an insolvency practitioner selling property was always to sell on the basis that environmental liabilities pertaining to an asset would transfer with the sale of that asset. That was what she understood was going to happen in this case. The buyer could always seek to negotiate. It was not standard to transfer all environmental liabilities of a company when only a limited range of that company's assets was being sold. The administrators had tried to find a commercial way forward after the pursuer's letter of 15 May, and were willing to extend negotiations.

[33] In re-examination, Ms Camp stated that AWESL's only site, and its only asset, was Stoneywood Mill. It did not own Little Clinterty, which was not for sale. Little Clinterty had been used to dump sludge produced by the mill. The administrators would have wanted to transfer all past, present and future liabilities which were intrinsically part of the property being sold. If the pursuer had put forward different proposals in the course of the negotiations, they would have been discussed and considered.

[34] Alistair McAlinden (43) provided an affidavit stating that he was a Chartered Accountant and a licensed insolvency practitioner, and had been Managing Director at Interpath Advisory for 2 years, having 20 years' accountancy experience. His particular area of expertise was corporate restructuring and insolvency. He regularly instructed the sale of

commercial properties and moveable assets on behalf of businesses which had entered an insolvency process, including properties which had the potential to incur environmental liabilities.

[35] He had been appointed a joint administrator of AWESL and AWSL on 22 September 2022. The decision had been taken to sell Stoneywood Mill together with the plant, machinery and other moveables. The stock had been sold, the property mothballed and the marketing process begun. The environmental liabilities associated with the property being sold, and the estimated costs of addressing them, had been factored into the administrators' views on the sale price. They had been advised by two industry experts that the property for sale would be worth around £6 million if it had no risk of environmental liabilities. A lower price than that would be acceptable if the terms of sale removed or transferred environmental costs and liabilities to the purchaser; in other words, a removal of risk from the administration, enabling an orderly and reasonable distribution to creditors, would merit a price reduction. It would, further, have been extremely difficult for the administrators to deal with environmental liabilities when the company in administration no longer owned the property to which those liabilities related. Accordingly, it was common practice to avoid separating responsibility for these types of liabilities from the associated property.

[36] He had been contacted by Steven Barnett of Shepherd Chartered Surveyors on 21 February 2023. Mr Barnett had intimated that his clients, Huntley Wood Investments Limited, wished to put forward a formal proposal to acquire the property. That formal proposal included a condition that Huntley Wood would deal with all remaining contaminants on the site. His understanding of that was that Huntley Wood would be responsible for all environmental obligations relating to the property being sold.

Negotiations ensued, during which it was agreed, on the suggestion of Huntley Wood, that the pursuer would be the purchasing entity.

[37] The DEA had been entered into and the deposit paid. There had been significant discussion on the dates that should be included in it before the final version was agreed and signed. The solicitors acting for both sides had commenced negotiations on the sale and purchase documentation. Various commercial points were discussed and resolved, but the administrators' clause on the environmental position was not accepted by the pursuer. He had become aware of that on 28 April 2023. The position of the pursuer's solicitor was that it would not accept responsibility for any environmental liabilities, which was in direct contrast to the initial position that it would deal with all remaining contaminants. It was generally accepted that such liabilities would pass to the buyer in an insolvency sale and the reward for that was the lower sale price. The pursuer should not have been surprised by the administrators' position given the sale price, the contents of the Heads of Terms and the fact that this was a sale by insolvency practitioners. The administrators had continued to try to negotiate a compromise with the pursuer but Mr Brough had been unwilling to talk. Mr McAlinden had instructed Addleshaw Goddard to try to reach a compromise. They had sent a suggested compromise to the pursuer's solicitors and had tried to set up all-party conference calls to negotiate the outstanding points, but the pursuer would not attend those calls. It simply refused to make any sort of compromise and that ultimately meant that the sale did not proceed.

[38] In cross-examination, Mr McAlinden stated that it was standard practice to divest an insolvent estate of liability pertaining to an asset being sold, but not of liability pertaining to an asset not being sold. The administrators in this case had asked for indemnities in relation to all liabilities of AWESL, but that was up for negotiation. They were looking for the best

outcome for the company creditors. He was unaware of what had actually been dumped at Little Clinterty. He had understood that Huntley Wood had offered to be responsible for all environmental liabilities relating to the property being sold. The Heads of Terms had contained the key commercial terms of the deal, but the legal niceties would be resolved afterwards. It would be understood that environmental indemnities were going to be asked for because of the stated intention to transfer the environmental permits, which would involve transfer of the environmental liabilities. The demand for indemnities was a starting position which could have been negotiated.

[39] In re-examination, Mr McAlinden stated that Stoneywood Mill was the only asset of AWESL. Heads of Terms had to be kept streamlined and could not mention every matter essential to a deal. The administrators had wanted to see the deal go through, but a balance had to be struck between risk and benefit.

[40] Jamie McIntosh (48), a qualified solicitor, partner and head of the Scottish restructuring team at Addleshaw Goddard LLP, swore an affidavit that he specialised in all aspects of insolvency, turnaround and corporate restructuring and had over 16 years of experience in the finance and restructuring market.

