OUTER HOUSE, COURT OF SESSION

[2017] CSOH 119

CA97/16

OPINION OF LADY WOLFFE

In the cause

J H & W LAMONT OF HEATHFIELD FARM AND OTHERS

Pursuers

against

CHATTISHAM LIMITED

Defender

Pursuers: Thomson; Maclay Murray & Spens LLP
Defender: Upton; Gilson Gray LLP

7 September 2017

The Background

[1] The pursuers, a partnership, are the heritable proprietors of a large area of land comprising about 73 acres ("the Subjects"). The defender is a developer. It considered that the Subjects had potential for development. To that end, the parties entered into an Option Agreement dated 21 December 2009 and 1 February 2010 ("the Option Agreement"). The pursuers granted a standard security, also dated 1 February 2010, over the Subjects in security of its obligations under the Option Agreement, which security was duly registered in the Land Register ("the Standard Security").

[2] No development of the Subjects ever took place and no planning permission in principle was ever obtained. In these circumstances, the pursuers terminated the Option Agreement by notice dated 30 September 2015 (No 6/5 of process) ("the Notice"). The defender's averment in answer, admitting that the pursuers gave notice "... purportedly in terms of clause 7.5" of the Option Agreement, was ambiguous. However, in the course of the debate before me, the defender's counsel accepted that the pursuers have validly terminated the Option Agreement in accordance with its terms.

[3] By this action the pursuers seeks implement of what it says is the defender's obligation under clause 3.1 of the Option Agreement to deliver a discharge of the Standard Security. The defender resists this *inter alia* on the basis of what it says were breaches by the pursuers of express and implied terms of the Option Agreement, and which are the subject matter of the defender's counterclaim seeking damages of about £5 million and, in the alternative, seeking a sum in excess of £500,000. The defender resists the pursuers' principal action and it asserts a right of retention, albeit this is not stated expressly in its pleadings to be pending resolution of its counterclaim.

Scope of the Debate

[4] The matter called before me at debate on the defender's first plea-in-law, of no jurisdiction (made under reference to the Conveyancing and Feudal Reform (Scotland) Act 1970), and on the pursuers' first plea-in-law, challenging the relevancy of the defences and seeking decree *de plano*. Counsel for the defender, Mr Upton, having opened the debate by moving his first plea-in-law, subsequently abandoned his arguments in support of that plea in the afternoon. His first plea-in-law therefore falls to be repelled and the relative averments in Answers 1 of the principal action fall to be deleted. Accordingly, it is

necessary only to deal with the pursuers' challenges to the relevancy of the defences. Before turning to those arguments, I set out the terms of the Option Agreement referred to by the parties.

The Option Agreement

[5] The Option Agreement is an extremely detailed agreement extending (together with its appendices) to 35 pages. Parties confined themselves to reference to clauses 3.3, 7.5 and 11 thereof, and to the definition of "Option Period" in clause 1. The pursuers granted the Standard Security – referred to in the Option Agreement as the "Chattisham Security" - in implement of clause 11 of the Option Agreement. Clause 11 provides as follows:

> "11. **CHATTISHAM SECURITY**
>
> 11.1 As security for implementation of [the pursuers'] obligations **under this Agreement**, [the defender] shall be entitled to require and [the pursuers] shall be obliged to provide on the Effective Date the [Standard Security] which shall be released (and progressively restricted in its application) both pursuant to Clause 11.2 and on completion of Disposals.
>
> 11.2 The Chattisham Security Subjects shall initially equate with the Subjects but following upon the Allocation Date shall thereafter be restricted to the Allocated Subjects together with such other part or parts of the Subjects to which any planning gain provisions (previously sanctioned by [the pursuers]) might apply and [the defender] shall upon demand by [the pursuers] subsequent to the Allocation Date execute and deliver to [the pursuers] a Deed of Restriction duly executed in a Self Evidencing Manner which shall be reflective of the foregoing provisions in this Clause 11.2.
>
> 11.3 Upon the earlier to occur of (a) the expiry of the Option Period and (b) the termination of this Agreement, [the defender] shall deliver to [the pursuers] a discharge duly executed in a Self Evidencing Manner of the [Standard Security]" (Emphasis added.)

