OUTER HOUSE, COURT OF SESSION

[2021] CSOH 107

CA23/21 & CA56/21

OPINION OF LORD TYRE

In the cause

NETWORK RAIL INFRASTRUCTURE LIMITED

Pursuer

against

(FIRST) FERN TRUSTEE 1 LIMITED, (SECOND) FERN TRUSTEE 2 LIMITED, (THIRD) McLAUGHLIN & HARVEY LIMITED, (FOURTH) THE SCOTTISH MINISTERS, and (FIFTH) SCOTT WILSON RAILWAYS LIMITED

Defenders

And in the cause

THE SCOTTISH MINISTERS

Pursuers

Against

(FIRST) McLAUGHLIN & HARVEY LIMITED, (SECOND) FERN TRUSTEE 1 LIMITED, (THIRD) FERN TRUSTEE 2 LIMITED, (FOURTH) NETWORK RAIL INFRASTRUCTURE LIMITED, and (FIFTH) SCOTT WILSON RAILWAYS LIMITED

Defenders

Pursuer (Network Rail Infrastructure Limited): D Thomson QC, M Steel; Dentons UK & Middle East LLP
Pursuers (Scottish Ministers): Massaro; Morton Fraser LLP
Defenders (Fern Trustee 1 Limited and Fern Trustee 2 Limited): Barne QC; Gillespie Macandrew
Defenders (McLaughlin & Harvey Limited): Lake QC; Balfour + Manson LLP
Defenders (Fern Trustee 1 Limited and Fern Trustee 2 Limited): Barne QC; Gillespie Macandrew
Defenders (Network Rail Infrastructure Limited): D Thomson QC; Dentons UK & Middle East LLP
Defenders (Scott Wilson Railways Limited): No appearance

21 October 2021

Introduction

[1] Fern Trustee 1 Limited and Fern Trustee 2 Limited ("Fern") are the proprietors of a large multi-storey office block in Glasgow city centre ("the premises"). Network Rail Infrastructure Limited ("Network Rail"), the Scottish Ministers and Scott Wilson Railways Limited are all tenants of parts of the premises. In about 2002-2004, works were carried out to the premises by McLaughlin & Harvey Limited ("the contractor") in pursuance of a building contract with the then proprietor. Fern acquired the premises in 2006, at which time the contractor granted a collateral warranty to Fern in respect of the works that had been carried out.

[2] In about 2008 certain defects became apparent in the works. Court proceedings were raised against the contractor by, separately, Fern, Network Rail, the Scottish Ministers and Scott Wilson Railways Limited. Following negotiations among the parties, separate agreements were entered into in 2016 between the contractor and the respective pursuers to settle the court actions. Each of the settlement agreements provided for the contractor to carry out and complete, at its own cost, certain remedial works to the premises. All of the parties hereto entered into a further agreement ("the Remedial Works Agreement"), as provided for in the various settlement agreements.

[3] Remedial works were carried out by the contractor. Disputes have now arisen between, on the one hand, Fern and the contractor and, on the other hand, Network Rail and the Scottish Ministers, as to whether the remedial works have been satisfactorily completed and accordingly whether Completion, as defined in the Remedial Works Agreement, has occurred. The two actions with which this opinion is concerned raise effectively the same issues for determination. Scott Wilson Railways Limited has not entered the process in either action.

The settlement agreements

[4] The Network Rail settlement agreement, dated 5 July 2016, provided *inter alia* as follows:

> "2.1 The Defender shall carry out and complete the Remedial Works at its own cost in accordance with the Remedial Works Agreement.
>
> 2.2 The Pursuer shall be entitled to make a claim and recover damages in respect of any losses that are incurred by the Pursuer as a result of a breach of the Remedial Works Agreement by the Defender, so far as is permitted by the Remedial Works Agreement…
>
> 2.3 The Defender agrees to pay the Pursuer by way of damages the sum of £840,000...
> …
>
> 3.1 If Completion has not occurred by the Liquidated Damages Date or any later date fixed under clause 3.4, then the Defender shall pay the Pursuer liquidated damages for delay at the rate of £52,500 (fifty-two thousand five hundred pounds) per week or part thereof between the Liquidated Damages Date and the date of Completion and the Pursuer shall not be entitled to any other damages in respect of delay in achieving Completion…"

The Liquidated Damages Date was defined as 30 September 2018 or any later date fixed under clause 3.2 of the settlement agreement.

