OUTER HOUSE, COURT OF SESSION

[2018] CSOH 30

CA25/12

OPINION OF LADY WOLFFE

In the cause

UNICORN TOWER LTD AND OTHERS

Pursuers

against

HSBC BANK PLC

Defender

Pursuers: Mitchell QC; John Mair Solicitors
Defenders: O'Brien; Shepherd & Wedderburn LLP

3 April 2018

Background

[1] The pursuers had the ambition to develop a large property in the centre of Glasgow ("the Property") in two phases, phase 1 being for 50 apartments and phase 2 being for commercial space at ground level ("the development"). The indicative cost of phase 1 was £14 million pounds. There are detailed averments about the arrangements amongst the pursuers, but it suffices to note that the second pursuer is the parent company of the first pursuer, which is a single purpose vehicle. The third pursuer, an individual, is a shareholder and director of the second pursuer and became a guarantor of the obligations of the first pursuer.

[2] In early 2007 the defenders agreed to provide finance for the development. There is no need to narrate the detailed averments about the pre-contractual communications (which comprise Articles 2 to 8 of condescendence). The import is that the third pursuer had a pre-existing business relationship with the defenders (in England), that the defenders were keen to expand its business and to raise its profile in the West of Scotland, and that the defenders were aware that the funding from the defenders was in substitution for funding from the Clydesdale Bank.

[3] The documentation entered into among the parties relative to the provision of financial facilities by the defenders to the first pursuer included the following:

1) A facility letter dated 25 January 2007 agreement ("the Facility Letter"), for a loan account ("the Facility") for £7,965,000;
2) A standard security granted by second pursuer over the property in favour of the defenders ("the Standard Security");
3) A guarantee granted by the third pursuer in favour of the defenders, dated 14 April 2008 ("the Guarantee");
4) A security interest agreement, dated 14 April 2008 ("the SIA"); and
5) An interest rate swap agreement ("the IRSA").

[4] The Facility bore to be repayable on demand and was due for review in 12 months' time. It was also subject to the defenders' Terms of Business, but no reference was made to these in the debate before me. The Facility was continued in January 2008 for a further 12 months (the "2008 Continuation Letter").

[5] The development did not proceed in the timescale envisioned. (The causes and consequences of the delay are disputed.) By letter dated 13 February 2009 the defenders outlined their concerns and stipulated for the provision of further reports and information to

be provided ("the 2009 Continuation Letter"). Subject to satisfaction with these materials, the Facility was continued on the same terms as set out in the Facility Letter. It stipulated for a review of the Facility in two months' time. The Facility was not further continued in April 2009. At about this time the third pursuer granted the Guarantee. He also entered into the SIA and deposited £700,000 with the defenders pursuant to it. By letter dated 8 June 2009, the defenders demanded immediate repayment of the Facility. The pursuers resist that demand and have raised these proceedings.

The pursuers' case

The Facility, the Standard Security, Guarantee and the SIA

[6] The pursuers challenge the defenders' termination of the Facility. They seek declarator (in conclusion 1) that the defenders were not entitled to terminate the Facility. They seek damages of £8,000,000 (in conclusion 2) for breach of contract and breach of undertaking. In support of these conclusions they argue:

1) That there was a collateral agreement (to be inferred *rebus et factis*) "negotiated" between "the First Pursuer and the Defender (*et separatim*, a binding unilateral promise made by the Defender)" that the Facility "was a fixed term facility and (absent a breach by the First Pursuer of its terms) would not be terminated until the completion of the development".
2) *Esto* there was no collateral agreement or promise, they argue that the defenders were personally barred from terminating the Facility; and
3) They also argue that the defenders' power to demand repayment was subject to an implied term that it would be exercised in good faith.

The pursuers also seek declarators (in conclusions 3 and 4, respectively) for release and discharge of the second pursuer from the Standard Security and of the third pursuer from the Guarantee and the SIA. They rely on the same grounds as those advanced to challenge the termination of the Facility and no separate argument was presented in respect of these conclusions.

The IRSA

[7] The pursuers aver that there was a negligent misrepresentation in respect of the entry into the IRSA. The defenders accept that the IRSA was mis-sold to the pursuers and compensation has been paid via a scheme under the auspices of the Financial Ombudsman. In these proceedings, the pursuers maintain a claim for consequential loss. They also seek to imply into the IRSA five principles and six rules from the Conduct of Business Sourcebook ("COBS") governing regulated activities.

The defenders' response to the pursuers' claim

[8] While this was a debate at the instance of the defenders challenging the relevancy of the pursuers' pleadings, it is helpful to note the defenders' position. In response to the argument that there was a collateral agreement, the defenders rely on the terms of the Facility Letter and the 2008 and 2009 Continuation Letters and they argue that the Facility was always repayable on demand. They invoke an exclusive jurisdiction clause in respect of the pursuers' IRSA claim. While the defenders have brought a counterclaim for repayment of the sums due under the Facility, the counterclaim was not the subject of debate.

The pursuers' pleadings

[9] The pursuers' pleadings are detailed. Their pleadings in support of a collateral agreement to the Facility are found in articles 9 to 20 and the pleadings anent the "purported calling up of the loan" Facility are in articles 22 to 26. The case of personal bar is in article 21. In relation to the IRSA, the pleadings are in articles 29 to 34. Averments of quantum are in articles 35 and 36. For the purposes of the argument about the exclusive jurisdiction clause, extensive reference was made to the pleadings in the Initial Writ. The relevant passages are quoted or summarised in parties' submissions.

The contractual documentation

[10] Having regard to the arguments presented, it suffices to note that the principal features of the contractual documentation referred to were the "on demand" character of the Facility and the stipulated periods before review. Mr Mitchell does not dispute these. His principal argument is that these have to be read subject to the collateral agreement (or promise etc) he contends for.

The defenders' submissions

[11] The defenders challenge the relevancy of the pursuers' case based on a collateral agreement, personal bar, unilateral promise, the several implied terms and the averments of quantum. They also invoke the exclusive jurisdiction clause.

