OUTER HOUSE, COURT OF SESSION

[2007] CSOH 123

CA25/06

OPINION OF LORD REED

in the cause

MACDONALD ESTATES PLC

Pursuers;

against

REGENESIS (2005) DUNFERMLINE LTD

Defenders:

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Pursuers: Sandison; Brodies LLP

Defenders: Connal, Q.C., Solicitor Advocate; McGrigors

11 July 2007

Introduction

[1] This is the latest in a series of cases before the Commercial Court in recent times concerned with the question where the costs incurred with a view to undertaking the development of land (including, in particular, the costs involved in applying for planning permission) should lie in the event that the development does not proceed. In the present case, the pursuers maintain that they are entitled, under their contract with the defenders, to be reimbursed for professional fees and other outlays which they incurred, amounting altogether to more than £500,000. The defenders on the other hand maintain that that is not the effect of the parties' contract. Alternatively, in the event that that is the effect of the contract, the defenders maintain, by way of a counterclaim to the principal action, that the contract fails to reflect the agreement between the parties and should therefore be rectified.

[2] The case has come before the court for proof before answer on the question of liability, under the principal action, and on the question of rectification, under the counterclaim. The quantification of the pursuers' claim has been left over to be dealt with, if necessary, at a later stage.

The witnesses

[3] Before turning to the facts, it may be useful to note at the outset my assessment of the witnesses. Evidence was given on behalf of the pursuers by their chief executive, Mr Dan MacDonald, their managing director, Mr Kevin Robertson, and their finance director, Mr Gordon Lawson; by Ms Brenda Scott and Mr Nick Scott, both partners in Brodies, who are the pursuers' solicitors; and by Mr Ken Ross, the chairman of the Elphinstone Group, who gave evidence of commercial practice in the property development industry. Mr MacDonald and Mr Robertson were involved only in the initial stages of the dealings with which the proof was concerned. Mr MacDonald did not appear to have a clear recollection of the events, which occurred several years ago, and Mr Robertson's recollection also appeared to be unreliable in the light of the contemporaneous documents. Mr Lawson appeared to me to be an unconvincing witness: he had a tendency to avoid giving direct answers to questions, and his evidence was at times inconsistent. The evidence of Ms Scott, Mr Scott and Mr Ross was relatively straightforward.

[4] Evidence was given on behalf of the defenders by Mr Peter Lawson (unrelated to Gordon Lawson), a partner in Burness, who were at the material time the defenders' solicitors; by his assistant, Mr Nick Williamson; by Mr Alfred Stewart, the principal of the defenders; by Ms Michelle MacDonald, née Forrest, who was at the material time Mr Stewart's employee, but who is now married to the pursuers' Mr MacDonald; and by Mr William McVicar and Mr Roano Pierotti, chartered surveyors who gave evidence relating to practice in the property development industry. Mr Lawson and Mr Williamson were impressive witnesses. Subject to some minor points on which their recollection may have been at fault, I accept their evidence in its entirety. Mr Stewart was an elderly man whose recollection of events was often vague or at odds with the contemporaneous records, and I did not consider him an entirely reliable witness. Ms MacDonald was a reluctant witness, who gave the impression of wishing to distance herself from the events in question. Her evidence was difficult to reconcile with the contemporaneous documents and with the evidence of other witnesses, and I do not regard it as reliable. The evidence of Mr McVicar and Mr Pierotti was relatively straightforward.

The factual background

[5] In 1999 Mr Stewart was on the verge of retiring, after a long career as the managing director of a housebuilding company, Alfred Stewart Properties Ltd ("ASP"), which carried on business in the Dunfermline area. He decided to acquire a large area of land in the centre of Dunfermline, which had been unoccupied for a number of years. Some of the buildings were in a dilapidated condition. Mr Stewart had it in mind also to secure control of some adjoining areas of land so as to form, with the land which he had already acquired, a site which would be capable of comprehensive re-development, in partnership with a developer, so as to provide Dunfermline with a major new shopping centre. Mr Stewart envisaged that this would be the final project of his career. ASP by this stage had only one employee besides himself: Ms Forrest, a former personal assistant who ran the office, and had the job title of project co-ordinator. Mr Stewart also formed another company, Regenesis (Dunfermline) Ltd ("RDL"), as a vehicle for the project.

[6] Mr Stewart instructed architects and other professional advisers, and plans for the proposed development were prepared. A number of developers were approached, but they showed little interest in the project. During 2002, the architects approached the pursuers, who are a property development company specialising in the development of shopping centres and other large retail developments. They have a small number of staff, and instruct external consultants, such as architects, traffic engineers and retailing consultants, as necessary.

[7] The pursuers' chief executive, Mr MacDonald, and their managing director, Mr Robertson, met Mr Stewart and Ms Forrest on a number of occasions during May and June 2002, to discuss the site and its possible development. Mr MacDonald concluded that the site offered an attractive opportunity for his company. He and Mr Robertson agreed to outline to Mr Stewart the type of joint venture which they would regard as feasible.

[8] Following these meetings, on 25 June 2002 Mr Robertson sent RDL a joint venture proposal [No. 31/3 of process]. The proposal was not intended to have contractual effect, and stated:

"Please note that the terms of this heads of terms document are an outline of our proposal and any contract will only be entered into by means of an exchange of Missives between Solicitors".

The proposal was that the pursuers would enter into a 50:50 joint venture with RDL to undertake the development of the site. The joint venture would be subject to three pre-conditions:

"a. Satisfactory planning permission being received for the proposed development.

b. Legal agreements being entered into with such third party landowners as is required to enable the development to proceed.

c. Pre-let agreements being entered into with anchor stores within the development."

In relation to costs, paragraph 2 of the proposal stated:

"The project costs and profits would be shared on an equal basis between R(D)L and ME [the pursuers] subject to 3b below."

Paragraph 3 stated:

"a. The R(D)L existing property holdings will be acquired by the JV [joint venture] at an agreed value.

b. ME will fund the costs of the planning and all professional fees and other associated costs in progressing the project from a date to be agreed up until detailed planning permission is obtained.

c. After detailed planning permission is obtained, ME will obtain the required funding for the development on a basis to be agreed with R(D)L."

[9] In relation to paragraph 3b, Mr MacDonald and Mr Robertson said in evidence that by "funding" the costs they had meant merely paying for the costs in the first instance: they had envisaged that, if the project proceeded, the costs would ultimately be borne by the joint venture; and they had not considered what would happen in relation to the costs if the joint venture did not proceed. Mr Stewart and Peter Lawson, on the other hand, said in evidence that they understood the pursuers' proposal as meaning that the pursuers would bear the costs involved in progressing the project from a date to be agreed until planning permission was obtained, and that the other costs of the project would be shared equally. I accept their evidence that that was how they understood the proposal.

[10] At a further meeting with Mr Robertson on 28 June, Mr Stewart and Ms Forrest indicated that they would instruct Burness, solicitors, to take the matter forward. Mr Robertson then passed the matter on to Gordon Lawson to deal with legal matters.

[11] On 11 July Peter Lawson, the partner in Burness who acted for Mr Stewart and the companies associated with him, wrote to Mr Scott, the "relationship partner" in Brodies who acted for the pursuers, enclosing draft heads of terms [No. 31/4 of process] for the proposed joint venture. The draft heads of terms envisaged a joint venture agreement ("JVA") between the pursuers and RDL, under which they would subscribe for equal numbers of shares in a joint venture company ("JVC"), which would acquire the properties owned by RDL or its parent company and undertake the development. The completion of the JVA would be subject to the satisfaction of three conditions precedent, covering the obtaining of planning permission, site assembly and pre-letting. The draft heads of terms also stated, at paragraph 12:

"ME will fund the costs of the planning and professional fees and other associated costs incurred in furthering the Development from [1 June 2002] until detailed planning permission, such as to allow the Development to proceed, is obtained [the Costs]. For the avoidance of doubt, the Costs shall include, but shall not be restricted to, the costs and expenses listed in Annex 1. All costs, expenses or charges in connection with the Development which are incurred after the grant of detailed planning permission shall be borne by the JVC".

That clause was intended to provide a framework for agreeing the nature of the costs to be borne by the pursuers, the date from which they would bear the costs, and their amount. The draft heads of terms were not intended to be legally binding, but to form a basis, as the document stated, for the parties to "endeavour in good faith to agree the detailed terms of the joint venture, on the basis of the principles set out in these Heads of Terms". Peter Lawson and Mr Williamson stated in evidence that the negotiation of the detailed terms of a joint venture would not normally be a particularly adversarial process, since the parties were choosing to form what was in effect a partnership. If one party's view were to change to such an extent as to affect the "deal" agreed at the outset, they would expect that party to say so and to propose an amendment of the "deal". Gordon Lawson, on the other hand, said in evidence that he would not necessarily spell out to the other party a departure from agreed heads of terms.

[12] Mr Scott saw little purpose in revising Burness's draft heads of terms, since they were not intended to be legally binding. He preferred to proceed directly to the negotiation of a contract. He told his partner Ms Scott, who specialised in company law, that they were not looking at the heads of terms produced by Burness.

[13] On 22 July Mr Scott met Gordon Lawson and Mr Robertson to discuss the matter. Later that day, Mr Scott e-mailed Peter Lawson [No. 31/5 of process]:

"I met my clients this morning, and received from them an indicative heads of terms which they provided to your clients in June [i.e. the proposal sent on 25 June].

Broadly the two accord [i.e. the proposal sent on 25 June, and the heads of terms prepared by Burness] and I think the simplest thing is for you to let me have a draft contract for consideration..."

Mr Scott then mentioned a number of specific points, some of which were concerned with the implications of taxation for the structuring of the joint venture. He continued:

"3. It is agreed that my clients will pick up the professional and other costs incurred in pursuing planning, optioning the various land interests, pre-letting the scheme and the like. If the deal aborts, that will be their risk. If, however, it becomes unconditional those costs should be JV costs. I'm not sure that was what your draft suggested but it is what my clients expect to happen.

The principal caveat to this is that my clients will need to review the schedule of costs you have provided, and the existing professional team appointments/fee arrangements. They are also to come back to me on the actual date from which they will 'take over' the fees. But I trust that needn't hold up progressing the legals" (emphasis added).

That e-mail was copied to Gordon Lawson and to Brenda Scott.

[14] In his evidence, Mr Scott said that he did not remember the meeting which had preceded the sending of the e-mail. Mr Robertson, in his evidence, said that he did not remember costs being discussed at the meeting, but he assumed that the matter dealt with in paragraph 3 of the e-mail must have been discussed. Gordon Lawson also said in evidence that he did not remember the matter being discussed at the meeting. It appears to me to be probable that the matter was discussed. In particular, Mr Scott's statement in the first sub-paragraph that the arrangement described there "is what my clients expect to happen", and his statement in the second sub-paragraph that "they are also to come back to me on the ... date", suggest that the matter had been discussed.

[15] As I have mentioned, the e-mail was copied to Gordon Lawson. He said in evidence that he remembered receiving it, and reading paragraph 3. Although he did not remember the discussion at the meeting, he was of the opinion that Mr Scott had misunderstood the pursuers' position. He did not however take any action, after receiving the e-mail, to draw the error to Mr Scott's attention. Mr Lawson said that he had not done so, because the transaction was still in the course of negotiation. I found that evidence unconvincing. The fact that the negotiations had not yet been completed was no reason not to correct an error of understanding on the part of Mr Scott, if there had been such a misunderstanding. It appears to me to be more likely that Mr Scott had acted in accordance with the instructions which he had received.

[16] On 25 July Peter Lawson e-mailed Mr Scott [No. 31/6 of process], agreeing to produce a draft joint venture agreement. In relation to paragraph 3 of Mr Scott's e-mail of 22 July, Mr Lawson responded:

"We agree that your clients will pick up costs etc, and we look forward to your client's comments on the schedule of costs. As stated in our draft Heads, our clients are assuming that the actual date from which your clients will take over the fees is 1 June 2002."

[17] In his evidence, Mr Scott said that he would not have regarded himself as free, following that exchange of e-mails, to put forward a different proposal regarding costs, in the absence of a change of circumstances: that was a matter which was settled for the course of the negotiations, subject to the issues which had been raised regarding the schedule and the date. He added, however, that if there were changes which caused a party to re-appraise aspects of the deal, that was part of the negotiation. Nothing was final until a contract was signed.

Peter Lawson similarly said in evidence that, following the exchange of e-mails, he considered that there was a common understanding that the pursuers would meet the costs, and "keep" them if the joint venture did not proceed, and that all that remained was to agree the details as to the categories of costs involved and the date from which the pursuers would be responsible for them. At the same time, he did not regard any matters dealt with in the e-mails as being incapable of being revisited. Gordon Lawson, in his evidence, said that he remembered receiving and reading Peter Lawson's e-mail. He maintained that he had understood the words "pick up costs" as meaning that the pursuers would fund the costs initially and be reimbursed, not as meaning that they would bear the costs if the joint venture did not proceed. He did not regard the pursuers as having adopted any definite position as to what they were going to do about costs. In cross-examination, however, Mr Lawson accepted that Peter Lawson had stated his agreement with what Mr Scott had said, and that what Mr Scott had said in the earlier e-mail meant that the pursuers would bear the costs if the joint venture did not proceed, and not merely fund them in the first instance. Mr Lawson accepted that he had known what had been said and agreed, and that he had taken no steps to do anything about it. He maintained that that was not because Mr Scott had acted in accordance with the pursuers' instructions, but because the parties were still some way off agreeing a legal document. I found that evidence unconvincing.

[18] On 6 August Peter Lawson's assistant, Mr Williamson, e-mailed Mr Scott a draft JVA between the pursuers and ASP. Before considering the draft, it should be noted how, on the evidence, solicitors currently go about drawing up contracts relating to commercial property transactions. Mr Scott explained that the negotiation of contracts of this kind does not normally involve meetings or discussions between the parties, or even between their lawyers. Such negotiations proceed electronically. One solicitor will take as a starting point a draft contract stored electronically as a template. He will make suitable adaptations to it, then e-mail the draft to the solicitor acting for the other party. That solicitor will then return by e-mail a revised version of the document, possibly after taking instructions from his client. This process continues until both solicitors are content with the draft. It will then be signed by their clients, to conclude the contract. This explanation is consistent with the evidence of Peter Lawson and Mr Williamson. The process which Mr Scott described largely reflects what happened in the present case, subject to the qualification that one meeting took place between the parties, as explained below.

[19] Clause 2.1 of the draft JVA [No. 31/7 of process] provided for the fulfilment of three conditions: satisfactory detailed planning permission being received for the development of a shopping centre on the site; satisfactory agreements or consents from third party owners of land forming part of the site; and pre-let agreements being entered into with anchor stores. Clause 2.2 provided that the pursuers would have primary responsibility for procuring that those conditions precedent were fulfilled, but that each party would use all reasonable endeavours. If the conditions were not fulfilled by a given deadline, the agreement would automatically terminate. Clause 3.1 provided for the incorporation of the JVC. Clause 3.2 provided that, in the event that the conditions precedent were fulfilled, the pursuers and ASP would each subscribe for shares in the JVC, and

"(g) the following [agreed form] ancillary agreements shall be entered into, namely:

[(i) the Asset Transfer Agreement between ASP and the JVC relating to the transfer of the Properties for a consideration of £[valuation to be discussed], to be satisfied in cash;]

[(ii) the Banking Arrangements];

[(iii) other agreements?];

[(iv) the [Management] Services Agreement between and the JVC relating to the provision of services to the JVC as therein provided;]"

The square brackets signified that the matter in question was not determined.

[20] In relation to clause 3.2(g)(iv), it appears from the evidence of the solicitors that it would be common in a

situation of this kind for there to be a management services agreement (MSA) relative to the development. It is to be noted that, in terms of the original draft of the JVA, the MSA was to be entered into only in the event that the conditions precedent were fulfilled. Mr Williamson, who prepared the draft JVA, explained that clause 2.2 imposed an obligation on the pursuers to make progress only up to the point when the conditions precedent were fulfilled. After that point, since the JVC would not have employees, it would be reliant on the pursuers to take the development forward. There therefore had to be some obligation on the pursuers to make progress with the development after the conditions precedent had been fulfilled. Such an obligation could be imposed either in the JVA itself or in a separate MSA.

[21] Mr Scott, on the other hand, regarded the suggestion of a MSA as a potential means by which one party to the joint venture could take out a larger share of the profit than the other party, since it would enable the former party to receive a "top slice" from the JVC by way of a fee, before the net profit of the JVC (after payment of the fee) was divided between its shareholders. The parties themselves, as explained below, appear to have regarded the legal paperwork as all comprising a single joint venture agreement.

[22] In relation to costs, clause 12.2 of the draft JVA provided:

"ME shall be responsible for all planning and professional fees and other associated costs incurred in furthering the Development from [1 June 2002] until detailed planning permission is achieved in terms of clause 2.1(a) (the Costs). For the avoidance of doubt, the Costs shall include, but shall not be restricted to, the costs and expenses listed in Schedule [5]. If each of the Conditions Precedent described in clause 2 is fulfilled or waived and Completion is effected in terms of clause 3 then the JVC shall become responsible for such costs and shall reimburse ME accordingly [when funds become available so to do]."

Peter Lawson explained in evidence that this provision was intended to implement the earlier understanding, reflected in the exchange of e-mails between himself and Mr Scott. It is apparent that clause 12.2 was modelled on paragraph 12 of Burness's draft heads of terms.

[23] Although the draft JVA did not envisage that the JVC would be party to the contract, it provided in clause 11 that ASP and the pursuers would each use their votes in the JVC to ensure that the JVA was performed. Finally, the draft JVA contained an "entire agreement" clause.

[24] In his e-mail of 22 July, Mr Scott had said that the pursuers were keen to get a schedule of the property interests owned by third parties. On 16 August Burness provided the information requested. Site assembly was not straightforward: for example, one of the sites to be acquired was a church, whose congregation would have to be found another place of worship. This was one of a number of factors which, over a period of time, caused the pursuers to re-appraise the degree of risk involved in the project, and (as Mr Robertson put it) affected their attitude to costs, making them determined to try to recover their costs. They did not however make their concern known to ASP or Burness.

[25] On 26 August Mr Scott e-mailed Burness a revised draft of the JVA, and suggested a meeting, attended by the clients, to agree matters and conclude the agreement. That meeting was subsequently arranged to take place on 4 September.

[26] In the revised draft JVA [No. 31/11 of process], Brodies proposed that the JVC should be formed immediately, and have the land transferred to its ownership at the outset. It was suggested that this would result in a saving of stamp duty. Clause 2.1, as revised, was in broadly similar terms to the original draft. Clause 2.2 specified the deadline for the fulfilment of the conditions precedent as three years from the date of the JVA, and was otherwise in similar terms to the original draft. Clauses 3.1 and 3.2 were in broadly similar terms to the original draft. Clause 3.2(g) provided, as before, for ancillary agreements to be entered into in the event that the conditions precedent were fulfilled, including:

"[(iv) the [Management] Services Agreement between ME and the JVC relating to the provision of services to the JVC as therein provided;] ME willing to provide admin services etc in Services agreement - can you please suggest a draft of what is required and fee proposal]".

The words from "ME willing" to the end of the clause had been added by Mr Scott. Although he maintained in evidence that these revisals had been made by his colleague Ms Scott, her evidence to the contrary is more consistent with the other evidence in the case, to the effect that issues relating to the MSA were dealt with by Mr Scott, and appears to me to be more likely to be correct.

