SHERIFFDOM OF GRAMPIAN HIGHLANDS AND ISLANDS AT BANFF

[2024] SC BAN 20

BAN-A16-21

JUDGMENT OF SHERIFF ROBERT McDONALD

in the cause

INICIO-FRESCO LIMITED

Pursuer

against

MESSRS AJ & AR BENZIE

Defender

Pursuer: L Kennedy, advocate
Defender: T Young, advocate

Banff, 4 April 2024

The sheriff, having resumed consideration of the cause, Finds the following facts admitted or proved.

[1] The pursuers ("IF") are a company incorporated under the Companies Acts and they have a place of business at King Edward, Banff, Aberdeenshire, AB45 3NR.

[2] IF carry on the business of raising potato micro-plants. Micro-plants are the initial plants from which all potato seed crops are derived. IF purchase the micro-plants from their suppliers and then grow them in glass houses in their premises at King Edward, Banff.

[3] IF grow the micro-plants until they become mini-tubers. IF then harvest them by hand to be planted in fields during the next growing season.

[4] "Seed" or "seed potatoes" are potato crops derived from the planting of mini-tubers. They can be planted for several generations to produce stock for sale.

[5] Mr Robert Eric William Ritchie is the Managing Director of IF and held that position in 2016.

[6] The defenders ("Benzie") are a family partnership and Mr Neil John Benzie is one of the partners. They carry on a mixed farming business based near Turriff, Aberdeenshire.

[7] In 2015 and 2016 there were certain business dealings between IF and Benzie relating to the growing and sale of mini-tubers and seed potatoes. These business dealings have resulted in a number of disputes between the parties.

[8] Benzie raised an action against IF in this court under court reference BAN-A13-18. The parties agreed to resolve this dispute by arbitration under the Arbitration Provisions set down by the British Potato Trade Association and the court action was sisted to allow the arbitration to progress.

[9] In the arbitration proceedings Benzie claimed they were due to be paid £111,850 being the balance they claimed was due by IF in respect of potatoes supplied to them between January and November 2016.

[10] IF lodged a counterclaim in the arbitration proceedings claiming payment of damages. IF claimed it had entered into a verbal agreement with Benzie whereby a quantity of mini-tubers numbering between 200,000 and 314,000 were supplied to and planted by Benzie on behalf of IF with a view that they would be multiplied over a period of 3 to 4 years with the purpose that the eventual crop be supplied to IF at an agreed price of £300 per tonne. Benzie claimed that no such agreement had been entered into.

[11] On 6 March 2020 the arbitrator issued his final award. He found Benzie entitled to payment of £98,250. So far as the counterclaim by IF was concerned the arbitrator found that there was insufficient evidence to establish that Benzie had agreed to grow mini-tubers supplied by IF to be harvested and stored and grown again for the following year and for

2 to 3 years thereafter. The arbitrator found that the only unchallenged fact in relation to the counterclaim was that 1.41 hectares of crops relating to mini-tubers supplied by IF were planted and successfully certified by Benzie. The arbitrator found that Benzie had not made that crop available to IF and he found IF entitled to payment of £14,940.75 being the value of that crop.

[12] In their submissions to the arbitration proceedings, IF relied on a meeting which they claimed had taken place between Mr Ritchie and Mr Benzie, which they say took place in or around December 2015 or January 2016 and at which they claimed Benzie confirmed they would plant the mini-tubers again along with the high grade seeds produced in 2015.

[13] In their submission to the arbitration proceedings, IF relied on a meeting between Mr Ritchie and Mr Benzie which they say took place at IF's premises on 5 September 2016. They claimed that at that meeting IF's Atlantic seed was in Brazil and that Benzie had bagged IF's high grade seed and shipped it under Benzie's label as their own stock of seed.

[14] In the arbitration proceedings IF submitted an affidavit by Mr Ritchie dated 22 November 2019. In that affidavit Mr Ritchie referred to a meeting at his office which he said took place on 5 September 2016. Mr Ritchie stated that at that meeting he asked Mr Benzie about the whereabouts of his potatoes. He stated that Mr Benzie had replied that the Atlantic potatoes were in Brazil and that he had binned the other varieties. He stated that Mr Benzie had then left his office abruptly.

[15] In his affidavit to the arbitration proceedings Mr Ritchie stated that he sent a lot of text messages to Mr Benzie asking about the mini-tubers which he claimed were in the possession of Benzie asking when/where they would be planted. In this connection he relied on a text message from Mr Benzie containing the words "I will get a few acres to plant them".

