



SHERIFF APPEAL COURT

**[2023] SAC (Civ) 14
ABE-CA40-21**

Sheriff Principal A Y Anwar
Appeal Sheriff T McCartney
Appeal Sheriff G Wade KC

OPINION OF THE COURT

delivered by Appeal Sheriff T McCartney

in the appeal in the cause

PIERPAOLO ROCCO

Pursuer and Appellant

against

METALNRG PLC

Defender and Respondent

**Pursuer and Appellant: Dewart, Advocate; Balfour & Manson LLP
Defender and Respondent: Middleton, Advocate; CMS Cameron McKenna LLP**

4 April 2023

Introduction

[1] This appeal and cross-appeal are about the construction of a written contract.

Ascertaining the meaning of a written contract is a matter of law. The principles to be applied to the construction of a written contract have been authoritatively expounded both in the Supreme Court and the Inner House of the Court of Session in a number of cases over recent years.

[2] Those principles are not in dispute in this case. What is in dispute is the application of those principles to the parties' written contract.

[3] That contract is a service agreement dated 14 November 2020 ("the agreement") in terms of which the pursuer and appellant ("the pursuer") was employed by the defender and the respondent ("the defender") as an executive in the oil and gas sector.

[4] In September 2021, the defender wrote to the pursuer making claims against him in connection with his directorship. As a consequence, the pursuer sought legal advice from solicitors. In December 2021, the pursuer was dismissed by the defender.

[5] There are ongoing proceedings between the parties in the High Court of England and Wales at the instance of the defender concerning the performance of the pursuer's duties as director of the defender. In addition, the pursuer is currently pursuing a claim against the defender in the Employment Tribunal in respect of his dismissal.

[6] That is the context of these proceedings. The pursuer firstly craves, put shortly, a declarator that in terms of clause 19 of the agreement between the parties he is entitled to be indemnified by the defender in full on a continuing basis in respect of any legal expenses incurred by him in circumstances where the pursuer requires to take legal advice in relation to an actual or perceived breach of the terms of the agreement or otherwise in respect of his employment or directorship with the defender. The pursuer secondly craves decree for payment in respect of legal expenses incurred to date in respect of the High Court and Employment Tribunal proceedings. Thirdly, the pursuer craves decree for payment of £50,000 in respect of a termination payment said to be due in terms of clause 13 of the agreement.

[7] This appeal is against the decision of the sheriff to dismiss the action following debate with a cross-appeal by the defender in respect of certain aspects of the sheriff's decision.

Clause 13

[8] The relevant part of clause 13 is as follows:

"In the event of the Termination of this agreement by either party, the Company shall, pay the Termination Payment to the Executive within one month following Termination as an end of employment bonus."

Sheriff's Decision

[9] The sheriff decided that reading the agreement as a whole, the pursuer is only entitled to the termination payment if the agreement is terminated other than in a situation where his employment is terminated by dismissal in terms of clause 11 (clause 11 makes provision for termination by the defender due to, *inter alia*, serious or persistent breach of contract, negligence or gross misconduct by the pursuer).

Submission for Pursuer

[10] It was submitted that the sheriff erred in so deciding. First, the sheriff's construction of clause 13 failed to take account of the plain meaning of the words used by the parties. The language of clause 13 indicates that the parties intended that the termination payment would be due in the event of the termination of the agreement by either party howsoever caused. The language actually used is the most obvious indication of what the parties intended. If the parties intended the termination payment to be made only in certain circumstances, it would have been open for them to distinguish those circumstances.

[11] Secondly, the sheriff appears to treat the words "Termination of this agreement by either party" as a defined term, meaning termination under clause 1.3 (in terms of which the pursuer's employment is terminable by either party giving not less than six months' notice). However clause 1.4 (which gives the defender discretion to terminate employment with immediate effect or at any time after giving notice pursuant to clause 1.3, by making payment of salary and benefits due in lieu of notice) undermines the sheriff's interpretation that the words "Termination by either party" means termination under clause 1.3. The sheriff failed to consider that, in treating termination by either party as termination under clause 1.3, the termination payment would not be due if the defender relied upon clause 1.4. Accordingly, the sheriff failed to take into account and to give effect to the terms of the contract as a whole.