[27] The revisals imply that the pursuers were willing, for a fee, to provide "administrative services" under the MSA. This was the first time it had been suggested that the pursuers would be paid a fee, and the first time it had been suggested that they would perform "administrative services". Given the pursuers' responsibility under clause 2.2 of the draft JVA for procuring that the conditions precedent were fulfilled (which included the obtaining of planning permission), the provision in clause 12.2 (discussed below) that the pursuers were to be responsible for the costs incurred up until the obtaining of planning permission, and the provision that the MSA was to be entered into after the conditions precedent had been fulfilled, the "administrative services" which could fall within the scope of the MSA, as envisaged at this stage, would have to be different from, and subsequent to, the work carried out by the pursuers in order to obtain planning permission and to procure the fulfilment of the other conditions precedent. Gordon Lawson's evidence, that the services which were envisaged at this stage as being provided under the MSA were the obtaining of planning consent and pre-lettings, and were therefore not aptly described as "administrative", is inconsistent not only with the use of that description in Brodies' revisals to the draft JVA (which Mr Lawson saw at the time) but also with the structure of the draft JVA as it then stood.

[28] In relation to costs, the revised draft of clause 12.2 provided:

"ME shall be responsible for all planning and professional fees and other associated costs incurred in furthering the Development from [date to be confirmed but to reflect the date on which ME began instructing the relevant professionals - and historic costs limited to architect and traffic engineers only] until detailed planning permission is achieved in terms of clause 2.1(a) (the Costs). For the avoidance of doubt, the Costs shall include, but shall not be restricted to, the costs and expenses listed in Schedule [5] [PROVIDED NOT A MONETARY AMOUNT AS NOT POSSIBLE TO SET COST RESTRICTIONS AT THIS STAGE ALTHOUGH A MECHANISM FOR CONTROL CAN BE DISCUSSED]. If each of the Conditions Precedent described in clause 2 is fulfilled or waived and Completion is effected in terms of clause 3 then the JVC shall become responsible for such costs together with any applicable VAT and shall reimburse ME accordingly at Completion."

In relation to Brodies' revisals, Gordon Lawson accepted in evidence that the only matters raised at that time concerned the date from which the pursuers would accept responsibility for costs, and the form in which the costs were to be listed in the schedule: the same two issues as had remained to be settled following the exchange of e-mails in July.

[29] As in the original draft, clause 11 provided that ASP and the pursuers would use their votes in the JVC to ensure that the JVA was performed. Finally, the revised draft contained an "entire agreement" clause in the same terms as the original draft.

[30] On receiving the revised draft JVA, Peter Lawson noted the revisals to clause 3.2(g)(iv). They were consistent with what he had in mind: the services provided under an MSA would typically involve liaising with professional advisers and tenants and reporting to the JVC on the progress of the project, and were therefore aptly described as administrative. There was however at that stage no very clear idea of what services the pursuers would provide under the MSA: in general terms, they would deliver the development. The revisals to clause 12.2 were equally as expected: he understood that there was no issue as to where the risk would lie in relation to the costs referred to in the clause, in the event that the conditions precedent were not fulfilled. Since the pursuers were to be responsible for costs up to that stage, any fees payable under the MSA would arise only subsequently: the pursuers were not

being paid a fee for the work involved in securing the fulfilment of the conditions precedent.

[31] Reporting to ASP on the revisals, Mr Williamson said, in connection with the revisals to clause 3.2(g)(iv), that a manager would typically be paid a fee equal to a percentage of the passing rent of the shopping centre. In his evidence, Mr Williamson (who had, at the time in question, only two years' experience as a solicitor) candidly acknowledged that that had not been a sensible thing to say: a fee of that kind was appropriate for the managing agents of a shopping centre, and it was not envisaged that the pursuers would perform a role of that kind. I accept that evidence. Like Peter Lawson, Mr Williamson understood the revised draft of clause 12.2 as implying, as previously understood, that the costs referred to would not be reimbursed to the pursuers if the conditions precedent were not fulfilled.

[32] After taking instructions from Ms Forrest, Mr Williamson e-mailed Mr Scott on 29 August [No. 31/12 of process] with comments on the revised draft JVA. He indicated that Burness agreed with the view that it would be tax efficient to transfer the property to the JVC sooner rather than later. In relation to clause 3.2(g)(iv), he wrote:

"In relation to the provision of management services, there has not previously been any discussion regarding any fee being payable to Macdonald Estates. Our clients do not envisage any such fee being payable."

That reflected Ms Forrest's instructions that fees did not form part of the deal, and that the pursuers would be getting sufficient return from their 50 per cent share in the JVC. In relation to clause 12.2, Mr Williamson wrote that the clause would be discussed at the meeting on 4 September. Burness understood that the pursuers had previously agreed that the date from which the pursuers would be responsible for costs would be 1 June 2002. ASP agreed that the only costs incurred by them which the pursuers should take over would be those relating to the architects and the traffic engineers.

[33] The agenda for the meeting on 4 September [No. 31/13 of process] included the following:

"4. Method of dealing with third parties (including Fife Council); representation/attendance at meetings.

...

6. Terms of management services agreement between JVCo and ME.

...

9. Liability for costs: date from which liable; what type; when reimbursed?

10. Thomsons' World of Furniture. Third party sites."

The agenda reflected the fact that the terms of the MSA (item 6) were not regarded as being related to the issue of liability for costs (item 9).

[34] In relation to item 4, it appears that Mr Stewart did not have a good working relationship with the Council's planning officials. They were concerned about the delay in developing the site, and were contemplating the possible use of powers of compulsory purchase. The Council also had concerns about the safety of some of the buildings on the site, and was contemplating the possible use of powers to order demolition. In order to deal with the Council, it was important that an experienced retail developer should be seen to be involved in the project. It was agreed at the meeting that the pursuers' Mr MacDonald would take forward the discussions with the Council, after agreeing with ASP's Ms Forrest what position he was to adopt. It was agreed that the list of services to be provided by the pursuers under the MSA should be prepared and provided to the Council, to demonstrate that ASP had a development partner on board. In that regard, a document was produced by Mr Scott at the meeting, described as a schedule of services, duties and obligations. It was put forward as a draft list of services which would be attached to the MSA, but which could also be shown to the Council (rather than the JVA, which was going to take some time to be agreed, and would in part be commercially confidential). It was envisaged that a

finalised schedule would be provided to the Council in time for a Council meeting to be held on 11 September.

[35] In relation to item 6, there appears to have been only a brief discussion at the meeting. None of the witnesses could remember the discussion, apart from Gordon Lawson, who maintained that his notes of the meeting (which were not produced) showed that the discussion had revolved around the fee the pursuers would receive for providing the services.

[36] In relation to item 9, 1 June 2002 was agreed as the relevant date. It was agreed that Gordon Lawson would produce a schedule of the costs which the pursuers were to be reimbursed in terms of clause 12.2 of the JVA (i.e. a draft of Schedule 5 to the JVA). Costs were not otherwise discussed in any detail. There was no suggestion that the pursuers should be reimbursed their costs even if the conditions precedent were not fulfilled.

[37] In relation to item 10, a large site owned by Thomsons, close to the site which was proposed to be developed by the JVC, had come on to the market. The pursuers considered that it would be useful to have control of it, possibly for development as a multi-storey car park associated with the proposed shopping centre. There was also discussion of the appropriate size of the shopping centre scheme, given the number of third party sites which had to be assembled.

[38] The draft schedule of services [No. 31/15 of process] which Mr Scott produced at the meeting had been prepared by Gordon Lawson, by revising a document which the pursuers had used in connection with another development. It set out the services to be provided by "the Consultant". They related, first, to the appointment by "the Employer" of professional advisers:

"1. PROFESSIONAL ADVISER'S APPOINTMENTS

1.1 Advise the Employer on the need for and make recommendations for the appointment of other Professional Advisers by the Employer.

1.2 Assist the Employer and the Project Manager in relation to Professional Advisers Appointments (including duty of care warranties).

1.3 In conjunction with the Project Manager monitor the performance of the Professional Advisers and the Main Contractor in the performance of their duties and the discharge of their responsibilities".

It will be noted from paragraphs 1.2 and 1.3 that the draft envisaged that, in addition to the consultant, there would also be a project manager. The subsequent provisions of the schedule generally required the consultant to co-ordinate and monitor the work of the other professional advisers and to report to the employer. Such services related, first, to the design brief:

"2. BRIEF, DESIGN AND QUALITY CONTROL

2.1 Co-ordinate with the Professional Advisers the preparation of the design brief. Amplify the design brief as necessary during design development. Incorporate any changes and obtain the Employer's authorisation.

2.2 Monitor the progress of design work."

Mr Ross, giving evidence on the basis of his experience of property development, observed that the preparation of a design brief might involve professional advisers from a variety of disciplines: typically, architects, structural engineers and quantity surveyors, but also possibly traffic consultants, retail consultants and other professionals. The draft schedule also provided for similar services relating to project meetings and reporting procedures, to the programming of the project, to the preparation of budgets, to financial management and to cash flow. In connection with planning, the draft schedule provided:

"8. LOCAL AUTHORITY AND PLANNING APPROVALS

8.1 In conjunction with Planning Consultant (if any) co-ordinate and support negotiations with planning authorities.

8.2 Check with the Planning Consultant (if any) the form and content of planning applications. Progress the planning process and arrange that a check of all approval/refusal documents is carried out by the project team. Check that Professional Advisers implement and deal with any conditions attached to a planning consent."

Mr Ross observed that the planning process would be likely to involve the entire design team, and that changes to the design of the development might be required as a result of discussions with the planning authority.

[39] Some of the services to be provided under paragraph 8 would plainly antedate the grant of planning permission. They were therefore not appropriate for inclusion in the MSA if, as had been envisaged (and as appeared from the current draft of the JVA), the MSA was to be entered into after the conditions precedent (including the obtaining of planning permission) had been fulfilled.

[40] The draft schedule further provided for services to be provided by the consultant in connection with the tendering process for the building contract and the preparation of contract documents, the management of the contract, the maintenance of the building pending occupation, tenancies and fitting out, and letting. In relation to tenancies and fitting out, in particular, the draft schedule provided:

"12.1 In conjunction with the Professional Advisers procure the preparation of drawings, specifications or other documentation required for marketing or contracts.

12.2 In conjunction with the Professional Advisers provide any tenant with information to enable him to prepare fitting out proposals and arrange for any Employer's approvals to be obtained."

Mr Ross commented that architects and services engineers would be likely to be involved in the matters described in those provisions.

[41] On 6 September Mr Williamson e-mailed a revised (third) draft of the JVA to Ms Scott. On the same date, the defenders were incorporated, under the name Lothian Fifty (912) Ltd. They were formed by Burness, and controlled by them, as an off-the-shelf company available for the use of their clients. Peter Lawson explained that Burness prepared "shelf" companies in batches, so as to have a stock available. He would not have identified any particular company as the JVC. A company would be taken off the shelf on the day it was required.

[42] On 9 September Mr Williamson faxed a revised draft of the schedule[No. 31/18 of process] to Mr Scott. The revisals were relatively minor: they altered the references to a project manager, to make it clear that that role would be undertaken by the pursuers, and added provisions relating to site assembly:

"9.1 Obtain information on ownership and any lessees of the Site, existing buildings, boundaries and any known easements, underground services, rights of way, right of support and other relevant matters.

9.2 Assist the Employer and its solicitors in negotiating the acquisition of any parts of the Site not under the Employer's control and ancillary property rights.

9.3 Negotiate for the acquisition of any additional land required to execute the Development and for the grant or release of any relevant servitudes, rights or restrictions."

Certain, at least, of these provisions would again be relevant only if some of the services were to be performed prior to the satisfaction of the conditions precedent (since site assembly was one of those conditions). In relation to paragraph 9.1, Mr Ross commented that the pursuers would need external assistance in order to obtain the necessary information.

[43] On 11 September Mr Williamson and Mr Scott finalised the terms of the schedule, and of the accompanying letter to be produced to the Council. The schedule and the letter were then transmitted to the Council. The letter

[No. 31/20 of process] described the schedule as "the list of services which it has been agreed in principle will be provided by Macdonald Estates PLC to the joint venture in connection with the redevelopment of Dunfermline town centre." The schedule was generally in similar terms to the previous draft.

[44] On 12 September Ms Scott e-mailed Gordon Lawson and Mr Scott [No. 31/25 of process], confirming that for tax reasons it would be desirable that the ASP properties should be transferred to the JVC at the outset, and that the JVC should remain part of the ASP group of companies until planning permission was obtained, with no more than 25 per cent of the shares in the JVC being taken by the pursuers at the outset: in the event, it was later agreed that the JVC should be wholly owned by ASP until the conditions precedent were fulfilled, at which point the pursuers would take a 50 per cent shareholding (as had been envisaged from the outset). She added:

"6. Will need to think of what happens if we do not complete. If you transfer shares back at par (£25) you don't get any reimbursement for costs and you get no benefit of any economic growth in the new property. Something to consider further".

Ms Scott said in evidence that the second sentence reflected the terms of the draft JVA, under which the pursuers would not be reimbursed their costs unless the conditions precedent were fulfilled. She had highlighted the risk in order for Mr Scott and Gordon Lawson to deal with it.

[45] In his evidence, Mr Scott said that it was around this time that the pursuers became concerned about what they were going to get out of this deal. They had by then failed to secure the Thomsons' site. It had been secured instead by Tesco, prejudicing the prospects of the pursuers' attracting a retail superstore operator to the proposed development. The pursuers were also becoming nervous about the prospects of assembling the site. It was suggested in evidence by Mr Scott and the witnesses from the pursuers that there had been a change in that regard, in that Mr Stewart had insisted on taking over responsibility for site assembly; but I found that evidence unconvincing in the light of the contrary evidence of other witnesses, including Mr Stewart himself, and the suggestion is not supported by the contemporary documents. What undoubtedly changed, however, was the pursuers' assessment of the prospects of the site being assembled. There were also doubts about the degree of support which could be expected from the Council. The pursuers became concerned that the project might never come to fruition.

[46] In these circumstances, Mr Scott's instructions from Gordon Lawson were to "cover the downside" and deal with the situation where the pursuers could not get the scheme to be a viable project. Specifically, he was to cover the downside in relation to the costs of obtaining planning permission. In responding to these instructions, there was little that Mr Scott could do about the JVA: it had to be conditional on site assembly. Mr Scott concluded that the way to deal with the costs was therefore through the MSA. For that purpose, the MSA would have to be in force before the JVA became unconditional. He said in evidence that, in drafting the MSA, he was trying to shift the costs on to ASP (or, strictly speaking, its wholly-owned subsidiary, the JVC). Gordon Lawson confirmed in evidence that he had instructed Mr Scott to look for a way of recovering the pursuers' costs. He knew that, in terms of the draft JVA, the pursuers were not to be reimbursed their costs in the event that the project did not proceed (indeed, they would effectively recover only half of their costs even if the project did proceed, since the JVC reimbursing their costs would in that event be 50 per cent owned by the pursuers themselves). He acknowledged that nothing was done to bring the pursuers' change of position to the attention of ASP or their advisers.

[47] On 5 November Peter Lawson e-mailed Mr Scott and Ms Scott a further revised draft of the JVA [No. 31/27 of process]. In relation to costs, Mr Lawson asked Brodies to confirm the precise costs which were to be included in Schedule 5, i.e. the costs which, in terms of clause 12.2, were to be the responsibility of the pursuers, subject to reimbursement by the JVC in the event that the conditions precedent were fulfilled. After taking instructions from Gordon Lawson, Ms Scott responded on 7 November [No. 31/28 of process] that the pursuers could not confirm precise costs, but could provide a note of the relevant categories, on the basis that Schedule 5 would cover costs falling within those categories provided they were properly incurred in connection with the development. A

schedule in that form was later provided by Mr Scott.

[48] In relation to this matter, Gordon Lawson accepted in evidence that there was still no indication given to Burness or ASP that the pursuers had changed their position in relation to the costs. He had told Mr Scott that the pursuers were looking to recover their costs in the event of the joint venture's not proceeding, and Mr Scott had said that he had something in the MSA to cover that. Mr Lawson accepted that, at the same time, Brodies were continuing, on his instructions, to negotiate the detail of the provisions in the JVA governing costs, under which the pursuers did not, in that event, recover their costs. Mr Lawson's explanation of his behaviour was that the JVA and the MSA were two separate agreements. Peter Lawson, on the other hand, said in evidence that he was under the impression that matters were going well. There was no indication of any hitches, and no discussion of any material changes: only matters of detail were being discussed.

[49] On 13 November Mr Scott e-mailed Peter Lawson [No. 31/29 of process]:

"Attached boilerplate - let me know if you have any comments. Its sent subject to any my guys have. Cant immediately recall what %age the fee was - will need to check. Also I believe you have the final form of services - can you add to Schedule 1. Ta."

The boilerplate was the draft of the MSA, into which the schedule of services agreed in September was to be incorporated. Mr Scott had prepared the draft by altering a document obtained from a colleague who dealt with construction law.

[50] The draft MSA was in the form of a letter addressed by the JVC (given the name, in the letter, of Macdonald Estates (Dunfermline) Ltd, or ME(D)L) to the pursuers:

"to confirm the terms of your appointment to provide certain services in connection with the proposed redevelopment of Dunfermline Town Centre on the following terms and conditions."

The draft MSA then provided inter alia as follows:

"2. Services

2.1 You shall provide to ME(D)L the services listed in Part 1 of the Schedule. You shall also perform such other reasonable services in relation to the Project as ME(D)L may from time to time instruct...

2.2 The services listed in Part 1 of the Schedule, and all Additional Services instructed under this Appointment, are referred to as 'the Services'.

....

3. Duty of Care

You warrant and undertake to ME(D)L that in the performance of the Services:-

3.1 You have exercised and will continue to exercise all such professional skill, care and diligence as may reasonably be expected from suitably and properly qualified project manager in providing services similar to the Services for exercises of a similar size, scope, nature and complexity as the Project

....

4. Fee

4.1 In consideration of the performance by you of the Services, ME(D)L shall pay to you a fee equal to [ ]% of the total cost of carrying out and completing the Project ...

4.2 The Fee shall be paid quarterly in arrears in equal payments throughout the projected period of the Project ...

....

4.5 In supplement of the foregoing ME(D)L shall free and relieve you on demand of all outlays reasonably required to be made by it as an incident of the performance of its obligations hereunder and the provision of the Services.

....

6. Provisions about this Appointment

6.1 Notwithstanding the date of this letter, it shall be deemed to have taken effect when you commenced the performance of any services within the scope of the definition of 'the Services'.

6.2 This Appointment supersedes any previous arrangements between the parties in respect of the Services (whether oral or written) and represents the entire agreement between the parties in relation to the Services."

The expression "project" was defined by clause 1 as meaning "the development of a new mixed use town centre scheme in Dunfermline on the Site".