[16] IF raised an action in Banff Sheriff Court against Benzie under reference BAN-A17-20. IF was unsuccessful in this action.

[17] The growing of seed potatoes is a highly regulated area of farming. To be marketed seed potatoes have to be inspected and certified by SASA and one requirement for certification in a crop inspection report is that the land on which the seed potatoes are grown has not been used for growing potatoes at any time for the previous 7 years.

[18] As at December 2015/January 2016, Benzie did not have any land available to plant potato seed for anyone other than themselves.

[19] In Scotland mini-tubers are normally planted in May to early June. Benzie normally planted mini-tubers in April and May. Late planting would have an adverse impact on the marketable yield of a crop and by late August to 5 September 2016 it would have been impossible to produce an economically viable crop.

[20] On 5 September 2016, IF's Mr Ritchie and Benzie's Mr Neil Benzie had a meeting at IF's office at King Edward, Banff. Mr Benzie's purpose in attending that meeting was to try and obtain payment of money which he considered was due to be paid by IF.

[21] IF made no claim against Benzie seeking damages for breach of the alleged contract which forms the subject matter of this action until the raising of these proceedings on 2 September 2021.

Finds in Fact and in Law

No contract was formed between the parties at any meeting between Mr Ritchie and Mr Neil Benzie in December 2015 or January 2016 in terms of which IF would supply to Benzie 400,000 mini-tubers of the Atlantic and Russet Burbank varieties in return for Benzie planting and harvesting same and selling them back to IF for £300 per tonne.

THEREFORE:

1. Repels the pursuer's pleas-in-law

2. Grants decree of absolvitor in favour of the defenders.

3. Appoints the case to a hearing on expenses to be held via Webex on Thursday, May 2 at 2pm; Parties to lodge contact details to Banffcivil@scotcourts.gov.uk by close of business on Tuesday, 30 April 2024

NOTE

[1] This is an action in which IF claimed £400,000 from Benzie for damages for breach of contract.

[2] The case called before me for a diet of debate on 11 March 2022. Following the diet of debate I repelled the pursuer's plea-in-law to the effect that the present proceedings were *res judicata*. The defender also had a plea to the effect that the pursuer's claim had been extinguished by prescription but I was of the opinion that the pursuer had made relevant and specific averments which, if proved, were sufficient to defeat the defenders' plea that the claim was time barred. I therefore allowed parties a proof before answer.

[3] Following the diet of debate the pursuer lodged a minute of amendment and the defender lodged answers thereto. On 15 December 2022 I allowed the Record to be opened up and amended in terms of the pursuer's minute of amendment and the defenders' answers and closed the Record of new.

[4] The case eventually called before me for proof before answer on 24 August 2023 and I heard evidence on that date, on 25 August 2023 and on 11 December 2023. I heard submissions from the parties on 5 February 2024 on which date I made avizandum.

[5] The case which the pursuer sets out in its pleadings is that by agreement in or about December 2015 between Mr Robert Ritchie at that time a Director of the pursuer and Mr Neil Benzie currently a partner of the defenders, a contract was entered into whereby in 2016 IF would supply 400,000 mini-tubers of the Atlantic and Russet Burbank varieties and in exchange Benzie would uplift the mini-tubers from IF, plant same, harvest them and then sell them to IF at £300 per tonne. It was claimed that IF would then sell the crop and take a risk on whether a profit was derived therefrom.

[6] The pursuer's position on Record is that no specific date was agreed by which Benzie would uplift and plant the mini-tubers but that it was an implied term that the mini-tubers would be uplifted and planted by Benzie in sufficient time to allow them to grow into a commercially viable crop. Such a term being implied as necessary to give business efficacy to the parties' contract.

[7] The pursuers go on to plead that as the 2016 planting season wore on Mr Ritchie became increasingly concerned regarding Benzie's arrangements for uplifting and planting the mini-tubers but that at no time did Mr Benzie respond in any manner except to confirm the agreement between the parties. The pleadings refer to a number of text messages between Mr Ritchie and Mr Benzie in July and August 2016. The pursuers then aver that ultimately Mr Benzie attended at IF's premises on 5 September 2016 and advised Mr Ritchie that Benzie had not made arrangements for and did not intend to plant the mini-tubers. The pursuer avers that by that date it was too late to make alternative arrangements to plant the mini-tubers although it would still have been possible to plant them in an appropriate field. The pursuer avers that in or about 5 September 2016 the mini-tubers could not be sold or planted in an appropriate location and their value had therefore been destroyed.