[12] Thirdly clause 22.1 defines "Termination" as "the date of termination of your employment with the Company howsoever caused". In his interpretation of clause 13, the sheriff failed to consider the effect of the use of the defined term importing the words "howsoever caused" into clause 13. The inclusion of the words "howsoever caused" by way of the definition of "Termination" in the first sentence of clause 13 undermines the sheriff's interpretation of clause 13. The sheriff has accordingly failed to give the language used by the parties in the agreement its natural and ordinary meaning, and to consider clause 13 as a whole.

[13] Finally, the sheriff has failed to consider the overall purpose of the clause and to take account of commercial common sense. The purpose of the termination payment was to compensate the pursuer for work which had been done for the ultimate benefit of the defender, but which would, or might, not come to fruition until after the date of termination.

Therefore the pursuer's submission that the termination payment was due no matter the reason for termination was consistent with commercial common sense.

Submission for Defender

[14] For the defender it was submitted that the sheriff was correct to conclude that reading the agreement as a whole the pursuer is only entitled to the termination payment if the agreement is terminated other than in a situation where his employment is terminated by dismissal in terms of clause 11.

[15] The wording of clause 13 must be construed in the context of the agreement as a whole. The agreement makes provision for its termination in a number of different circumstances. Clause 13 does not explicitly refer to any clauses of the agreement. However placed in the context of the agreement as a whole it becomes clear that clause 13 cannot, for example, have been intended to refer to termination under clause 11.4 (termination by reason of liquidation of the company) as this would be inconsistent with termination "by either party."

[16] A construction of clause 13 that results in its application upon termination of the agreement for whatever reason (including termination due to serious breach of contract or gross misconduct by the pursuer) is not a construction that accords with commercial common sense. Such a construction would require the defender to pay £50,000 to the pursuer where the contract was terminated by the company due to the bankruptcy of the pursuer (clause 11.1.4). Such a construction is devoid of any business common sense. In contrast, a construction of clause 13 as applying to termination of the agreement other than pursuant to clause 11, accords with business common sense.

[17] Such a construction is also consistent with the presumption that the parties did not intend that the pursuer could obtain a benefit as a result of his own breach of contract. In contrast the construction advanced by the pursuer would require the company to make payment of £50,000 to the pursuer in circumstances where the agreement had been terminated on account of his serious or persistent breach of the terms of the agreement; his serious negligence or gross misconduct; or his conviction for an arrestable criminal offence.

Decision

[18] The construction of a particular clause in a contract requires consideration of the contract as a whole. As was stated by the Inner House in *Ashtead Plant Hire Co Ltd v Granton Central Developments Ltd* 2020 SC 244:

“A contract must invariably be construed contextually. This is an elementary point. Language is inherently ambiguous, and in no serious field of discussion is it possible to reach an intelligent view on the meaning of a particular passage without placing that passage in context.” (paragraph 10).

[19] It is a well-established principle of contractual construction that if there are two possible meanings, the court is entitled to prefer the construction which is consistent with commercial common sense and to reject the other. It is also a well-known principle of construction that a party should not be entitled to rely on his own breach in order to obtain a benefit under the contract (*Crimond Estates Ltd v Mile End Developments Ltd* 2021 CSIH 60).

[20] Applying these principles to the construction of clause 13 we are satisfied that the sheriff did not err in deciding that entitlement to the termination payment under clause 13 does not arise if the agreement is terminated in terms of clause 11.

[21] That is evident when the contract is construed contextually. Interpretation of a particular clause requires consideration of the contract as a whole. Clause 13 cannot be

considered in isolation and more particularly, it cannot be considered without regard to the terms of the clause 11 which makes provision for termination of employment on the grounds of misconduct etc. of various kinds on the part of the pursuer.

[22] Clause 11.3 of the agreement, which sets out the obligations of the pursuer in the event his employment is terminated, stipulates that it applies upon termination “for whatever reason and howsoever arising”. Clause 14.1, which deals with return of the defender’s property and records upon termination, stipulates that it applies upon termination “for any reason”. Notably, no such express stipulation is made in clause 13. The pursuer’s analysis that clause 13 provided for a termination payment no matter the circumstances of termination is also inconsistent with a separate clause making provision for termination due to misconduct etc. on the part of the pursuer.

[23] We are not persuaded by the pursuer’s submission that the purpose of the termination payment under clause 13 is to compensate for work done by the pursuer which has not yet come to fruition. The fees, remuneration and benefits to which the pursuer is entitled are set out in clause 4 of the agreement. The pursuer is, put shortly, entitled to an annual salary, paid monthly in arrears and he is entitled to certain bonuses. Clauses 4.5 and 4.6 deal with the payment of bonuses and expressly provide mechanisms for the payment of bonuses in the event of termination of the pursuer’s employment. It is not clear to us on what basis the pursuer would be entitled to any further compensation for work done which has not yet come to fruition. On the pursuer’s analysis the termination payment of £50,000 would be payable even if the pursuer had carried out no duties at all under the agreement. The pursuer’s analysis does not accord with commercial common sense.