[51] In this draft, clause 4.5 was intended by Mr Scott to enable the pursuers to recover the costs incurred by them in attempting to secure planning permission, site assembly and pre-letting, in the event that the project did not proceed, on the basis that such costs were "outlays" falling within that provision. Mr Scott's thinking was that the schedule of services, to be appended to the boilerplate, obliged the pursuers to provide services for which they had no professional competence (for example, in connection with obtaining planning consent, it was necessary to obtain architectural drawings, surveys, traffic impact assessments and retail impact assessments, amongst other matters; and in connection with site assembly, it was necessary to obtain legal advice regarding ownership, leases, servitudes and boundaries, amongst other matters). Since they would have to engage suitably qualified experts in order to provide the services contracted for, the costs which the pursuers had already incurred in instructing such experts (in particular, solicitors, architects, traffic engineers, planning consultants and chartered surveyors) would be recoverable under the boilerplate as outlays required to be made by the pursuers in order to perform the services listed in the schedule. Clause 4.5 was thus intended by him to cover not only incidental costs, but the fees of approximately £500,000 which the pursuers had already incurred or anticipated incurring. Clause 6.1, giving the MSA retroactive effect, was drafted with the same objective in mind. Clause 6.2 was intended to ensure that clause 4.5 would not be affected by the treatment of costs in the JVA. In relation to clause 4.2, Mr Scott said in evidence that the pursuers' fee was to be paid while the project was ongoing as a construction project. Mr Scott drew clause 4.5 to the attention of Gordon Lawson, as meeting his concerns. Mr Lawson was content that it met the pursuers' requirements. He explained in evidence that, since the schedule required the pursuers to provide services (such as legal services) which were beyond their competence, it followed that they were entitled to engage professionals to provide the services in question (e.g. engaging Brodies to provide the legal services), and to recover the cost of doing so as an outlay. They were also in his opinion entitled, in addition, to recover the fee agreed in the MSA as their remuneration for providing the services in question: in his view, the fee was a priority profit return.

[52] In his evidence, Mr Scott said that, in describing this draft as a boilerplate, he was saying that he did not regard there as being a need for much negotiation of this: it covered standard matters. The evidence of the other legal witnesses was to similar effect. Ms Scott, for example, said that to describe something as boilerplate meant that it was a standard wording and non-controversial. At the same time, Mr Scott said quite candidly that what he was attempting to achieve, when he drafted the document, was to shift costs amounting to £500,000 to ASP (or their subsidiary-to-be). When it was suggested to Mr Scott that he had never indicated to Burness that there had been a change in his client's position in relation to costs, he responded:

"It's not our job to tell Burness the consequences of the documents that we're presenting ... We assume that they will pick it up if they're concerned about it by reading the document and then negotiating".

At another point in his evidence, Mr Scott said:

"It's not my job to advertise to [Peter] Lawson if he's labouring under a misapprehension. I mean that's why you hire a big law firm in Edinburgh to negotiate documents for you. I leave it to them to advise their clients. I can't comment on what they thought".

When it was put to Mr Scott that there was nothing in any of the documents to suggest that anything was happening to "shift costs" he responded:

"It's not my responsibility, and it's not my duty to my client, to point out to the other party or his lawyers the consequences for them of their acceptance of the document".

[53] Peter Lawson did not notice anything out of the ordinary about the boilerplate. Clause 3.1 accorded with his understanding that the pursuers would act as a project manager, liaising with professional advisers, negotiating with prospective tenants, dealing with the Council and reporting to the employer. The outlays which he envisaged as being incurred by a project manager would be in respect of such matters as travel and hotels. He did not understand clause 4.5 as being concerned with the costs dealt with in the JVA: the issues arising in relation to those costs had already been discussed in detail in the context of the JVA, and the JVA made it clear how those costs were to be allocated.

[54] Peter Lawson's evidence about the role of a project manager was consistent with that of most of the other witnesses. Mr Ross, for example, said that a project manager would co-ordinate a design team appointed by the employer: he would not appoint them or be responsible for their costs. A project manager would not appoint the people listed in Schedule 5A to the JVA (as the schedule listing the costs which were to be borne by the pursuers and reimbursed in the event of completion - described as Schedule 5 in the draft JVA - came to be designated), i.e. the architect, the structural engineer, the planning consultant, the services engineer, the traffic consultant, the quantity surveyor, the environmental consultant, the topographical surveyor and the lawyers. It would at least be unusual for such appointments to be made by the project manager. I accept that evidence. Although the expression "project manager" does not have a fixed meaning, and the precise responsibilities of a project manager will depend on the particular contract, it appears from the evidence that the role of a project manager is normally to co-ordinate the work of others involved in a project, those others being in a contractual relationship (or in a chain of such relationships) with the employer rather than with the project manager himself. The services to be provided under the schedule were however more extensive than those typically undertaken by a project manager, notably in that they included matters arising prior to the construction phase of the project.

[55] On 19 November Mr Williamson e-mailed to Ms Scott a further revised draft of the JVA [No. 31/34 of process]. One of the proposed amendments was to the clause concerning costs (previously clause 12, now re-numbered as clause 13), so as to provide for the conditional reimbursement of costs incurred by ASP as described in Schedule 5B, as well as for the conditional reimbursement of costs incurred by the pursuers as described in Schedule 5A. In relation to the pursuers' draft of Schedule 5A, Mr Williamson asked for clarification of what was covered by a £50,000 provision for legal fees. Mr Williamson also noted that it had been agreed between the pursuers and ASP that, since the pursuers were to receive a fee for services provided under the MSA, ASP should also receive a fee in respect of the services provided by Ms Forrest.

[56] On 25 November Peter Lawson e-mailed to Mr Scott [No. 31/33 of process] that, subject to agreement on the fee, the draft MSA was fine. The fee was agreed the following day (at 5 per cent of the cost of the project).

[57] On 26 November Mr Scott replied to Mr Williamson's e-mail of 19 November [No. 31/34 of process]. His reply was copied to Gordon Lawson, who followed the exchanges. In response to the proposal that ASP should be reimbursed costs, Mr Scott wrote:

"We need to know what you are talking about here - if its internal costs I think that may be a problem as ME aren't

charging any either - they get the service fee from when it goes unconditional but nothing before".

One implication of the latter statement was that the fee under the MSA (i.e. the "service fee") would be payable only in the event that the project proceeded (and, therefore, only in the event that the conditions precedent listed in the JVA were fulfilled): as Mr Scott said in evidence, the fee was payable during the construction phase of the project, and the project would have to be unconditional for it to be under construction. The statement that the pursuers would get "nothing" until the project "goes unconditional" was consistent with Peter Lawson's understanding that the pursuers' costs would be reimbursed only if the conditions precedent were fulfilled. In relation to the provision for legal fees in Schedule 5A to the JVA, Mr Scott wrote:

"Its to cover the costs of getting planning alone - in terms of any offsite works, negotiation of the planning consent and statutory agreements".

The implication was that the costs incurred by the pursuers in respect of legal services related to the obtaining of planning permission were covered by clause 13 of the JVA. In relation to this matter, Gordon Lawson accepted in his evidence that no indication had been given to Burness that Schedule 5A was effectively irrelevant (since, on Brodies' approach, the costs in question would be recoverable under the MSA, regardless of whether the conditions precedent were fulfilled), and that that had been on his instructions.

[58] On 28 November Mr Scott e-mailed Mr Williamson [No. 31/36 of process], requesting that a conference call be held the following morning to discuss the remaining issues. He accepted the proposal that the JVA should provide for the conditional reimbursement of ASP's costs. In relation to the proposal that there should also be a fee payable to ASP under an agreement analogous to the MSA, he wrote:

"ME do not agree a fee for Michelle's time; they aren't getting a time charge fee and the fee they are getting is for basically doing what a professionally employed project manager would do anyway - the fee would be paid to whoever did that role. But ME's own inhouse time in getting planning etc isn't being charged so in turn AS [Mr Stewart] should [not] be charging a fee for Michelle's time."

The apparent implication of the latter statement, in particular, was that the pursuers were not charging a fee for obtaining planning permission, and, therefore, that obtaining planning permission fell outwith the scope of the services for which a fee was payable under the MSA. In relation to those services, Gordon Lawson (to whom the e-mail was copied) said in evidence that Mr Scott had used the description "project manager" with his knowledge. Mr Lawson said that he had not agreed with that description, but had not corrected it. Mr Williamson and Peter Lawson, on the other hand, said that that description fitted their understanding of the MSA: that the pursuers would be liaising with and supervising the professional advisers and drawing the project to a successful conclusion.

[59] On 29 November Mr Williamson replied to Mr Scott's e-mail, and provided a schedule of ASP's costs. On the same date, Peter Lawson also e-mailed Mr Scott revised drafts of the JVA and the MSA, reflecting the matters that had been discussed. In relation to the agreement under which a fee was to be paid to ASP, Mr Lawson noted that "as with the ME management fee, this will only be paid by the JVCo on completion".

[60] On 2 December the JVA, the MSA and the ASP services agreement were executed by Mr Stewart and Mr MacDonald. The terms of the JVA and the MSA, as executed, are discussed below. In his evidence, Mr MacDonald said that his view of the paperwork was that it all formed part of one joint venture agreement. He would read the MSA as being part of the JVA. Mr Stewart's evidence, although somewhat confused, was essentially to the same effect. He said that he did not know that there was going to be a MSA before the date of signing, and believed the JVA was the only agreement. He was under the impression, he said, that the purpose of the MSA was to have an agreement which could be shown to the Council, the terms of the JVA being commercially confidential. He had envisaged that instructions would continue to be given to the various professionals by the pursuers, rather than by the defenders. On the same date, the existing share capital of the defenders (a single subscriber share,

held by a Burness nominee) was transferred to ASP, who also subscribed for a further 49 shares, in accordance with the JVA.

[61] Gordon Lawson accepted in evidence that, in terms of the JVA, the pursuers were agreeing to fund the costs until a point was reached when the deal either completed or collapsed. When it was put to him that, in that case, the pursuers could not have been expecting to be reimbursed the same costs under the MSA in the period before that point was reached, he responded that they had provision to do so (in the MSA), but in the spirit of the joint venture they were not looking to draw the costs down, but were hoping that the joint venture would proceed and that they would recover their joint venture costs in due course. I note that the pursuers would effectively recover only half of their costs under the JVA if the project proceeded (since they would in that event own 50 per cent of the JVC), whereas they would recover the whole of their costs under the MSA, if their interpretation of it were correct. Their entitlement to recover their costs under the MSA (on their interpretation of it) would also be immediate and unconditional, rather than being contingent on the fulfilment of the conditions precedent. When it was put to Mr Lawson that the pursuers had agreed to fund the costs, he replied "In terms of the joint venture agreement we had, yes". He maintained that the pursuers were nonetheless entitled to be repaid the same costs under clause 4.5 of the MSA. Asked whether it was his understanding that the JVA and the MSA provided for different ways in which the same costs were to be dealt with, he confirmed that it was.

[62] On 5 December Mr Williamson summarised the main points arising from the agreements in a note intended for ASP and the defenders [No. 31/49 of process]. He noted that the JVA was conditional on the satisfaction of the conditions precedent prior to the deadline, and that in that event the JVC was to reimburse the pursuers' costs. He also noted:

"The fee payable to ME (by JVCo) in terms of the ME Management Services Agreement is 5% of total project costs, but this only becomes payable if the JV Agreement becomes unconditional and the parties proceed to Completion (i.e. if the JV Agreement does not become unconditional then ME will receive no fee, nor be reimbursed for the costs which it has incurred)".

Peter Lawson said in evidence that that was his understanding of the position throughout the discussions, and that it was on that basis that he had taken instructions. Mr Stewart confirmed that that had also been his understanding when he signed the agreements.

[63] Reference was also made during the evidence to a letter dated 17 November 2004 [No. 31/50 of process] sent to Mr Pierotti by the pursuers' Mr Robertson, and copied to Mr Scott. The letter was written in response to a suggestion made by Mr Pierotti, who was then acting on behalf of ASP, that ASP should be reimbursed costs of £60,000 which had been incurred in connection with the demolition of a building on the site. Mr Robertson wrote:

"Alf [i.e Mr Stewart] has taken responsibility for all property acquisitions in the proposal, which are reimbursed when the JV Company is triggered.

This is mirrored by our responsibility to fund the costs of obtaining planning permission which are now substantial".

It was suggested to Mr MacDonald and Mr Robertson that the implication of the letter was that the pursuers were not entitled to be reimbursed their costs until the conditions precedent were fulfilled. Mr MacDonald said that he could only suggest that the letter had been written absent-mindedly. Mr Robertson himself maintained that he had meant that the pursuers had to "fund" the costs, in the sense of meeting them in the first instance, until the conditions precedent were fulfilled, and that that was consistent with the pursuers' recovering the costs under the MSA whether the project proceeded or not.

[64] On 5 September 2005 the pursuers submitted invoices to the defenders in respect of costs which they claimed to have incurred. The amounts invoiced totalled £507,307.67 and are the sums sued for in the present proceedings. By then it was apparent to the pursuers that the conditions precedent were not going to be fulfilled

and that the development was not going to proceed. On 15 September 2005 the present proceedings were commenced. On 5 December 2005 the time limit for the fulfilment of the conditions precedent, as agreed in the JVA, expired. The conditions precedent had not been fulfilled.

[65] During the present proof, a number of witnesses were asked whether, as the pursuers maintain in their pleadings, it would have made no commercial sense for a developer such as the pursuers to incur substantial costs, conferring potential benefits on a landowner such as the defenders or ASP, in the hope that the JVA would reach completion; or whether, as the defenders maintain in their pleadings, it would have made no commercial sense for the landowner to agree to pay costs incurred by the developer, over which the landowner had no control, regardless of success in obtaining the necessary consents and agreements. All the witnesses agreed (although, in some cases, with a degree of reluctance) that there was no standard practice in this regard, and that the arrangements entered into varied from case to case, reflecting the particular circumstances and the negotiating strength of the parties involved. I accept that that is the position.

[66] Finally, in relation to the factual background, it will be apparent that much of the foregoing narrative has been concerned with the actual intentions of the parties, their negotiations, and the drafts of the contracts in question. Evidence about these matters was led, by agreement, under reservation of its competency and relevancy. I consider below the extent to which, and the purposes for which, it is admissible and relevant.

The JVA
[67] It is necessary to set out at some length the relevant provisions of the JVA and the MSA. The JVA [No. 31/1 of process] is headed:

"Agreement between Alfred Stewart Properties Limited and Macdonald Estates plc.

Joint Venture Agreement relating to the operation of Lothian Fifty (912) Limited as a jointly-owned company".

It begins by narrating that the agreement is made between ASP and the pursuers, and continues:

"WHEREAS

(A) ASP has established a new company (JVC) which will acquire certain rights and assets, and otherwise be established and carry on business, in the manner set out in this Agreement.

(B) ASP and ME have agreed that upon satisfaction of the conditions precedent set out in this Agreement, ME shall subscribe for shares in JVC and that their relations as shareholders in JVC shall be governed by the terms of this Agreement.

IT IS AGREED as follows".

[68] Clause 2 of the JVA provides for the fulfilment of the three conditions precedent, in broadly similar terms to the earlier drafts:

"2.1 Completion under clause 3 shall be conditional upon each of the following conditions having first been satisfied or waived:

(a) satisfactory detailed planning permission (and to the extent necessary, demolition consents, road construction consents, stopping up orders, listed building consents and Section 75 agreements) being received for the Development;

(b) satisfactory unconditional binding agreements or consents from the owners of the Third Party Sites and any other parties having rights over or the benefit of restrictions or other interests required to be acquired or released to enable the Development to proceed; and

(c) unconditional binding pre-let agreements being entered into with at least (i) one anchor food superstore and (ii)

two anchor department stores within the Development.

2.2 ME shall have primary responsibility for procuring that the Conditions Precedent set out in Clauses 2.1(a), (b) and (c) .... are fulfilled as soon as possible, but notwithstanding such obligations each party shall use all reasonable endeavours to procure that the Conditions Precedent are fulfilled as soon as possible. If the Conditions Precedent shall not have been fulfilled (or waived) by the date three (3) years from the last date of subscription hereof .... then the parties shall procure that:

(i) this Agreement (other than the provisions of Clause 11 (Confidentiality)) shall, unless otherwise agreed, thereupon automatically cease and terminate;

...

(iii) the ME Management Services Agreement is terminated with immediate effect".

[69] The expression "JVC" is defined in Schedule 1 as meaning Lothian Fifty (912) Ltd, i.e. the defenders. The expression "ME Management Services Agreement" is defined as meaning "the management services agreement in the agreed form between ME and JVC to be entered into of even date or near even date herewith". The expression "in the agreed form" is in turn defined as meaning agreed by the pursuers and ASP.

[70] Clause 3.1 narrates that the JVC has been incorporated and has an authorised share capital of £100 divided into 50 A shares and 50 B shares. It goes on to provide:

"on the date of this Agreement the following events shall take place:

(h) ASP shall subscribe unconditionally for 49 A shares in cash at par and shall accept the transfer of the 1 nil-paid subscriber share (the subscriber share having been designated an A share);

.....

(j) Alfred Stewart and Michelle Forrest shall be appointed as the first A Directors pursuant to Clause 5.1, (for the avoidance of doubt to the exclusion of any prior directors);

(k) the following agreed form ancillary agreements shall be entered into, namely:

(i) the Asset Transfer Agreement between ASP and the JVC relating to the transfer of the Properties for a consideration of £4,000,000, such sum to be treated as an advance to JVC by way of a A Shareholder Loan;

(ii) the ME Management Services Agreement between ME and JVC relating to the provision of services to the JVC as therein provided".

I note that, although ASP was not to be party to the MSA itself, the JVA (entered into between the pursuers and ASP) provided for the MSA (described as an "ancillary" agreement) to be entered into, in an agreed form.

[71] Clause 3.3 makes provision for the eventuality that the conditions precedent were to be fulfilled within the deadline:

"Completion shall take place within ten (10) days after the Conditions Precedent are fulfilled or waived) when the following events shall take place, namely:

(a) ME shall subscribe unconditionally for 50 B shares in cash at par;

.....

(c) Dan Macdonald and Gordon Lawson shall be appointed as the first B Directors pursuant to Clause 5.1, Dan Macdonald to be the Chairman of the Board from the date of his appointment; and

....

(f) ME will procure that JVC is placed in sufficient funds to repay the A Shareholder Loan to the extent of £2 million whether by a loan from ME or by some other means of financing;

(g) the parties shall procure that the JVC shall reimburse ME for the ME costs incurred in terms of Clause 13.2;

...

(i) the following ancillary agreements shall be entered into, namely:

(i) novations and/or assignations (containing suitable indemnities in favour of ME or the other contracting purchaser/developer) of (i) all missives and agreements for lease and (ii) professional appointments concluded by ME in pursuance of satisfaction of the conditions mentioned in Clause 2.1."

I note that under clause 3.3(g), ASP and the pursuers agreed to procure that the JVC would reimburse the pursuers for the costs which they incurred in terms of clause 13.2, in the event that the conditions precedent were fulfilled. I also note that clause 3.3(i) envisaged that the pursuers would conclude professional appointments for the purpose of fulfilling the conditions precedent, and that those appointments would be taken over by the JVC (by way of novation or assignation) in the event that the conditions precedent were fulfilled.

[72] Under clause 12, it is agreed that ASP and the pursuers will each use their votes in the JVC and all other means at their disposal to ensure that the JVA is duly performed.

[73] In relation to costs, clause 13.2 provides:

"13.2 ME shall be responsible for all planning and professional fees and other associated costs incurred in furthering the Development from 1 June 2002 until detailed planning permission is achieved in terms of clause 2.1(a), to the extent that those matters were instructed by any of (i) the JVC with the knowledge and consent of ME, (ii) ME or (iii) ASP with the knowledge and consent of ME (the ME costs). For the avoidance of doubt, the ME costs shall include, but shall not be restricted to, the costs and expenses listed in Schedule 5A. If each of the Conditions Precedent described in clause 2 is fulfilled or waived and Completion is effected in terms of clause 3 then the JVC shall become responsible for such costs and shall reimburse ME in accordance with clause 3.3(g) except that project management costs incurred by ME may be invoiced by ME after Completion and will be repaid within 30 days of invoice date".