[41] Addleshaw Goddard had been instructed by the administrators in the sale of Stoneywood Mill. As the location of a former papermill business, a number of environmental permits from SEPA had been required in terms of the Environmental Protection Act 1990. The pursuer had been sent a pack of title documentation which included environmental documentation. The sale was to be unconditional and the pursuer was to be satisfied on the title before entering into contracts, which was common in an insolvency sale. The pursuer had taken longer than usual to be satisfied on the title, and then had heavily negotiated a Deposit and Exclusivity Agreement, which was concluded on

28 March 2023. Addleshaw Goddard had then issued a draft offer to sell together with a pack of conveyancing documentation such as a disposition, draft discharge of security and so on. He was surprised by some of the amendments then made to that documentation by the pursuer's solicitors. The documentation as issued by Addleshaw Goddard had been in a standard form for insolvency sales that was generally accepted by other solicitors in Scotland. The draft contract had been sent on 4 April 2023 and he did not receive an amended version back until 27 April. The amended version did not reflect earlier discussions and had a number of fundamental clauses deleted in a way that would not normally be acceptable to administrators. The Property Standardisation Group had been formed to produce agreed forms of documents and procedures for Scottish commercial property transactions, and what it published was generally accepted as a template for commercial property transactions in Scotland. In terms of its standard sale contract, there was a provision which stated that the liability for any notice or requirement of any environmental authority relating to contaminated land would rest with a purchaser rather than a seller.

[42] Further, it was generally accepted as standard practice in insolvency sales that the purchaser would accept the property "as seen" and grant an indemnity for environmental liabilities. Administrators did not know the history of a site being sold and therefore could not ascertain what liabilities might exist in that connection. If liability was to remain with the administrators, that would prevent creditors being paid a dividend from the sale proceeds, as they would require to be ring-fenced in case the administrators had to deal with a liability at a later date, and the insolvency process might require to remain open for an extended period. Addleshaw Goddard had in the past had their standard clause on environmental liabilities accepted by many other firms of solicitors, including Curle Stewart.

Given the nature of the property being sold and the content of the Heads of Terms, he would have expected the pursuer to agree to terms at least similar to those put forward.

[43] The administrators continued to negotiate and Addleshaw Goddard revised and returned the draft contract on 4 May 2023. The pursuer's solicitors had advised later on the same day that there was not much left to negotiate, but then had failed to return a revised version of the contract at all. The DEA expired on 19 May 2023. Prior to that, the pursuer had refused to attend all-party conference calls to negotiate the outstanding points.

[44] In cross-examination, Mr McIntosh stated that his starting point in the negotiations was to ask for a complete indemnity. Although the phrase "non-negotiable" had been used in a travelling draft for the proposed contract, the relevant clause was in fact negotiable. The phrase had only been used to indicate it was an important matter. The negotiations had been difficult in general, with Curle Stewart responding slowly in what was meant to be a quick sale, and deleting clauses which were absolutely standard in an insolvency sale. That firm had accepted indemnity clauses similar to the one in question here in previous transactions. Offers to have all-party calls with the party principals involved had been rebuffed.

[45] He was unaware of what was in the ground at Little Clinterty. In an insolvency sale, the applicable maxim was that the buyer should beware.

[46] In re-examination, Mr McIntosh pointed out that certain other clauses in the draft contract had been described by him as imperative in one way or another when in fact negotiation as to their precise terms had proved possible. He had been under the impression from the terms of the Huntley Wood offer that there was no issue about the acceptance of environmental liabilities.

[47] Adam Gordon (38), Chartered Accountant, and an investment director with Hilco Capital, gave an affidavit that he had been approached by Kevin Boyd of Quest Corporate Limited on 23 June 2023. Mr Boyd had told him that he was working with Huntley Wood Investments, who were looking to purchase a site but required to obtain funding of about £1.2 million in order to do so. There had been a telephone call amongst himself, Mr Boyd and his colleague Steven Patterson, and David Unwin and Rob Brough of Huntley Wood on 29 June, in the course of which those matters had been confirmed. He stated on examination that it was the same people who were managing the deal for the pursuer and subsequently Huntley Wood. He did not regard what was discussed with him as being different from the proposed transaction involving the pursuer. He had been under the impression that it was Huntley Wood that had put up the £300,000 deposit in the deal involving the pursuer.

Pursuer's submissions

[48] On behalf of the pursuer, senior counsel moved the court to grant the decrees of declarator and *ad factum praestandum* first and second concluded for.

[49] The clause dealing with environmental indemnities required by the administrators in the negotiations was not based on anything contained in the Heads of Terms. The Heads of Terms did refer to other forms of indemnity, but not of the kind which was subsequently demanded. Clause 3.1.4 of the DEA bound the administrators to act towards the pursuer in good faith, and to diligently and expeditiously progress the negotiation and conclusion of the property sale contract. It was impossible to regard the insistence, on a non-negotiable basis, on such an indemnity as a discharge of those obligations. The indemnity sought was not even restricted to liabilities in respect of the site being purchased, but extended to

liabilities associated with Little Clinterty and indeed to any liability of the administrators or the companies in administration under the Environmental Protection Act 1990. While it was open to the administrators to ask for such indemnities, they could not be insisted upon as "non-negotiable" throughout the negotiations until the point at which the sale and purchase transaction was expected to settle. Mr Curle had been entitled to take the description of that clause as "non-negotiable" at face value, particularly when it was insisted upon after being objected to. In consistently insisting on that to which they were not entitled, the administrators were in breach of clause 3.1.4 of the DEA.