[8] The pursuer claims that he has therefore suffered loss by the defenders' breach of contract. It is averred by the pursuer that as at 5 September 2016 the mini-tubers had a market value of £1 each and accordingly they have suffered a loss of £400,000 being the lost value of the mini-tubers.

[9] The defenders' position on Record is that there was no such contract between the parties and therefore no breach of contract.

[10] The defenders further plead that *esto* there was a contract between the parties, the pursuer's claim has been extinguished by operation of the short negative prescription. These proceedings not having been raised until 2 September 2021.

[11] The defenders also plead that the sum sued for is excessive.

Was there a contract?

[12] The first question I therefore have to address is whether the pursuer has proved in the balance of probabilities that there was a contract between the parties as averred in their pleadings.

[13] In support of their pleadings the pursuer led the evidence of Mr Ritchie who claimed that a contract had been entered into and who also made reference to a number of productions.

[14] On this issue the defenders led the evidence of Mr Neil Benzie who denied the existence of any such contract.

[15] To a large extent the pursuer's case hinges on the evidence given by Mr Ritchie and accordingly I have decided that my first task is to assess his evidence.

[16] Mr Ritchie stated in evidence that in 2015 IF had acquired 40,000 Atlantic and 56,000 Russet Burbank micro-plants. In support of this he referred to emails which he said came

from his suppliers Gentech Propagation Limited. He also relied on one invoice and what appeared to be the relative delivery note which he said was issued by his suppliers and which refers to 14,000 Russet Burbank micro-plants. No invoices or delivery notes were lodged in support of the remaining 82,000 micro-plants which Mr Ritchie claimed were supplied to IF in 2015. I did not consider this evidence sufficient to enable me to make any finding in fact in respect of the number of micro-plants which might have been obtained by the pursuer in 2015.

[17] Mr Ritchie then went on to state that each micro-plant would have produced between 5 to 8 mini-tubers and that 96,000 micro-plants would therefore have produced between 480,000 to 768,000 mini-tubers. He said that for the purposes of litigation the pursuers were relying on the lower figure of 480,000. The figure of 400,000 mini-tubers referred to in the pleadings was explained by Mr Ritchie as taking into account 80,000 mini-tubers which he said IF had been able to grow in their glass houses when they became aware that Benzie were not going to plant any of their mini-tubers. One would have thought that if that were the case then, logically, the pursuer should be averring that there was an agreement to plant 480,000 mini-tubers.

[18] In any event, Mr Ritchie then gave evidence regarding the meeting at which he says he agreed the contract in question with Mr Neil Benzie. He stated that on 2 January 2016 he met with Mr Benzie at Mr Benzie's farm near Turriff. He said that Neil Benzie agreed that Benzie would plant IF's mini-tubers in about 20 acres of land. He said that Benzie would have planted about 20,000 mini-tubers per acre. Mr Ritchie stated that after planting Benzie would spray the crop, harvest it, store it and that IF would then pay Benzie £300 per tonne for the mini-tubers growing to market standard.

[19] The contract which Mr Ritchie spoke to is not the contract pled on Record which refers to a meeting in or around December 2015 at which a contract was agreed for the supply of 400,000 mini-tubers.

[20] In respect of this inconsistency between the pursuer's case on Record and Mr Ritchie's evidence the pursuer's agent submitted that his evidence did not differ from the tenor of what had been pled. Even if the pursuer's submission in this respect is correct I would still require to be satisfied on the balance of probabilities that there was a contract and to a large extent this must depend on whether I found Mr Ritchie to be a credible and reliable witness so far as this is concerned. I have a number of issues with Mr Ritchie's evidence and these are as follows.

[21] The first problem I have in relation to Mr Ritchie's credibility and reliability is the discrepancy I have referred to above between his evidence and what was pled on Record. One might not necessarily place a great deal of significance on the discrepancy in the date of the alleged meeting at which the contract is said to have been concluded. The pursuer's averments state that the agreement was formed in or about December 2015 and this could be said to encompass Mr Ritchie's evidence that the meeting at which the agreement was formed took place on 2 January 2016. However, more than 7 years after the event Mr Ritchie was so clear in his evidence as to the precise date of the alleged meeting that I did think it was significant that a different date had been pled on Record.