[5] The Scottish Ministers' settlement agreement, dated 18 and 21 October 2016, contained similar but not identical provisions. Clause 2.1 stated:

> "The Defender shall carry out and complete the Remedial Works at its own cost in accordance with the Remedial Works Agreement. Notwithstanding any other provision of this Agreement and for the avoidance of doubt either Party shall be entitled to make a claim and recover damages as a result of breach of the Remedial Works Agreement by the other Party, so far as is permitted by the Remedial Works Agreement."

The amount payable by way of damages was £750,000. Clause 2.4 stated:

> "In addition, from the date of the commencement of the Remedial Works under the Remedial Works agreement until Completion, the Defender shall pay to the Pursuer

> by way of damages for the Future Claims the Monthly Payment in accordance with clause 3 below."

Clause 3 set out various sums payable by way of damages for Future Claims, subject to an overall maximum amount of £189,000. The definition of Future Claims excluded any entitlement of the Scottish Ministers to claim damages in respect of losses incurred as a result of breach by the contractor of the Remedial Works Agreement.

The Remedial Works Agreement

[6] The Remedial Works Agreement was entered into on 5 July 2016. Recital G stated:

> "In terms of the Settlement Agreements, some of which may not yet have been entered into as at the date of this Agreement but pursuant to which, if and when entered into, the Parties have or will have (as the case may be) agreed to settle the Court Proceedings on the basis that the Defender carries out and completes the Remedial Works to the Property at its own cost on the terms of this Agreement. For the avoidance of doubt, any references in this Agreement to the Settlement Agreements shall apply in respect of each of the Pursuers if and when they enter into their respective Settlement Agreement."

As already mentioned, the Network Rail settlement agreement was entered into on the same date as the Remedial Works Agreement. The Scottish Ministers' settlement agreement was entered into several months later.

[7] Clause 1.1.8 defined Completion as "the date on which satisfactory completion of the Remedial Works shall be deemed to have taken place in accordance with clause 3.30 of this Agreement."

[8] For present purposes, the key provisions of the Remedial Works Agreement were contained in Clauses 3.26 to 3.31, which so far as material stated:

> "3.26 Within 7 days of completion of the Remedial Works, the Defender shall notify the Pursuers in writing, through the Architect, that it considers that the Remedial Works have been completed in accordance with this Agreement ("the Defender's Completion Notice").

3.27 Within 7 days of receipt of the Defender's Completion Notice, the Owner shall confirm in writing (copied to the Tenants) whether or not it accepts that the Remedial Works have been satisfactorily complete ("the Owner's Completion Notice"). The Owner shall liaise with the Tenants regarding acceptance of whether or not the Remedial Works have been satisfactorily completed and shall add any elements of the Remedial Works it considers have not been completed satisfactorily to the Owner's Completion Notice.

3.28 If the Owner does not accept that the Remedial Works have been satisfactorily completed:

3.28.1 the Owner shall specify in the Owner's Completion Notice what elements of the Remedial Works it considers have not been completed satisfactorily and why;

3.28.2 the Defender shall within 7 days of receipt of the Owner's Completion Notice notify the Owner in writing whether it agrees or disagrees with any of the matters raised by the Owner;

3.28.3 if the Defender agrees with any of the matters raised by the Owner it shall carry out and complete such works that are reasonable to address the matters raised by the Owner and then issue a fresh Defender's Completion Notice in accordance with clause 3.26 above and the Parties shall thereafter follow the procedure set out in clauses 3.26 to 3.30 of this Agreement;

3.28.4 if the Defender does not agree with any or all of the matters raised in the Owner's Completion Notice then the Defender may refer the question of satisfactory completion of the Remedial Works to adjudication as provided for at clause 21 of this Agreement.