The challenge to the pursuers' case based on a collateral agreement/unilateral promise

[12] Mr O'Brien, who appeared for the defenders, relied on the provisions in the original Facility Letter and in the two subsequent continuations of it, which stated that the Facility

was repayable on demand. He also noted that there was provision for the Facility to be reviewed periodically. All continuations thereof were for limited periods, the last of which had expired by the time repayment of the Facility was demanded.

[13] The pursuers' case appeared to be that the alleged collateral agreement was entered into at the same time as the Facility Letter. He referred to articles 9 and 10 of condescendence, averring that the Facility Letter was to be read alongside the collateral agreement; and to article 21 of condescendence, where a fallback case of personal bar was advanced "even if there was no collateral agreement at the time of the entering into the original agreement on or about 25th January 2007". Mr O'Brien noted, however, that the pursuers made no averments of matters capable of giving rise to such an agreement. Article 12 of condescendence merely contained a generic assertion that the defenders' employees "constantly reassured the pursuers and other that the funding would be a term loan". This was wholly lacking in specification about when and in what terms such assurances were supposedly given (particularly where they so obviously contradict the terms of the contemporary contractual documentation). Mr O'Brien went through the averments in articles 13 to 19 of condescendence in detail. These related to events after the Facility Letter was entered into. At most, some of these narrated that the defenders were supportive. There were no averments from which the court could infer that a collateral agreement had been reached. The pursuers' averments were insufficient to justify a departure from the clear terms of the Facility Letter (or its two continuations) or such as to justify finding that there was a collateral agreement in the terms contended for.

[14] In respect of the pursuers' argument that there is a conflict or repugnancy between the provisions that the Facility was repayable "on demand" and a provision for review in 12 months, he submitted that a provision that a loan is repayable on demand is not

inconsistent with an expectation (or even a provision) that repayment will be made from the proceeds of sale. Reference was made to *Bank of Ireland* v *AMCD (Property Holdings) Ltd* [2001] 2 All ER (Comm) 894) at para 17. There was no repugnancy. Mr O'Brien submitted that there were no relevant averments of a unilateral promise.

[15] In relation to Mr Mitchell QC's reliance on *Royal Bank of Scotland* v *Carlyle* 2015 SC (UKSC) 93, this case was readily distinguishable. On the facts of that case, the defender had communicated that he would not enter into a first agreement (for the purchase of a property) if he did not also have the bank's firm commitment to fund the redevelopment and that he required a full commitment to the proposal or nothing. The bank gave a verbal assurance that these would both be provided. The parties entered into a written contract for the provision of finance for the purchase. The bank subsequently refused to provide support for the redevelopment. After proof, Lord Glennie held that the specific assurance by the bank constituted an oral agreement. The fact that the parties had envisaged that there would be a written agreement in due course did not preclude that oral agreement coming into existence. The Supreme Court upheld this finding.

[16] Accordingly, Mr O'Brien submitted, the pursuers' case based on the existence of a collateral agreement or promise was irrelevant, or at least wholly lacking in specification.

Personal bar

[17] Mr O'Brien turned to the pursuers' *esto* case (in article 21 of condescendence) that, in the event that there was no collateral agreement as averred, the defenders were nonetheless personally barred from seeking repayment on demand, by reason of the representations allegedly made. He submitted that, even assuming that the elements of personal bar were found to be proved, that would not provide a basis for the pursuers' claim. "Personal bar

only operates as a defence; it does not create any claim or positive right…": *Advice Centre for Mortgages Ltd* v *McNicoll* 2006 SLT 591, at para 17, *per* Lord Drummond Young. Thus, personal bar could never have provided the pursuers with a right to draw down further funds after the facility had expired. Nor can it provide a basis for a damages claim. Accordingly, the pursuers' claim so far as based on personal bar was also irrelevant. In relation to the pursuers' claim for discharges of the Standard Security, the Guarantee and the SIA, the supporting averments, at articles 27 to 28 of condescendence, were premised on the success of the first pursuer's claim that the defenders were not entitled to demand repayment of the loan. They were irrelevant for the same reasons.

Reliance on the IRSA transaction as a defence

[18] There was a discrete challenge to the pursuers' averments in article of condescendence 25. Mr O'Brien noted that the pursuers relied on the IRSA mis-selling claim as a defence to the counterclaim, and in the principal action it is averred that, "the debit balance had arisen as a result of the mis-selling" of the IRSA by the defenders to the first pursuer and "as a result of the application" by the defenders of the IRSA "interest charges to overdraft account, without any authorisation or entitlement to do so" (*per* article 25).

[19] Mr O'Brien's submission was that, even assuming that there was mis-selling, any claim arose under a separate contract and was irrelevant to the demand for repayment of the balance due under the Facility. The obligations in the IRSA and the Facility were not counterparts to each other, in the sense required by the principle of mutuality, so no right of retention would arise: *Inveresk plc* v *Tullis Russell Papermakers Ltd* 2010 SC (UKSC) 106. There was no need for any default on the part of the pursuers before the defenders were entitled to demand repayment. Mr O'Brien argued that even if that claim were well-founded, it would constitute

an illiquid claim for damages arising from a separate contract entered into at a later date. In any event, the pursuers have already received compensation in respect of the charges that had been incurred as a result of the IRSA agreement.

Implied terms for the IRSA

[20] Subject to issues of jurisdiction and quantum, Mr O'Brien accepted that the averments in article of condescendence 29.1 was relevant for a proof of negligent misrepresentation inducing contract. The passage at article of condescendence 29.2, introduced by amendment, was a reformulation of 29.1. While repetitive, it was relevant. Otherwise, he challenged the averments about the implication of a substantial number of the COBs rules as terms to be implied into the IRSA.

[21] A term may only be implied in a commercial contract where it is necessary to give the contract business efficacy or where the term is so obvious that it goes without saying: *Marks & Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, at paras 21 to 23, *per* Lord Neuberger. Neither test was met. At most, the pursuers' case was that the term should be implied because the defenders were subject to the COBS Rules and that these exist for the protection of customers, such as the first pursuer. However, such a term was not necessary for business efficacy, nor was it so obvious that it went without saying.