The pursuers lay stress on the opening words of clause 11.1, that the Standard Security was granted for implementation of the pursuers' obligations "under this Agreement". While it

was accepted that the defender's claim for damages is a secondary obligation and substitutional for any primary obligation owed by the pursuers under the Option Agreement during its currency, parties differed as to whether the obligation underpinning the damages claim was "under" the Option Agreement for the purpose of clause 11.1. I shall refer to this as "the characterisation question". The primary obligation founded upon by the pursuers is that set out in clause 11.3, particularly 11.3(b), following its termination of the Option Agreement.

[6] The pursuers rely on the provision for termination in clause 7.5, which provides as follows:

> "7.5 If no Third Party Land Sale Contract shall have been concluded by the Third Party Land Sale Longstop either Party shall be entitled to resile from this Agreement [ie the Option Agreement] without penalty and specifically [the pursuers] shall, subject to clause 3.3, have no responsibility to repay to [the defender] the Option Payments. If any Third Party Land Sale Contract has been concluded by the Third Party Land Sale Longstop then subject to the provisions of Clause 24 hereof this Agreement shall subsist for the Option Period, but only insofar as relating to the Allocated Subjects".

It is a matter of agreement that no "Third Party Land Sale Contract" was concluded by the "Third Party Land Sale Longstop". Accordingly, the provision for subsistence of the Option Agreement as set out in the final sentence of clause 7.5 has no application. It is accepted that (as stated in the first sentence) either party "is entitled to resile from [the Option Agreement] without penalty". By letter dated 30 September 2015, the pursuers exercised their right to resile and to terminate the Option Agreement, which they did with immediate effect upon giving the Notice. The right to resile in clause 7.5 is expressed, in relation to the pursuers, to be subject to clause 3.3 and to entail no responsibility on their part to repay the option payments. (The defender does not seek repayment of those payments.)

[7] Turning to clause 3.3 of the Option Agreement, this provides:

> "The Option Payments shall not be refunded by [the pursuers] in any circumstances save to the extent that it is agreed and determined that [the pursuers are] in material breach of its obligations in terms of [the Option Agreement]."

The Option Payments comprised an initial payment of £60,000 and a subsequent payment of £75,000.

[8] As Mr Thomson, counsel for the pursuers, made reference to the definition of the "Option Period", contained in the definitions in clause 1, it is appropriate I set out its terms, which are as follows:

> "'**Option Period'** means the period commencing on the Effective Date and expiring on the first to occur of:-
>
> (a) the tenth anniversary of the Allocation Date; and
>
> (b) completion taking place under the final Third Party Land Sale Contract which exhausts the Allocated Subjects,
>
> save and to the extent that this Agreement shall previously be terminated pursuant to Clauses 4.8.1, 5.11, 7.5 or 24".

The Standard Security

[9] The Standard Security granted over the Subjects refers to the Option Agreement entered into (and which it defined as "the Option") and it narrates that it is granted "in security of performance of all obligations undertaken by us [i.e. the pursuers] to [the defenders] in terms of the Option [ie the Option Agreement] …." The Schedule of variations appended to the Standard Security excludes standard condition 11.

The Pleadings

[10] After certain admissions in respect of the Standard Security in Answer 3, the defender avers:

> "the [Standard Security] is for implement of [the defenders'] obligations under the [Option Agreement]. Those obligations embrace both their primary obligations, and their secondary obligations to make reparation for loss caused by breach of their primary obligations".

The defences then set out in numbered sub-paragraphs the "primary" obligations, express and implied. After reference to obligations said to be contained in specified clauses of the Option Agreement, there are the following averments of an implied term:

> "Reciprocally it was an implied term of [the Option Agreement] that the pursuers would neither hinder nor impede the defender's procurement of planning permission and sales generally, nor the particular steps to those ends agreed in those clauses. That implied term expressed parties' presumed intentions. It was reasonable; not contradictory of any express term; such that if asked by a reasonable bystander possessed of the parties' knowledge whether it reflected their agreement they would have both agreed without hesitation; and necessary to give the contract business efficacy that the parties intended it to have. It was part of what the contact construed as a whole against the relevant background, would reasonably be understood to mean."