…

3.30 The date on which satisfactory completion of the Remedial Works shall be deemed to have taken place shall be:

3.30.1 the date of the relevant Defender's Completion Notice, when accepted by the Owner; or

3.30.2 a date determined by the Adjudicator pursuant to clause 21 of this Agreement (such decision to have temporarily binding effect as provided for by the Scheme for Construction Contracts (Scotland)).

3.31 Upon Completion:

3.31.1 the Owner shall (without prejudice to the Defender's other obligations under this Agreement, including those in clauses 3.34 – 3.37 and liability for latent defects) assume responsibility for the insurance and ongoing care of the Remedial Works; and

3.31.2 the Defects Period will commence."

[9] It is agreed that the references in clauses 3.28.4 and 3.30.2 above to clause 21 ought to be to clause 20, which conferred upon parties a right to refer any dispute to adjudication, to be conducted in accordance with the Scottish Scheme for Construction Contracts ("the Scheme"), and for the decision in such adjudication to have temporary binding effect and to be complied with by the parties unless and until the subject matter of the dispute had been determined by court proceedings. Clause 21 stated that, except as otherwise stated in the agreement, any disputes arising out of, under, or in connection with the agreement were to be determined by the Court of Session which would have exclusive jurisdiction.

Events giving rise to the present dispute

[10] On 17 December 2019, the Architect issued the Defender's Completion Notice in terms of clause 3.26. Agents on behalf of Network Rail and the Scottish Ministers wrote to Fern setting out various aspects in respect of which they considered that the Remedial Works were defective or incomplete. On 23 December 2019, Fern's agents issued the Owner's Completion Notice, pursuant to clause 3.27, stating that Fern did not accept that the Remedial Works had been satisfactorily completed, and attaching correspondence from Network Rail and the Scottish Ministers setting out the elements of the remedial works that they considered had not been completed satisfactorily.

[11] The contractor did not agree with the matters raised in the Owner's Completion Notice. Protracted correspondence followed between Fern and the contractor. In the course of that correspondence, agreement was reached, with the consent of the various tenants, regarding the approach to be taken to certain of the matters raised in the Owner's

Completion Notice, but disagreement continued with regard to others. In about September 2020, Fern's agents indicated to the tenants that it was minded to agree that Completion had occurred on 29 May 2020. Network Rail and the Scottish Ministers intimated their objection to such a proposed course of action, contending that Completion had not occurred.

[12] On 1 February 2021, the contractor referred its dispute with Fern to adjudication. The dispute referred bore to be between the contractor and Fern, and to be concerned only with whether Completion had occurred on 17 December 2019, as contended by the contractor, or on 29 May 2020, as contended by Fern. Neither Network Rail nor the Scottish Ministers were convened as parties to the adjudication. On 6 March 2021, the adjudicator issued a decision finding that Completion had occurred on 17 December 2019.

[13] In its action, Network Rail seeks a declarator that, in terms of the Remedial Works Agreement, Completion has not occurred, and has not been deemed to occur in terms of clause 3.30. For their part, the Scottish Ministers seek a declarator in the same terms, and also a declarator that the contractor is yet to discharge its obligation under the Remedial Works Agreement and the settlement agreement to complete "the Works" as defined in those agreements.

The issue

[14] The issue in each of the present actions focuses on clause 3.27 of the Remedial Works Agreement, and in particular on whether Fern were entitled to take and intimate the decision that the remedial works had been satisfactorily completed when Network Rail and the Scottish Ministers continued to contend that they had not.