[22] Furthermore, the implication would be wholly inconsistent with the statutory scheme under the Financial Services Market Act 2000 ("the 2000 Act"), in combination with the Financial Services Market Acts 2000 (Rights of Action) Regulations 2001 ("the 2001 Regulations"), which carefully limited the extent to which breaches would give rise to a private right of action, as opposed to regulatory consequences. This was provided for by

section 150 (which was in force at the material time) of the 2000 Act, read together with regulation 3 of the 2001 Regulations. The effect of the pursuers' implied terms was to try to rely on features of COBS, even though those rules were not directly enforceable by persons such as the first pursuer.

[23] Mr O'Brien referred to a number of cases to support this proposition. *Green and Anr* v *Royal Bank of Scotland PLC (FCA intervening)* [2014] Bus LR 168 was a case where the court refused to imply a like term at common law which was found in the COBS rules but in respect of which the plaintiff's claim was precluded. The court held that there was no need or justification for the independent imposition of a duty at common law on the defendant bank where there was an express cause of action for breach of a statutory duty when the bank was undertaking a regulated activity. Mr O'Brien looked at the cases of *Crestsign Ltd* v *National Westminster Bank PLC and another* [2014] EWHC 3043 (Ch) and *Thornbridge Ltd* v *Barclays Bank plc* [2015] EWHC 3430 (QB), essentially to argue that the latter qualified the former. While the plaintiff in *CGL Group Ltd* v *Royal Bank of Scotland* [2016] EWHC 281 (QB) failed on time-bar, it would have also failed on the implication of a term that was inconsistent with the clear statutory scheme. He also referred to *Flex-E-Vouchers Limited* v *the Royal Bank of Scotland Plc* [2016] EWHC 2604 (QB) in which the court refused to imply a term that would cut across the statutory scheme (para 54). None of these cases provided support for the kind of implication that the pursuers sought to do in this case.

No relevant averments of loss for the IRSA claim

[24] The pursuers' case was for consequential loss flowing from the mis-selling of the IRSA proceeded on the hypothesis that the defenders were entitled to terminate the Facility. It was unclear what was meant by "excess interest". It may mean that the pursuers paid

more than anticipated by way of interest under the IRSA after the 2008 crash and the Facility was not drawn down to the same extent because of the delay in progressing the development. The tenor of the averments was that the pursuers therefore ended up owing more to the defenders. Article 35 of condescendence appeared to be the primary basis of loss (loss of profit if the Facility had not been terminated). Article 36 of condescendence was the loss from the mis-selling. The averments of quantum were confusing. The pursuers appeared to contend that but for the application of "excess interest" the Facility would not have been terminated. The problem was that this was inconsistent with the pursuers' averments about the change in policy on the part of the defenders (in articles 24 and 25 of condescendence). The problem for the pursuers was that, on the hypothesis on which this part of their case proceeded, the defenders were entitled to call up the Facility (because it was repayable on demand or because any extension expired). If the pursuers averred that the defenders wanted out of this type of lending, where was the causal link between an alleged mis-selling of the IRSA and the demand for repayment of the Facility? The criticism was more fundamental than just a lack of specification.

Plea of no jurisdiction in respect of the IRSA claim

[25] The pursuers' case began in the sheriff court by initial writ. There had been two root and branch rewritings of the pursuers' case. The matter was appointed to the Commercial Roll on 23 February 2012. The pursuers' case of mis-selling of the IRSA was introduced by adjustment in March 2012 and the defenders challenged jurisdiction at that point. The pursuers accept that there is an exclusive jurisdiction clause in the IRSA but they wish to override this on the basis, they say, that the defenders have accepted jurisdiction. The apparent basis for this argument was the lodging of the defenders' counterclaim (*per* article

of condescendence 1). The pursuers appear to have departed from this, as there is no reference to this in their Note of Argument. From that document, the pursers now seek to invoke a discretion. (There were no pleadings for this but Mr O'Brien did not take that point.)

[26] Mr O'Brien proceeded to go through the averments and craves in the initial writ in detail, to the effect that the complaint in the sheriff court pleadings had nothing to do with a case of mis-selling the IRSA. Accordingly, there was no occasion in those proceedings to take a jurisdiction plea. As soon as that ground had been introduced in the pleadings in this case, the plea was taken. It was unfounded to contend that there had been a submission to jurisdiction. The claims in the two actions were quite different.

[27] In respect of the pursuers' resort to a discretion, under reference to *Donoghue v Armco Inc* [2002] 1 All ER 749 (at paras 24, 25, 27, 74 and 75), he argued that the court required a very strong reason to permit a party to sue in a non-contract forum. He accepted that the court has a discretion and that, on the facts of that case, it had been found preferable to have a single composite trial of all issues. The facts were distinguishable, because in this case there are two distinct claims, with no risk of conflicting proceedings. It was not artificial to have two separate courts deal with the separate contracts, the Facility and the IRSA, as that was what parties had contracted for. If the court upheld the plea, then the whole of the IRSA claim fell away.

Disposal

[28] Mr O'Brien explained that if the court were with him on the basis that there was no jurisdiction or that there were no relevant averments of loss, then the mis-selling case fell. If the court was against him on both of these points, but with him on the relevancy of the

implied terms, then what was left was a stand-alone claim of negligent misrepresentation. In that event, the court should put the matter out By Order to identify what parts of the pursuers' pleadings fell to be excluded. On the primary case (of a collateral agreement), if the pursuers failed, then the whole case fell. If the pursuer succeeded on the basis that there was a collateral agreement, then, again the matter should be put out By Order.

Reply on behalf of the pursuers

Background

[29] Mr Mitchell QC, who appeared on behalf of the pursuers, began by going through the background. He emphasised that an IRSA was no more than a bet on the direction of interest rates. It demonstrably made no commercial sense whatsoever, especially if it became disconnected from the Facility. It was incomprehensible to enter into an IRSA unless to hedge a variable interest rate due under a loan. Mr Mitchell also explained the detail of the proposed development and the relationship between the Facility and the IRSA. The pursuer was paying interest for noting more than losing the bet.