[24] The conclusion that the agreement does not provide for a termination payment when termination is as a result of the pursuer’s own misconduct is consistent with the principle

that it was not the intention of the parties that either should be entitled to rely on his own breach in order to obtain a benefit under the contract. On the pursuer's analysis he is entitled in terms of clause 13 to a termination payment of £50,000 no matter how flagrant or egregious his breach of contract, negligence or misconduct may have been. In the absence of a clear expression to the contrary, we are not persuaded that a reasonable person in business would be likely to have so intended.

[25] The submission for the pursuer that the sheriff's interpretation fails to consider the existence of clause 1.4 does not stand up to scrutiny. Clause 1.4 is not separate and distinct from clause 1.3. Clause 1.4 explicitly applies after notice is given pursuant to clause 1.3. It simply provides a mechanism for the defender to terminate employment with immediate effect by making payment in lieu of notice rather than having the pursuer work the six months' notice period. It is incremental to, and not distinct from, clause 1.3.

[26] The use of "Termination" with a capital "T" where it first appears in clause 13 is clearly a typographical error. In the definitions clause "Termination" is defined as a date and makes no sense if imported into line 1 of clause 13. The words "howsoever caused" relate to the definition of the date of termination and do not import the term "howsoever caused" into clause 13.

[27] Accordingly we shall refuse the pursuer's ground of appeal (set out in paragraph 2, sub paragraphs 2 to 6 of the Note of Appeal) directed at the sheriff's construction of clause 13.

Clause 19

[28] Clause 19 of the agreement is in the following terms:

"19. LEGAL FEES

In the event that the Executive requires to take legal advice in relation to an actual or perceived breach of the terms of this agreement or otherwise in respect of his employment or directorship with the Company, the Company shall indemnify the Executive in full on a continuing basis in respect of any legal expenses incurred by him."

Sheriff's Decision

[29] The sheriff decided that clause 19 is written from the perspective of the pursuer and as a precaution in the situation where he perceives or maintains that the defender is acting in breach of the agreement or otherwise in breach of his rights as an employee or director of the defender; it is the pursuer who has to perceive or maintain that breach has occurred on the part of the defender before he can rely on the clause. The clause is designed to apply if the defender acted in breach of the agreement or contrary to the pursuer's legitimate expectations as regards his employment or directorship with the defender and the pursuer requiring to take legal advice as to his rights in relation thereto and so as to vindicate his position. The sheriff concluded that if liability for legal expenses arises from the pursuer's breach of contract then clause 19 does not apply.

Submission for Pursuer

[30] For the pursuer it was submitted that the language of clause 19 is clear and unambiguous and in those circumstances, there was no requirement for the sheriff to resort to consideration of the requirement of commercial common sense. By interpreting clause 19 as requiring the breach or behaviour to be on the part of the defender only, the sheriff failed to give effect to the plain meaning of clause 19 and his decision amounted to a re-writing of

the contract (as cautioned against in *Credential Bath Street Ltd v Venture Investment Placement Ltd* 2008 Hous LR 2).

[31] There is no justification in commercial common sense to distinguish between legal advice which is required because of action on the part of only one party in circumstances where the agreement imposes reciprocal rights and obligations on both parties.

Submissions for Defender

[32] The sheriff was correct to construe clause 19 as excluding legal advice obtained by the pursuer in connection with any alleged default or breach of duty on his part. Only this construction will produce a legally enforceable result, which is presumed to have been the parties' intention.

[33] In the context of the agreement it is clause 6 which makes provision for the situation of civil proceedings by the company against a director. If the pursuer's interpretation is applied, that completely undermines clause 6 and that cannot have been the intention of the parties.

Decision

[34] The purpose of contractual construction is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The purpose is to identify what the parties agreed and not what the court thinks they should have agreed. It is not the function of a court to relieve a party from the consequences of imprudence or poor advice.