[22] I do, however, have a more fundamental problem in accepting Mr Ritchie's evidence in relation to the way in which this case is pled. The case on Record is that there was a contract whereby Benzie agreed to uplift and plant 400,000 mini-tubers. This averment makes no sense since it seems to be Mr Ritchie's position that he was expecting 480,000 mini-tubers to be planted and that the pursuers were only claiming for 400,000

having made alternative planting arrangements for 80,000 tubers sometime after 5 September 2016.

[23] Mr Ritchie in his evidence stated quite clearly that the contract was not that Mr Benzie would uplift and plant 400,000 mini-tubers but rather that Benzie would make available 20 acres which would have allowed 400,000 mini-tubers to be planted which the pursuers argue amounts to the same thing. Again, Mr Ritchie giving evidence 7 years after the event was quite clear in what he was putting forward. He was the only witness for the pursuers speaking to the terms of the contract yet in his evidence he describes the contract in a quite different way from the case pled on Record.

[24] One fundamental problem I have with the description of the contract in the pleadings taken with Mr Ritchie's evidence is that it simply does not make sense. Mr Ritchie's position in evidence was that Benzie agreed to plant out 20 acres with the pursuer's mini-tubers. The pursuer's position that this is effectively the same as an agreement to plant 400,000 mini-tubers. At the same time in evidence Mr Ritchie stated that IF would have had 480,000 mini-tubers requiring to be planted out. However, if one accepts Mr Ritchie's evidence that Benzie would plant about 20,000 mini-tubers per acre then 20 acres would not have been enough to plant 480,000 mini-tubers.

[25] In addition, it is clear that in terms of Mr Ritchie's evidence the pursuers did not actually know how many mini-tubers would require to be planted out. It was Mr Ritchie's evidence that they could have been looking to plant out as many as 780,000 mini-tubers. In these circumstances it would have made no sense for Mr Ritchie to have entered into an agreement that the defender plant out only 20 acres without making arrangements to plant out perhaps as many as 380,000 mini-tubers elsewhere. There was no evidence to suggest that Mr Ritchie had attempted to plant out what he said was IF's crop from the 2015

micro-plants anywhere other than with the defenders (with the exception, of course, of the 80,000 which he said were planted in their glass houses after 5 September 2016). Mr Ritchie's evidence taken along with the case pled on Record is simply not believable. I had so little faith in his evidence that I was not willing to make any finding in fact in relation to the number of micro-plants the pursuer might have bought in 2015 and the number of mini-tubers which they might have produced.

[26] There were a number of other reasons why I decided I could not accept Mr Ritchie as a credible and reliable witness. These are as follows.

[27] The pursuers made no claim against the defenders for damages for breach of this alleged contract until this action was raised on 2 September 2021, almost 5 years from the date that the pursuers state they became aware that the defenders were not going to implement the parties' contract. This claim for breach of contract could have been included in the arbitration proceedings concluded in March 2020. Mr Ritchie stated in evidence that this claim had not been included in the arbitration claim on the advice of his lawyer. I did not believe this. If the pursuer had a genuine claim for damages for £400,000 I do not think that they would have done nothing whatsoever to progress that claim until a few days before they thought the claim might be time barred.

[28] In cross-examination the statement of claim and counterclaim and answers in the arbitration proceedings (6/2/1 of process) were put to Mr Ritchie. In particular, Mr Ritchie was referred to statement 3 of the counterclaim by IF which states:

> "In or around December or January 2016, Mr Ritchie of the respondents and Mr Benzie of the claimants met on the claimant's said farm. The claimants confirmed they would plant the mini-tubers PD again along with the high grade seed produced in 2015 and the claimant's own commercial stock of Atlantic as previously agreed …".

Mr Ritchie stated in evidence that this referred to the same meeting at which he says the alleged contract in this case was formed. It was put to him that in the arbitration he was giving a different version of that meeting. Mr Ritchie did not give a clear response to this questioning and he did not really answer the questions which were being put to him. I found his responses on this point evasive and unconvincing.