[11] In Answer 6, after an admission that the defender had not delivered a discharge of the Standard Security, it is averred that

> "the pursuers are not entitled to a discharge of [the Standard Security]. They contracted to provide it in security of, inter alia, their obligations specified at Ans. 3. They have breached all of those obligations."

In Answer 6.2, the defender sets out its case based on an implied term:

> "*Separatim*, [the pursuers] breached their implied obligation not to hinder nor impede the defender's procurement of planning permission and sales."

In Answer 6. 3, an alternative basis of loss is set out:

> "between 2009 and 2015 in seeking to implement [the Option Agreement] the defender in any event incurred costs in respect of option fees paid to the pursuer, and planning authority's, planning consultants', legal and other fees totalling about £577,750."

The defender's 6th and 7th pleas-in-law were in the following terms:

> "6. Separatim, the defender, having suffered loss through the pursuers' breach of the contract on which they sue, for which they are obliged to make reparation, is entitled to retain the contractual security and should be assoilzied.

7. Separatim, further and in any event, the pursuers having breached the contract on which they sue, the defender is entitled to retain performance of any obligation to discharge the [Standard Security], and should be assoilzied".

[12] Mr Thomson seeks deletion of the foregoing averments. Mr Thomson also argued that, given that the defender otherwise admits the circumstances entitling the pursuers to delivery of the discharge of the Standard Security (as sought in the conclusion to the Summons), the pursuers seek decree *de plano*. The defender's defence relies critically on a right of retention.

Submissions on behalf of the Pursuer

[13] Mr Thomson challenged the relevancy of the defences and the counterclaim on three grounds:

(1) the lack of relevant averments in the defences to the principal action to support the defender's plea of retention, resisting immediate delivery of a discharge of the Standard Security;

(2) the relevancy of the defender's averments (in Answer 6) of an implied term; and

(3) the averments of loss, in the alternative basis, set out in the counterclaim.

The characterisation question arose in the context of the first ground of challenge.

The Pursuers' Right to a Discharge of the Standard Security

[14] Mr Thomson began by considering clauses 7.5 and 11.3, together with the definition of "Option Period" in clause 1 of the Option Agreement. (These clauses are all set out above, at paras [5] to [8].) He argued that the Option Agreement had to be considered as a whole. Looking at clause 7.5, it made no provision for refund of the option payments unless

the pursuers were in material breach: this followed from clause 7.5 read together with clause 3.3. This was important. Parties had, he argued, provided for a right to resile in terms of clause 7.5, even when it was contemplated that the pursuers might be in breach of the Option Agreement. If the pursuers were in breach, the option payments might become repayable (in accordance with clause 3.3), but the right to resile in clause 7.5 was intact.

[15] Clause 7.5 conferred a clear entitlement to resile in specified circumstances. Those circumstances had occurred. The defender has now accepted that the pursuers have validly exercised the right to resile provided for in clause 7.5. There was no doubt that the Option Period (as defined) had ended. The final part of the definition made it clear that the Option Agreement was susceptible to termination *inter alia* in accordance with clause 7.5 of the Option Agreement. The pursuers had resiled from the Option Agreement upon giving the Notice. Clause 11.3 made provision for what was to happen in the event of termination of the Option Agreement: the defender came under an obligation to deliver to the pursuers a discharge of the Standard Security. It had singularly refused to do this and the pursuers have had to raise this action for delivery of a discharge.

[16] Mr Thomson argued that the provisions the pursuers founded upon were clear and unambiguous. It was, he argued, simply not possible to construe the relevant provisions within the Option Agreement in any other way and effect must thus given to its terms: *@SIPP Pension Trustees* v *Insight Travel Services Ltd* 2016 SC 243; *Arnold* v *Britton* [2015] AC 1619 and, most recently, *Wood* v *Capita Insurance Services Ltd* [2017] 2 WLR 1095. Clause 11.3 was clear. One cannot construe the parties' bargain as being subject to some further condition before the obligation to grant a discharge arises. It follows that, in the admitted circumstances of this case, the contractual "trigger" has occurred, and the pursuers were, accordingly, entitled to decree *de plano* as first concluded for.