[30] He urged the court to take a comprehensive, not a particularised view, of the pleadings. The pursuers got in deeper and deeper as a consequence of the defenders' encouragement until they turned around in 2009 and demanded repayment. They had issued a bland letter. The pursuers cry "foul" and this was the basis for the averments of a lack of good faith (in article 25 of condescendence).

Retention

[31] Under reference to *Inveresk,* Mr Mitchell argued that there was the requisite degree of mutuality between the IRSA and the facility agreement to enable the pursuers to withhold

sums due under the Facility, pending resolution of their consequential loss claim under the IRSA. This wasn't a case of retention but he invoked the court's discretion to permit this.

Jurisdiction

[32] Mr Mitchell referred to statements 21, 25 and 34, 35 and 40 of the initial writ to identify the references to the IRSA. There was arguably a crave relative to this, if one had regard to the plural form of the fourth crave. The defenders took no plea of no jurisdiction. They referred to clause 6.2 of the IRSA. He referred to answers 33 to 36. The defence was derived from the IRSA. In the sheriff court process, therefore, the parties had joined issue on the IRSA.

[33] Mr Mitchell advanced a subsidiary argument. The defenders strive to find prorogation of a discrete claim. But there was no authority for that. In fact, the parties had joined issue on the IRSA. It mattered not that there was no discrete claim based on the IRSA in those proceedings.

[34] Otherwise, Mr Mitchell invoked the court's discretion. Relevant to the exercise of that discretion was the practical reality that this was all really one case. If the evidence were split, the evidence about the Facility will be relevant to the evidence in relation to the IRSA. The same witnesses would be required. One needed to understand why the IRSA followed the Facility. If credibility was important, there could be different assessments. The English courts would only have jurisdiction over the IRSA. They had no jurisdiction over the counterclaim. If the English proceedings focused only on the IRSA then they would fail to see the big picture and the commercial reality of the whole package. There were practical difficulties. There were questions of economy, convenience and coherence because of the unity of the two contracts.

The Facility: Collateral Agreement and promise

[35] Mr Mitchell began by arguing that the defenders' submissions only worked on a narrow reading of the pleadings. The defenders were correct that there were no averments of a collateral agreement at the outset. The pursuers were not offering to prove a particular meeting where a particular representation was made. Mr Mitchell also accepted that the representations to third parties could not be the basis of a contractual undertaking to the pursuers. The pursuers' averments proceeded on the basis of inference. Notwithstanding the reference in the averments to representations at, or shortly after, the time the Facility was entered into, Mr Mitchell also made a submission that, looking at the totality of the averments, a collateral agreement could be inferred by March 2009. Everything was relevant to the possibility of the court drawing the necessary inference. The date of any collateral agreement could be earlier. On this basis, even the representations to third parties could be relevant, *rebus et factus*. Mr Mitchell then looked in detail at his averments in articles 10 and 11, and 13 to 20 of condescendence. A proof should be allowed to see how it all hung together. It could not be said that the pursuers could not possibly succeed. He had, he said, averred enough. He made passing reference to the cases of *Baillie* v *Fraser* (1853) 15 D 747 and *Sutherland* v *Montrose Shipbuilding Co* (1860) 22 D 665 but indicated that these were not particularly relevant.

[36] In relation to his alternative case that there was a unilateral promise, Mr Mitchell rested on his note of argument and the submissions just made. He emphasised his reliance on the collateral agreement argument.

Personal bar

[37] The defenders had departed from their ability to call up the Facility on demand. He deployed personal bar as a shield, that was only so far as it could be taken. He abjured the use of the doctrine as a sword.

Implication of a term of an obligation of good faith

[38] Mr Mitchell argued that he had sufficient averments that the defenders had acted in bad faith. He turned to his argument that there fell to be implied as a term an obligation of good faith. This argument was developed toward the end of Mr Mitchell's reply at the end of the second day of the debate. While there were some averments in the pleadings, the case of *Yam Seng Pte Limited v International Trade Corporation Limited* [2013] EWHC 111 (QB) had not been included in the two-volume joint bundle of authorities. He made detailed references to *Yam*. (Mr O'Brien handed up the case of *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch) by way of his proposed reply.) From *Yam,* Mr Mitchell emphasised that Leggat J looked at the contract as a whole and the greater prospect for implication in a "relational" contract. Here, the on demand character of the Facility was not inconsistent with a duty on the defenders to act fairly. The case of *Property Alliance* followed a long proof. It exhibited an anglo-saxon individualism. Whether or not the IRSA was actionable, parties were entitled to protection. The attempt in *Property Alliance* to push back on Leggat J in *Yam* was unpersuasive.

[39] It was necessary to find a further day to enable the parties to conclude their submissions. In advance of that date, parties both helpfully provided supplementary submissions on the implication of a term of good faith which developed the arguments significantly from their first submissions.

[40] The parties' submissions ranged widely, across centuries and jurisdictions, and raised a number of interesting questions. Mr Mitchell proposed the following:

> "(1) There is a principle in Scots Law that parties must act in good faith towards each other in relation to their actings under a mutual contract. For the sake of brevity, this principle is hereinafter referred to as an "obligation of good faith";
>
> (2) If it be the case that this principle has not yet been definitively declared, there are compelling public policy reasons why this should now be done;
>
> (3) Whether or not the court chooses to declare a general obligation of good faith in contract under Scots Law, nonetheless, even an incremental approach to the application of the concept of good faith to contractual relations should result in the implication of a term into the present contract requiring good faith, in respect of which the defender is alleged to have been in breach."