[50] In *Van Oord UK Limited* v *Dragados UK Limited* [2021] CSIH 50, 2021 SLT 1317, the Inner House at [19] had construed a clause similar to 3.1.4 of the DEA as "reflecting and reinforcing the general principle of good faith in contract" and went on to emphasise that "clear language is required to place one contracting party completely at the mercy of the other"- [20(iii)]. The administrators had attempted to place the pursuer completely at their mercy, or face losing the deposit. In *Van Oord* the court cited with approval McBryde, *The Law of Contract in Scotland* (3rd edition), at 17-23 – 17-34. One example of bad faith cited in those passages (at 17-33) was "A systematic and unjustified refusal to approve an agent's contracts in exercise of a contractual right." That was this case. The pursuer was entitled to a deal that reflected the Heads of Terms, but had been met with a systematic and unjustified refusal to provide that.

[51] In *Unwin* v *Bond* [2020] EWHC 1768 (Comm) the court "set out some of the principles … in relation to express contractual good faith obligations", including at [230] a minimum standard that parties "must be faithful to the parties' agreed common purpose as derived from their agreement". In the present context, that meant the Heads of Terms, and the absence of any mention therein of indemnities.

[52] The administrators' attempt to rely on what had been said prior to the conclusion of the DEA was misplaced. Nothing said prior to its execution could affect the proper construction of the DEA. In any event, what had been said at that stage had been said on behalf of Huntley Wood, not on behalf of the pursuer, and had been restricted to an acceptance that the contaminants on site would be managed, which was something very different from what the indemnities sought. What the administrators subjectively thought Huntley Wood meant by that was irrelevant. Equally, what Mr Brough had said after the conclusion of the DEA was no different from what had been said before that point, and was likewise incapable in law or in fact of instructing the construction of the DEA for which the administrators contended.

[53] Other matters relied upon by the administrators were similarly irrelevant. The level at which the purchase price had been struck, though implying that the pursuer was going to deal with some element of land contamination, did not warrant any inference that it was going to grant indemnities of the kind demanded. No argument that the grant of indemnities fell to be regarded as an implied term of the DEA had been advanced, and no such implication arose, either, from the intended transfer of the environmental permits to the pursuer. While that transfer might regulate the possible future uses of the land being purchased, it did not deal with responsibility for what might have happened in the past. The administrators' desire for an arrangement which would relieve them of all liabilities could not be transformed into a requirement for the pursuer to grant them such an arrangement, absent any basis for it in the DEA. In any event, the claim that the administrators needed the deal to proceed on that basis was undermined by the fact that they ultimately began (albeit too late) to retreat from that position when it became apparent that the pursuer was not going to proceed on that basis.

[54] The fact that the administrators had sought to retrench from their demand for full environmental indemnities on 19 May did not assist them. That retrenchment had come at 12 minutes past three in the afternoon of the intended settlement date, without any proposal to extend time or waive the £50,000 payable by the pursuer for such an extension. That was too late to represent compliance with the administrators' obligations under clause 3.1.4 of the DEA. Further, the administrators' proposal on 19 May only removed Little Clinterty from the equation, and continued to demand - again as an ostensibly final position - the other indemnities previously sought, without justification.

[55] In any event, by 19 May the DEA had been validly rescinded by the pursuer. As at 15 May, the administrators were in material breach of their obligations under the DEA for the reasons already stated. It did not matter whether that breach was then extant or merely anticipatory; objectively viewed, the administrators were saying that they would not deal other than on the basis of the indemnities being illegitimately demanded. That was a breach of their obligation to act in good faith and make expeditious progress, and an indication that they would not stick to the agreed Heads of Terms. Reference was made to *Chitty on Contract*, (34th edition) at 27-070 – 27-075 and to McBryde at 20-23 – 20-25.

[56] The pursuer could have insisted on the bargain, with the risk that the deposit would be lost on 19 May, or they could have rescinded. They chose the latter option. It was settled law that:

> "An act of acceptance of a repudiation requires no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that that aggrieved party is treating the contract as at an end." *Vitol S.A.* v *Norelf Ltd (The Santa Clara)* [1996] AC 800 at 810 - 811, [1996] 3 WLR 105 at 113, per Lord Steyn.

[57] Here, the position could not be clearer. The pursuer's solicitors' letter of 15 May set out the basis upon which the administrators were said to be in breach, and concluded by saying that the "direct result of that breach is that Settlement will not occur, by 19 May 2023 or otherwise". That amounted to a plain communication that the pursuer was treating the contract as at an end. Secondly, the letter went on to demand repayment of the deposit. There was no basis in the DEA upon which the deposit would be repayable other than where settlement did not occur as a result of breach on the part of the administrators. Accordingly, demanding repayment of the deposit was wholly incompatible with any suggestion that the contract remained on foot. Thirdly, the letter made it clear that the pursuer's concern was that the deposit would be paid to the administrators at close of business on 19 May, and indicated that steps would have to be taken to put the matter before the court before then. This was entirely inconsistent with the pursuer having sought to effect anything other than rescission.

[58] The deadline set out in the letter was not one for the administrators to fulfil their obligations under clause 3.1.4, but was set out as the time by which the administrators were to confirm their position about the deposit, again reinforcing that the pursuer viewed the DEA as at an end. In any event, the present action was begun on 17 May and the orders which it sought were incompatible with any suggestion that the pursuer regarded the DEA as remaining on foot, rendering it, too, a clear and unequivocal statement to the administrators that the pursuer regarded the DEA as at an end. Rescission ended the DEA and it could not be revived unilaterally by either party: Chitty at 27-072; McBryde at 20-34.