Argument for Fern

[15] On behalf of Fern it was submitted that the pursuers were not entitled to the declarators sought. The matter could be characterised either as one of contractual title to sue or of relevancy. Paragraphs 3.26 to 3.28 of the Remedial Works Agreement made clear that the determination of the date on which satisfactory completion occurred was a matter for Fern and the contractor, failing which the adjudicator. Although the contractor was obliged to notify both Fern and the tenants (who, together, comprised the "Pursuers" in the Remedial Works Agreement) of the fact that it considered that the remedial works had been completed, it was, in terms of clause 3.27 and 3.28.1, Fern who had to confirm by notice whether or not they accepted that Completion had occurred. There was an obligation on Fern to "liaise" with the tenants on the issue of satisfactory completion, but it was for Fern alone to decide what elements, if any, of the remedial works should be added to the Owner's Completion Notice as not having been completed satisfactorily. This was to be contrasted with the contractual mechanism in terms of which the tenants and owners notified the contractor of defects that arose during the defect liability period. Under clause 3.36.1, Fern's obligation to liaise with the tenants regarding the identification of defects was supplemented by a requirement for Fern to "add any defects … identified by any of the Tenants to the schedule of defects to be specified by the Owner".

[16] Following upon the service of the Owner's Completion Notice, clause 3.28 required the contractor to engage with Fern, and not the tenants, in relation to disputed matters related to Completion. If the contractor disagreed with the contents of the Owner's Completion Notice, it could refer the question of satisfactory completion to adjudication, but the wording was not mandatory and did not prevent Fern and the contractor from entering into negotiations. Identification of the deemed completion date was a matter for Fern and

the contractor, failing which the issue had to be resolved by adjudication. This was not surprising: to have multiple parties arguing about whether or not the works had been satisfactorily completed would be unworkable in practice. The remedial works involved common parts, and different tenants might have different views. Whose view was to take precedence? Network Rail and the Scottish Ministers' interpretation of the Remedial Works Agreement would require Fern not only to include in the Owner's Completion Notice any matter, however trivial, that the tenants considered should be included, but also to adjudicate at its own risk on all matters notified by the tenants, even if Fern did not agree with them. The pursuers' reference to addition to the notice of matters which in their reasonable view had not been satisfactorily completed was an attempt to imply a term into the agreement and not a question of its proper interpretation.

[17] There was no merit in the argument that when the Remedial Works Agreement was read together with the relevant settlement agreement, it had to be construed as giving the tenants certain enforceable rights relating to the content of the Owner's Completion Notice. The terms of the Remedial Works Agreement were clear and there was no need to have recourse to extrinsic material. In any event, Fern were not a party to the settlement agreements, and the tenants were not parties to settlement agreements other than their own. The settlement agreements contained confidentiality clauses. It could not be said that the terms of the individual settlement agreements formed part of the "matrix of fact" that would be known to the various parties and would inform how the Remedial Works Agreement ought to be construed.

[18] Network Rail's contention that Fern's construction deprived them of any remedies should also be rejected. Completion had no effect on the collateral warranty granted by the contractor to each of the other parties to the Remedial Works Agreement. The defects

liability period began to run on Completion. The consequences of Completion were significant but limited.

Argument for McLaughlin & Harvey Limited

[19] The argument on behalf of McLaughlin & Harvey was broadly in accord with that of Fern, but with greater emphasis placed on whether the pursuers had title to the remedy they sought. Title in private law required the identification of a right; no contractual right had been identified here. There was also a question as to the scope of the jurisdiction of the court in determining whether Completion had occurred. In terms of the Remedial Works Agreement it could only occur in one of two ways: by agreement or by determination by an adjudicator. Here there had been no agreement but there had been a determination by an adjudicator. There was no contractual scope for the court deciding whether or when Completion had occurred. If the adjudicator's decision were to be reduced by the court, the issue would have to go back to the adjudicator for re-determination, because the parties had chosen to contract on the basis that the adjudicator's decision was what determined Completion, with the practical consequences set out in clause 3.31.

[20] As regards the second declarator sought by the Scottish Ministers, it added nothing to the first one. The court could not go behind the adjudicator's decision on this issue; there was nothing produced that would entitle the court to reach a contrary decision.