Schedule 5A lists categories of costs, with estimated amounts totalling £420,000 (exclusive of VAT). The categories are: architect, structural engineer, planning fees, planning consultant, services engineer, traffic consultant, quantity surveyor, environmental consultant, topographical surveys and legal costs. It is a matter of admission, in the present proceedings, that all the costs which the pursuers are seeking to recover fall within the scope of clause 13.2 and Schedule 5A.

[74] Finally, in relation to the JVA, clause 15 sets out an "entire agreement" provision:

"This Agreement and any other Agreements entered into on Completion pursuant to clause 3 set out the entire agreement and understanding between the parties with respect to the subject matter of it. It is agreed that:

(a) neither party has entered into this Agreement in reliance upon any representation, warranty or undertaking of the other party which is not expressly set out in this Agreement;

(b) a party shall have no claim or remedy in respect of misrepresentation (whether negligent or otherwise) or untrue statement made by the other party;

(c) this clause shall not exclude any liability for fraudulent mirepresentation."

The MSA

[75] The MSA [No. 31/2 of process] is in the same terms (apart from the date, and the name of the JVC) as Mr Scott's original "boilerplate" draft. It is in the form of a letter addressed by the defenders ("JV Co") to the pursuers. It provides inter alia:

"2. Services

2.1 You shall provide to JVCo the services listed in Part 1 of the Schedule. You shall also perform such other reasonable services in relation to the Project as JVCo may from time to time instruct, subject to the parties first agreeing an additional fee therefor under clause 4.

2.2 The services listed in Part 1 of the Schedule, and all Additional Services instructed under this Appointment, are referred to as 'the Services'.

2.3 You shall perform the Services in accordance with:

2.3.1 the terms and conditions set out in this Appointment

2.3.2 JVCo reasonable instructions, and

2.3.3 any agreed programme.

3. Duty of Care

You warrant and undertake to JVCo that in the performance of the Services:-

3.1 you have exercised and will continue to exercise all such professional skill, care and diligence as may reasonably be expected from suitably and properly qualified project manager in providing services similar to the Services for exercises of a similar size, scope, nature and complexity as the Project.

3.2 you are and will remain competent to perform the obligations imposed on you by this Appointment; and

3.3 you shall act in a competent and efficient manner and in the best interests of JVCo so as to give to JVCo the benefit of your experience and expertise in relation to the Project.

4. Fee

4.1 In consideration of the performance by you of the Services, JVCo shall pay to you a fee equal to 5% of the total cost of carrying out and completing the Project (subject to clauses 4.3 and 4.4).

4.2 The Fee shall be paid quarterly in arrears in equal payments throughout the projected period of the Project. Where the costs of carrying out and completing the Project change, an appropriate adjustment shall be made to future payments of the Fee so as to ensure that in total all payments received by you for the Services (subject to Clause 4.3 and 4.4) shall be 5% of the total cost of carrying out and completing the Project.

4.3 If JVCo ask you to perform any Additional Services, the parties shall require to agree a fair and reasonable adjustment to the Fee prior to the date of commencement of such Additional Services.

4.4 Where you require to carry out Additional Services in the event of emergency, you will not require to agree the additional fee with JVCo before carrying out such Additional Services, and an additional fee shall be calculated on a fair and reasonable basis.

4.5 In supplement of the foregoing JVCo shall free and relieve you on demand of all outlays reasonably required to be made by it as an incident of the performance of its obligations hereunder and the provision of the Services.

4.6 Payment of any part of the Fee or of the outlays due hereunder shall be required to be made by JVCo on the

date occurring 7 days after the date of receipt by JVCo of a demand from you, accompanied by the appropriate VAT invoice ...

5. Assignation

5.1 You shall not assign or transfer your rights or obligations in terms of or arising out of this Appointment without JVCo's prior written consent.

5.2 You shall not sub-contract the performance of the Services or any part thereof without JVCo's prior written consent.

...

6. Provisions about this Appointment

6.1 Notwithstanding the date of this letter, it shall be deemed to have taken effect when you commenced the performance of any services within the scope of the definition of 'the Services'.

6.2 This Appointment supersedes any previous arrangements between the parties in respect of the Services (whether oral or written) and represents the entire agreement between the parties in relation to the Services".

The expression "Project" is defined by clause 1.3 as meaning "the development of a new mixed use town centre scheme in Dunfermline on the Site".

[76] Part 1 of the Schedule is based on the schedule which was produced by Mr Scott at the meeting on 4 September, and reflects the revisals which were subsequently agreed. It lists the following services:

"1. PROFESSIONAL ADVISER'S APPOINTMENTS

1.1 Advise the Employer on the need for and make recommendations for the appointment of other Professional Advisers by the Employer.

1.2 Assist the Employer in relation to Professional Advisers Appointments (including duty of care warranties).

1.3 Monitor the performance of the Professional Advisers and the Main Contractor in the performance of their duties and the discharge of their responsibilities.

2. BRIEF, DESIGN AND QUALITY CONTROL

2.1 Co-ordinate with the Professional Advisers and oversee the preparation of the design brief. Amplify the design brief as necessary during design development. Incorporate any changes and obtain the Employer's authorisation.

2.2 Monitor the progress of design work.

3. REPORTING AND MEETINGS

3.1 Establish meetings structure. Lay down procedure for converting, chairing, attendance, function, frequency and responsibility for recording of meetings and circulation of information and ensure that this procedure is followed on behalf of the Employer. Monitor communications and distribution of information.

3.2 Agree with Professional Advisers their reporting and recording procedures and generally establish appropriate channels of communication between the Professional Advisers, the Contractor and the Employer.

3.3 Attend and represent the Employer at all principal project meetings.

3.4 Provide regular monthly reports to the Employer indicating the current situation on progress of the Project.

4. PROGRAMMING

4.1 In conjunction with Professional Advisers (but assuming primary responsibility for achieving successful resolution of this matter), prepare and maintain a master programme from concept to completion to record principal activities and identify critical dates, verify and incorporate Professional Advisers' programmes for production of detailed design information. Monitor progress.

4.2 Check that applications for statutory consents, government grants, etc, are submitted in accordance with the master programme. Make recommendations on any necessary or appropriate action to be taken in this respect.

4.3 Advise the Employer of changes to programme and recommend appropriate action.

4.4 Check in conjunction with the design Professional Advisers, the Main Contractor's programme; seek clarification of the Main Contractor's programme proposals if necessary, and incorporate these into master programme.

5. COST CONTROL

5.1 Monitor the Professional Advisers in the preparation of budget costs, and present feasibility studies to the Employer for approval.

5.2 In conjunction with the Professional Advisers (but assuming primary responsibility for achieving successful resolution of this matter), prepare and maintain a master cost plan. Advise the Employer of any alterations required and obtain authorisation for changes.

5.3 Report any actual or potential delays and cost increases and advise as to measures to avoid or reduce them.

6 CONSTRUCTION ECONOMICS AND FINANCIAL MANAGEMENT

6.1 Check that the Professional Advisers are providing adequate and timely information for the preparation of tender documentation.

6.2 Obtain the Employer's authorisation for costs of variations when limit of authority is exceeded and check that costs are being documented.

6.3 Report to the Employer at regular intervals in relation to the forecast of final costs (including costs of variations and the cost implications of extensions of time) and forecast completion dates.

6.4 Check, in conjunction with Professional Advisers (but assuming primary responsibility for achieving successful resolution of this matter), fees for statutory approvals and arrange payments.

6.5 Check and recommend applications for payment made by those of the Professional Advisers who are employed by the Employer.

6.6 Check and recommend other relevant invoices to the Employer.

6.7 Check that those of the Professional Advisers who are employed by the Employer prepare final account and agree settlement.

7. CASH FLOW

7.1 In conjunction with Professional Advisers (but assuming primary responsibility for achieving successful resolution of this matter) arrange for the preparation and maintenance of cash flow forecasts.

8. LOCAL AUTHORITY AND PLANNING APPROVALS

8.1 In conjunction with Planning Consultant (if any) (but assuming primary responsibility for achieving successful resolution of this matter) co-ordinate and support negotiations with planning authorities.

8.2 Check with the Planning Consultant (if any) the form and content of planning applications. Progress the planning process and arrange that a check of all approval/refusal documents is carried out by the project team. Check that Professional Advisers implement and deal with any conditions attached to a planning consent.

8.3 Check with the Professional Advisers which other statutory approvals are required and that applications for approval are submitted. Check that Professional Advisers apply for amendments to statutory approvals granted when required.

8.4 In conjunction with the Professional Advisers (but assuming primary responsibility for achieving successful resolution of this matter) check that (a) all necessary approvals are received and correctly documented and that adequate records are kept of all tests, inspections etc. which are carried out to satisfy the requirements of the various authorities and (b) the Professional Advisers obtain clearance from health and safety and fire officers.

8.5 Discuss the Development as appropriate with outside groups who may influence the design and construction, including adjoining owners, environmental groups, archaeological departments and statutory undertakers.

9. SITE ASSEMBLY

9.1 Obtain information on ownership and any lessees of the Site, existing buildings, boundaries and any known easements, underground services, rights of way, right of support and other relevant matters.

9.2 Assist the Employer and its solicitors in negotiating the acquisition of any parts of the Site not under the Employer's control and ancillary property rights.

9.3 Negotiate for the acquisition of any additional land required to execute the Development and for the grant or release of any relevant servitudes, rights or restrictions.

10. CONTRACT PROCEDURES

10.1 In conjunction with the Professional Advisers (but assuming primary responsibility for achieving successful resolution of this matter) advise on and obtain the Employer's approval of a list of tenderers for the Building Contract.

10.2 In conjunction with the Professional Advisers (but assuming primary responsibility for achieving successful resolution of this matter) invite tenders.

10.3 In conjunction with the Professional Advisers (but assuming primary responsibility for achieving successful resolution of this matter) appraise the tenders with the Professional Advisers and report to the Employer.

10.4 Monitor Professional Advisers in the preparation of contract documents. Arrange signatures of parties to the contract. Prepare letter of intent for signature if this is required or necessary (subject to approval of its terms by solicitors).

11. CONTRACT MANAGEMENT

11.1 Save where Professional Advisers' appointment has been novated to the Main Contractor to co-ordinate the Professional Advisers to ensure that information is provided to the Main Contractor in an appropriate timescale.

11.2 Save where Professional Advisers appointment has been novated to the Main Contractor to check that Professional Advisers are providing adequate supervision in accordance with their terms of appointment and undertaking regular site inspections.

11.3 Save where Professional Advisers' appointment has been novated to the Main Contractor to check that the Professional Advisers fulfil their contractor obligations in relation to practical completion and defects liability generally.

11.4 Check that making good of defective works is carried out during the defects liability period.

12. BUILDING MANAGEMENT, COMMISSIONING AND MAINTENANCE

12.1 Advise the Employer and deal with practical management, maintenance programmes, provision of maintenance staff and state of services pending occupation.

12.2 In conjunction with the Professional Advisers (but assuming primary responsibility for achieving successful resolution of this matter), arrange for the Main Contractor's and Professional Adviser's maintenance and cleaning information, maintenance manuals, test certificates, guarantees, operating instructions, 'as built' drawings and 'as installed' progress diagrams to be forwarded to the Employer.

13 TENANCIES AND FITTING OUT

13.1 In conjunction with the Professional Advisers (but assuming primary responsibility for achieving successful resolution of this matter) procure the preparation of drawings, specifications or other documentation required for marketing or contracts.

13.2 In conjunction with the Professional Advisers (but assuming primary responsibility for achieving successful resolution of this matter), provide any tenant with information to enable him to prepare fitting out proposals and arrange for any Employer's approvals to be obtained.

14 TENANT AND FINANCIERS

14.1 In conjunction with the Professional Advisers (but assuming primary responsibility for achieving successful resolution of this matter), arrange for and implement a system for approval by the Employer, Tenant, Financiers for any variation or changes to the Contract Works whether required by the Employer or the Tenant.

14.2 In conjunction with the Professional Advisers (but assuming primary responsibility for achieving successful resolution of this matter), supervise and co-ordinate the measurement of the lettable areas of units prior to practical completion statement being issued to the Main Contractor.

15 LETTING STRATEGY

15.1 On behalf of the Employer, instruct letting agents approved by the Employer (from time to time) to promote the Project and market vacant parts of the Site (as developed) on the best terms reasonably achievable, negotiate leases, investigate and assess the creditworthiness, profile and desirability as tenants of all prospective Tenants and take such reasonable steps as shall assist the Employer, as soon as reasonably practicable to enter into agreement for leases and leases with Tenants recommended for such lettings by the agents (such lettings to be consistent with a good tenant mix taking account of the character of the Site (as developed).

15.2 On behalf of the Employer, instruct solicitors and agents approved by the Employer to effect lettings of vacant parts of the Site (as developed) on terms approved by the Employer.

For the avoidance of doubt, the Consultant, in questions with the Employer shall have no liability to such letting agents and solicitors instructed by the Consultant on behalf of the Employer pursuant to this Paragraph 15 and the Employer shall, upon demand, free, relieve and fully indemnify the Consultant in respect of all costs, fees and others incurred by the Consultant to such letting agents and solicitors pursuant to such instructions except where the consultant has exceeded its authority or has acted recklessly, fraudulently or in a grossly negligent manner".

The submissions on behalf of the pursuers

(a) The principal action

[77] Counsel for the pursuers submitted that a reasonable person in the position of the parties to the MSA would appreciate that the performance of the services set out in the Schedule to the MSA (specifically, those described in paragraphs 2.1, 8.1-8.3, 9.1 and 13.1) would require the pursuers to engage external professional assistance, thereby incurring considerable costs. Those costs were recoverable under clause 4.5 as "outlays reasonably required to be made by [the pursuers] as an incident of the performance of [their] obligations [under the MSA] and the provision of the Services".

[78] Virtually none of the evidence led was admissible for the purpose of construing the MSA, for the reasons explained by Lord Wilberforce in Prenn v Simmonds [1971] 1 W.L.R. 1381 at pages 1384-1385. The question was not what one or other of the parties meant or understood by the words used, but the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract: Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 896 at page 912 per Lord Hoffmann; Bank of Credit and Commerce International SA v Ali [2002] 1 A.C. 251 at paragraph 39 per Lord Hoffmann; Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] A.C. 749 at pages 767-768 per Lord Steyn. The starting point was that words were to be given their ordinary and natural meaning: Charter Reinsurance Co Ltd v Fagan [1997] A.C. 313 at page 384 per Lord Mustill; Bank of Scotland v Dunedin Property Investment Co Ltd 1998 S.C. 657 at page 661 per Lord President Rodger.

[79] In response to the defenders' contention that the MSA was subsidiary to the JVA and should be construed so as to accord with it (and, therefore, on the basis that the sums in question were not payable to the pursuers unless and until completion occurred in terms of the JVA), counsel submitted that the MSA was the whole agreement between the pursuers and the defenders in relation to the services in question. That was made clear by the "entire agreement" clause. The fact that the pursuers and ASP were also entering into the JVA was a relevant part of the factual matrix known to the parties to the MSA. But the MSA and the JVA were not two contracts executed by the same parties: they were between different parties and governed different matters. The purpose of the JVA was to determine the events in which the pursuers and ASP would become joint shareholders in the defenders, and to regulate their relationship as such shareholders thereafter. That was apparent from the recitals, which were a proper aid to construction: Crouch v Crouch [1912] 1 K.B. 378. The purpose of the MSA, on the other hand, was to govern the terms and conditions upon which the pursuers would render services to the defenders both before and after "completion" (if it occurred) in terms of the JVA. There was no hierarchy between the documents.

[80] There was in any event no inconsistency between the JVA and the construction of the MSA advanced by the pursuers. The two were, if possible, to be read together, and effect was to be given to them as a whole: Pagnan SpA v Tradax Ocean Transportation SA [1987] 2 Lloyd's Rep. 342 at pages 350-351 per Bingham L.J. Clauses 3.3(g) and 13.2 of the JVA dealt with what was to happen if completion took place and the defenders accordingly became a joint venture vehicle between the pursuers and ASP. The JVA did not deal with what was to happen in relation to costs incurred by the pursuers if completion did not occur. The MSA made provision for the liability of the defenders to reimburse certain costs incurred by the pursuers, both before completion and, if completion had taken place, thereafter. The defenders' approach to the construction of the JVA was based on what they subjectively understood the bargain to be, on the basis of remarks made in the early stages of the negotiations.

[81] In the course of discussion, counsel accepted that it would be impossible in practice to charge a fee under the MSA unless the project proceeded. Counsel also accepted that the MSA had been terminated with effect from 5 December 2005, but maintained that any right to payment which had accrued prior to that date remained enforceable.

[82] In response to the defenders' contention that the pursuers' construction of the MSA made no commercial

sense, in that the landowner would be liable for costs over which he had no control, regardless of whether planning permission was obtained, counsel submitted that that contention was not supported by the evidence. The pursuers' witnesses were adamant that there was nothing uncommercial about such an arrangement. All the solicitors who gave evidence agreed that there was no standard practice in the relevant regard: that could not be the case if the arrangement contended for was truly uncommercial. If, in the circumstances, the defenders had made a bad bargain, the court could not rescue them from it: City Wall Properties (Scotland) Ltd v Pearl Assurance plc 2004 S.C. 214 at paragraph 23 per Lord Clarke. Reference was also made to Glasgow City Council v Caststop Ltd 2002 S.L.T. 47 at paragraph 34 per Lord Macfadyen.

[83] If it were suggested that the subsequent actings of the pursuers, and in particular their invoicing of the defenders for costs prior to the expiry of the deadline for "completion" in terms of the JVA, were inconsistent with their construction of the MSA, such actings were irrelevant: James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583 at page 603 per Lord Reid.

[84] If it were suggested that the scope of the services to be rendered under the MSA was limited by the use of the phrase "suitably and properly qualified project manager" to describe the scope of the pursuers' duty of care, none of the witnesses claimed that the phrase "project manager" was a term of art. The MSA made it clear that the appointment was to perform certain services in connection with the proposed development.

(b) The counterclaim

[85] The defenders' claim for rectification, under section 8(1)(a) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, was of an extreme nature. It sought to insert a new clause 6.1.1 into the MSA in the following terms:

"Notwithstanding the terms of this Agreement, payments by the defenders to the pursuers shall be conditional upon and the timing thereof shall be governed by the terms of the Joint Venture Agreement between the defenders and Alfred Stewart Properties Limited relating to the operation of the defenders dated of even date herewith and in particular by Clauses 3.3(g) and 13.2 thereof".

It also sought a consequential amendment of clause 6.2 (the "entire agreement" clause), by inserting at the beginning the words "Save as specified in Clause 6.1.1 hereof".

[86] A heavy burden rested upon the defenders to demonstrate that the terms of a written contract settled by exchanges between the parties' respective solicitors, and formally executed, so radically failed to express the true agreement of the parties: Huewind Ltd v Clydesdale Bank plc 1996 S.L.T. 369 at page 375. As to the requirements of section 8(1)(a), reference was made to Shaw v William Grant (Minerals) Ltd 1989 S.L.T. 121 and Renyana-Stahl Anstalt v McGregor 2001 S.L.T. 1247 at paragraphs 35-36 per Lord Macfadyen. The evidence showed how the MSA was put together. Reference to a MSA first appeared in Burness's initial draft of the JVA, taken from their in-house style. Upon the first revisal of that draft by the pursuers' solicitors, the entity which would provide the services was identified as the pursuers. Subsequently a list of services which would be provided by the pursuers to the JVC was provisionally settled between the pursuers and ASP, largely for the purpose of demonstrating to the Council the role of the pursuers in the project. Although the initial list of services produced by the pursuers was amended somewhat before being provisionally agreed, no attempt was made at that stage to agree the terms and conditions upon which those services would be provided by the pursuers to the JVC. In mid-November 2002, a draft of the terms and conditions upon which the services would be provided was produced by the pursuers' solicitors. That draft was not intended to reflect any previous agreement between the pursuers and the defenders as to the terms on which the services would be provided, because there was no such earlier agreement. There had been no previous discussion about what would or would not appear in the proposed MSA. Either party to that proposed agreement was free to propose or reject the inclusion of any term. The draft was the subject of some minor revisal by the defenders' solicitors, agreed to by the pursuers, but no alteration was made to any clause of import for present purposes, and no attempt was made to alter the "entire agreement" clause. No

attempt was made to add any stipulation that the terms of the MSA would fall to be regarded as subordinate to the terms of the JVA.