[41] In support of these propositions, Mr Mitchell undertook a review of the development of the obligation of good faith in Scots and English law as found in the case-law and academic writings. The respective high points, as it were, in those two jurisdictions were Lord Clyde's observations in *Smith v Bank of Scotland* 1997 SC(HL) 111 at 121 and Legget J in the case of *Yam* (and in which Lord Clyde's observations in *Smith* were cited). Mr Mitchell analysed further cases which he submitted supported the proposition that:

> "in the context of the contract between the parties, including especially its whole structure as a term loan to fund the entire project…the expected community norm would have been…that the defender would exercise its contractual right to call in the loan at any time if that would have the effect (as indeed it did) of frustrating the carefully constructed contract between the parties"

[42] Under reference to more discursive materials, Mr Mitchell commended a principled or inductive approach, which he submitted were established features of Scots law and consistent with its Roman law roots, and urged the court to declare that there is, and always has been, a "clear underlying principle pf good faith" in Scots contract law. He advanced six reasons why the court should find that there is a general principle of good faith. In the alternative, he contended such a term could be implied in this case, proceeding on an incremental basis. To that end, he submitted that:

> "As already submitted in aural argument, the exercise of the apparent right to call up the loan at will was wholly inconsistent with and frustrated the contractual scheme which had been created by the parties. Whether or not it served the interests of the defender, it did not serve the objectives of the mutual contract which the parties had entered into. The parties, it is submitted, entered into the contract in the expectation that both parties would observe the expected community norm, in this case that (absent default or other similar event) **the contract would be seen through to completion on a basis of mutual trust**.
> In other words, this is a case of breach of the requirement for objective good faith." (Emphases added)

The defenders' reply to the argument of implication of an obligation of good faith

[43] Mr O'Brien reviewed the Scottish cases and contended that none support the pursuers' argument for a general principle of good faith. He reviewed the English cases, including cases subsequent to *Yam*, to note that *Yam* was more restrictive in its approach than Mr Mitchell appeared to allow, and that it may be best understood as focused on "relational" contracts (ie where the nature and duration of the contract pointed to a need for active co-operation between the parties). Subsequent decisions in England supported this reading of *Yam.* He referred to *Compass Group UK & Ireland Ltd v. Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 2000, *per* Jackson LJ at paragraph 105; *Globe Motors Inc v. TRW Lucas Variety Electric Steering Ltd* [2016] EWCA Civ 396, *per* Beatson LJ at paragraphs 67 -68; and *Ilkerler Otomotiv Sanayi Ve Ticaret Anonim Sirket v. Perkins Engines Co Ltd* [2017] EWCA Civ 183. He also referred to *Monde Petroleum SA v. WesternZagros Ltd* [2016] EWHC 1472 (Comm), in which the court, having reviewed the authorities (at paras 262 to 270), held that a contractual right to terminate could be exercised for any reason and did not have to be justified (at para 261). He noted the court's observation in *TSG Building Services v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC) (at para 51), that an implied term of an obligation of good faith could not be used to restrict an express term of the agreement between the parties.

Discussion

The Facility Letter, Standard Security, Guarantee and SIA: Collateral agreement, unilateral promise and personal bar

[44] I start with the argument directed to the terms of the Facility. The pursuers argue that the provision that the Facility was repayable on demand was necessarily inconsistent with a provision that it would be reviewed in 12 months. I accept Mr O'Brien's submission that there is no repugnancy between a facility repayable "on demand", and other provisions providing for a specified duration before review (eg in 12 months' time), as is found in the Facility Letter, for the same reasons expressed by the court in *Bank of Ireland*.

Collateral agreement

[45] The pursuers' next argument, to elide the provision that the Facility was on demand, was to contend that there was a "collateral agreement negotiated between the First Pursuer and the Defender…that the facility was a fixed term facility and (absent a breach by the First Pursuer of its terms) would not be terminated until the completion of the development". In the alternative, the same facts were said to instruct a unilateral promiser or an undertaking. (No distinction was drawn between these alternatives and the case of collateral agreement. The parties' common approach was that these legal bases stood or fell together.)

[46] What facts and circumstances did the pursuers rely on to establish a collateral agreement (or unilateral promise)?

[47] In relation to the averments about the parties' conduct or communications, Mr Mitchell was frank that he could not point to any specific representation or act of the defenders when he could say that the collateral agreement he averred had come into existence. He did not rely on any specific representation. Mr O'Brien characterised the

pursuers' averments that the defenders' employees "constantly reassured the pursuers and others that the funding would be a term loan" as no more than a generic assertion. I agree. The pursuers do not even aver that a collateral agreement was created by any particular representation or representations, or at any particular point. Rather, they averred that its coming into existence (at some unspecified date) was to be inferred from certain statements. I accept as well founded Mr O'Brien's submission that if those statements did not themselves create an obligation, nothing in the surrounding context could change that. The case of *Royal Bank of Scotland plc* v *Carlyle*, relied on by Mr Mitchell, is readily distinguishable. The defender in that case made clear from the outset that he would not take the facility offered (for purchase of land), if he would not also be provided at a later point with another facility (for development). Once the Bank gave a specific assurance to that effect, the defender then accepted the first (of the anticipated two) facilities. The court held that that constituted an oral agreement, notwithstanding that the parties anticipated a written agreement at a later point, and which precluded the bank from refusing to provide the second facility. There is nothing in this case equivalent to the clear stipulation by the borrower or the specific acceptance of or statement by the bank in that case.

[48] If the pursuers fail to plead a relevant case for a collateral agreement or unilateral promise, they will not fail for want of trying. After transfer of the case onto the Commercial Roll, the pursuers adjusted in 2012; they adjusted on 3 more occasions (in 2016 and 2017); and they further amended their pleadings on the first morning of the debate. The pleadings are detailed and lengthy, particularly for a Commercial Action. Mr Mitchell's *cri de coeur*, to have the evidence all come out at proof to see if the court could infer from all of the evidence that there was a collateral agreement at some point, is in my view misconceived. Even allowing for the latitude afforded in Commercial Actions, the pursuers must identify or

plead a relevant and sufficiently specific case to justify proof. What Mr Mitchell proposes is not consistent with this court's established rules of pleading and practice.

[49] I turn next to address the features the pursuer relied on in support of a collateral agreement. The pursuers aver (in article of condescendence 10) that a collateral agreement was to be inferred from four factors. The first is the "many and repeated comments, assurances and representations made by the defenders…that the [Facility] would be available to the end of phase 1 of the completion of construction". I have just addressed this feature. The second feature was the "structuring of the project" such that the Facility would be repaid from the sale of the flats. The third feature was that the IRSA was structured in such a way that (a) there was a progressive increase in the notional sum to reflect the progressive drawdown of the Facility, and (b) that the IRSA would serve no purpose if the Facility were terminated before completion of the development. The fourth factor was said to be the unworkability of the scheme if the Facility could be arbitrarily terminated.