Argument for Network Rail

[21] On behalf of Network Rail it was submitted that no issue arose in relation to its title and interest to pursue the declarator sought. The action was predicated on the Remedial Works Agreement. Network Rail was a party to that agreement. There was no basis upon

which Network Rail could in these circumstances be without title and interest. The issue was one of relevancy and not title or interest.

[22] The construction of the Remedial Works Agreement contended for by Fern and by McLaughlin & Harvey was untenable. The relevant provisions had to be interpreted not in isolation but in the context of that agreement as a whole, and in the context of the Network Rail settlement agreement which formed part of the same overall transaction. The purpose of the settlement agreements was to facilitate resolution of the court proceedings on the basis that McLaughlin & Harvey would carry out the remedial works, whose scope was to be defined in the Remedial Works Agreement. The Network Rail settlement agreement was therefore part of the factual matrix, playing a role in ascertaining what the Remedial Works Agreement would objectively convey to the reasonable person.

[23] Placed in their proper context, the relevant provisions of the Remedial Works Agreement were reasonably capable of bearing more than one meaning. A literal construction might be thought to give Fern alone the ability to accept or reject that the remedial works had been satisfactorily completed, but such a construction would take place in the type of vacuum that the courts have cautioned against, ignoring the enduring relevance of the Network Rail settlement agreement. On a proper approach, the combined effect of clauses 3.26 to 3.30 was to require the inclusion in the Owner's Completion Notice of all and any elements of the remedial works which in the *reasonable* view of Network Rail had not been completed satisfactorily. Before McLaughlin & Harvey's obligations to Network Rail were discharged under the Network Rail settlement agreement, there first had to be completion in terms of the Remedial Works Agreement. A construction which deprived Network Rail of the ability to reject that Completion had been achieved would defeat its rights under the Network Rail settlement agreement. It would reduce to nothing

the obligation to "liaise" with, *inter alios*, Network Rail. Faced with ambiguous provisions, the court was entitled to prefer the construction which best accorded with commercial common sense. It made no commercial sense to allow Fern to exercise sole judgement without taking account of reasonable concerns of the tenants.

[24] It was not contended that clause 3.27 conferred a right of veto on Network Rail or the other tenants; they could merely each insist upon the addition to the Owner's Completion Notice of concerns that were reasonable. It should not be assumed that the difference between clause 3.27 and clause 3.36.1, which imposed an express obligation to include defects identified by the tenants, was intentional. The drafting of the Remedial Works Agreement was not perfect and regard should be had to the overall intention of the parties. It made no commercial sense to read the agreement as conferring different entitlements. Provisions regarding collateral warranties and the defects liability period did not address the question of whether the works had been satisfactorily completed.

[25] As regards the jurisdiction issue, there was nothing in the language of clause 3.30 to deprive the court of jurisdiction. Clause 3.30.2 was one of two options and did not impose adjudication on the parties as the only means by which disputes could be resolved. Clause 3.30.2 referred to any decision of an adjudicator as having a "temporarily binding effect": it was implicit that the court would have jurisdiction. The option afforded to either party to refer a dispute to adjudication was inconsistent with the assertion that adjudication was the only option available to them as a means of resolving a dispute. Such an interpretation would fetter the rights of the parties to seek a final determination by the court of matters in dispute. There was a presumption that parties did not intend to give up such a fundamental right.

Argument for the Scottish Ministers

[26] The arguments presented on behalf of Network Rail were adopted *mutatis mutandis* on behalf of the Scottish Ministers. It was further submitted that the fact that the Scottish Ministers' settlement agreement was entered into some time after, and not contemporaneously with, the Remedial Works Agreement strengthened their argument. It was clear that the obligation in clause 2.1 of the settlement agreement was a distinct obligation, supporting the second declarator sought by the Scottish Ministers.

Decision

Title and interest or relevancy?