[29] I allowed Mr Ritchie's affidavit in the arbitration proceedings to be put to him (production 5/7/1). From paragraph 18 of this affidavit through to paragraph 21, Mr Ritchie referred to having a meeting with Mr Benzie in December 2015, asking Mr Benzie in May 2016 if the mini-tubers had been planted, chasing this up in June, Mr Benzie not taking his calls in July, Mr Benzie avoiding him in August and having a meeting with Mr Benzie on 5 September 2016. It was put to Mr Ritchie that in this affidavit used in the arbitration proceedings he was referring to 2015 mini-tubers which he had claimed were already in possession of the defenders. It was put to him that in the arbitration proceedings he had therefore been relying on the same meetings and text messages that he was now relying on in relation to a completely different quantity of mini-tubers which he said Benzie had to uplift from IF. Mr Ritchie's reply to this line of questioning was far from convincing. He tried to maintain that there were two separate contracts running alongside each other. However, when we looked at the various text messages relied upon by Mr Ritchie it was far from clear to me which mini-tubers were being referred to. I did not think, however, that these text messages could be interpreted as accommodating Mr Ritchie's assertion that there were actually two separate contracts running side by side with each other and that these messages were referring to two different lots of mini-tubers at the same time. I did not find Mr Ritchie's evidence in this respect credible or reliable.

[30] Paragraph 21 of Mr Ritchie's affidavit was put to him in which he stated:

> "NB then visited my office on 5 September 2016. I asked him where my potatoes were. At that time he told me the Atlantic potatoes were in Brazil and that he had binned the other varieties. He then left my office abruptly ….".

This account of the meeting on 5 September 2016 which he gave in his affidavit for the arbitration proceedings does not sit comfortably with the account of the meeting given by Mr Ritchie as evidence in this case. I therefore did not believe his evidence in this respect.

[31] In paragraph 22 of his affidavit to the arbitration proceedings, Mr Ritchie refers to a text from Mr Benzie containing the comment "I will get a few acres to plant them". Mr Ritchie relied on this same text message (6/5/1 page 104) to support his claim in this action. I cannot see how this text taken in context can be said to refer to two different lots of mini-tubers. I therefore did not find Mr Ritchie either credible or reliable in this regard.

[32] On the overall assessment of Mr Ritchie's credibility and reliability it was put to him that while in this case he was asserting that the mini-tubers had a value of £1 each, in the arbitration he had agreed a valuation of between 15p to 45p (production 6/1 page 46). He said this concession was, maybe, made under duress. This response simply reinforced my view that Mr Ritchie could not be considered as a credible or reliable witness.

[33] I therefore did not accept the pursuer's submission that there had been an agreement between the parties that the defenders would uplift and plant the pursuer's mini-tubers. The defenders' submitted that the subject matter of this action was a fabricated claim put forward by the pursuers because they had been unsuccessful in previous proceedings and this seems to me to be the most likely explanation for this claim.

[34] In reaching my decision that the pursuers have failed to establish the contract founded upon I also took into account the lack of any independent witness to the alleged agreement. I further took into account the lack of vouching in respect of the quantity of

mini-tubers founded upon by the pursuers. According to the pursuers these mini-tubers were being stored by them until they were destroyed sometime after the meeting on 5 September 2016. Yet they do not appear to have attempted to count or record the mini-tubers in any way.

[35] Having explained why I found Mr Ritchie to be lacking in credibility and reliability, I think it is appropriate to make some reference to the evidence of Mr Benzie who was the main witness for the defenders. I have to say that his evidence was far from satisfactory. His evidence was contradictory in several respects. In particular, his evidence in relation to there being a difference between what he called "mouth agreements" and binding contracts was very confused. He seemed to be saying on the one hand that so called "mouth agreements" did not amount to a binding contract while at the same time he seemed to concede that there had been occasions he had treated a "mouth agreement" as a binding contract. In addition, Mr Benzie's responses to questions about the meaning of various text messages was quite inadequate. However, Mr Benzie was firm in his assertion that there had been no agreement such as put forward by Mr Ritchie and was founded upon by the pursuers. While I found his evidence unsatisfactory in many respects I did not find anything in his evidence which could be said to have proved the pursuer's case or led me to believe that Mr Ritchie was telling the truth.

Quantification of the pursuer's claim

[36] As I have decided that there was no contract between the parties there could have been no breach of contract and therefore no damages for breach of contract due to the pursuers. I do not require to make any decision on the value of the pursuer's claim. I do,

however, think it is appropriate to make a few comments since I had a number of difficulties in relation to the pursuer's assessment of loss.