First Defenders' submissions

[59] On behalf of the administrators, senior counsel submitted that decree of absolvitor with expenses should be granted. The witnesses adduced by the administrators should be regarded as credible and reliable and their evidence should be accepted in full. The pursuer's witnesses should be regarded as mistaken insofar as their evidence did not coincide with that of the administrators' witnesses.

[60] In particular, the court should accept the evidence of Mr McAlinden, Ms Camp and Mr McIntosh that the wording of the environmental indemnities clause as first advanced by the administrators, though described as "non-negotiable", was in fact an opening position which was negotiable as to its terms and scope at least. It was clear that the pursuer's solicitors had not taken the expression "non-negotiable" literally and had sought to negotiate its terms. From 15 May onwards, the administrators and their solicitors had repeatedly requested further discussions and negotiations between the parties in order that a way forward could be identified. On 19 May the administrators' solicitors had put forward counter-proposals relating to the potential environmental liabilities, namely that: (i) the administrators would retain all environmental obligations and associated liabilities in respect of the former landfill site at Little Clinterty and (ii) the administrators would waive the requirement for a parent company guarantee in respect of environmental obligations in relation to the property being sold. The exclusivity period could have been extended to 16 June and the right to payment of a further deposit in order to do so would have been waived by the administrators had they been asked to do so. It was the pursuer that refused thereafter to negotiate the terms of the environmental indemnities, in breach of the duties of good faith imposed upon it by clause 2.1.3 of the DEA. Accordingly, the administrators had fulfilled their obligations in terms of the DEA. That contract was still in force as at 19 May

when the administrators' compromise wording had been put forward, and was only terminated by the administrators by way of notice dated 24 May 2023.

[61] The pursuer had failed to prove that it was entitled to repayment of the deposit in terms of paragraph 2.5 of Part 2 of the Schedule to the DEA. In order to establish such an entitlement, the pursuer required to prove that settlement had not occurred as a result of a breach by the administrators of the good faith obligations incumbent upon them in terms of clause 3.1.4 of the DEA. It had failed to establish that in circumstances where the indemnity clause insisted upon by the administrators was a reasonable requirement in the insolvency context of the proposed sale and in accordance with standard practice where (as here) the property being sold was the sole asset of the insolvent company, where the original offer to purchase stated that the purchaser agreed to manage all remaining contaminants on site and made no distinction between past and future liabilities, and where the purchase price was discounted to take account of the remaining contaminants on the site being purchased. The indemnity clause put forward by the administrators was not inconsistent with any of the terms of the Heads of Terms. The DEA had not been terminated by the pursuer on 15 May 2023, and the administrators had continued to negotiate and make counter-proposals in respect of the wording of the clause in question. All of those matters indicated that the administrators had acted towards the pursuer in good faith and had diligently and expeditiously progressed the negotiation and conclusion of the sale and purchase contract, thereby fulfilling the obligations imposed upon them by clause 3.1.4 of the DEA.

[62] It was of assistance to consider the meaning and content of an express contractual duty of good faith, such as appeared in clause 3.1.4 of the DEA. *Unwin* v *Bond* provided a helpful summary of the minimum content of an express contractual duty of good faith at [228] to [232]:

> "228. Following that lengthy tour of the authorities, I need to set out some of the principles which emerge from them in relation to express contractual good faith obligations.
> 229. First, the context in which the good faith obligation was entered into is everything, or at least a great deal. That is hardly surprising, because the extent of the obligation, that is, what prospective acts of a defendant may be subject to a duty of good faith, is a matter of the construction of the contract which contains the obligation.
> 230. Secondly, once it is established that a prospective act of a defendant is subject to a duty of good faith, the defendant is bound to observe the following minimum standards:
> • i) they must act honestly;
> • ii) they must be faithful to the parties' agreed common purpose as derived from their agreement;
> • iii) they must not use their powers for an ulterior purpose;
> • iv) when acting they must deal fairly and openly with the claimant;
> • v) they can consider and take into account their own interests but they must also have regard to the claimant's interest.
> These minimum standards are not entirely distinct from one another. Rather, they tend to overlap.
> 231. Fair and open dealing is a broad concept and what it means in practice in any case will again depend on context. It is likely that, in many cases, the claimant is entitled to have fair warning of what the defendant proposes. In those cases where the defendant is contemplating taking a decision which will affect the claimant, fair and open dealing is likely to require that the claimant is given an opportunity to put their case before the defendant makes the decision and the defendant is likely to be required to consider the claimant's case with an open mind.
> 232. Thirdly, and very much linked to the second point, the fact that a defendant could have achieved the same result in a procedurally compliant way does not amount to a defence where the approach they adopt does not meet the minimum standards I have set out."