[27] In my opinion it makes no practical difference whether the issue in the present action is seen as one of title and interest to sue or of relevancy. As Lord Reed made clear in *AXA General Insurance Co Ltd* v *Lord Advocate* 2012 SC (UKSC) 122 at paragraphs 166-169, different considerations apply to title and interest (or standing) in private law cases on the one hand and applications for judicial review based on public interest on the other. As regards the former, the observations of Lord Dunedin in *D&J Nicol* v *Dundee Harbour Trs*, [1915] A.C 550 at pages 12-13, remain apposite: for a person to have title and interest to sue in private law, including contract,

> "…he must be a party (using the word in its widest sense) to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies."

[28] In the present case, the right asserted by Network Rail and the Scottish Ministers is to have their complaints, so far as reasonable, that the remedial works have not been satisfactorily completed included in the Owner's Completion Notice. The issue between the parties is whether such a right exists. If, on a proper construction of the Remedial Works

Agreement, no such right exists, then the only ground founded upon by the respective pursuers in these actions for declarator that Completion has not occurred is removed. In these circumstances I see little or no difference between characterising the issue as being whether the respective pursuers have demonstrated a contractual title (it not being in dispute that they may have a financial interest) to require such inclusion, or as being whether they have pled a relevant case that they are entitled to require such inclusion. There may be cases in which the distinction is important, but it appears to me to be academic here. On either approach, the essence of the parties' dispute lies in the proper interpretation of the Remedial Works Agreement.

[29] I do not, however, accept the submission by Network Rail that the mere fact that it is a party to the Remedial Works Agreement is sufficient to confer title to sue, regardless of the matter at issue. The argument to this effect was supported *inter alia* by reference to Lord Dunedin's observation in *D&J Nicol* (above, at page 13) that "the relation of contract gives the one party a right to insist on the fulfilment of the contract by the other", and to a dictum of Lord Johnston in *Scottish Enterprise* v *Archibald Russel of Denny Ltd* 2002 SLT 519, at paragraph 6, that a "plea of no title to sue can never arise in relation to a contracting party seeking to sue upon his or her contract". These observations should not be relied upon out of context. Lord Dunedin's statement was clearly concerned with a contract between two parties, as was the *Scottish Enterprise* case. They provide no guidance as to the extent of the contractual title of a party to a multipartite agreement such as the Remedial Works Agreement where different parties are granted differing rights against one or more of the others. In my view the proper approach to the question "on whom was the right of enforcement conferred?" is as stated by Gloag, *Contract* (2nd ed) at page 218: namely, that it is

a question of the intention of the party who undertook the obligation, to be determined by application of the normal rules of contractual interpretation.

Construction of the Remedial Works Agreement

[30] The principles of interpretation of contractual provisions, enunciated by Lord Neuberger of Abbotsbury PSC in *Arnold* v *Britton* [2015] AC 1619 at paragraphs 14-23 and by an Extra Division in *Ashtead Plant Hire Co Ltd* v *Granton Central Developments Ltd* 2020 SC 244 (Lord Drummond Young at paragraphs 9-17), are well established. In the context of the issue arising in the present case, the following points may be noted.

[31] Firstly, as Lord Neuberger observed at paragraph 17 in *Arnold* v *Britton*, the language used by the parties must be accorded due respect:

> "…(T)he reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook* [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision."

[32] Secondly, as Lord Neuberger emphasised at paragraph 20, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be slow to reject the natural meaning of a provision as correct simply because it appears to be an imprudent term for one of the parties to have agreed. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed.

[33] Thirdly, it is clear that the use of commercial common sense in construing a contract is appropriate where a word or phrase is capable of having more than one meaning. As Lord Drummond Young observed in *Ashtead Plant Hire* at paragraphs 12 and 13:

> "…(T)he authorities supporting [the use of commercial common sense] are quite clear; they include most of the recent cases where the approach to contractual interpretation has been discussed. Contractual disputes frequently involve wording that is capable of having more than one meaning. This may involve conflict between the most literal meaning of a word or phrase and an alternative meaning that makes better commercial sense in context and according to the fundamental purposes of the contract…
> …
>
> …Thus in any case where a contractual provision is capable of bearing more than one meaning, the court should adopt the construction that best accords with commercial common sense."