[87] The terms of the draft MSA between the pursuers and the defenders which had been agreed by circulation between those parties' respective agents were the terms set out in the version of the MSA executed by both parties on 2 December 2002.

[88] Against that background, there was no basis upon which it could be suggested that the terms of the MSA did not represent the terms of the agreement between the parties on the subject to which it related. It might be the case that the terms to which the defenders agreed had a different import from that which they imagined those terms to have when they signed the MSA. That was however irrelevant to found a claim for rectification, which was properly predicated upon a discrepancy between an executed document and a pre-existing agreement, and not upon a discrepancy between an executed document and what one party imagined that document to mean: George Thompson Services Limited v Moore 1993 S.L.T. 634 at page 636 per Lord Weir.

[89] The defenders' contention appeared to be that the terms of the MSA were in conflict with what the pursuers and ASP had at an early stage in their discussions contemplated would or might be said in relation to certain costs of the proposed project in the JVA. That was wholly irrelevant. Quite apart from the facts that the JVA and the MSA were not contracts between the same parties, and that the defenders were not even in existence until September 2002, the final terms of the MSA and of the JVA were ultimately settled relatively contemporaneously. Reference was made to Rehman v Ahmad 1993 S.L.T. 741 at pages 751-752 per Lord Penrose, and to Co-operative Wholesale Society Ltd v Ravenseft Properties Ltd 2003 S.C.L.R. 509 at paragraphs 28 and 31 per Lord Eassie. In any event, even if there had been an informal agreement between the same parties as the ultimate contract, following which the intention of one of the parties changed, and the words of the final contract reflected that change, it would be impossible to hold that the contract as finally concluded was intended to express the common intention of the parties to the informal agreement at the time when that agreement was entered into: there would have ceased to be any common intention which the contract expressed. Reference was made to Angus v Bryden 1992 S.L.T. 884 at page 888 per Lord Cameron of Lochbroom.

[90] Furthermore, even if there had been a prior agreement, the "entire agreement" clause expressly stipulated that the terms of the MSA as executed "supersede" any previous agreement between the parties, and represent the entire agreement between the parties in relation to its subject-matter. Although there was English authority that such a clause might not be a bar to rectification under English law (J J Huber (Investments) Ltd v Private DIY Co Ltd (1995) 70 P.& C.R. D33), the English law of rectification did not require the demonstration of an antecedent contract (Joscelyne v Nissen [1970] 2 Q.B. 86). That approach could not be reconciled with the Scots law of rectification. Reference was also made to the explanation of the purpose of an entire agreement clause in Inntrepreneur Pub Co (GL) v East Crown Ltd [2000] 2 Lloyd's Rep. 611 at page 614 per Lightman J.

[91] In reality, it was submitted, the defenders were resorting to the tactic described by Lord Nicholls of Birkenhead in his 2005 Lecture to the Chancery Bar Association, published under the title "My Kingdom for a Horse: The Meaning of Words" at (2005) 121 L.Q.R. 577, at page 578:

"In my days at the Bar the practice was that when the parties' pre-contract negotiations furnished some insight into their actual intentions, one or other of the parties would include a rectification claim in the proceedings. By this means, whatever the outcome of the rectification claim, the evidence of the parties' actual intentions would be before the court. The hope was that, either consciously or subconsciously, the judge's thinking on the interpretation issue would be influenced by this evidence. No one was deceived by this transparent ploy. I understand this still goes on. There is nothing improper about this, so long as the rectification claim has a seriously arguable factual basis and is brought in good faith".

The submissions on behalf of the defenders

(a) The principal action

[92] On behalf of the defenders it was submitted that, on a proper construction of the MSA, outlays were payable only as a supplement to the fees. Clause 4.5 appeared in a clause dealing with fees, and followed immediately upon detailed provisions governing fees which might arise in particular circumstances. The phrase "supplemental to the foregoing" was read naturally as meaning "supplemental to the foregoing provisions about fees".

[93] When was the fee payable? The fee was designed to be calculated once the costs, or estimated costs, of the project were known. It was difficult to see how the fee could be calculated before it was known whether the project was to proceed at all. Accordingly, on a proper construction of the MSA, the fee did not become payable until the project became unconditional. The logical consequence was that if the outlays were supplemental to the fee, the intention of the parties was that the outlays would also be payable once the contract became unconditional. As it was a matter of agreement that that did not take place, nothing was payable.

[94] For the pursuers to succeed, it would be necessary to establish that the sums recoverable under clause 4.5 as "incidents" of performance under the MSA included, on a natural construction of the contract, what were described in evidence as "big ticket" items, i.e. the costs of instructing professionals such as architects, lawyers and so forth. These were the same costs as were set out in Schedule 5A to the JVA. If on a proper construction of the MSA it did not encompass such costs, the claim for recovery failed.

[95] There was no express inclusion, within the Schedule of services, of the instruction and payment of other professionals. The Schedule created an entirely different impression - namely that the person carrying out such services would be engaged in advising "the employer" on the appointment of other professionals and would then be engaged in liaison with and supervision of those other professionals. Insofar as fees were mentioned, the role of the pursuers was restricted to checking invoices and passing them on (e.g. at paragraph 6.5 of the Schedule). That was the consistent approach throughout the Schedule, other than in paragraph 15, where careful provision was made for the instruction of particular professionals and for the manner in which liability for those instructions was to be managed as between the person carrying out services under the MSA and the client.

[96] It was nothing to the point that some of the services might require the involvement of other professionals, since, under the Schedule, other professionals would have been appointed to the team following advice from the "manager". Accordingly, there was nothing in the Schedule which supported the proposition that the intention of clause 4.5 was to carry with it "big ticket" items.

[97] Clause 4.5 should be understood as covering incidental outlays incurred by the manager while carrying out his duties. The concept of fees and outlays was well known. It was not suggested that anything of the nature of such modest outlays was the intended aim of recovery in this case.

[98] When setting a standard by which a duty of care should be imposed, the parties had referred to the role of a project manager (clause 3.1). It seemed to be suggested by the pursuers that this was a largely meaningless phrase or that it did not accord with what was truly envisaged. The defenders maintained that it accorded precisely with what was envisaged. No doubt the services to be provided by a project manager would depend on the project, but to say that someone was responsible for making progress was a reasonable description of a project manager. The use of the term "project manager" supported the defenders' submission. A project manager was there to manage as one of a team, not to take direct responsibility for payment. There was a consensus among the witnesses that the one thing a project manager would never do would be to instruct and pay other members of the professional team.

[99] The modern approach to the interpretation of documents was set out in Investors Compensation Scheme Ltd v West Bromwich Building Society at pages 912-913 per Lord Hoffmann. As his Lordship observed at page 913, the background to a document might enable the reasonable man not merely to choose between the possible meanings of words which were ambiguous, but to conclude that the parties must have used the wrong words or syntax. In establishing the relevant circumstances, reference could be made to the parties' discussions: Bovis

Construction (Scotland) Ltd v Whatlings Construction Ltd 1994 S.C. 351 at page 357 per Lord President Hope, Bank of Scotland v Dunedin Property Investment Co Ltd, Proforce Recruit Ltd v The Rugby Group Ltd [2006] EWCA Civ.69. Reference was also made to Charter Reinsurance Co Ltd v Fagan, to the lecture by Lord Nicholls already cited, and to Berg, "Thrashing Through the Undergrowth" (2006) 122 L.Q.R. 354.

[100] In the present case, the correct approach was to regard the MSA and the JVA as parts of one overall joint venture agreement. In the context of a set of documentation signed at the same time by effectively the same parties, it was unrealistic to construe the MSA in isolation. Part of the factual matrix was the terms of the JVA. The JVA described the MSA as "ancillary" (clause 3.1(b)). It would be natural to construe an ancillary agreement along with and in the context of the principal agreement.

[101] There was no dispute that the JVA made the recovery of costs by the pursuers conditional on the deal completing. The parties had gone into detail on the nature of those costs, and when they were to be recovered: Schedule 5A and clauses 3 and 13. The parties were agreed that the mechanism through which the costs would become payable was the JVC (the defenders), and provision was then made as to how and when that would be achieved. The mechanism of the parties "procuring" payment was employed simply because the JVC was not itself a party to the JVA.

[102] The JVA made specific provision as to what was to happen if the contract did not complete. Although there was no provision which expressly stated what was to happen to costs in the event of non-completion, the treatment of costs in that event was an inevitable consequence of the conditional nature of the payment provisions. In addition, the JVA specifically provided that the parties would procure that on non-completion the JVA would automatically terminate and that the parties would forthwith terminate the MSA (clause 2.2). The joint venturers had therefore agreed that if the conditions precedent were not satisfied, both the JVA and the "ancillary" MSA would come to an end. When that was considered together with the conditional nature of the payment of costs under the JVA and the payment mechanism, it was plain that the intention of the parties was that the costs would be payable only in the event of completion. To interpret a provision for incidental outlays as entitling the pursuers to recover major sums prior to completion would set at naught much that was carefully included in the JVA. The court should prefer a construction which made sense of the provisions as a whole, rather than one which led to conflict, or one which made the provisions on costs in the JVA largely redundant.

[103] The defenders' construction was consistent with the exchanges between Mr Robertson and Mr Pierotti in November 2004. Subsequent conduct could shed light on what the parties to a contract intended: Scottish Law Commission, Report on Interpretation in Private Law (Scot. Law Com. No. 160, 1997), paras. 2.24 et seq; Cameron (Scotland) Ltd v Melville Dundas Ltd 2001 S.C.L.R. 691. In addition, the pursuers' pleadings repeatedly accepted that the JVA regulated the position on costs "until the events described in clause 13.2 occurred, or, if they did not, for so long as the JVA itself continued in existence". On that basis, the MSA could not entitle the pursuers to payment of costs while the JVA remained in force. If, as was agreed, the MSA was terminated at the same time as the JVA, there could be no right, accrued or otherwise, to payment of costs under the MSA.

[104] The defenders also maintained that it would have made no commercial sense for ASP or the defenders to agree that they would pay costs of the type in question regardless of whether or not the contract became unconditional. The pursuers would be in control of the costs. It was known that the costs were likely to be very substantial. It would make no commercial sense for another party to entrust complete control of such substantial costs to the pursuers and to agree, in advance, to meet those costs even if the pursuers failed to get the planning consent, which was a central pillar of the conditions precedent. It was the developer, rather than the landowners, who was best placed to assess risk, particularly in relation to obtaining planning consent, and to bear the risk that consent would not be obtained. It appeared to be suggested that had the landowners not entered into a joint venture or similar arrangement, they would have had to do everything themselves - but then they would have had control of the process, and of the costs being incurred. On the pursuers' interpretation, the landowners wrote what was close to being a blank cheque.

[105] In discussion, it was accepted that, if the pursuers had a right to payment under the MSA prior to the termination of that agreement on 5 December 2005, that right would remain enforceable after that date.

(b) The counterclaim

[106] Rectification was a flexible and wide-ranging remedy, restricted only by the words of the statute. It was not confined to errors of expression, but could correct more substantial defects: Bank of Scotland v Graham's Trustee 1993 S.L.T. 252 at page 255 per Lord President Hope. Common intention was to be determined objectively: Rehman v Ahmad at page 752 per Lord Penrose. Agreement could be reached over a period of time, for example through a process of exchange of documents: Rehman v Ahmad at page 751. The fact that a document had been read and approved prior to execution did not make rectification impossible: Renyana-Stahl Anstalt v MacGregor at page 1258 per Lord Macfadyen. The fact that terms were re-negotiable did not prevent the parties from being ad idem unless and until their agreement on those terms was departed from: Huber (Investments) Ltd v Private DIY Co Ltd. An "agreement", within the meaning of section 8, need not be legally binding: Shaw v William Grant (Minerals) Ltd; Joscelyne v Nissen at page 98.

[107] In the present case, agreement on the question of costs, and on the question at whose risk the costs would be, was reached in July 2002 by way of the e-mail exchange between Mr Scott and Peter Lawson. At no time thereafter was any indication given by or on behalf of the pursuers that they had changed or intended to change their position so as to depart from that agreement. In addition, the parties continued to negotiate on the way in which costs were to be described in the JVA so as to give effect to that agreement. The details supporting the agreement in principle continued to be discussed and negotiated up until the date of signing of the JVA. That was consistent with such an agreement remaining in place and, on the face of it, was inconsistent with the proposition that there had been any change. The pursuers' contention would have to be that at one and the same time parties were thrashing out the details of their prior agreement on costs for the purpose of inserting them in the principal agreement, while at the same time they were entering into a very different agreement as a subordinate (or ancillary) agreement. That was a scarcely tenable proposition.

[108] It was clear that the parties viewed negotiations as being a single process leading to the conclusion of "joint venture arrangements". Accordingly, the presence of a third participant (the JVC, now the defenders) did not detract from the argument. For practical purposes, the JVC remained a creature of ASP throughout. It was a matter of agreement in the pleadings that Burness represented both ASP and the JVC throughout. A common intention could be attributed to ASP and the JVC.

[109] If such a dramatic turnaround over such a large sum of money was to be envisaged, it was surprising that plain and straightforward words to that effect were nowhere to be found. One might also note the evidence that, in the negotiation of the terms of a joint venture, one would normally expect to see any significant change identified and brought forward for discussion. There was no sign of that having been done. The MSA was presented as being boilerplate: in other words, a standardised or usual form of words. Gordon Lawson clearly had a particular view of how matters could properly be conducted in order to achieve a business objective. He accepted that the JVA was structured in such a way that recovery of costs was conditional on completion, that it recorded that the JVA and MSA should fall in the event of non-completion, and that the details of those costs continued to be discussed and negotiated almost up to signing. His view was that the pursuers were entitled to continue to negotiate with their joint venture partners on that basis, safe in the knowledge that, in the MSA, there was a provision which not only entitled them to recover their costs if completion did not take place, but indeed entitled them to recover their costs at any time after the MSA was signed. He accepted that he was content for the pursuers knowingly to sign two contradictory documents at the same time in relation to one project. It was ultimately not in dispute that the JVA was structured to make recovery of costs conditional on completion and to make both principal and ancillary agreements fall on non-completion whereas, according to the pursuers, under the MSA an entitlement to payment of those self-same costs arose immediately, and was unconditional.

[110] Even leaving aside the moral dimension to behaviour of that kind, a party who decided not to raise a point

overtly ran the risk that, on an objective consideration of the evidence, no material would be found to support the suggestion that any change was ever made. The courts had shown themselves willing to approach commercial disputes in a manner which would, in some cases, prevent a party playing a "dirty trick" on the other. The court should be reluctant to adopt an approach which would allow such a result. Reference was made to Alpha Trading Ltd v Dunnshaw-Patten Ltd [1981] Q.B. 290 at page 306 per Templeman L.J., Thomson v Thomas Muir (Waste Management) Ltd 1995 S.L.T. 403, Anderson v Commercial Union Assurance Co plc 1998 S.C. 197 and Glasgow City Council v Caststop Ltd 2002 S.L.T. 47.

[111] The entire agreement clause was not a bar to rectification. The question was whether the document correctly reflected the parties' agreement. If, on the evidence, it did not, an entire agreement clause did not oust the court's jurisdiction to order the rectification of the document. The case of Inntrepreneur Pub Co (GL) v East Crown Ltd was not concerned with rectification; neither were Exxonmobil Sales and Supply Corp v Texaco Ltd [2003] 2 Lloyd's Rep. 686, SERE Holdings Ltd v Volkswagen Group UK Ltd [2004] EWHC 1551 (Ch.) or Ravennari SpA v New Century Shipbuilding Co Ltd [2006] EWHC 733 (Comm.). The defenders' argument was supported by J J Huber (Investments) Ltd v Private DIY Co Ltd.

Discussion

(a) The principal action

(i) The terms of the MSA

[112] Without overlooking the importance of context to the interpretation of a contract, it is often useful to begin by considering the words which the parties have used to express their agreement (cf. Bank of Scotland v Dunedin Property Investment Co Ltd at page 661 per Lord President Rodger, following Charter Reinsurance Co Ltd v Fagan at page 384 per Lord Mustill). In the present case it appears to me to be useful to begin by considering the terms of the MSA.

[113] Under clause 2.1 the pursuers are to provide to the defenders the services listed in Part 1 of the Schedule. In return, the defenders are required under clause 4.1 to pay the pursuers a fee "in consideration of the performance by you of the Services". The presence of the words "by you" suggests that the Services are to be provided by the pursuers themselves: otherwise those words need not be present. Under clause 3.2, the pursuers warrant and undertake that they are and will remain competent to perform the obligations imposed on them by the contract: they therefore warrant, in particular, that they are competent to perform the Services themselves, without requiring the assistance of third parties. Clauses 5.1 and 5.2 in addition prohibit the pursues from assigning or transferring their rights or obligations under the contract, or sub-contracting the performance of the Services, without the defenders' prior written consent; and there is no suggestion that such consent was given in the present case. Clause 6.1 gives retrospective effect to the provisions of the MSA, so that they apply from the date when the pursuers began to perform any services falling within the scope of the Schedule.

[114] Considering clause 4.5 in that context, it provides:

"In supplement of the foregoing JVCo shall free and relieve you on demand of all outlays reasonably required to be made by it as an incident of the performance of its obligations hereunder and the provision of the Services".

The words "it" and "its" must be a mistake: the defenders could not sensibly be undertaking to relieve the pursuers of outlays which the defenders had themselves made. Those words must be understood as meaning "you" and "your". So understood, clause 4.5 entitles the pursuers to be relieved of the outlays reasonably required to be made by them as an incident of the performance of their obligations under the contract. Those outlays cannot in my opinion include the cost of their paying third parties to perform the Services in whole or in part, since, for the reasons already explained, the contract envisages that the Services will be performed by the pursuers alone. Nor could such costs be described in that context, in my opinion, as "an incident of the performance of [the pursuers']

obligations hereunder and the provision of the Services". The contrary interpretation would have the unreasonable consequence, if the project proceeded, that the defenders would be obliged to pay the pursuers the entire fee due for the performance of the Services, and in addition would be obliged to meet the very substantial costs which the pursuers had incurred in employing third parties to assist them, because of their own inability to perform the Services without assistance.

[115] Nothing in the remaining provisions of the MSA supports any different interpretation. On the contrary, the provisions of the Schedule, in particular, are consistent with that interpretation. Paragraph 1.1 envisages that other professional advisers will also be appointed by the defenders; and it is apparent from other provisions (e.g. paragraphs 2.1, 4.1, 5.2, 7.1, 8.1-8.4, 10.1-10.3, 12.2, 13.1-13.2 and 14.1-14.2) that the pursuers may work in conjunction with such other professional advisers. It is not however envisaged that the pursuers will themselves engage or pay such advisers, or that such advisers will be engaged in "the performance of [the pursuers'] obligations hereunder and the provision of the Services", in terms of clause 4.5.