[50] It seems to me that these three additional features are of no avail to the pursuers' case. These features did not emerge, unanticipated, after the parties contracted and they did not compel some accommodation or change in their position as a consequence (cf. *Scanmudring SA v James Fisher MFE Limited* [2017] CSOH 91, where the fact that the seabed conditions were not as expected of necessity led to a variation in the parties' contract). Rather, these features existed or were reasonably anticipated at the outset. They were expressly part of the parties' agreed contractual arrangements. The proposed payment of the Facility from the sale of the flats may reflect a degree of commercial pragmatism, but that is not necessarily inconsistent with the on demand character of the Facility which the pursuers had accepted. Had the pursuers wanted the contractual protection of a term loan of a minimum duration, or to the completion of the development, they should have

contracted expressly for this. For aught yet seen, in that circumstance, the defenders might have insisted on other terms to match that character of lending or extended period of risk.

[51] The third feature, of the risk of the payments under the IRSA becoming out of step with the proposed payments under the Facility reflects, at most, a potential inadequacy of the IRSA (from the pursuers' perspective). The absence of a contractual mechanism in the IRSA to tie its duration to the subsistence of the Facility resulted in the continuation of payments being made under the former even after the latter had been terminated. The pursuers contend that this serves "no continuing legitimate commercial purpose" (*per* article 10 of condescendence). In the circumstances that transpired, the IRSA may have become "uncommercial" from the pursuers' perspective. The fundamental flaw in this argument, in my view, is that this simply flows from what parties agreed at the time. It was not unforeseeable. Furthermore, in advancing this argument, the pursuers do not appear to rely on the contended for collateral agreement. The pursuers' complaint about the operation of the IRSA may, or may not, be relevant to a challenge of the IRSA on other grounds (eg the mis-selling referred to). That issue does not arise here. Be that as it may, I am not persuaded that this feature of the IRSA provides a basis to infer a collateral agreement to vary a different contract (the Facility Letter), at least where those two contracts are not counterparts (in an *Inveresk* sense) and where each may be interpreted and capable of due performance in the absence of the desiderated collateral agreement.

[52] In relation to the pursuers' fourth factor, it may assist to consider the pursuers' assertion of a lack of commerciality or workability from the perspective of the other party, as part of the facts and circumstances. The collateral agreement contended for is the availability of the Facility until the development was completed. There is an inherent lack of clarity as to what this means. It is not clear whether this was phase 1 or phase 2. What is meant by

completion? The collateral agreement contended for takes no account of the uncommercial character (viewed from the defenders' viewpoint) of the term proposed. The effect of the collateral agreement would be to commit the defenders to a loan for an extended but indeterminate period of time, and where the event that would trigger repayment was uncertain and dependent on the acts of third parties. At times in his submissions, Mr Mitchell referred to the parties' common purpose or the "contractual scheme", and their need to work together to achieve its fulfilment. However, the contractual arrangements between the parties did not constitute a joint venture. Those contractual arrangements had no features that would support the kind of gloss that Mr Mitchell seeks to place on them.

[53] I have addressed the parties' pleadings and submissions. In my view, there are three further difficulties with the pursuers' argument that there was a collateral agreement. The first concerns the time by which the collateral agreement had to come into effect, the second difficulty concerns the 2008 and 2009 Continuation Letters subsequently entered into by the parties, and the third is the consequence of the expiry of the Facility Letter before any termination was exercised. In order to argue that they *relied* on the collateral agreement, eg by drawing down the Facility or by entering into a contract for the construction of the development, the pursuers must establish that a collateral agreement came into existence before then. This necessarily confines the relevant time frame to a period soon after the Facility Letter was signed. The pursuers appeared to recognise this, as they aver (in article 20 of condescendence) that in reliance on representations (as to the defenders' support) they expended substantial funds in progressing the development and incurring substantial legal obligations to third parties. The latter included the construction contract, which they aver that they entered into this on the basis of representations "which had been made by early 2007". However, there are no relevant or sufficiently specific averments of any

representation or conduct by the parties that instruct (or enable the court to infer) that there was an "agreement" reached at the material time, much less one that was explicable "only" on the basis that there was a collateral agreement (*per Minevco*).

[54] The second difficulty follows on from this. Even if there were relevant averments about a collateral agreement being established in the months following the Facility Letter, there is the (in my view) insurmountable difficulty of the two continuations of the Facility (in January 2008 and February 2009). Parties cannot but have applied their minds on those occasions to the material terms and the nature of the financial support the defenders provided. On both of those occasions the continuation of the Facility was expressly on the same terms as the Facility Letter in respect of the "on demand" nature of the Facility. Furthermore, on each occasion, it was noted that the Facility would be reviewed after a stipulated timeframe, eg in 12 months (in January 2008) and after two months (in February 2009). Even had there been a collateral agreement in the terms averred "by early 2007", the express terms of the 2008 and 2009 Continuation Letters are manifestly inconsistent with the collateral agreement contended for and would have superseded it. Thirdly, there is the fact that the Facility Letter was not further continued after it expired in April 2009. Mr Mitchell did not argue that a collateral agreement had been constituted between April and June 2009. In any event, the pleadings do not support such a case.

[55] The legal test, of whether the pursuers have established that there was a collateral agreement which augmented the terms of the Facility, is found in the observation of the Second Division in *Minevco Ltd* (at para 16): the party seeking to maintain that a written agreement has been varied required to identify facts and circumstances that are explicable "**only** on the basis that there was an express or implied agreement" (emphasis added). I accept Lord Tyre's observation, at paragraph 25 of *Scanmudring SA*, that it is correct to

emphasise "only" in that passage, as the test to be applied in determining whether a variation of a subsisting contract had been effected by the conduct of the parties. The case of *Scanmudring AS*, relied on by Mr Mitchell, is in my view readily distinguishable on its facts. In that case, the conduct and communings that Lord Tyre found proved occurred after the expiry of the contractual deadline and could be explicable only on the basis that the parties had varied the original contract. The conduct averred in this case, such as the drawdown of the Facility or the pursuers contracting with third parties, was equally consistent with the unaltered terms of the Facility Letter. In my view, the *Minevco* test is not met in relation to the pursuers' four features or the remainder of their pleadings. The parties' conduct is readily referable to the agreement agreed, not to a collateral agreement supplemental to it. For these reasons, the pursuers' case based on a collateral agreement fails.