Accordingly, although as Lord Drummond Young noted it is not necessary to conclude that a literal construction would produce an absurd result before having regard to commercial common sense, it is at least necessary for the court to be satisfied that the provision in question, read in the context of the contract itself and the background knowledge of the parties at the time of contracting, is capable of bearing more than one meaning. If that were not so, the court would risk substituting its own view of what the parties ought to have agreed for what they did in fact agree.

[34] In my opinion clause 3.27 is not capable of bearing more than one meaning. Its terms and purpose are unambiguous. A distinction is clearly drawn between the rights and obligations of the Owner on the one hand and of the Tenants on the other. The Owner's obligation is to liaise with the Tenants: ie to consult them before intimating to the contractor whether or not it accepts that the works have been satisfactorily completed. But the clause is clear that the decision whether or not to add any elements to the notice is to be made by the Owner alone ("…*it* considers…"). That phraseology is continued in clause 3.28: "If the

Owner does not accept…"). No further reference to the Tenants is made in any of clauses 3.27 to 3.31, and in my view there is nothing in those clauses that renders them capable of bearing the meaning contended for by Network Rail and the Scottish Ministers. In these circumstances there is, in my view, no foundation for an argument that commercial common sense requires clause 3.27 to be interpreted as conferring an obligation upon Fern to include any or all of the tenants' complaints, reasonable or otherwise, in its notice to the contractor. I agree with Fern's characterisation of the argument as an attempt to imply a term into the contract rather than interpretation of the terms that were agreed. This is readily apparent from the fact that the pursuers accept that their entitlement to have a complaint included in the Owner's Completion Notice is subject to the qualification that the concern must be a reasonable one. The pursuers have not pled circumstances in which the legal requirements for implication of such a term may be held to have been met.

[35] Nor does the construction contended for by Network Rail and the Scottish Ministers find support from reading the Remedial Works Agreement as a whole. The contrast with clause 3.36, where the tenants are given a right not only to be liaised with but also to have their complaints added to the Owner's schedule of defects, is a stark one. It affords a strong indication that the parties intended different rights to be conferred upon the tenants under clause 3.27. In my opinion it accords with commercial common sense to treat these two clauses as conferring different rights. The principal purpose of clauses 3.27 to 3.30 is to determine whether and if so when Completion has occurred, giving rise to the consequences in clause 3.31, namely assumption of responsibility by Fern for the insurance and ongoing care of the remedial works and commencement of the defects liability period. In my view it makes commercial sense to place the decision as to whether to accept that the works have been satisfactorily completed in the hands of the party upon whom responsibility for their

care and insurance is being assumed. It is important to note that by virtue of clause 3.36, the tenants remain entitled to raise issues relating to defects and other faults in the remedial works and to require to have these included in a schedule of defects.

[36] I accept that the various settlement agreements constitute a part of the context and background against which the Remedial Works Agreement must be construed. The agreements contain references to one another and were clearly entered into by the respective parties as interlinked ingredients of the resolution of the disputes that had arisen in relation to the premises. However, I find nothing in the settlement agreements to indicate that clause 3.27 ought to be interpreted in the manner contended for by Network Rail and the Scottish Ministers. The fact that their differing entitlements to liquidated damages were effectively terminated by the occurrence of Completion clearly gave them an interest to argue that Completion had not yet occurred, but it does not follow that the Remedial Works Agreement must be construed as conferring upon them a right to require their concerns to be included in the Owner's Completion Notice. That, in my view, would amount to rewriting the parties' agreement.