[116] Paragraph 6.5 requires the pursuers to "check and recommend applications for payment made by those of the Professional Advisers who are employed by the Employer", and paragraph 6.7 requires the pursuers to "check that those of the Professional Advisers who are employed by the Employer prepare final account and agree settlement": there is no suggestion that the pursuers will themselves pay the professional advisers. Paragraph 6.6 requires the pursuers to "check and recommend other relevant invoices to the Employer": again, it is not suggested that the pursuers are themselves to pay the invoices. The only exception to this general pattern, in relation to the instruction of other professional advisers, appears in paragraphs 15.1 and 15.2. Paragraph 15.1 requires the pursuers on behalf of the defenders to instruct letting agents approved by the defenders "to promote the Project and market vacant parts of the Site (as developed)", and paragraph 15.2 requires the pursuers on behalf of the defenders to instruct solicitors and agents approved by the defenders "to effect lettings of vacant parts of the Site (as developed)". There is no suggestion that either provision is applicable on the facts of the present case; but what is significant, for present purposes, is the specific provision in paragraph 15.2 that the defenders "shall, upon demand, free, relieve and fully indemnify the [pursuers] in respect of all costs, fees and others incurred by the [pursuers] to such letting agents and solicitors pursuant to such instructions". That provision would be unnecessary if clause 4.5 had the meaning for which the pursuers contend. It is necessary, in the only section of the Schedule which provides for the pursuers to instruct third parties, because the general position under the contract is that the pursuers are not authorised to instruct other professionals (let alone, to instruct other professionals to perform the Services), and cannot therefore recover the cost of instructing such professionals under clause 4.5 as incidental outlays.

[117] That being the meaning of the MSA, if its provisions are considered in isolation, the pursuers rely on certain aspects of the factual background to support their claim. In particular, they rely on evidence that, notwithstanding clause 3.2, the pursuers were known by the defenders not to be competent to perform certain of the obligations imposed on them; that, notwithstanding clauses 5.1 and 5.2, it was understood that the pursuers would sub-contract the performance of part of the Services without obtaining the defenders' prior written consent; that, notwithstanding clause 6.1, it was understood that many of the Services had already been performed by other professionals instructed by the pursuers, without the defenders' prior consent; that, notwithstanding paragraph 1.1 of the Schedule, it was understood that the necessary professional advisers would be instructed (and that many had already been instructed) by the pursuers; and that, notwithstanding paragraphs 6.5, 6.6 and 6.7, it was understood that the pursuers would themselves pay the professional advisers and meet other relevant invoices, and that they had already done so in respect of substantial sums. It is against that background that the pursuers advance the somewhat audacious proposition that a reasonable person would interpret clause 4.5 as entitling them to recover, as outlays, the fees which they had paid to professionals whom they had instructed to perform part of the Services on their behalf, or to assist them in performing the Services, in addition to their being entitled under clause 4.1 to receive the fee payable as remuneration for the performance of the Services.

[118] In reality, therefore, the pursuers' claim under clause 4.5 does not depend merely upon the interpretation of the MSA against its factual background. It proceeds on the basis that the terms of the MSA do not reflect the agreement between the parties. It requires the court to accept that there was in reality a different agreement between the parties, under which the pursuers were to be remunerated for services which lay beyond their own competence, and which had been, or were to be, performed wholly or in part by third parties instructed and paid by the pursuers. The court cannot however proceed on the basis that an agreement was entered into on materially different terms from those of the MSA simply as a matter of interpretation of the MSA. It may be that the pursuers might have sought the rectification of the MSA if, as they maintain, its terms do not reflect the common intention of the parties; or it may be that other remedies might have been available if there was in reality no consensus between the parties. These are matters which need not be considered at present. The present action is concerned with the interpretation of the MSA as it stands; and the pursuers' case requires the court to go beyond the limits of interpretation, since the terms of the MSA cannot be interpreted as conveying the meaning for which the pursuers contend. The disparity between the terms of the MSA and the agreement which the pursuers seek to establish is not simply a matter of syntax or choice of words, of the kind exemplified by Mannai Investment and discussed by Lord Hoffmann in the Investors Compensation Scheme case at page 913, where the intended meaning would be clear, notwithstanding its infelicitous expression, to a reasonable person aware of the background circumstances. As Lord Mustill observed in Charter Reinsurance Co Ltd v Fagan at page 388,

"There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for the court".

On that short basis, the pursuers' claim for reimbursement of professional fees falls to be dismissed.

[119] There is however one element in the pursuers' claim which requires separate consideration, namely their claim for reimbursement of planning application fees totalling £11,090. Although it was not suggested in argument that those fees might require to be considered separately from the professional fees to which the remainder of the claim relates, that appears to me to be the position, for two reasons. First, paragraph 6.4 of the Schedule to the MSA requires the pursuers to "check ....fees for statutory approvals and arrange payments". (emphasis added). No reference was made to this provision in the parties' submissions. At first sight, the phrase "fees for statutory approvals" might include planning application fees. Paragraph 6 is however headed "Construction Economics and Financial Management", and it deals with the preparation of tender documentation (paragraph 6.1), variations (paragraph 6.2) and final costs (paragraph 6.3). In that context, paragraph 6.4 would appear to be concerned with statutory approvals during the construction phase of the project, rather than with the initial obtaining of planning permission. That impression is strengthened when one sees that planning approvals are dealt with separately in paragraph 8. In the circumstances, and bearing in mind that no reliance was placed by counsel for the pursuers on paragraph 6.4, I need not consider it further.

[120] Secondly, however, the argument which I have accepted, that clause 4.5 cannot be interpreted (whatever the factual background might be) as entitling the pursuers to be reimbursed professional fees paid to third parties for performing the Services, does not apply to the planning application fees. The only question is whether those fees are "outlays reasonably required to be made by [the pursuers] as an incident of the performance of [their] obligations hereunder and the provision of the Services". Paragraph 8 of the Schedule requires the pursuers to provide services in relation to planning. In particular, in relation to applications for planning permission, paragraph 8.2 requires the pursuers to

"Check....the form and content of planning applications. Progress the planning process and arrange that a check of all approval/refusal documents is carried out by the project team. Check that Professional Advisers implement and deal with any conditions attached to a planning consent".

That paragraph does not expressly impose any duty upon the pursuers in relation to the submission of planning applications (whereas paragraph 8.3, in relation to other statutory approvals, requires them to check that applications for approval are submitted). Nor does it state that they are required to pay planning application fees: an obligation which, if it were to be imposed, one would expect to see stated expressly. Nevertheless, the words "progress the planning process" are arguably wide enough to be capable of being interpreted as meaning that the pursuers were to submit the planning application and to pay the appropriate fee, if that was a reasonable interpretation to place on those words in the light of the surrounding circumstances. In respect of that limited aspect of the pursuers' claim, therefore, it appears to me that the factual background might in principle be capable of supporting the pursuers' interpretation, and accordingly requires to be considered.

[121] Finally, in relation to the terms of the MSA, in the preceding discussion I have not questioned the premise of the pursuers' argument, namely that the performance of the services set out in the Schedule (specifically, those described in paragraphs 2.1, 8.1-8.3, 9.1 and 13.1) would require them to engage external professional assistance. That proposition was based particularly on the evidence of Mr Ross, which I have summarised, and on the evidence of other witnesses to the effect that the instruction of architects, traffic engineers and other professional advisers was understood to be the responsibility of the pursuers. That evidence does not however appear to me to support the proposition advanced in argument. Paragraph 2.1, for example, does not require the pursuers to prepare the design brief single-handed, but to "co-ordinate with the Professional Advisers and oversee the preparation of the design brief". The evidence does not suggest that the performance of a service described in those terms lay beyond the competence of the pursuers: on the contrary, that was the type of service which Peter Lawson envisaged the pursuers as performing.

[122] Similarly, paragraphs 8.1 to 8.3 do not require the pursuers to undertake obtaining planning permission without the involvement of other members of the design team. Paragraph 8.1 requires them to "co-ordinate and support negotiations with planning authorities"; and paragraph 8.2 requires them to "check ... the form and content of planning applications", to "progress the planning process and arrange that a check of all approval/refusal documents is carried out by the project team", and to "check that Professional Advisers implement and deal with any conditions attached to a planning consent". Paragraph 8.3 similarly requires the pursuers to check other matters with the Professional Advisers. Although it is apparent that other professional advisers would be involved in the process of obtaining planning permission, they would not be performing the services required of the pursuers under these provisions: the pursuers were being paid a fee for acting as project managers, not for acting as architects or engineers.

[123] The same point arises in relation to paragraph 13.1: it does not require the pursuers to prepare fitting-out drawings or specifications, but rather "in conjunction with the Professional Advisers ... [to] procure the preparation of drawings, specifications or other documentation". As previously explained, the appointment of those professional advisers was not the responsibility of the pursuers under the MSA: under paragraph 1.1, their responsibility was to advise the defenders in relation to such appointments.

[124] In the context of the MSA, it appears to me that paragraph 9.1 similarly has a more limited scope than was assumed in the pursuers' submissions. Considered in isolation, an obligation to

"Obtain information on ownership and any lessees of the Site, existing buildings, boundaries and any known easements, underground services, rights of way, rights of support and other relevant matters"

might be thought to require legal expertise, as Mr Ross suggested. Paragraph 9.2 however requires the pursuers to "assist the Employer and its solicitors in negotiating the acquisition of any parts of the Site not under the Employer's control and ancillary property rights"; so it is apparent that the defenders will be instructing solicitors, who will deal with the acquisition of any necessary real rights. Paragraph 15.2 similarly envisages that solicitors will be instructed to deal with lettings. More fundamentally, it has to be borne in mind that the pursuers were known to the other party to the MSA to be property developers, not lawyers, and that the professional skill required of them

under clause 3.1 was "such ... as may reasonably be expected from [a] suitably and properly qualified project manager". In that context, paragraph 9.1 cannot in my opinion sensibly be construed as requiring the pursuers to research conveyancing deeds and the law governing heritable property. In requiring the pursuers to "obtain information" about the ownership of the Site, leases and related matters it must be intended to refer to the type of information which a project manager such as the pursuers could reasonably be expected to obtain through their own enquiries.

[125] For these reasons also, therefore, it appears to me that the pursuers' claim under clause 4.5 is based on a mis-reading of the MSA, which places a meaning upon the agreement that its terms cannot fairly bear.

(ii) The "entire agreement" clause
[126] Before considering the factual background, it is necessary first to consider the effect of clause 6.2 of the MSA:

"This Appointment supersedes any previous arrangements between the parties in respect of the Services (whether oral or written) and represents the entire agreement between the parties in relation to the Services."

[127] Provisions of this kind, commonly referred to as "entire agreement" clauses, have not been the subject of judicial discussion in Scotland, so far as appears from the authorities cited to me. They have however been discussed in recent years in a number of cases in England. They are also the subject of section 1(3) of the Contract (Scotland) Act 1997, and were considered by the Scottish Law Commission in the Report which preceded that Act (Report on Three Bad Rules in Contract Law, Scot. Law Com. No.152, 1996).

[128] In their Report, the Commission stated (at paragraph 2.29):

"'Entire contract' clauses do not in our view raise questions of evidence so much as questions of substance. The 'entire contract' clause is either an accurate reflection of the agreement between the parties or it is not. If it is, then the terms of the document necessarily supersede any prior terms and, as a matter of substance, the only terms of the contract as at the time of execution are the terms set out in the written document. Evidence of a prior term would simply be evidence of a superseded term and, as such, would be irrelevant. If, on the other hand, the 'entire contract' clause is not an accurate reflection of the agreement between the parties then the remedy is rectification. Of course, an 'entire contract' clause may also be challengeable under the common law on fraud or under the Unfair Contract Terms Act 1977 or the Unfair Terms in Consumer Contracts Regulations 1994. However, if unrectifiable and unchallengeable, it ought simply to take effect according to its terms. Nonetheless, although we do not consider that any special provision on 'entire contract' clauses is necessary, the very fact that this issue was raised by some consultees suggests that there could be value in including a provision, for the avoidance of doubt, preserving the effect of such clauses."

That approach is reflected in section 1(3) of the 1997 Act, which provides that where one of the terms in a document is to the effect that the document does comprise all the express terms of the contract, that term shall be conclusive of the matter.

[129] Entire agreement clauses may have a bearing on a number of significant contractual issues. Such a clause may, for example, be intended to exclude any argument that there is some collateral contract or term, or some implied term arising from custom or usage, which does not appear in the contract; or it may be intended to exclude any argument that evidence extrinsic to the contract should be considered in its construction; or it may be intended to have other effects (e.g. to exclude claims for misrepresentation, or to exclude any common law duty of care). The effect of any particular clause will depend upon its terms.

[130] An entire agreement clause in similar terms to that in the MSA was considered by Lightman J in Inntrepreneur Pub Co (GL) v East Crown Ltd. After reviewing the earlier authorities, his Lordship observed (at page 614):

"[S]uch a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document ... [I]t constitutes an agreement that the full contractual terms to which the parties agree to bind themselves are to be found in the agreement and nowhere else and that what might otherwise constitute a side agreement or collateral warranty shall be void of legal effect. That can be the only purpose of the provision."

That approach was followed by Park J in Inntrepreneur Pub Co (CPC) v Sweeney [2002] 2 E.G.L.R. at pages 139-140. At the same time, such a clause would not in my opinion exclude terms which required to be implied in order to make the express terms work (cf. Exxonmobil Sales and Supply Corp v Texaco Ltd). Questions might also arise, which I need not consider, as to the effect of such a clause on terms implied by statute.

[131] In the present case, the terms of the entire agreement clause appear to me to preclude any argument that the terms of the parties' agreement are partly to be found outside the MSA. In that regard, I respectfully agree with the judgments cited in the preceding paragraph. On the other hand, the terms of the clause do not appear to me to be apt to bar consideration of the surrounding circumstances for the purpose of interpreting the agreement contained in the MSA. I note that that conclusion is consistent with the decision of the Court of Appeal in Proforce Recruit Ltd v The Rugby Group Ltd (a decision which however only determined arguability), and with the earlier judgment of the New Zealand Court of Appeal in Air New Zealand Ltd v Nippon Credit Bank Ltd [1997] 1 N.Z.L.R. 218 at page 224.

(iii) The MSA in context

[132] I therefore consider next the interpretation of the MSA in the context of the surrounding circumstances. In doing so, I shall consider all aspects of the pursuers' claim, in case my conclusion that clause 4.5 of the MSA cannot be interpreted as entitling the pursuers to the reimbursement of professional fees paid to third parties for their assistance in performing the Services is mistaken.

[133] The question arises, which surrounding circumstances are relevant? In that regard, counsel for the pursuers relied on the opinion of Lord Wilberforce in Prenn v Simmonds. In his opinion, with which the other members of the Appellate Committee expressed their agreement, Lord Wilberforce said at page 1384, under reference to the judgment of Lord Blackburn in River Wear Commissioners v Adamson (1877) 2 App.Cas. 743 at page 763:

"We must, as he said, inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view".

Lord Wilberforce however rejected a contention that prior negotiations could be considered as an aid to the construction of a written document, concluding (at page 1385):

"In my opinion, then, evidence of negotiations, or of the parties' intentions, and a fortiori of [one party's] intentions, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction".

In relation to the "aim" of the transaction, Lord Wilberforce had earlier acknowledged (ibid):

"It may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true: the commercial, or business object, of the transaction, objectively ascertained, may be a surrounding fact".

When Lord Wilberforce's judgment is read as a whole, it appears that, in stating that "evidence of negotiations ... ought not to be received", his Lordship may not have intended to exclude evidence concerning things said or

written in the course of the parties' negotiations which were relevant to establishing "the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction". I note that that was also the conclusion reached by Lord President Hope in Bovis Construction (Scotland) Ltd v Whatlings Construction Ltd at page 357.

[134] Lord Wilberforce returned to this subject in Reardon Smith Line Ltd v Hansen-Tangen [1976] 1 W.L.R. 989 at pages 995-996:

"No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating ....

When one speaks of the intention of the parties to the contract, one is speaking objectively - the parties cannot themselves give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties".

After referring to the speeches in Charrington & Co Ltd v Wooder [1914] A.C. 71, his Lordship continued, at page 997:

"I think that all of their Lordships are saying, in different words, the same thing - what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were. All of these opinions seem to me implicitly to recognise that, in the search for the relevant background, there may be facts which form part of the circumstances in which the parties contract in which one, or both, may take no particular interest, their minds being addressed to or concentrated on other facts so that if asked they would assert that they did not have these facts in the forefront of their mind, but that will not prevent those facts from forming part of an objective setting in which the contract is to be construed".

[135] Lord Hoffmann summarised the principles emerging from these speeches of Lord Wilberforce in the Investors Compensation Scheme case at pages 912-913:

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them."

[136] In relation to the boundaries of the exception, it is also necessary to note the opinion of Lord President Rodger in Bank of Scotland v Dunedin Property Investment Co Ltd, where, after referring to prior authorities including Prenn v Simmonds, Bovis Construction (Scotland) Ltd v Whatlings Construction Ltd and the Investors

Compensation Scheme case, his Lordship observed (at page 665):

"As these authorities demonstrate, the rule which excludes evidence of prior communings as an aid to interpretation of a concluded contract is well-established and salutary. The rationale of the rule shows, however, that it has no application when the evidence of the parties' discussions is being considered, not in order to provide a gloss on the terms of the contract, but rather to establish the parties' knowledge of the circumstances with reference to which they used the words in the contract."

I respectfully agree with that observation.

[137] I note that the question whether the rule excluding evidence of previous negotiations and of subjective intent should be relaxed has become the subject of debate in recent years, not only in the jurisdictions of the United Kingdom but also in other common law jurisdictions. That debate is reflected in some of the authorities (e.g. Bank of Credit and Commerce International SA v Ali at paragraph 31 per Lord Nicholls of Birkenhead), as well as in the lectures and articles which were cited. It is unnecessary for me to enter into that debate, since my conclusion would be the same whether or not the existing rule were to be relaxed. In the circumstances, I can confine myself to the approach laid down in the authorities to which I have referred.

[138] One important surrounding circumstance, in relation to the construction of the MSA, is that it formed only one part of a larger transaction: the "entire agreement" clause does not require one to close one's eyes to that fact, since one can take account of that fact as an aid to interpretation without seeking to establish some wider or collateral contract between the parties to the MSA. To construe the MSA as if it were a separate and independent transaction, standing alone, would be unreal. The transaction was of a composite nature: a number of inter-related steps, including the execution of a series of contracts, were to be taken on the same date in order to establish a joint venture for the development of the site in question, each step being taken on the basis that the others would also be taken. Those steps included, in particular:

(i) the execution of the JVA by Mr MacDonald and Mr Stewart on behalf of the pursuers and ASP respectively;

(ii) the establishment of the defenders as a wholly-owned subsidiary of ASP in accordance with clause 3.1(h) and (j) of the JVA;

(iii) the entering into of the Asset Transfer Agreement between ASP and the defenders, whereby properties valued at £4m were to be transferred from ASP to the defenders, in accordance with clause 3.1(k)(i) of the JVA; and

(iv) the execution of the MSA, in terms agreed by the pursuers and MSA, by Mr MacDonald and Mr Stewart on behalf of the pursuers and the defenders respectively, in accordance with clause 3.1(k)(ii) of the JVA.

[139] Since that composite transaction forms the factual context in which the MSA was entered into, the other elements of that transaction, including the JVA, can be referred to as an aid to the construction of the MSA. In particular, the MSA should if possible be construed so that it and the JVA fit together to form consistent elements in the overall transaction, rather than conflicting with each other.