[63] Although *Unwin* was an English authority, and caution had to be exercised because the content of an express contractual duty of good faith was fact sensitive, it was of assistance as there were no material differences between English and Scots common law on the matter: *Van Oord* at [18] - [22] and McBryde at 17-23 to 17-34. If the guidance in *Unwin* was applied to the present circumstances, it was clear that the administrators did not breach the obligation to act in good faith that was imposed upon them by clause 3.1.4 of the DEA. They acted honestly, were faithful to the parties' agreed common purpose, did not use their powers for an ulterior motive and dealt fairly and openly with the pursuer. From both a

subjective and objective standpoint, the administrators acted in good faith: McBryde at paragraph 17-24. The administrators did not have to prove that there was a binding contract for the inclusion of the environmental indemnities which they sought, merely that they were acting in good faith in seeking to include the clause they wanted in the missives and in the negotiations thereafter.

[64] There were six principal factors indicating that the administrators had acted in accordance with their obligations under clause 3.1.4 of the DEA.

[65] Firstly, if the administrators were not able to agree either a transfer of the permits and licenses (along with the liabilities) or a surrender of the permits and licenses (to extinguish the liabilities) there would be no merit in completing the transaction as they would be unable to distribute funds to creditors because of the remaining possibility of an environmental liability crystallising and having to be paid out of the transaction proceeds. So much was plain from the evidence of Mr McAlinden and Ms Camp. In such circumstances, the administrators were acting honestly and in good faith when they requested the environmental indemnities from the pursuer. In doing so they acted openly without any ulterior motive. The reasons why administrators would require a "clean deal" were self-evident.

[66] Secondly, in the negotiations preceding the DEA and Heads of Terms, the pursuer's agents expressly stated that it agreed to manage all remaining contaminants on the property. That was stated in an e-mail dated 21 February 2023 from the pursuer's property agents, Shepherd Chartered Surveyors, and in an accompanying formal offer to purchase the property. Those statements had made no distinction between past and future liabilities. Such a distinction would be impossible to apply to contaminants on site, as such contaminants would simultaneously represent a past liability and would require future

action to remedy. Nor had any distinction been drawn between the transfer of liabilities and provision of an indemnity. These concepts were two sides of the same coin; the provision of indemnities was the legal means by which liabilities were transferred. The administrators understood those statements to mean that after the sale the pursuer would be responsible for all environmental obligations relating to the sold property. That was a reasonable understanding which was honestly and genuinely held. Its advancement in the negotiations was accordingly in good faith.

[67] Thirdly, Mr Brough's evidence was to the effect that the pursuer's offer to purchase was not subject to further environmental investigations, and that it agreed to manage all remaining contaminants on site. He drew no distinction between past and future liabilities or between agreeing to transfer liabilities and providing an indemnity. The administrators' request for environmental liabilities flowed naturally from Mr Brough's acceptance that the pursuer had agreed to manage all remaining contaminants on site, with the precise wording and scope of the indemnities being a matter for negotiation. So far as Little Clinterty was concerned, it was not owned by either of the companies in administration and was not to be transferred in the sale and purchase contract under negotiation. However, waste from the property to be sold had historically been disposed of there, so it was not a wholly unrelated site. The waste disposed of there was a hazardous substance attributable to the property being sold, and so responsibility for it would fall to be transferred to the purchaser had the Property Standardisation Group terms been applicable. In these circumstances the administrators had been acting in good faith when they initially sought an environmental indemnity that extended to Little Clinterty as an opening negotiating position before subsequently dropping that requirement at a later stage in negotiations. The existence of Little Clinterty was no secret; the pursuer had on 21 March 2023 been provided with various

environmental permits, including the waste management licence relating to Little Clinterty. It was not the fault of the administrators if the pursuer had not appreciated the significance of that documentation. At best for the pursuer, there had been a misunderstanding between the parties as to what was to happen in relation to liabilities at Little Clinterty, which did not support any conclusion that the administrators had acted in bad faith in requesting indemnities extending to that site. In any event, the administrators had subsequently offered, prior to the termination of the DEA, to retain all environmental obligations and associated liabilities in respect of the Little Clinterty site.

[68] Fourthly, the pursuer accepted that the purchase price had been discounted to take account of the contaminants on the site being purchased. Accordingly, as the environmental liabilities had been taken account of in the purchase price, the administrators had been acting honestly and in good faith when they sought the environmental indemnities from the pursuer, with the precise wording and scope of the indemnities being a matter for negotiation. Seeking indemnity for environmental liabilities which had already been priced into the transaction (to some extent at least), was faithful to the parties' agreed common purpose. The administrators had not been seeking to take advantage of the pursuer in any way. On the contrary, by refusing to provide the requested environmental indemnities, the pursuer was seeking to obtain the windfall benefit of a discounted purchase price with no environmental liabilities.

[69] Fifthly, the environmental indemnities clause which the administrators had sought to have included in the draft sale and purchase contract was not inconsistent with any of the express terms of the Heads of Terms. Given Mr Brough's evidence that the pursuer had agreed to manage all remaining contaminants on site, the Heads of Terms were evidently incomplete and did not provide a comprehensive record of the parties' agreement. As their

request was not inconsistent with the (incomprehensive) Heads of Terms, the administrators had been acting honestly and in good faith in seeking to negotiate for environmental indemnities from the pursuer. That was faithful to the parties' agreed common purpose, and it was the pursuer's refusal to provide such indemnities which was unfaithful to that purpose.