[35] The terms of clause 19 are broad. They include the executive requiring to take legal advice not only in respect of an actual or perceived breach of the terms of the agreement but

also “otherwise in respect of his employment or directorship with the Company”. We perceive no ambiguity in this clause. The obvious meaning from the language of the provision is that clause 19 is sufficiently broad in its terms to include the legal expenses to which this action relates. We do not agree with the defender’s submission that clause 6 is the clause which applies in respect of claims by the company against a director. Clause 6 deals with the company’s obligations to arrange and maintain directors’ liability insurance in respect of legal action against its directors. Clause 6.5 requires to be considered in context; it applies to situations arising under clause 6 in which a director may require to take independent legal advice. Clause 19 is broader. The parties could have chosen to express clause 19 as being subject to the terms of clause 6. They did not do so.

[36] Therefore we conclude that the sheriff erred in his restrictive interpretation of clause 19; there is no basis to restrict its application to a breach or perceived breach on the part of the defender only. Accordingly we shall grant the pursuer’s ground of appeal (set out in paragraph 2, sub paragraphs 7 to 10 of the Note of Appeal) directed at the sheriff’s interpretation of clause 19.

[37] Two ancillary matters arise in respect of clause 19. The defender maintained that the phrase “legal advice” does not extend to legal expenses incurred in instructing solicitors to represent the pursuer’s position in correspondence or in conducting litigation. We reject that argument. It would be impossible to separate legal advice from other legal representation in the context of clause 19. The phrase is properly construed broadly. Further we note that clause 19 specifically refers to indemnity in respect of “any legal expenses” in the event that the pursuer requires to take legal advice.

[38] The second point is whether the word “reasonable” requires to be implied between the words “any” and “legal” in clause 19. The sheriff held that no such implication was

justified. On this matter, we prefer the submissions of the defender. The implication of the word “reasonable” satisfies the conditions summarised by Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (at page 283), cited with approval in *Marks and Spencer Plc v BNP Paribas Securities Services* [2016] AC 742. We consider that such an implication is necessary to give the contract business efficacy and it is so obvious that it “goes without saying”. It is in our view, how any reasonable person would read the agreement irrespective of whether the word “reasonable” is specifically expressed. We note too that the implication of the word “reasonable” is more consistent with the language the parties have used elsewhere (see for example clause 6.5). A term will be implied into a commercial contract only if it is necessary to give the contract business efficacy or it is so obvious that it goes without saying. We consider that it does go without saying that a provision to indemnify in respect of legal expenses is limited to reasonable legal expenses. That is how any reasonable person would read the agreement irrespective of whether the word “reasonable” is specifically expressed.

[39] Accordingly we shall grant the defender’s first ground of appeal (set out in paragraph 2 of the Grounds of Appeal in the Cross Appeal) directed at question of whether the word “reasonable” required to be implied into clause 19.

Sections 232 and 234 of the Companies Act 2006

[40] Sections 232 of the Companies Act 2006 (“the 2006 Act”) provides:

“232 Provisions protecting directors from liability

...

(2) Any provision by which a company directly or indirectly provides an indemnity (to any extent) for a director of the company, or of an associated company, against any liability

attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company of which he is a director is void, except as permitted by-

...

(b) section 234 (qualifying third party indemnity provision)

...

(3) This section applies to any provision, whether contained in a company's articles or in any contract with the company or otherwise.

..."

[41] Section 234 of the 2006 Act provides:

"234 Qualifying third party indemnity provision

(1) Section 232(2) (voidness of provisions for indemnifying directors) does not apply to qualifying third party indemnity provision.

(2) Third party indemnity provision means provision for indemnity against liability incurred by the director to a person other than the company or an associated company. Such provision is qualifying third party indemnity provision if the following requirements are met.

(3) The provision must not provide any indemnity against-

...

(b) Any liability incurred by the director-

...

(ii) in defending civil proceedings brought by the company, or an associated company, in which judgment is given against him."

Sheriff's Decision

[42] On the sheriff's interpretation of clause 19 it is not caught by section 232 of the 2006 Act. Nonetheless the sheriff found that, on the pursuer's interpretation, clause 19 is an indemnity to some extent against a liability attaching to the pursuer in connection with any negligence, fault, breach of duty or breach of trust in relation to the company of which he is

a director. It is not rescued by section 234. Clause 19 is wide enough to cover the cost of legal advice in civil proceedings brought by the company, regardless of the outcome of such proceedings. It does not exclude any liability incurred by the pursuer in defending civil proceedings brought by the company in which judgment is given against him. In order to be a qualifying third party indemnity provision it must not provide any such indemnity. As clause 19 is capable of providing indemnity in respect of liability for legal expenses incurred in defending civil proceedings brought by the company in which judgment is given against the pursuer that is enough to exclude it from being a qualifying third party indemnity.