[17] If the language of the Option Agreement was not clear, then the court should follow the approach in *Rainy Sky SA* v *Kookmin Bank* [2011] UKSC 50. In that event, the pursuers' interpretation of the Option Agreement was to be preferred. What, Mr Thomson asked, was the purpose of a Standard Security granted under the Option Agreement in relation to a large area of land ripe for development? The critical obligation of the pursuers under the Option Agreement was to grant the Option Agreement and to sell the land when the option was exercised. The Standard Security secured that obligation and precluded the pursuers from selling the Subjects out from under the noses of the defender, who had the benefit of the option. The grant of a discharge arose only on the expiry or termination of the Option Agreement. This had happened. This interpretation was consistent with the commercial purpose of the Option Agreement and it did not offend against the basis of that agreement. By contrast, he argued, the defender's approach permitted the defender to maintain the Standard Security over a very large area of ground, namely the 73 acres of the Subjects, simply on the basis of an asserted breach of contract on the part of the pursuers, and to retain the benefit of that Standard Security until final disposal of the defender's claim. In those circumstances, the defender was relying on the Standard Security to secure an obligation to make reparation. It was to be noted that the retention of the Standard Security now asserted was not in contemplation of the defender becoming the owners of the Subjects (or any part of them). This was far removed from the purpose for which the Standard Security had been granted. This was not commercially sensible or in accordance with the terms or purpose of the Option Agreement. On the defender's approach, it was entitled to retain the Standard Security simply to secure an obligation to make reparation but there was no corresponding security for any like obligation owed by the defender to the pursuers. It was highly improbable, and non-commercial, that the Subjects were to be sterilised pending resolution of

a damages claim on the part of the defender. This was, Mr Thomson argued, too removed from the purpose of the Option Agreement and the function of the grant of the Standard Security, which was to preclude the pursuers from disposing of the Subjects and frustrating the defender's rights under the Option Agreement. Now that the Option Agreement had been terminated, the obligation of the defender to provide a discharge arose.

[18] He referred to the summary of legal principles articulated by Lord Justice Clerk Ross in *Lloyd's Bank plc* v *Bamberger* 1993 SC 570 at page 573 concerning the right to resile and its impact on contractual obligations and, in particular, to points (3) and (7) thereof. Those propositions were to the effect that obligations that parties clearly intended to survive rescission may be enforced, notwithstanding the rescission of the contract. It was always a question of ascertaining the intention of the parties upon a proper construction of the contract in question. The observations of Lord Kincraig in *Alexander Stephen (Forth) Ltd* v *J J Riley (UK) Ltd* 1976 SC 151 at pages 152 and 159, were to like effect: parties may stipulate in their contract how their rights are to be regulated in the event of a breach, even one entitling the innocent party to resile. Condition 5 in that case was an example of an express contractual provision coming into operation only after a breach of contract. Clause 7.5 of the Option Agreement was, Mr Thomson argued, a similar provision. It was an obligation that subsisted after the Option Agreement had been terminated. The case of *Alexander Stephen (Forth) Ltd* had been approved in *Highland Leasing Ltd* v *Lyburn* 1987 SLT 92. Lord Morison had observed in that latter case (at page 94) that there was no reason in principle why parties could not make express provision for ascertainment of their rights upon conclusion of their contractual relationship. Mr Thomson argued that this is what parties had done here, in clause 7.5, construed together with clauses 11.3 and 3.3.

[19] Mr Thomson also referred to the observations of Lord Clarke in *Forster* v *Ferguson & Forster, Macfie & Alexander* 2010 SLT 867 at paragraph 15. From these he argued, as I understood him, that retention operated only during the currency of a contract. The Option Agreement had been brought to an end but, nonetheless, the defender's 6th and 7th pleas-in-law were concerned with retention.