[140] Considering the terms of the JVA, I accept that the recitals are relevant, since any contract must be construed as a whole. At the same time, it is necessary to bear in mind that recitals are usually in more general terms than the operative parts of the contract. In the present case, the recitals indicate that ASP has established the JVC, that the JVC is to acquire rights and assets, and to be established and to carry on business, in the manner set out in the JVA, that upon satisfaction of the conditions precedent the pursuers are to subscribe for shares in the JVC, and that the relations of the pursuers and ASP as shareholders in the JVC are to be governed by the JVA. In general terms, that is a reasonable summary of the aims of the JVA, although it is apparent from the remainder of the JVA that those recitals are not an exhaustive account of its terms. Even the recitals however indicate that the purpose of the JVA was not confined to the two matters specified by counsel for the pursuers in his submissions, namely to determine the events in which the pursuers and ASP would become joint shareholders

in the JVC, and to regulate their relationship as joint shareholders thereafter.

[141] Turning to the operative provisions of the JVA, it is common ground that the costs with which the present case is concerned fall within the scope of clause 13.2. That clause is a detailed provision, in terms of which the pursuers are to be

"responsible for all planning and professional fees and other associated costs incurred in furthering the Development from 1 June 2002 until detailed planning permission is achieved ... to the extent that those matters were instructed by any of (i) the JVC with the knowledge and consent of ME, (ii) ME or (iii) ASP with the knowledge and consent of ME".

The costs in question are specified, for the avoidance of doubt, as including those listed in Schedule 5A: namely, architect, structural engineer, planning fees, planning consultant, services engineer, traffic consultant, quantity surveyor, environmental consultant, topographical surveys and legal costs. They therefore cover all the costs which the pursuers seek to recover in the present proceedings. Clause 13.2 continues:

"If each of the Conditions precedent described in clause 2 is fulfilled or waived and Completion is effected in terms of clause 3 then the JVC shall become responsible for such costs and shall reimburse ME in accordance with clause 3.3(g) ...".

Although those words do not state in terms what is to happen if the conditions precedent are not fulfilled, the plain implication is that the obligation of the JVC to reimburse the pursuers is contingent on the fulfilment or waiver of the conditions precedent. That is equally the implication of clause 3.3(g), which includes, in a list of events that are to take place within ten days after the fulfilment or waiver of the conditions precedent, that "the parties shall procure that the JVC shall reimburse ME for the ME costs incurred in terms of clause 13.2".

[142] That being the meaning of the detailed provision of clause 13.2 of the JVA, it would be unreasonable to construe the general language of clause 4.5 of the MSA ("JVCo shall free and relieve you on demand of all outlays reasonably required to be made by [the pursuers] as an incident of the performance of [their] obligations hereunder and the provision of the Services") as requiring the defenders to reimburse the identical costs regardless of the fulfilment or waiver of the conditions precedent. It would make no sense for the JVA to provide for reimbursement by the defenders only in the event that the conditions were fulfilled or waived within a three year deadline, if the MSA entitled the pursuers unconditionally to immediate reimbursement. It would equally make little commercial sense for the JVA to provide for reimbursement by the defenders at a time when fifty per cent of their share capital was held by the pursuers, if the MSA entitled the pursuers to payment by the defenders at a time when they were a wholly-owned subsidiary of ASP. These conclusions are fortified by a number of other considerations.

[143] First, it is apparent from the terms of the JVA that its terms and those of the MSA must have been intended to be consistent with one another, rather than contradictory. Clause 2.2(iii) of the JVA refers to the MSA; Schedule 1 defines the expression "ME Management Services Agreement" as meaning "the management services agreement in the agreed form between ME and JVC to be entered into of even date or near even date herewith", and defines the expression "in the agreed form" as referring to "a document agreed by the parties", i.e. by the pursuers and ASP; and clause 3.3(g) describes the MSA as being ancillary to the JVA.

[144] Secondly, the JVA expressly envisages that the pursuers will instruct professional advisers for the purpose of securing the fulfilment of the conditions precedent (i.e. planning permission, site assembly and pre-letting): that is apparent from clause 3.3(i) as well as clause 13.2. The necessity for the pursuers to instruct such advisers arises from their obligation, under clause 2.2, to procure that the conditions precedent are fulfilled, and from their inability to do so without assistance (a factual circumstance of which both parties to the JVA were aware). As I have discussed, the JVA also makes express provision for the circumstances in which the costs incurred by the pursuers in respect of those instructions will be reimbursed by the defenders. The MSA, on the other hand, does not envisage that the pursuers will instruct professional advisers to assist them in the performance of the specified

services; nor, when the services are carefully examined, is it apparent that they would require such assistance; and the pursuers had in any event warranted their own competence to perform those specific services. In those circumstances, the instruction of professional advisers by the pursuers for the purpose of securing planning permission, site assembly and pre-letting, and responsibility for the fees incurred in that regard, can be understood as being matters falling within the scope of the JVA rather than of the MSA.

[145] It is also necessary to note the final part of clause 13.2, which follows the words previously quoted:

"... except that project management costs incurred by ME may be invoiced by ME after Completion and will be repaid within 30 days of invoice date."

Nothing was made of those words in parties' submissions; and the relationship between those words and the earlier part of the clause is not clear. It is however apparent that "project management costs" are intended to fall within the scope of clause 13.2, and that they are to be invoiced by the pursuers after the conditions precedent have been fulfilled or waived. The expression "project management costs" is not defined. In the context of clause 13.2, the expression must be intended to cover costs incurred by the pursuers prior to the grant of detailed planning permission. In that context, the words "project management" could be understood as referring to the management of the project during the period when the pursuers are responsible (under clause 2.2) for securing planning permission, site assembly and pre-letting. On that construction, it might be argued that there is an overlap with the MSA, which also uses the concept of a project manager to describe the pursuers' duties (in clause 3.1). So understood, however, the final words of clause 13.2 of the JVA are a further indication that it is only after the fulfilment or waiver of the conditions precedent that invoices are to be submitted and paid.

[146] Accordingly, even if it were not clear from the terms of the MSA alone, as I consider it to be (except possibly in relation to the planning fees), that the pursuers are not entitled to recover the costs in question as "outlays" under clause 4.5, regardless of whether planning permission was obtained, it appears to me in any event that that is clearly the correct interpretation when regard is had to the surrounding factual circumstances, including in particular the terms of the JVA.

[147] Finally, although I do not require to rely on this principle, I note that the construction of contracts according to what a reasonable person would have understood is not value-free: since the reasonable person is honest, the law is able to give effect to what have been described as the reasonable expectations of honest people (Lord Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 L.Q.R. 433; Lord Nicholls of Birkenhead, "My Kingdom for a Horse: the Meaning of Words" (2005) 121 L.Q.R. 577, 580). In different language, the reasonable person will tend to expect a result which is just rather than unjust (Australian Broadcasting Commission v Australian Performing Right Association Ltd (1973) 129 C.L.R. 99 at pages 109-110 per Gibbs J), fair rather than unfair (Laura Investment Co Ltd v Havering London Borough Council [1993] 1 E.G.L.R. 124 per Hoffmann J). In the present case, an honest person in the position of the pursuers, having agreed to clause 13.2 of the JVA, would not in my opinion have expected to be able to recover the same costs, without being subject to the same conditions, under clause 4.5 of the MSA.

(b) The counterclaim

[148] If my conclusion in respect of the principal action is correct, then it is unnecessary for the defenders to seek the rectification of the MSA, and the counterclaim should therefore be refused. I require nevertheless to consider the counterclaim, on the hypothesis that my conclusion as to the interpretation of the MSA is mistaken.

[149] Rectification is sought by the defenders under section 8(1)(a) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, which provides:

"8-(1) Subject to section 9 of this Act, where the court is satisfied, on an application made to it, that -

(a) a document intended to express or to give effect to an agreement fails to express accurately the common

intention of the parties to the agreement at the date when it was made; or

(b) a document intended to create, transfer, vary or renounce a right, not being a document falling within paragraph (a) above, fails to express accurately the intention of the grantor of the document at the date when it was executed,

it may order the document to be rectified in any manner that it may specify in order to give effect to that intention.

(2) For the purposes of subsection (1) above, the court shall be entitled to have regard to all relevant evidence, whether written or oral".

[150] It appears, from the terms of the additional clause which the defenders seek to have inserted into the MSA, that the claim to rectification proceeds on the basis that there was a common intention, held by the parties to an agreement which the MSA was intended to express or give effect to, that payments by the defenders to the pursuers under the MSA were to be conditional upon, and their timing governed by, the terms of the JVA, and in particular clauses 3.3(g) and 13.2.

[151] Such a claim raises a number of questions in relation to the application of section 8(1)(a). Issues arise, in the first place, from the use of the defenders as a corporate vehicle to give effect to arrangements which had in reality been made by the pursuers and ASP. For example, can the requirements of section 8(1)(a) be met if the "agreement" relied on was made prior to the incorporation of the company which executes the document intended to give it effect, or prior to the acquisition of the company for use as a vehicle? Other issues arise from the nature of the exchanges between the pursuers and ASP, and their respective agents, which could be described in broad terms as a continuing negotiation. Does an "agreement" have to be a legally binding contract? Does there have to be an objectively manifested agreement? Further issues arise from the conduct of the pursuers and their agents: their failure to disclose their change of position, their decision not to draw the attention of Burness to the intended effect of clause 4.5 of the MSA, and the description of the MSA as "boilerplate". If, for example, one party to an agreement knows that the document does not give effect to it, and is content that it should not do so, can it be said that the document is "intended" to give effect to the agreement? Is intention ascertained according to what is in the parties' minds, or on the basis of their words and conduct? Is the situation one in which the mistake is merely one of expression of an agreement, or is it a situation where the agreement itself has been entered into under a mistake? What, finally, is the effect of the "entire agreement" clause in the MSA in relation to rectification?

[152] In considering these questions, which involve fundamental aspects of the law relating to rectification, it is useful to begin with the background to the introduction of the remedy of rectification, in order to understand what it was intended to achieve. Section 8(1)(a), in particular, has its origins in the Scottish Law Commission's Report on Rectification of Contractual and Other Documents (Scot. Law Com. No.79, 1983), which was itself preceded by the Commission's Consultative Memorandum No.43 (1979): Defective Expression and its Correction. That Memorandum began by referring to what the Commission described (at paragraph 2) as

"the problem that arises when parties have reached agreement but their agreement is later recorded inaccurately in the document purporting to be the embodiment of the contract."

The problem arose because of Scots law's failure to provide a suitable remedy. Although patent defects in expression could be "cured" by construing the document so as to accord with the parties' intentions, latent defects were more difficult to address, particularly because the law of evidence was reluctant to admit extrinsic evidence once a contract had been reduced to writing (the "parole evidence" rule). In order to avoid the application of the parole evidence rule, mistakes in expression tended to be treated as if they were errors in substantialibus, i.e. the type of error which would invalidate a contract and warrant its reduction. With rare exceptions (notably Krupp v Menzies 1907 S.C. 903) the court had declined to grant a remedy where reduction was not available.

[153] The law had been clarified by the House of Lords in Anderson v Lambie 1954 S.C. (H.L.) 43. In that case, as

the result of a mistake, a disposition of property conveyed the entirety of an estate which consisted mainly of a farm, but also included other property. The preceding missives of sale were capable of more than one meaning as to the extent of the subjects to be conveyed. The evidence established that the missives had themselves been preceded by an oral agreement for the sale of the farm alone. Lord Reid observed that the problem arising from this type of mistake in expression could not be resolved by construing the document as it stood, unlike a mistake in expression which was obvious on the face of the document. Equally, this was not a case where an agreement was vitiated by error: "in the present case the error only arose after the parties had reached agreement". There must nevertheless be a remedy: Lord Reid cited Lord President Dunedin's remark, in Krupp v Menzies (at page 908) that "it would be truly a disgrace to any system of jurisprudence if there was no way available of rectifying what would otherwise be a gross injustice". Reversing the judgment of the First Division, the House of Lords held that reduction was an available remedy. In that regard, Lord Reid's first proposition (at page 57) was that:

"In my judgment, if two parties both intend their contract to deal with one thing and by mistake the contract or conveyance is so written out that it deals with another, then as a general rule the written document cannot stand if either party attacks it."

Lord Keith of Avonholm considered (at page 68) that reduction was available in the event of a conveyance or contract "being expressed as regards essentials in different terms from what the parties really intended and had agreed between them".

[154] In relation to reduction, Lord Reid observed (at page 62):

"But, when it is sought to reduce a deed, it is necessary to go behind the deed and discover the real facts. The fact that the parties agreed to the missives is important evidence but it is not the only competent evidence. The question is not what the missives mean: if that were the question, the ordinary rule would apply that the meaning of a document must be found from its terms. The question is whether the real facts are such that the disposition must be reduced, and the existence of the missives does not alter the nature of the inquiry."

In discovering "the real facts", and "what the parties really intended", their Lordships' conclusions were not based on uncommunicated states of mind: Lord Reid concluded (at page 57) that each party had had the same intention and that "each had made that intention clear to the other"; and Lord Keith of Avonholm described the issue as being "what the parties really intended and had agreed between them" (emphasis added).

[155] In Anderson v Lambie, their Lordships made it clear that it was incompetent under Scots law for a defectively expressed document to be corrected by the court so as to give effect to the true agreement between the parties. Lord Reid, for example, stated (at page 61):

"I think that it is equally clear that a Scots court has no power to rectify a disposition or other deed in the sense of altering its terms so as to make them conform to some earlier contract or to the real intention of the parties."

[156] The practical disadvantages consequent on the need for reduction, and the absence of any jurisdiction to rectify defectively expressed documents, were commented on by Lord Maxwell in the later case of Hudson v Hudson's Trustees 1978 S.L.T. 88. The following year the Scottish Law Commission issued their Memorandum. Following consultation, they issued their Report. It appears from the Memorandum, in particular, that the Commission's proposals emerged from a detailed consideration of rectification in English law, where the remedy had long existed. The Commission's proposals generally followed the approach adopted in the English authorities which they discussed (with one exception, in relation to the need for an agreement to have some outward or objective expression, where the Commission appear to me to have misunderstood the English authorities: I refer to the analysis of those authorities by Hoffmann LJ in Britoil plc v Hunt Overseas Oil Inc [1994] C.L.C. 561 at pages 577-579, and to Smith, "Rectification of Contracts for Common Mistake, Joscelyne v Nissen and Subjective States of Mind" (2007) 123 L.Q.R. 116).

[157] In their Report, the Commission stated, in relation to contractual documents:

"3.3 In the memorandum we discussed criteria which potentially might have to be satisfied by a party seeking the rectification of a written contract. Our provisional view was that rectification of a document giving effect to an agreement should not be confined to cases where the original agreement had in itself been an enforceable contract. Some contracts will only be legally constituted when in formal writing, and it was our provisional view that this requirement would prove unduly restrictive. Most of those who commented on the memorandum shared this opinion.

3.4 We do not think that any particular restrictions should be imposed on an applicant for rectification other than that to be successful he should be able to satisfy the court that the terms of a written contract fail to express accurately the common intention which the contracting parties had agreed it should express...

3.5 Our provisional proposals in the memorandum were in wide terms and were designed to permit, rather than restrict, the use of all relevant evidence in the proof of defective expression. We agree, however, with those commenting on the memorandum that there are some important criteria which should be satisfied if rectification is to be granted. The first is that the parties should have reached agreement. The second is that the document which was intended to give effect to that agreement defectively expresses the parties' common intention at the time when they reached agreement. These apparently simple requirements may often prove difficult to satisfy and we consider that they should operate as adequate safeguards against unjustified claims. Accordingly we recommend that:

The court should be able to order the rectification of a document intended to give effect to a prior agreement when it is satisfied that the document does not express accurately the common intention of the parties to that agreement at the time when it was made. (Recommendation 2)"

In relation to evidence, the Commission stated (at paragraph 4.2):

"Latent defects by definition can only be rectified if it is possible for the court to go behind the terms of the writing in question and investigate all relevant evidence, whether written or oral, which can establish what the true agreement was and what the correct expression of it should be. Extrinsic evidence of that nature is currently admitted in cases of reduction ... for the simple reason that the remedy would not be a practical proposition were such evidence not admissible. For similar reasons of practicability we consider that a new power to rectify a writing would be of limited value unless specific provision were also made enabling the court to hear all relevant evidence as to how the defect in question came to exist."

The Commission appended to their Report a draft Bill, the relevant provisions of which were subsequently enacted, with only formal changes, as section 8(1) and (2) of the 1985 Act.

[158] In the light of that background, three general observations might be made. First, although section 8(1)(a) is a short provision, it requires a considerable amount of unpacking, and is apt to raise a variety of difficult questions. Secondly, the provision creates a significant new remedy, which has to be integrated into the remainder of the law of contract. That integration is facilitated by the use of terms, such as "agreement" and "intention", which are central to the law of contract. Those terms are open-textured and capable of development, enabling rectification to develop as a remedy as the law of contract evolves over time. Thirdly, I would respectfully adopt, in relation to section 8(1)(a), an observation made by Lord President Hope in respect of section 8(1)(b), in Bank of Scotland v Graham's Trustee (at page 255):

"We think that it would be unwise to attempt to define all the circumstances to which the power of rectification under section 8(1)(b) can apply."

Bearing that observation in mind, and bearing in mind also that my remarks on this branch of the case are obiter dicta (given my conclusion in relation to the principal action), it would be not only unnecessary but also unwise to

express a concluded opinion on all the issues raised by the counterclaim. I require, nonetheless, to consider the parties' submissions.

[159] First, I am not persuaded by the contention that an "agreement", within the meaning of section 8(1)(a), must be an enforceable contract. I respectfully agree in that regard with the Opinion of Lord McCluskey in Shaw v William Grant (Minerals) Ltd. The contrary proposition would deprive the remedy of rectification of some of its intended effect, not least in relation to agreements requiring writing, and it would involve reading into section 8 words which do not appear there. I would observe that it is necessary, when considering other aspects of rectification, to bear in mind one of the implications of this conclusion: that rectification can be ordered so as to give effect to an agreement by which neither party was bound.

[160] Secondly, I am not persuaded by the contention that there can be no "agreement", for the purposes of rectification, unless that agreement has been concluded prior to the execution of the document which is sought to be rectified. I respectfully agree, in that regard, with the Opinion of Lord Penrose in Rehman v Ahmad at page 751:

"An error of expression of common intention may enter the proceedings at a time prior to the resolution of the last essential of a completed contract, and remain uncorrected when that final stage is achieved. If the authorities are any guide, one might think typically of an error of description of heritable property in missives overlooked while parties' solicitors negotiated the minutiae of a modern contract for sale of the subjects. The agreement would be made, in many cases, by the delivery of a final letter which might do no more than accept the last counter stipulation and 'hold the bargain as completed'. The last letter would both complete the agreement and the exchange of documents intended to express it. I can see no reason to deny a remedy in such a case, if otherwise appropriate, simply because the two events occurred simultaneously."

I note that this reasoning is the same as that adopted in the English authorities (such as Joscelyne v Nissen) to which the Scottish Law Commission had referred.