[37] For these reasons, I hold that the tenants, including Network Rail and the Scottish Ministers, had no contractual entitlement to insist upon their concerns being added to the Owner's Completion Notice. From that it follows that they had no contractual entitlement to challenge Fern's decision to accept that the works had been satisfactorily completed by 29 May 2020 and to enter into adjudication with the contractor on that basis.

[38] As it turned out matters did not progress, as envisaged by clause 3.28.3, by means of the contractor carrying out the works needed to address the matters raised by Fern and then issuing a fresh Defender's Completion Notice, so there has never been acceptance by Fern of any Defender's Completion Notice. Instead, the matter was referred for adjudication. In

terms of clause 3.30, the date of Completion is therefore to be determined by the adjudicator's decision. The adjudicator has given a decision and that is the date upon which satisfactory completion of the Remedial Works is deemed to have taken place. That being so, there is no basis in law upon which either Network Rail or the Scottish Ministers are entitled to a declarator that Completion has not occurred or been deemed to occur. Whether this is characterised as a question of relevancy or of absence of contractual title, the result is the same.

[39] The Scottish Ministers also seek a declarator that the contractor is yet to discharge its obligation under the Remedial Works Agreement and the settlement agreement to complete "the Works". As I understood it, the argument was that because the Scottish Ministers' settlement agreement was entered into some time after the Remedial Works Agreement, they were entitled to rely upon clause 2.1 of their settlement agreement as conferring a separate and stand-alone right to make a claim as a result of a breach by the contractor of the Remedial Works Agreement. There is, however, no separate pleaded case in support of the second conclusion, and in my opinion the same considerations apply to it as apply to the first conclusion, with which I have dealt. The fact that the settlement agreement was executed later appears to me to be of no legal significance. I have set out above the terms of Recital G of the Remedial Works Agreement, which envisaged that the agreements might or might not be entered into contemporaneously, and which seem to me to confirm that the parties attached no significance to matters of timing.

[40] I have reached my decision on the issue of contractual interpretation without requiring to consider the question raised by the contractor as to the scope of the jurisdiction of the court. Determining whether Fern were entitled to reach and intimate their view that the works had been satisfactorily completed, and to participate in an adjudication with the

contractor on that basis, without having regard to the concerns expressed by the tenants which remained outstanding, does not require consideration of the consequences of a party raising court proceedings in which ascertainment of the date of satisfactory completion is put in issue. Moreover, since, so far as I am aware, no such court proceedings have been raised, the question is academic. I shall, however, briefly express my view on it.

[41] I agree with the submission by Network Rail that there is nothing in the Remedial Works Agreement to exclude or restrict the jurisdiction of the court. Indeed, the parties seem to have gone out of their way to emphasise that a decision by an adjudicator will have only temporary binding effect unless and until the subject matter of the dispute has been determined by court proceedings. It is unclear to me why it was considered necessary to include this phraseology in clause 3.30.2 and yet again in clause 20.2 when it is contained in paragraph 23(2) of the Scheme itself, applied to the agreement by clause 20.3. Whatever the reason for that may be, it is clear that a dispute about whether Completion has occurred, and if so when, is as open for determination by court proceedings as any other dispute arising under or in connection with the agreement. I reject the proposition that in such a dispute the role of the court would be restricted to quashing the adjudicator's decision without making its own determination. On the contrary, it seems to me that on a proper construction of the agreement, the parties have contemplated that the date of Completion, carrying the consequences set out in clause 3.31, could eventually be held by the court to have occurred on a date different from that determined by the adjudicator.

Disposal

[42] In the action at the instance of Network Rail, I shall sustain the first and second pleas in law for Fern and the second and third pleas in law for the contractor, repel the pleas in law for Network Rail, and dismiss the action.

[43] In the action at the instance of the Scottish Ministers, I shall sustain the third and fourth pleas in law for the contractors and the first and second pleas in law for Fern, repel the pleas in law (including the preliminary plea added by way of amendment during the debate) for the Scottish Ministers, and dismiss the action.

[44] Any questions regarding expenses are reserved.