The Characterisation Question

[20] As part of his challenge to certain averments of the defender, Mr Thomson addressed the characterisation question. He referred to the defender's averments in Answer 3 (in respect of what was said to be the pursuers' "secondary obligations to make reparation for loss caused by breach of their primary obligations") and in Answer 6 (to the effect that the Standard Security was provided in security of "inter alia, their obligations specified at Ans 3"). As these averments disclosed, the defender purported to retain the discharge and to rely on the Standard Security in support of its damages claim. He submitted that these averments were irrelevant. Any obligation on the part of the pursuers to make reparation was not an obligation owed by the pursuers "under this Agreement" (clause 11.1 of the Option Agreement), namely, "under the Option Agreement". That is so because (except in the case of liquidated and ascertained damages, with which one is not here concerned) the obligation to pay damages arises by implication of law *loco facti non praestabilis, vel non praestiti, succedit damnum et interesse* and not by agreement: see generally Erskine, *Institutes*, III, 3, 86.

[21] He developed this submission under reference to *Moschi* v *Lep Air Services* [1973] AC 331 (HL), *per* Lord Reid at 345G to 346B and *per* Lord Diplock at 350C to E, and to *Photo Productions Ltd* v *Securicor Transport Ltd* [1980] AC 827 (HL**)**. Although it was no doubt true

that the Option Agreement was the "source" of the obligation to pay damages, as the observations from the speeches in *Moschi* made clear, the secondary obligation to make reparation is actually substituted by operation of law for the conventional primary obligations set forth in the contract.

[22] Once the Option Agreement was terminated, the primary obligations under it came to an end (subject of course to those obligations or rights that were expressed to survive termination). On a proper construction of the Option Agreement, the substitutionary obligation to pay damages cannot be regarded as one of "[the pursuers'] obligations under this Agreement" in respect of which the parties intended the Standard Security should be granted. It is plain, from the terms of the Option Agreement as a whole, that the Standard Security was to be provided to prevent the exercise of the Option by the defender over the Subjects being frustrated by a sale of the Subjects while the Option remained exercisable. There was, Mr Thomson argued, simply no warrant in the terms of the Option Agreement for the conclusion that what the parties further intended was that the defender (but not the pursuers) should have security for claims in respect of damages. As was clear from its substantive plea in the counterclaim, the defender's own case was confined to an action of damages for breach of the Option Agreement. The defender's case was not to enforce, and it could not seek to enforce, any obligations under the Option Agreement now that it had been terminated.

[23] For these reasons, the allegation of breach of contract, coupled with a claim for damages, did not entitle the defender to retain a contractual security which, according to the terms of the contract in question, did not relate to claims for damages for breach *of* that contract, as opposed to performance of obligations *under* the contract. Rather, the defender

had agreed it would, in the circumstances which have come to pass, give up the Standard Security by the grant of a discharge.

[24] Mr Thomson noted that in support of its position, the defender referred to the principles of mutuality and withholding of performance but, he argued, these were just presumptions. Mr Thomson indicated that there was no need for him to address these cases. They all relied on presumptions but these had to give way to the express agreement of the parties. Here, the clear language of the terms of the Option Agreement founded upon was sufficient to displace those presumptions. The language of the Option Agreement, and clause 11.3 in particular, was clear.

Implication of Contractual Terms

[25] Mr Thomson turned to consider the defender's averments regarding the implication of a term into the Option Agreement in Answer 3.2, set out above, at paragraph [11]. Even if the court was with him on his primary argument and decree *de plano* granted, it was still necessary to challenge the averments about implication of terms because of the counterclaim.