Unilateral promise

[56] In relation to the pursuers' argument for a unilateral promise (*per* article 10 of condescendence) or undertaking (*per* the 1st plea in law), Mr Mitchell did not advance a separate argument in relation to this. He did not point to any statement by or on behalf of the defenders that had the requisite qualities of certainty and clarity. At most, these were expressions of encouragement without conferring any concrete expectation (much less constituting an undertaking or promise). Further, had there been any specific statement relied on, the difficulties identified above (at paras [53] and [54]) would also apply. How was any promise made, say, in mid-2007, that the Facility had been a term loan, reconcilable with the continuation of the Facility (in 2008 and in 2009) on terms patently inconsistent with a promise in such terms? It follows that I accept Mr O'Brien's submission that there are no relevant pleadings to support the pursuers' case of a collateral agreement or promise to

the effect that the Facility was converted to a term loan that would subsist until completion of the development. The pursuers' case was presented on the basis that the separate conclusions in respect of the Guarantee, the Standard Security and the SIA stood or fell with their argument based on the case of a collateral agreement. The pursuers' averments are irrelevant.

Personal bar

[57] The pursuers' averments of personal bar are brief and are on a further *esto* basis that there was no collateral agreement or unilateral promise (*per* article 21 of condescendence). The defenders are said to be personally barred from seeking repayment on demand by reason of representations made in the course of the contract.

[58] I accept Mr O'Brien's submission that the case of *Money Advice* is not as limited as Mr Mitchell suggests. The case of *Shaw* v *James Scott Builders & Co* [2010] CSOH 68 confirms the analysis that personal bar operates as a shield, not a sword. The pursuers' case is predicated, in part, on a right to draw down further funds and their damages claim based on the consequences (it is said) of not being able to do so. The assertion of a right of this character is, in my view, an impermissible use of the doctrine of personal bar. But in my view, the difficulty for this part of the pursuers' case is more fundamental. Once the Facility Letter had not been renewed (from April 2009), there was no possible argument that the on demand character of the Facility could be qualified by reference to a time period or postponed to the occurrence of some future event. There are no relevant pleadings to preclude the defenders exercising the right to demand repayment, much less are there relevant pleadings to confer the positive entitlement of the pursuers to draw further sums. This aspect of the pursuers' case is also irrelevant.

Reliance on the IRSA as a defence

[59] In the light of my decision that the pursuers' have no relevant case based on collateral agreement, unilateral promise or personal bar, this particular criticism is academic. On this point, I prefer the submissions of Mr O'Brien. I accept that the Facility and the IRSA are not counterparts in an *Inveresk* sense such as to enable the pursuers to exercise the *de facto* or quasi-retention they wish to exercise.

IRSA: averments of loss

[60] The issues of mis-selling and any compensation flowing from that have been determined in a different forum. The pursuers' claim for damages arising from the IRSA are for consequential loss only. The pursuers' averments are predicated on the hypothesis that the defenders were otherwise entitled to demand payment. The point is a short one. I accept as well made the defenders' submission that there were no averments of a causal link between the alleged mis-selling of the IRSA and the defenders' decision to demand repayment of the Facility, which had already fallen due for repayment. The pursuers' averments of quantum of their consequential loss claim in respect of the IRSA are fundamentally irrelevant. Had it been a matter of specification, I would have been minded to permit the pursuers an opportunity to address this by further adjustment.

IRSA: the implied COBS terms

[61] In terms of the scheme under the 2000 Act and the 2001 Regulations, no right of action is conferred on non-natural persons acting in the course of a business for contravention of the COBS rules. Mr O'Brien founded on this. The first pursuer was not

within the scope of any extension of the actionability beyond "private persons". Mr Mitchell does not dispute the proposition that the pursuers had no right of action under the regulatory scheme. Notwithstanding this, the pursuers sought to imply principles 2, 6, 7 and 8, and for COBS Rules 2.1, 5.2, 5.3, 5.4, 5.5, 7.1 and 7.5 into the IRSA. The basis for implication was simply that, as the defenders were already subject to these provisions as part of the regulated context in which they operate, they should be implied into the terms of the IRSA.

[62] The parties accepted that the text for implication of a term are authoritatively set out by Lord Neuberger in *Marks & Spencer plc* at paragraphs 21 to 23. A term is implied into a commercial contract only where it is necessary to do so to give the contract business efficacy or where the term is so obvious that it goes without saying. In my view, neither condition is met in this case.

[63] The starting point is that the provision of the IRSA, as a regulated activity, is subject to a detailed regulatory regime under, *inter alia*, the 2000 Act and the 2001 Regulations. Parties cannot contract out of this. It is accepted that, in terms of that regulatory regime, the first pursuer is expressly precluded from having a cause of action in respect of any breach by the defenders of the COBS rules. Given that this is all expressly provided for by a statutory scheme, it cannot be maintained that implication of a term conferring such a right of action is "necessary". It cannot be necessary if Parliament has excluded it. For the same reason, it is not a term which would have satisfied the second limb of the *Marks & Spencer Plc* test (of obviousness). Rather, had such a term been proposed, it might have been remarked to be obviously inept (because expressly excluded by the regulatory scheme). I accept that all of the cases Mr O'Brien cited support this conclusion and vouch the proposition that a term

cannot be implied that is inimical to the statutory scheme governing the IRSA. In my view, this part of the pursuers' case is also irrelevant.

IRSA: no jurisdiction plea

[64] Given that I have found the pursuers' case based on the implication of terms into the IRSA and their case for consequential loss flowing irrelevant, I can deal with the defenders' jurisdiction plea shortly.