Submission for Pursuer

[43] The sheriff took an overly broad approach to the interpretation of section 232(2). Properly construed, clause 19 does not provide an indemnity against a liability attaching to the pursuer in connection with any negligence, default, breach of duty or breach of trust in relation to the company properly construed. Indemnities between the pursuer and the defender are dealt with in clauses 6.3 and 6.4 of the agreement. Clause 19 is an agreement by the defender to make available funds to pay for the pursuer's legal expenses at the time at which they are incurred.

[44] Before there is a finding of negligence, default, breach of duty or breach of trust in relation to the defender any liability for legal costs is not caught by section 232. It was accepted that where there is such a finding legal fees owed to the pursuer's own solicitor could be caught by section 232. Section 232 does not bite before there is a finding of negligence, default, breach of duty or breach of trust in relation to the defender on the part of the pursuer.

[45] *Esto* clause 19 is an indemnity provision to which section 232 applies, the sheriff erred in concluding that clause 19 is not a qualifying third party indemnity provision in terms of section 234. The liability with which this case is concerned is in respect of legal advice which could be owed to the solicitor to whom the pursuer was obliged to pay legal fees and therefore is a liability owed to a third party. Therefore it is a qualifying third party indemnity provision in terms of section 234(2).

[46] The sheriff erred in determining that clause 19 fell within the terms of section 234(3)(b)(ii) by failing to consider the terms of clause 19 read together with clause 6.3 and 6.4. Clause 6.3 would prevent the pursuer from being indemnified for legal expenses in respect of a judgment given against him and clause 6.4 would require the pursuer to indemnify the defender for any losses caused by the pursuer's material breach or wilful actions, where such actions are admitted or found following civil or criminal proceedings and such action amounts to an offence. Clause 19 requires to be interpreted in the context of the contract as a whole. Taking clause 19 along with clause 6.3, any legal expenses paid under clause 19 would have to be repaid in the event of a finding to which clauses 6.3 and 6.4 apply.

Submission for Defender

[47] The sheriff was correct to conclude that if clause 19 is to be construed in the manner advocated by the pursuer, it would be rendered void and unenforceable by section 232(2) of the 2006 Act. On the pursuer's construction, clause 19 would oblige the defender to indemnify the pursuer against a liability attaching to him in connection with a default or breach of duty in relation to the defender. Any such indemnity would fall squarely within section 232(2).

[48] The sheriff was also correct to conclude that clause 19 could not be a qualifying third party indemnity within the meaning of section 234 because it is unconditional. It would oblige the defender to indemnify the pursuer against liabilities which the pursuer has incurred to a third party in defending civil proceedings brought against him by the defender regardless of the outcome of those proceedings. The clause is therefore drafted too widely to fall within the exception provided by section 234(3)(b)(ii) of the 2006 Act.

Decision

[49] Unless falling within specified exceptions, section 232 of the 2006 Act renders void any provision by which a company directly or indirectly provides an indemnity to any extent for a director of the company against any liability attaching to him in connection with any negligence, default breach of duty or breach of trust in relation to the company. It was a matter of concession that legal expenses fall within the definition of "any liability attaching to him in connection with any negligence etc."

[50] We have decided that clause 19 is wide enough to include legal expenses in relation to proceedings in connection with alleged negligence, default, breach of duty or breach of trust in relation to the company. The broad terms of clause 19 result in it being a provision by which the defender company provides an indemnity of the kind declared by section 232 to be void.

[51] Clause 19 is not a qualifying third party indemnity provision which would be excepted from the application of section 232(2) in terms of section 234. It is, in terms of section 234(2), a provision for indemnity against liability incurred by the director to a person other than the company, ie the solicitor providing legal advice. However, in order to be excepted from section 232(2), the indemnity provision must not provide any indemnity

against any liability incurred by the director in defending civil proceedings brought by the company in which judgment is given against the director (section 234(3)(b)(ii)). Clause 19 is sufficiently wide to provide such an indemnity and, as previously explained, its terms are not constrained by clauses 6.3 and 6.4 which, as stated by the sheriff, are entirely separate and independent from clause 19.

[52] Therefore clause 19 is void in terms of section 232(2) of the 2006 Act. Accordingly we shall refuse the pursuer's ground of appeal (set out in paragraph 2, sub paragraphs 11 and 12 of the Note of Appeal) directed at the sheriff's interpretation of sections 232 and 234 of the 2006 Act.