[70] Sixthly, given that the property being sold was the only heritable property owned by the companies in administration, there was nothing untoward in seeking an indemnity in respect of the insolvent companies' liabilities rather than limiting any indemnity so that it related to the heritable property alone. In such circumstances the insolvent companies and the heritable property were effectively one and the same. The form of wording suggested by the administrators had been accepted by the pursuer's solicitors, Curle Stewart, in previous transactions involving Addleshaw Goddard and concerning the purchase of heritable property from an insolvency practitioner. In seeking an indemnity as a starting point for negotiations, the administrators were acting in accordance with general insolvency practice and were not acting in bad faith. The suggested clause was merely a starting point for negotiations between the parties.

[71] In any event, the DEA had not been terminated by the pursuer's solicitors' letter of 15 May 2023. The letter related only to the return of the deposit and did not expressly or impliedly seek to terminate the DEA as a whole. The pursuer had no contractual right to terminate the DEA prior to the end of the exclusivity period. Section 4 of the DEA set out the circumstances in which it might be terminated and the procedures to be followed in order to terminate it. That clause conferred no right upon the pursuer to terminate the DEA prior to the expiry of the exclusivity period on 19 May 2023. If the pursuer's letter of 15 May 2023 could properly be interpreted as seeking to terminate the DEA, the terms of section 4

would prevent it from doing so, and indeed an attempt at early termination when negotiations were still ongoing would be a breach of the pursuer's own duty of good faith in terms of clause 2.1.3. The pursuer could not take advantage of its own breach of contract and, therefore, could not insist on repayment of the deposit: *Van Oord* at [20(i)]. The DEA was still in force when the administrators sought to engage in further negotiations after the receipt of the letter of 15 May 2023 and when they made their compromise proposals in their solicitor's e-mail of 19 May.

[72] Although the evidence did not enable the administrators to submit that the pursuer was unable to complete the purchase of the property because of a funding gap, there remained unanswered questions in respect of funding. In particular, if the pursuer and Huntley Wood were, in effect, joint venture partners, it was unclear why the funding that was available to the pursuer would not also be available to Huntley Wood. The evidence of Mr Gordon was that Huntley Wood had provided the funding for payment of the deposit of £300,000 and that the Pursuer and Huntley Wood were, in effect, interchangeable with the same individuals making the decisions relating to the proposed purchase of the property. Those unanswered questions were part of the background factual matrix against which the court required to assess whether or not the administrators fulfilled their contractual obligation to negotiate in good faith.

Decision

Breach of contract

[73] The first question posed by this dispute is whether the administrators were, as at 15 May 2023 (or alternatively as at 17 May, when this action was raised) in repudiatory breach of their obligations under the DEA, and in particular their obligation under

clause 3.1.4 thereof to "act towards the Purchaser in good faith and to diligently and expeditiously progress the negotiation and conclusion of the Transaction Documents". It will be recalled that the Transaction Documents were defined as an unconditional contract for the sale of the property registered under title number ABN61499 and associated machinery, etc, to settle by 19 May 2023 or at the latest by 16 June 2023 and to be "otherwise on the terms set out in the Heads of Terms".

[74] Much of the argument in the case was directed to the question of whether, given the essentially undisputed sequence of events described above, the administrators had acted in good faith within the meaning of clause 3.1.4 of the DEA. However, the requirement to act in good faith is not the sum and substance of that clause. Rather than placing upon the administrators a single duty to act in good faith in the negotiation of the contemplated contract for the sale and purchase of the property, it places on the administrators firstly a general duty to act towards the pursuer in good faith and separately a specific duty diligently and expeditiously to progress the negotiation and conclusion of an unconditional contract for the sale of the property on the terms set out in the Heads of Terms. From 4 April until 19 May 2023, the administrators introduced and maintained an adamantine insistence that that contract should contain a clause requiring the pursuer to grant them and the companies in administration an indemnity against any liability that might exist, or which they might incur, under the Environmental Protection Act 1990. The provision of such an indemnity was not a requirement of the Heads of Terms, which - in connection with environmental matters - simply noted that the administrators had already surrendered (subject to SEPA's final approval) the Radioactive Substances Permit and would move to cancel the Greenhouse Gas Emissions Permit pertaining to the mill business, and obliged the pursuer and the companies in administration to use reasonable endeavours to transfer the

permits for Pollution Prevention Control, Controlled Activities Water Use, Waste Management and Reservoirs to the pursuer. Whatever the significance that the respective surrender, cancellation and transfer of those permits might have for the nature and incidence of any environmental liability past, present or future - a matter not explored before me in any detail - would simply be a consequence of the agreement reached between the parties and set out in the Heads of Terms. There was no obligation in the Heads of Terms for the pursuer to grant any indemnity to the administrators or the companies in administration in respect of any environmental liability which might remain with them in consequence of the arrangements contemplated by the Heads of Terms. The actions of the administrators in advancing a demand for the grant of such an indemnity, for a sustained period and on an *ex facie* non-negotiable basis, did not represent the diligent and expeditious progress of the negotiation and conclusion of an unconditional contract for the sale of the property on the terms set out in the Heads of Terms, and represented a material breach of contract on their part. Whether it represented, as at 15 or 17 May, a repudiatory breach of contract capable of being accepted by the pursuer so as to bring the DEA to an end, is a matter subsequently to be discussed.