[65] Mr Mitchell's basic proposition was that in the sheriff court proceedings parties "joined issue" on the IRSA mis-selling claim, and that the defenders did not take a plea of no jurisdiction in those proceedings. They had submitted to the jurisdiction. Their plea to that effect, in these proceedings, came too late. (He did not advance an argument that the lodging of the counterclaim had the same effect.) Having considered the terms of the sheriff court proceedings, I do not accept that there was such an identity of issues or pleas that the defenders can be taken to have submitted to the jurisdiction of this court in respect of the first pursuer's claim concerning the IRSA. I accept the defenders' analysis of the pleadings. Mr O'Brien is in my view correct that the pleadings in the initial writ were not habile to include the pursuers' claim based on the IRSA. It follows that I accept Mr O'Brien's submission that it cannot be said that the defenders have submitted to the jurisdiction of this court in respect of the IRSA by bringing their counterclaim for repayment of the sums due under the Facility.

[66] In relation to Mr Mitchell's subsidiary "joining issue" argument, I do not accept that this is well-founded. A party can hardly be expected to invoke an exclusive jurisdiction clause if there is no direct claim asserted against it and based on the agreement or document containing that clause. Mr Mitchell's approach has the prospect of being profoundly

disruptive, if it compelled the taking of such pleas absent a relevant claim. On a fair reading, the averments in the initial writ anent the IRSA did not assert a claim in respect of that against the defenders, but were included simply as background. As there was no claim in the sheriff court pleadings in respect of the IRSA, no issue of the defenders' possible submission to the jurisdiction of this court in respect of such a claim could arise. The defenders have not conceded jurisdiction in respect of the pursuers' IRSA claim.

[67] That leaves the question of whether I should nonetheless exercise my discretion to permit that part of the pursuers' case to remain part of these proceedings, notwithstanding the terms of the exclusive jurisdiction provision of the IRSA. The arguments advanced in favour of the exercise of a discretion in favour of the defenders were based on the practical consideration of avoiding duplication of evidence, the inextricable link (it was said) between the IRSA and the Facility, and the risk of inconsistent outcomes (if the IRSA claim were decoupled and litigated in England). Given that I have held that the arguments relative to the Facility (ie the collateral agreement, unilateral promise, personal bar) have failed, these considerations fall away.

[68] Even had I been persuaded that the pursuers' case that there was a collateral agreement was relevant, I would not have been minded to exercise the discretion in favour of the pursuers. The IRSA and the Facility Letter (and its continuations) were entered into at different times. Their terms are not interdependent or counterparts to each other. While there might be overlapping evidence about the circumstances, or evidence from the same witnesses, the issues before the court in respect of these two agreements are different. I was not persuaded that expediency justified overruling the exclusive jurisdiction clause. In any event, the expediency issue may not in fact arise. The pursuers' IRSA claim proceeds on the hypothesis that the pursuers' primary case (that there was a collateral agreement to the

Facility) failed. In my view it has. In that event, the only remaining substantive issue is the pursuers' IRSA claim for consequential loss. This is independent of the defenders' claim in the counterclaim. There is therefore no risk of inconsistent outcomes or duplication of evidence. All that remains will be the pursuers' claim in England, for consequential loss flowing from mis-selling or misrepresentation about the IRSA.

The implied term of a duty of good faith

[69] I have already referred to the supplementary submissions and additional volumes of cases helpfully provided in advance of the resumed diet, which was concerned with the pursuers' more developed argument for implication of a term of good faith. I am grateful to parties for their efforts. However, having considered those materials, and the pleadings and productions, I have come to the view that, in the particular circumstances of this case, it is not necessary to decide this issue.

[70] There are two principal difficulties for the pursuer. The first is that Mr Mitchell's gloss of the parties' contractual arrangements (the passage underlined in para [42], above) does not, in my view, accurately reflect the contractual arrangements the parties entered into. He also appears to presume a common and overriding purpose, for which there is no support in the documents or in the pursuers' averments. The more fundamental difficulty concerns the term he seeks to imply (see para [6(1)] and the passage highlighted bold, in para [42], above). The term he proposes is utterly inimical to the express terms of the Facility Letter and to the 2008 and 2009 Continuation Letters.

[71] The second difficulty is this: leaving aside for the moment that the basis of implication is argued to be a duty of good faith (whether expressed as a general principle nascent in Scots private law or to be developed incrementally on a case by case basis), the

term sought to be implied must still satisfy the test for implication in *Marks & Spencer Plc.* Even assuming an obligation of good faith is available as a matter of Scots private law as a possible term for implication (on which I express no view), I am not persuaded by any of Mr Mitchell's submissions that such a term satisfies the tests of necessity or obviousness. The test for implication has simply not been met. I am fortified in this view by the observations of Akenhead J in *TSG Building Services v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC), where he stated (at para 51):

> "Even if there was some implied term of good faith, it would not and could not circumscribe or restrict what the parties had expressly agreed in clause 13.3, which was in effect that either of them for no, good or bad reason could terminate at any time before the term of four years was completed. That is the risk that each voluntarily undertook when it entered into the contract, even though, doubtless, initially each may have thought, hoped and assumed that the Contract would run its full term."

Those observations apply with equal force in this case. The express terms of the Facility Letter and the two continuations thereof in 2008 and 2009 provided that the Facility was available for a fixed period (of 12 months) and, in terms of the 2009 Continuation Letter, a very limited period (of 2 months). On each occasion, too, the "on demand" character of the Facility was reiterated. These features necessarily preclude the implication of a term that is so directly inconsistent with it, regardless of the basis of implication (ie such as good faith).

[72] For these reasons, the pursuers' case for implication of a term of good faith also fails for want or relevancy. As a consequence, and with some regret, I find there is no need to adjudicate upon the parties' submissions as to whether Scots private law recognises an obligation of good faith (whether generally expressed or developed from first principles).

Disposal

[73] It remains for me to thank Counsel for their very helpful written submissions and bundles of authorities, including the supplementary submissions and cases produced in relation to the interesting and as-yet-to-be-determined issue of whether Scots law permits the implication of an obligation of good faith in a contract. I shall put the case out By Order to discuss the terms of the interlocutor and to deal with any motion for expenses or other matters.