[37] In the course of submissions I pointed out to the pursuer's counsel that I had some difficulty with how the pursuer assessed its claim for damages. This is an action for damages for breach of contract. The alleged contract was for the defenders to uplift the pursuer's mini-tubers, plant them, harvest them and then sell them back to the pursuers so that the pursuers could then attempt to make a profit. The general principle of damages is that the person successfully claiming breach of contract should be put in the same position, so far as money can, as if the contract had been performed and the pursuer's counsel accepted that this as the general principle. I would therefore have expected to see evidence backed up by relevant averments outlining, for example, what crop was likely to have been harvested from the pursuer's mini-tubers, that the pursuers would have purchased that crop from the defenders and what profit they would have been likely to derive therefrom.

[38] The pursuer's counsel argued that in this particular case the pursuers were entitled to assess damages on the basis of the loss in the value of the mini-tubers. That loss having resulted from the defenders' breach. I find it difficult to see why there should be any departure from the general principle of assessment of damages in this case.

[39] However, even if I was persuaded that I should consider awarding damages by reference to the loss in the value of the mini-tubers I would still have difficulty with the pursuer's quantification.

[40] The pursuer's position is that the defenders breached this contract on 5 September 2016 and as at that date the mini-tubers had a value of £1 each. The pursuer avers as at 5 September 2016 the mini-tubers could not be sold because by then it was not possible for them to be planted elsewhere. This seems to suggest to me the mini-tubers had no value as

at 5 September 2016. I find it difficult to understand how the mini-tubers at the same time could have a value of £1 each and yet no saleable value.

[41] Even if I were persuaded that the mini-tubers had a value as at 5 September 2016 but for the defenders' alleged breach of contract it would not have been possible for me to properly assess the value of those mini-tubers.

[42] The parties disputed the market value of the mini-tubers as at 5 September 2021. The pursuers led evidence from Professor Harry Dickinson who expressed the opinion that the mini-tubers had a value of £1 each. However, he conceded that he was unaware of actual prices as at that date and his value of £1 per tuber was described as a notional value. His evidence was therefore theoretical and not based on experience. Professor Dickinson could, in my view, properly be regarded as an expert in certain aspects relating to the cultivation of potatoes but I did not find that he had relevant expertise on the valuation of mini-tubers at the relevant date.

[43] Professor Dickinson's evidence was inconsistent with the evidence the pursuer relied on in the arbitration proceedings. In addition to his concession as to an agreed value for mini-tubers in the arbitration proceedings he also confirmed in cross-examination that in the arbitration proceedings IF had led the evidence of a Mr David Scott, an expert potato industry consultant who stated that the value of mini-tubers would have been between 15 and 45p each.

[44] In this connection the defenders led the evidence of Doctor Stuart Wale who gave a valuation of 40p per mini-tuber. Again, while I was willing to accept that Doctor Wale had some expertise in relation to certain aspects of potato cultivation he did not, in my view, have sufficient expertise to allow him to express an expert opinion on the value of mini-tubers at the relevant date. He did not appear to have any first-hand knowledge of selling

potatoes at the relevant time and his valuation seemed to be derived from speaking to two leading producers of mini-tubers within Scotland.

[45] For the pursuers to have succeeded in a claim for damages in this case they would have to have adduced sufficient evidence for me to make a finding in fact in relation to the value of mini-tubers as at 5 September 2021. The valuation put forward by the pursuer was not an expert valuation, was a notional value and was inconsistent with IF's position in the arbitration proceedings. The defenders' valuation was based on hearsay evidence rather than the expertise of Doctor Wale. I did not find any of this evidence helpful in arriving at a value of mini-tubers as at 5 September 2016. I was not willing to pluck my own valuation out of thin air. I therefore do not consider that I was in a position to make any finding in fact as to the value of a mini-tuber as at 5 September 2016.

Prescription

[46] It was the defenders' position that the pursuer had failed to prove the obligation relied on had not prescribed before 2 September 2021, the date of raising of these proceedings. This was disputed by the pursuer. As I have decided that there was no contract between the parties I am not required to decide that point. I do not think that it is useful or appropriate for me to express an opinion on this complicated question the answer to which would depend on the consideration of alternative findings in fact.

Expenses

[47] The parties were agreed that the question of expenses would be best dealt with at a hearing on expenses when my judgment became available. I am therefore appointing the case to a hearing on expenses on 2 May 2024