[75] In these circumstances, whether the administrators were separately in breach of their duty to act towards the pursuer in good faith is of little moment. I did not find the authorities cited to me to be of much assistance in the analysis of this question, which is hardly surprising given the apparently universal acceptance that deployment of the "good faith" concept in a contractual context will involve detailed consideration of the particular circumstances within parameters that may themselves only loosely be set. Breach of an obligation to act in good faith in this context is something more easily recognised once it has occurred than described in the abstract when it has not. In the present case, I do not doubt

that the administrators subjectively considered themselves, in demanding the indemnities which they did, to be acting reasonably and in accordance with what they and their solicitors considered to be standard practice in the context of sales of property by insolvency practitioners. Equally, no question of lack of probity on the part of the administrators arises - they acted throughout with complete honesty as to what they wanted and why. The problem, rather, was that they misconceived the nature of the obligation incumbent upon them. Thus, while a "clean deal" which would leave them with no prospect of future environmental liabilities would have been a reasonable thing for the administrators to wish and ask for in a free negotiation, and might have been standard in at least some types of sale by insolvency practitioners, this was a negotiation which was required to proceed along the lines, or at least to the destination, set out in the Heads of Terms, in which the only terms touching upon environmental liabilities were those concerning the surrender, cancellation and transfer of the various permits listed there. The other variety of error into which the administrators fell was to regard what had been said in Huntley Wood's offer, including its price point, and in the course of the negotiations which followed thereon, as remaining apt to instruct the terms of the anticipated contract whereas in point of law all of those matters were superseded by the DEA, which in turn incorporated the Heads of Terms. Again, what Mr Brough may have stated orally to Ms Camp after the DEA was executed (and, for the avoidance of doubt, I do not consider that he said anything of materiality) was incapable of altering the content of the written DEA or Heads of Terms. In the context of their obligation to act in good faith as set out in the DEA, the administrators cannot be effectively criticised. They wanted the proposed deal to proceed just as much as the pursuer, and for reasons which appeared good to them, but which in fact and law were not, thought that they were entitled to take the negotiating position which they took. They did not proceed in the teeth

of any legal advice to the contrary, since they received no such advice. I accordingly reject the submission that the administrators were in breach of their obligation to act in good faith towards the pursuer in terms of clause 3.1.4 of the DEA. However, standing my conclusion that they were in material breach of their obligation under the same clause diligently and expeditiously to progress the negotiation and conclusion of the Transaction Documents, the question of the significance of that breach in the proper resolution of the parties' dispute remains to be considered.

Termination of the DEA

[76] The slightly more difficult questions raised in this action concern when and how the DEA was terminated and the consequences of that termination on the proper destination of the deposit paid by the pursuer. The pursuer's position is that it lawfully terminated the DEA by letter on 15 May 2023, or alternatively by raising the present action on 17 May. The administrators maintain that neither that letter nor the summons had the effect claimed and that the DEA was terminated by them after the pursuer broke off negotiations. Three cumulative questions are raised: firstly, did the terms of the DEA permit the pursuer to terminate it on the basis of a repudiatory breach by the administrators? Secondly, if so, were the administrators in repudiatory breach of the DEA as at 15 or 17 May 2023? Thirdly, if so, did the letter of 15 May or the terms of the summons signeted on 17 May actually amount to an acceptance by the pursuer of such repudiatory breach, with the effect of terminating the DEA?

[77] The suggestion that the DEA could not validly be terminated by the pursuer, even in the face of a repudiatory breach by the administrators, is based on the terms of section 4 of that contract as set out above at [5]. That section permits the administrators to terminate the

DEA by written notice to the pursuer on expiry of the Exclusivity Period (ie 19 May, which failing 16 June 2023), and further allows them to terminate the contract on three days' notice, in advance of the end of the Exclusivity Period, if the pursuer is in breach of its obligations under clauses 2.1.1 or 2.1.2 - ie, its obligations to pay, respectively, the First and Second Deposits. The administrators argue that the situations in which the DEA could be terminated were limited to those set out in section 4. That submission cannot be accepted. While it is normally possible for parties to a contract to opt out of the application of many default provisions of the law, exclusion of the availability of basic remedies for breach of contract is something that requires to appear expressly in, or by clear implication from, the terms of the bargain. Section 4 of the DEA simply provides, firstly, how it is to be brought to an end by the party whose activities it primarily restricts if the period contemplated for the settlement of the anticipated sale and purchase contract elapses without such settlement, and secondly makes it clear that that same party may terminate it before that point should there be a failure of the core consideration in respect of which it has agreed to restrict its activities. Nothing in those stipulations can bear the weight of the administrators' submission that any remedies for breach of contract available to either party in other circumstances are excluded. It follows that the DEA could be validly terminated by the pursuer as and when the administrators were in repudiatory breach thereof.

[78] Turning, then, to the next question, viz. whether the administrators were indeed in repudiatory breach of the DEA as at 15 or 17 May 2023, the matter is complicated by the fact that both the pursuer and the administrators were under the mistaken impression at all material times that the former simply had an option to extend the negotiation period should 19 May come and go without settlement of the sale and purchase contract having occurred. In fact, as may be seen clearly from clause 2.1.2 of the DEA, the pursuer was - all other

things being equal - bound to pay a further £50,000 by way of deposit and continue the negotiations until 16 June should settlement of that contract not have occurred by 19 May. The question therefore arises whether a failure diligently and expeditiously to progress the negotiation and conclusion of the Transaction Documents as at 15 or 17 May 2023 constituted a repudiatory breach of contract - that is to say, an unequivocal indication on those dates that the administrators did not intend to perform one or more of their core contractual obligations - in the context of a negotiation commenced on 4 April and which was intended to continue, if need be, to 16 June before time was finally to be called. In other words, did the fact that the pursuer was *prima facie* obliged to extend the negotiations from 19 May to 16 June, but did not, deprive the administrators of a *locus poenitentiae* from their negotiating stance to that point which the scheme of the contract ought to have afforded them?