Retention

Sheriff's Decision

[53] On his interpretation of clause 13, the sheriff concluded that the pursuer will qualify for the termination payment only if he is not in breach of contract; therefore the defender is entitled to withhold payment if the pursuer is in breach of contract. The sheriff expressed the view that if he was wrong in his interpretation of clause 13, then the pursuer is entitled to the termination payment on termination of his employment howsoever caused. The defender would not be entitled to withhold payment as a result of the breach of contract averred by the defender that being the "howsoever" cause of the termination of the pursuer's employment. That effectively precludes reliance upon the principle of mutuality.

Submission for the Pursuer

[54] The pursuer submitted that the sheriff was correct to conclude that the language of clause 13 was sufficient to imply that the common law principle of mutuality is excluded.

The plain language of clause 13 provides that the termination payment would be made in the event of termination by either party, independently of other sums and howsoever caused.

[55] *Separatim*, the obligation to make the termination payment in clause 13, properly construed, is an independent stipulation which is not affected by the other terms of the agreement. Clause 13 makes express provision for the circumstances in which the termination payment will be made, which is not related to the performance of the party's obligations under the contract in any general sense. The defender does not seek to withhold performance under clause 13 to compel the pursuer to perform under the contract. In the circumstances, it would not be equitable to permit the defender to withhold performance in security for their claim which proceeds in the English courts.

Submission for Defender

[56] The pursuer's appointment as a director of the defender was inextricably related to the conclusion of the service agreement between the parties. The defender's obligation to make payment under clause 13 of the agreement is the counterpart of the pursuer's obligation to perform his duties under the agreement. The defender has a damages claim against the pursuer for over £1 million for breach of those duties which is currently proceeding before the High Court in England. *Esto* payment under 13 is due, the defender is entitled to withhold payment of the termination payment pending the establishment of the damages claim on the basis of mutuality.

[57] If not entitled to do so, it would be equitable in the circumstances to allow the defender to do so. The damages claim is for a sum substantially in excess of the termination

payment and proceedings are already underway in respect of the damages claim in the High Court.

[58] The exclusion of the common law right of retention can only be effected either expressly or by clear implication. There is nothing in clause 13, or elsewhere in the agreement that meets that test.

Decision

[59] The sheriff correctly found that, given his interpretation of clause 13, the pursuer will qualify for the termination payment only if he is not in breach of contract; the defender is entitled to withhold payment if the pursuer is in breach of contract.

[60] However we consider the sheriff erred in further deciding that if the pursuer's interpretation of the clause is correct then mutuality is excluded. Entitlement to the termination payment in clause 13 forms part of an overall agreement between the parties in respect of obligations, remuneration, benefits and ancillary matters. There are mutual obligations and duties which are related and counterparts.

[61] The mutual obligations fall within the ambit of the case of *Inveresk plc v Tullis Russell Papermakers Ltd* 2010 SC (UKSC) 106. There are two claims, one liquid, the other in the nature of the claim for damages. They both arise from the same contract. They are truly counterparts of each other. Therefore the defender, being the creditor in the claim for damages, may withhold payment of their debt until the amount due them as damages is established. That recognises that the obligations are truly counterparts of each other.

[62] Accordingly we shall grant the defender's ground of appeal (set out in paragraph 4 of the Grounds of Appeal in the Cross Appeal) directed at the sheriff's decision on the application of the principle of mutuality.

[63] For completeness the remaining ground of appeal in the cross-appeal (set out in paragraph 3) was not insisted upon.

Decision

[64] In conclusion, we refuse the pursuer's ground of appeal directed at the sheriff's interpretation of clause 13, we sustain the pursuer's ground of appeal directed at the sheriff's interpretation of clause 19, we refuse the pursuer's ground of appeal directed at the sheriff's interpretation of sections 232 and 234 of the 2006 Act, we sustain the defender's ground of the cross-appeal as to implication of the word "reasonable" in respect of legal expenses and we sustain the defender's ground of appeal directed at the sheriff's decision on the application of the principle of mutuality. For these reasons we adhere to the sheriff's interlocutor of 24 June 2022 dismissing the action.

[65] It was agreed between the parties that a further hearing would be necessary to consider the question of expenses in light of our decision. In the event that parties are not able to agree the issues of expenses and provide the clerk of court with a note of their joint position within 14 days, further procedure will be assigned.