[26] Mr Thomson contended that these averments were irrelevant. First, they are premised on averments that effectively amount to no more than the recitation of various legal tests which might, in any given case, support the implication of a term. However, it was not enough to recite the tests for implication. The defender failed to make averments of fact to support the implication of the desiderated term in the present case. He referred to the observations of Lord Reed (in the Outer House) in *Moyarget Developments Ltd* v *Mathis & Ors* [2006] CSOH 145 at paragraphs 37 to 40. As in *Moyarget Developments Ltd*, here there were no averments for leading any evidence from which the court could infer that the term contended

for met the test for implication. He also referred to a decision of Lord MacFadyen in *F Brown Plc* v *Tarmac Construction (Contracts) Ltd*, unreported, 11 February 2000, Outer House. He argued that secondly, and fundamentally, the defender's averments in support of the implication of a term did not satisfy, in any respects, the requirements in law for the implication of a term. The law was most conveniently set out in the judgement of Lord Neuberger in *Marks & Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at paragraphs 18 and 22. From these passages he emphasised that the critical aspect was whether it had been shown (or averred) that the implied term was necessary. In the absence of such averments the defender's averments regarding breach of the supposed implied term were irrelevant and should be excluded.

Averments of Loss: Alternative Sum Sought in the Counterclaim

[27] Lastly, Mr Thomson turned to his third ground of challenge. This related to the averments of loss made in the counterclaim, in respect of the sum of £577,750 which is claimed in the alternative. These averments were, he argued, self-evidently lacking specification to the point of irrelevancy. Having tabled a counterclaim for payment *inter alia* of the sum £577,750, it was incumbent on the defender to provide proper particularisation of its very substantial claim. It has simply failed to do so. He noted that he advanced the argument in circumstances where the pursuers had tried to obtain details of this head of claim by other means. The averments regarding the costs of £577,750 should therefore be excluded from probation.

Submissions in reply on behalf of the Defender

The Defender's Motion

[28] Mr Upton argued that the pursuers' objections to the defences and counterclaim were misconceived. His motion was that the pursuers' first pleas-in-law in both the principal action and the counterclaim should be repelled or, at least, held over; and proof before answer should be allowed on the whole pleadings in the principal action and the counterclaim.

The Pursuers' Right to a Discharge of the Standard Security

[29] Mr Upton resisted the contention that the pursuers were entitled to a discharge of the Standard Security. He argued that the defender was entitled to withhold performance of its obligation under clause 7.5 of the Option Agreement to grant a discharge on the basis that the pursuers were in breach of express and implied terms of the Option Agreement. The breaches of the express terms and of the implied term were set out in detail in Answer 6 and in paragraph 13 of the defender's second Note of Arguments (No 31 of process). It mattered not whether this was termed "retention" or "withholding". Its essential basis was on the mutuality of the obligations under the Option Agreement. Reference was made to the observations of Lord Clarke in *Forster* v *Ferguson & Forster* at paragraph 15, and in particular his observation that the principle of mutuality:

> "has a vigour going beyond its application in relation to retention and, in particular, may be used by a party to a contract which has been broken materially by the other party to resist any claim for performance of any obligation on his part under the contract, even when the contract has been terminated."

Accordingly, the defender could, by way of security for its own claim for damages, invoke mutuality to resist the pursuers' demand. This right to retain or withhold performance subsisted until its damages were quantified and paid: *Stair Memorial Encyclopaedia* vol 13 at

paragraph 94; McQueen and Thomson, *Contract Law in Scotland* (3rd ed), chapter 5 at paragraph 5.21. This was a common law right.

[30] The question in this case was whether that common law right had been excluded by the terms of the Option Agreement. As to whether the Option Agreement was habile to exclude common law remedies, such as retention, Mr Upton referred to a tract of cases, starting with *Gilbert-Ash (Northern) Ltd* v *Modern Engineering (Bristol) Ltd*, [1974] AC 689, and Lord Diplock's observation (at page 717) that:

> "[i]n construing ... a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption".