[79] Although I do not think that the matter is free from doubt, it is important to bear in mind that the administrators were at the relevant times undoubtedly in material breach of contract, as a result of their failure diligently and expeditiously to progress the negotiation and conclusion of the Transaction Documents from 4 April to 15 May. That breach must fall to be regarded as a counterpart of the pursuer's apparent obligation to further prime the pump of the negotiations by adding £50,000 to the deposit on 19 May. It follows that the pursuer was not in the circumstances obliged to extend the negotiation period until 16 June and that the question of whether or not the administrators were in repudiatory breach falls to be answered in the context of a negotiation due to end on 19 May. As at 15 (and 17) May, the administrators had consistently maintained, in the face of protest, the position that they were only willing to enter into the sale and purchase contract on the basis of the full environmental indemnities which they had, from the start, illegitimately demanded.

Despite the suggestion that this was in truth merely a robustly-stated negotiating position which was open to change, the pursuer was entitled, at least after the passage of five weeks during which that position had been maintained, to take it at face value. That position amounted to a statement, as the remaining negotiation time came to be numbered in days only, that the administrators were not prepared to progress the negotiations towards the end that had been agreed from the outset. That amounted to a repudiatory breach of contract which the pursuer was entitled to accept as bringing the DEA to an end.

[80] The final question which arises is whether the pursuer did indeed so accept the administrators' repudiatory breach, either by the letter of 15 May or by way of the content of the summons of 17 May. Dealing firstly with the letter, it extends to around 800 words over two and a half pages and at no point states in so many words that the pursuer was accepting the administrators' repudiatory breach of contract as terminating the DEA. It is primarily concerned with claiming that the administrators were in breach of their duty of good faith under clause 3.1.4 of DEA and demanding the return (or at least the safekeeping) of the deposit if court action was to be avoided. The pursuer appears to have been much more concerned with securing the deposit rather than with determining the nicety of terminating the contract. I am not convinced that it did indeed subjectively intend to end the DEA on 15 or indeed 17 May, but the matter must be judged by an objective assessment of what it said and did. In that connection, the letter does contain the following passage (**emphasis** added):

> "9. In the circumstances, your client's insistence on introducing a potentially significant indemnity as an essential condition to the conclusion of the Transaction Documents is not in good faith, and involves a breach of Cl3.1.4 of the DEA.
> 10. The direct result of that breach is that Settlement will not occur, by 19 May 2023 **or otherwise**. In these circumstances, para 2.5 of Part 2 of the Schedule to the DEA applies, and the balance of the deposit account falls to be paid to our client."

[81] That passage makes it clear that what is being alleged is a breach of contract on the part of the administrators, the direct result of which is that settlement of the sale and purchase contract will never take place. What is not spelled out is why the alleged breach of contract will result in that outcome, but the clear implication is that it is because the pursuer is not prepared to accept the negotiating position taken by the administrators in breach of their contractual obligations. It does not matter that the pursuer considered that the repudiatory breach committed by the administrators was constituted by a lack of good faith on their part, whereas I have concluded that it lay in their failure diligently and expeditiously to progress the negotiation and conclusion of the Transaction Documents; if the pursuer was entitled to treat the DEA as at an end, as I have decided it was, then its reliance on a mistaken ground does not affect the validity of the decision which the letter intimated. The legal test identified in *The Santa Clara* was met by the terms of the letter of 15 May and the DEA was lawfully brought to an end by it. It was also argued by the pursuer that the letter's demand for the return of the deposit amounted to sufficient intimation of its decision to terminate the DEA, but I do not accept that submission, because such a demand would not in itself clearly indicate that the pursuer was treating that contract as at an end; it was equally consistent with the pursuer forming an erroneous view about its rights to the return of the deposit in the circumstances which had developed. Although it is unnecessary formally to decide the matter, the content of the summons when it passed the Signet on 17 May essentially mirrored the terms of the preceding letter, making no express claim that the DEA had been terminated, but averring that settlement of the sale and purchase contract would not occur by 19 May "or at all" as a result of the administrators' breach of contract. No claim that the DEA had been terminated was advanced until adjustments to the summons were made on 17 July 2023. Had it been necessary, I would

have applied the same analysis to the summons as to the letter. However, in the event the DEA was terminated on 15 May by the pursuer's acceptance of the administrators' repudiatory breach already identified. What happened after 15 May (which is what should have happened before then, and which, had it occurred earlier, would probably have led to the successful conclusion and settlement of the sale and purchase contract, to the benefit of all) is therefore of no consequence to the determination of the parties' present rights and obligations. Settlement of the sale and purchase contract did not take place prior to the expiry of the Exclusivity Period on 19 May 2023 as a result of the breach by the administrators of their obligations under the DEA, and the deposit accordingly falls to be paid by Addleshaw Goddard to the pursuer in terms of clause 2.5 of Part 2 of the Schedule thereto.

Conclusion

[82] I shall sustain the pursuer's first plea-in-law, repel the defenders' pleas, and grant decree as first and second concluded for.