[161] The contention that "the common intention of the parties" must be determined objectively, and that the evidence of the parties or their agents as to what they actually had in their minds should therefore be disregarded, raises a more difficult issue. On the one hand, I was referred to the dictum of Lord McCluskey in Shaw v William Grant (Minerals) Ltd (at page 121) that the court has to be satisfied "that the intentions were actual (not deemed) intentions": an approach which might be argued to derive support from dicta in Anderson v Lambie. On the other hand, I was referred to the Opinion of Lord Penrose in Rehman v Ahmad at page 752:

"Common intention, in the context of making an agreement, has to be determined objectively: Thomson v James (1855) 18 D. 1 and Muirhead & Turnbull v Dickson (1905) 7 F. 686. In the former case, the 'actual' intention of Mr James to enter into any contract at all had been departed from, but there was held to be a completed bargain, on an application of the postal rule. In the latter, one finds the statement of Lord President Dunedin: 'But commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say.' The description of intention as 'actual' leaves open, perhaps, the question whether one is concerned with a party's intention as a matter of subjective perception, or as a matter of expression, objectively determined. In my opinion the common intention of parties referred to in the provision is the common intention ascertained objectively in accordance with the normal canons of construction of agreements, and in particular the rules applicable in ascertaining whether consensus in idem has been achieved, and to what effect."

[162] It is also relevant to note in this connection the Opinion of Lord Weir in George Thompson Services Ltd v Moore, where rectification was sought on the basis of a common intention, without any suggestion that that intention had found expression in an agreement. Lord Weir dismissed the petition, stating (at pages 636-637):

"In my opinion it is implicit in the terms of [s.8(1)(a)] that one has to discover the existence of an earlier agreement from which a common intention can be discerned. The word 'intention' has a positive character. It is suggestive of

something more than a wish or a belief, an indication or even a general understanding. It has a purpose to it and in this context, in my view, it must be related to an agreement" (emphasis added).

[163] I note that the same approach was followed in the English authorities cited by the Scottish Law Commission (and in more recent authorities), for the same reasons as were explained by Lord Penrose in Rehman v Ahmad. In Britoil plc v Hunt Overseas Oil Inc, for example, Hobhouse LJ referred (at page 574) to

"the necessity that a claimant for rectification show something with the objective status of a prior agreement. There must be some 'outward expression of accord' or evidence of a continuing common intention 'objectively manifested'. Without this, the claimant for rectification will not be able to begin to satisfy the relevant criteria. In the words of Simonds J, it is this which gives the court 'jurisdiction'."

In the same case, Hoffmann LJ (in a dissenting judgment) explained (at pages 578-579) some of the implications of adopting an objective approach to the ascertainment of the common intention:

"In my view it does not matter what [the plaintiff] thought that the heads of agreement [a prior informal agreement] and the definitive agreement [the document sought to be rectified] meant. What matters is what the parties agreed. The purpose of rectification of a contract (as opposed to rectification of a unilateral instrument like a will or voluntary settlement) is not to make the instrument accord with what the parties subjectively intended but with what they actually agreed. Agreement in English law does not require a meeting of minds, a consensus ad idem. It is an objective fact, requiring only the appearance of such a consensus. If therefore the parties both intended a written instrument to embody their agreement and it does not do so, the necessary common mistake exists. It does not require that the written instrument should actually mean something different from what each of the parties thought it meant.

There is ample authority for the reverse proposition, namely that rectification will not be granted merely because the effect of the instrument is different from that which both parties subjectively intended. ... [T]here must be material upon which it can be said that the instrument does not reflect what the parties agreed, not merely what they or one of them thought it meant.

In my judgment the converse is also true. A subjective mistake as to what the contract means is unnecessary as well as insufficient. As Mustill J said in The Olympic Pride [1980] 2 L1 Rep 67, at pp.72-73:

'It is the words and acts of the parties demonstrating their intention, not the inward thoughts of the parties, which matter.'"

[164] This is the approach which appears to have been adopted by Lord Cameron of Lochbroom in Angus v Bryden. In that case, an informal agreement for the sale of river fishings was followed by an exchange of missives, in the course of which the pursuers (the sellers) made an offer which the defenders (the purchasers) interpreted as including sea fishings as well as the river fishings. The defenders were assumed, for the purposes of the hearing on relevancy, to have realised that this was a drafting error by the sellers' agents, but to have decided to say nothing so as to take advantage of the mistake. They accepted the offer. A disposition was then granted, which conveyed both the river fishings and the sea fishings. Lord Cameron of Lochbroom held that, correctly interpreted, the missives were for the sale only of the river fishings. It followed that the disposition had failed to express accurately the common intention (objectively ascertained) of the parties to the missives. In those circumstances, his Lordship appears to have considered (at page 888) that it would be competent in principle to rectify the disposition so as to give effect to the missives, although he could not do so "as matters presently stand on the pleadings".

[165] For the reasons explained below, I do not require to express a concluded view in relation to this matter; but my provisional view is that the approach adopted by Lord Penrose and Lord Cameron of Lochbroom is to be preferred to that stated in the Shaw case.

[166] The contention that rectification cannot be granted where the subjective intention of one party has changed since the parties' antecedent agreement, but that change of intention has not been disclosed to the other party, appears to me to raise difficult questions. It may be argued, as it was in the present case, that in such circumstances the document is not "intended" to give effect to the common intention of the parties to the agreement.

[167] Where the agreement is an enforceable contract, under which the parties are entitled to a document which gives it effect, it might be thought to be sensible for the court to have the power to rectify the document, whatever the subjective intentions of one of the parties might have been, since the alternative remedy - reduction, possibly coupled with an order for specific performance - would, even if available, be at best a circuitous method of achieving the same result. In that regard, I note the observations of Hobhouse LJ in the Britoil case at page 572:

"Where the prior agreement is a legally binding contract then the grant of the remedy of rectification is, as was pointed out by Lord Cozens-Hardy in Lovell & Christmas v Wall (1911) 104 LT 85 at p.88, analogous to the remedy of specific performance. The parties were entitled to have an agreement conforming to their earlier contract. If the later document fails to fulfil this entitlement, the parties are entitled to have it rectified so that it will do so. Such a conclusion will only be defeated if the parties have intended to vary their earlier agreement. In such a situation the court will have to construe the earlier agreement as a contract and as a matter of law. Having decided as a matter of law what its effect is, the court will give effect to the legal rights of the parties."

There are a number of possible bases on which that approach might be supported in Scots law. Even if a subjective approach were adopted to the ascertainment of what was "intended", the view might well be taken that, standing the parties' legal obligations under the agreement, they cannot be heard to say that they had no intention of fulfilling them. If an objective approach were adopted, then an undisclosed change of inward intention would in principle be of no relevance.

[168] Where the agreement is not an enforceable contract, the position may be less straightforward. A situation of that kind was considered, obiter, by Lord Cameron of Lochbroom in Angus v Bryden. The facts of the case have already been narrated. His Lordship considered what the situation would have been if, contrary to his opinion, the missives had included the sea fishings. In that situation, the disposition would have given effect to the missives, but the missives would not have accurately given effect to the prior informal agreement, as a result of a mistake by one party, of which the other party had decided to take advantage by remaining silent. His Lordship considered that rectification was incompetent in that situation, stating (at page 888):

"If, notwithstanding the earlier informal agreement, a party changes ground in the course of negotiations for purchase of property (as any party is entitled to do where there has been an informal agreement for the sale of heritable subjects which has not been homologated or otherwise subject to rei interventus), it is impossible for the court to hold that the missives as finally concluded were intended to express the common intention of the parties to the informal agreement at the time when that agreement was entered into. In my opinion, s.8(1)(a) gives no countenance to the proposition, which was urged upon me by counsel for the pursuer, that the court can in such circumstances intervene to rectify the missives. To do so would be to ignore the fact that at the conclusion of the missives there had ceased to be any common intention which the missives expressed. Indeed to do otherwise would be, as counsel for the defenders pointed out, to make enforceable an informal agreement relating to heritage which had neither been homologated by the parties nor was subject to rei interventus. In the event that the pursuer established this alternative case, in my opinion, the result must be that the court would require to reduce both the disposition and the missives. Otherwise the court would be seeking to write into the contract terms which the defenders at the end of the day had not intended to accept."

His Lordship's conclusion that reduction was competent was based on the view that the missives and disposition were vitiated by an error on the part of the pursuer which, although unilateral and uninduced, was to be treated as an error in substantialibus, the defenders having taken advantage of the error in bad faith.

[169] There are some aspects of this reasoning which, with respect, I do not find entirely persuasive. If the common intention of the parties to an agreement is to be ascertained objectively (as previously discussed), then an undisclosed intention to depart from the agreement does not entail that "there had ceased to be any common intention". Equally, if a document can be rectified to give effect to an informal agreement (as previously discussed), then it appears to me to follow that rectification may "make enforceable an informal agreement relating to heritage". The background of section 8 in Anderson v Lambie suggests, as previously discussed, that that was one of the situations which section 8 was intended to cover. Nevertheless, I acknowledge that it may be arguable, at least in certain circumstances, that in the absence of a legally binding agreement the court should not "write into the contract terms which the defenders at the end of the day had not intended to accept". On the other hand, there may also be circumstances where to allow a defender successfully to oppose rectification by reason of an undisclosed intention to depart from an earlier informal agreement would result in injustice. Reduction may not always be a competent remedy where there has been a unilateral error of the kind in question, since its availability depends on the error being sufficiently serious to be regarded as going to the root of the contract. Even where available, reduction may not be an adequate remedy: as explained previously, that was one of the reasons for the introduction into Scots law, from English law and its cognate systems, of the remedy of rectification. It would be productive of injustice, in my opinion, if the court had no jurisdiction to rectify a contract which one party had entered into on the basis of a manifest prior agreement, which to all appearances continued but had been incorrectly expressed in the final document, merely because of an uncommunicated subjective change of mind on the part of the other party.

[170] I note that English law has developed an approach to rectification in cases of unilateral mistake which adopts the same starting point as in Angus v Bryden - that the court should not ordinarily "write into the contract terms which the defenders at the end of the day had not intended to accept" - but nevertheless permits rectification where it is unconscionable for the defendant to resist it. The law was summarised by Stuart Smith LJ in Commission for the New Towns v Cooper (Great Britain) Ltd [1995] Ch. 259 at page 277:

"The commonest circumstance in which rectification is granted is where the written contract does not accurately record the parties' joint agreement. In other words, there is a mistake common to both parties. In the case of unilateral mistake, that is to say where only one party is mistaken as to the meaning of the contract, rectification is not ordinarily appropriate. This follows from the ordinary rule that it is the objective intention of the parties which determines the construction of the contract and not the subjective intention of one of them. Also, it would generally be inequitable to compel the other party to execute a contract, which he had no intention of making, simply to accord with the mistaken interpretation of the other party: see Olympia Sauna Shipping Co. S.A. v Shinwa Kaiun Kaisha Ltd [1985] 2 Lloyd's Rep. 364, 371, per Bingham J. But the court will intervene if there are 'additional circumstances that render unconscionable reliance on the document by the party who has intended that it should have effect according to its terms:' Spry, Equitable Remedies, 4th ed. (1990), p.599."

[171] A similar approach appears to be followed in other common law jurisdictions. In Canada, for example, the law was summarised by Binnie J in Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd [2002] I S.C.R. 678 at paragraph 31:

"Rectification is an equitable remedy whose purpose is to prevent a written document from being used as an engine of fraud or misconduct 'equivalent to fraud'. The traditional rule was to permit rectification only for mutual mistake, but rectification is now available for unilateral mistake (as here), provided certain demanding preconditions are met. Insofar as they are relevant to this appeal, these preconditions can be summarized as follows. Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down properly. The error may be fraudulent, or it may be innocent. What is essential is that at the time of execution of the written document the defendant knew or ought to have known of the error and the plaintiff did not. Moreover, the attempt of the defendant to rely on the erroneous written document must amount to 'fraud or the equivalent of fraud'."

[172] It appears from Angus v Bryden, and the authorities discussed there, that Scots law has in the past been able to address the problems caused by unilateral errors relating to the expression of prior agreements, within the limits of the remedies then available. Given the purpose behind the introduction of the remedy of rectification - essentially, to provide a more convenient and effective remedy than reduction in cases of defective expression - it is not to be expected that that remedy will be narrower in scope. It is apparent from the experience of other jurisdictions, with a broadly similar approach to the treatment of mistakes in the law of contract but with a longer experience of rectification as a possible remedy, that it has been found necessary to make rectification available in certain cases of unilateral mistake in order to avoid injustice. The facts of the present case, and of Angus v Bryden, suggest that similar cases can also arise here.

[173] In Scots law, rectification is not rooted in the conceptual framework of equity (in any technical sense), but depends on the fulfilment of statutory requirements. Those requirements draw no explicit distinction between defects in expression which are due to a common mistake and those which are due to a unilateral mistake, but simply require that the document is "intended" to express or to give effect to an agreement but fails to express accurately the "common intention" of the parties to the agreement at the date when it was made. It is also to be noted that the remedy of rectification is discretionary.

[174] In this situation, one possible approach might be to construe "intended" as referring to the parties' actual, subjective, intentions. If that approach were adopted, it may be that recourse could be had to the concept of personal bar if that was necessary in order to avoid injustice. The circumstances in which such a bar would arise would require to be considered in particular cases: in that context again, it might be of assistance to consider the experience of other jurisdictions which have previously addressed these issues. Since the present case was not analysed in argument in terms of personal bar, it is unnecessary for me to express any view as to what the necessary requirements might be.

[175] Another possible approach would be to construe "intended" as referring to an intention which is to be ascertained objectively. That approach would be consistent with the adoption of an objective approach to the assessment of the "common intention" of the parties to the agreement: the adoption of an objective approach at one stage and a subjective approach at another would be liable to give rise to difficulties, since they might point in different directions and, when they did, primacy would have to be given to one or the other. An objective approach would also be consistent with Scots law's general unwillingness to have regard, in the law of contract, to inward intentions uncommunicated to the other party: an unwillingness for which there are strong practical reasons. If that approach were adopted, any argument that it was unjust to rectify a particular contract because the defender had not (subjectively) intended to give effect to the prior agreement might (if relevant) be directed to the court's exercise of its discretion.

[176] These appear to me to be questions of importance, which deserve fuller consideration than they received in argument in the present case. Although I am inclined to favour the adoption of an objective approach, I do not require to reach a concluded view for present purposes. In the circumstances, it is appropriate for me to reserve my opinion.

[177] The argument in the present case also proceeded on the assumption that, where the document sought to be rectified is a contract, the parties entering into that contract must either be the same as "the parties to the agreement", or at least that it must be possible to attribute the intentions of the parties to the agreement to the parties to the contract. That appears to me to be correct. As explained earlier, section 8(1)(a) is intended to address the situation where an agreement is reduced to writing (or put into effect by a written document) but the document does not accurately express the parties' agreement, by enabling the court to rectify the document so as to express the parties' agreement. That being the case, it appears to me that the parties must either remain the same at the time when the document is executed as when the agreement was made, or they must be indistinguishable for the purposes of the law of contract (e.g. by reason of a relationship of agency). In relation to the present case, this issue was not analysed in argument beyond counsel for the defenders' describing Brodies

and Burness as having conducted negotiations as the agents of the pursuers, and of ASP and the defenders, respectively. As explained below, there appear to me to be difficulties with that approach on the facts of the present case.

[178] Finally, I do not find persuasive the contention that the presence of an entire agreement clause, in the terms of the clause contained in the MSA, precludes the court from rectifying a document. The power to rectify under section 8(1)(a) exists, by force of statute, where "a document ... fails to express accurately the common intention of the parties to the agreement". If a document fails to do so, that fact is not altered by the presence of the entire agreement clause: a defectively expressed document cannot, as it were, haul itself up by its own bootstraps. I would in any event interpret the clause as being intended to preclude the establishment of a collateral contract or term, rather than to preclude the rectification of any defects in expression which might be present in the document itself.

[179] The present case, so far as concerned with rectification, can in my opinion be decided on a relatively narrow basis, without requiring to determine all the issues canvassed in the foregoing discussion. The defenders' case, as pleaded, is that "the intentions of parties as to costs and their agreement on that subject were reflected in the Letter of Intent [i.e. the pursuers' letter to Regenesis (Dunfermline) Ltd dated 25 June 2002], the exchanges between the parties in the course of preparation of the suite of documents and the said JVA". The pleadings also state that "the provisions as to payment of costs specified in the [JVA] represent ... the intentions and agreement of ASP and the defenders on the one hand and the pursuers on the other". The vagueness of these averments is evident: there is no reference to any specific agreement between the pursuers and the defenders, other than the MSA itself; nor is it explained on what basis ASP and the defenders might be treated as if they were effectively indistinguishable.

[180] The submissions of the defenders focused on the exchange of e-mails between Mr Scott and Peter Lawson on 22 and 25 July 2002 as establishing an agreement in relation to costs, and on the absence of any subsequent indication on behalf of the pursuers of an intention to depart from that agreement. I am prepared to accept that that exchange of e-mails established an informal agreement between the agents acting for the pursuers and ASP, but the character of that agreement has to be borne in mind: exchanges at that stage did not bind either side to enter into any contract, nor did they commit them to the terms of any contract which might subsequently be entered into. Although they are not without significance, they were a stage in the negotiations between those parties. The idea of an MSA emerged during the subsequent discussions between Burness and Brodies, as has been explained, and the terms of the MSA were settled by exchanges between them. Brodies' draft of the terms and conditions, first produced on 13 November 2002, had been accepted by Burness by 26 November with only minor revisals, none of which related to clause 4.5. The MSA, as executed, accurately reflected the terms which had been so agreed; and it was in the terms which the JVA envisaged when it referred to "the management services agreement in the agreed form".

[181] Whether or not the connection between the exchange of e-mails in July 2002 and the executed MSA is sufficiently direct to support the proposition that the MSA was intended, but failed, to give effect to the agreement contained in that exchange, it is in any event clear that the defenders were not involved in the exchange of e-mails either directly or through agents acting on their behalf: they were not even incorporated until 6 September 2002. Although an agent's intention may be attributed to a disclosed principal for the purposes of section 8(1)(a) (cf. Bank of Scotland v Brunswick Developments (1987) Ltd 1997 S.C. 226 at page 232 per Lord President Rodger), a company cannot be a principal, and cannot be deemed to have possessed an intention, prior to its incorporation. Even at the stage when the terms of the MSA were negotiated, Burness were not acting on behalf of the defenders: it was only on the date of execution of the MSA that the defenders were acquired by ASP and became involved in the transaction which had been arranged between ASP and the pursuers. Until then, they merely belonged to Burness's stock of "shelf" companies. In those circumstances, it is not possible, in my opinion, to treat the defenders as having been party to any agreement entered into by ASP or by Burness prior to the date of

execution of the MSA, or as having had any intention in common with the pursuers, derived from such an agreement, prior to that date. The argument for the defenders did not attempt to establish that any agreement had been constituted between the pursuers and the defenders on the date of execution of the MSA (other than the MSA itself). Nor was it argued that the defenders had entered into the MSA as the agent of ASP. If, as was assumed in argument, section 8(1)(a) requires that the contract sought to be rectified must be between the same parties as the agreement to which it was intended to give effect, or that at least the intentions of the parties to the agreement can be attributed to the parties to the contract under the law of agency, it follows that that requirement is not met.

[182] In these circumstances, I conclude that, whatever other remedies might be available (if, for example, the defenders might be regarded as having entered into the MSA under a mistake as to its effect), the defenders have not demonstrated that the court has any jurisdiction to order the rectification of the MSA. Given that conclusion, the other criticisms which were made of the application for rectification, on behalf of the pursuers - in particular, that rectification could not be ordered where the prior agreement was not legally binding, or where there was an undisclosed intention to depart from it, or where the document contained an entire agreement clause - do not require to be determined, although I have indicated my view of certain of those contentions.

Conclusion

[183] In the circumstances, I shall grant decree of absolvitor in the principal action and refuse the application made in the counterclaim. Refusal of the application appears to me to be more appropriate than the decree of absolvitor sought by the pursuers, since the court is refusing an application made by the defenders to provide them with a remedy, rather than adjudicating between the parties on a question of disputed right.