This case had been followed or approved in subsequent cases such as *Port of Tilbury (London) Ltd* v *Stora Enso Transport & Distribution Ltd*, [2009] EWCA Civ 16, *per* Rix LJ at paragraph 32 and *per* Lord Drummond Young in *Persimmon Homes Ltd* v *Bellway Homes Ltd*, [2011] CSOH 149, at paragraph 35. Mr Upton also referred to the observation of Lord Dunedin in the earlier case of *W & S Pollock & Co* v *Macrae*, 1922 SC (HL) 192, at pages 198-199, that "to be effectual" a contractual provision that a party "will forgo the ordinary remedies which the law gives him in the event of breach of contract ... must be most clearly and unambiguously expressed". The common-law remedies to which that presumption applies included rights to retain performance: *Redpath Dorman Long Ltd* v *Cummins Engine Co Ltd*, 1981 SC 370. Mr Upton noted that even an express agreement that "[t]he consequences of termination set out in [the contract at issue] represent the full extent of the parties' respective rights and remedies arising out of any termination", was considered by the court in *Dalkia Utilities Services PLC* v *Celtech International Ltd*, [2006] EWHC Civ 63, not to exclude common law remedies. See *per* Clarke J at paragraphs 19 and 21.

[31] In short, one needed clear words to exclude a common law remedy. Put another way, common law remedies subsisted unless it could be shown that they had been excluded by "clear and unequivocal words" in the contractual provisions in question: *per* Lord Justice Clerk Ross in *Redpath*, *op cit* at page 374. This was the correct approach whereas, he argued, the pursers' approach had been to turn this on its head.

[32] Furthermore, he argued that the cases of *Wood* and others on interpretation referred to by the pursuers were irrelevant. This was not a case about the meaning of words. The issue did not turn on the scope of the obligations for which the Standard Security was granted, but on the scope of the defender's common law right to withhold performance of the obligation to deliver a discharge. The availability of the common law right requires only that the presumption of the mutuality of parties' obligations is not rebutted. There are no grounds for such a rebuttal. One just asked: had the common law remedies been excluded? Mr Upton contended that they had not. In respect of the pursuers' reliance on clause 3.3, the pursuers appeared to imply that this was a complete code of the parties' rights, to the exclusion of common law rights. The same kind of argument had been advanced and rejected in *Dalkia*, and it should be rejected here. Even if parties had in clause 3.3 of the Option Agreement agreed all of the consequences for breach, the wording of clause 3.3 was not sufficiently clear to exclude the common law right of retention. Clause 3.3 said no more than this: if the pursuers were in breach, they need not repay the option payments.

The Characterisation Question

[33] Thus far Mr Upton had predicated his argument on the defender's common law right, based on the doctrine of the mutuality of contract, to withhold performance. However, he developed his submission in a manner that engaged the characterisation question. In relation

to the issue of the scope of the obligations for which the Standard Security had been granted, Mr Upton argued that, having regard to clause 11.1, the Standard Security had been given for all of the pursuers' obligations under the Option Agreement, including its secondary obligation to pay damages. In terms of clause 11.1 of the Option Agreement, the pursuers were obliged to provide "security for the implementation of [the pursuers'] obligations under" the Option Agreement: clause 11.1. An obligation of the pursuers to pay damages for breach of the Agreement is in those terms an "obligation under the Agreement" as much as is any of their obligations which are stated in express terms on the face of the Option Agreement. The Option Agreement was just as much the source of secondary obligations as it was of primary obligations: see *Photo Production Ltd*, *per* Lord Diplock at page 849A-B. As a matter of what was contemplated when the contract was made, there is no principle of law or of construction which requires the reference in clause 11.1 of the Option Agreement to obligations to be restricted to primary obligations to the exclusion of secondary or substitutionary ones. On the contrary, Mr Upton argued that such a construction would be extremely odd, for it would entail that in any case where by breaching the contract the pursuers could effectively leave the defender with only a remedy in damages, they would be better off, by denying the defender the benefit of the Standard Security. The source of the defender's claim for damages was both the substitutionary character of a claim for damages and the Option Agreement itself, because of the damages claim for breach of it. Without the Option Agreement there would be no right to damages. The breadth of clause 11.1 was consistent with this. The Standard Security was granted to secure the pursuers' obligations under the Option Agreement and it was habile to cover obligations to pay damages for breach of the Option Agreement. Parties would have had in contemplation their common law rights.

The Implied Term

[34] Mr Upton turned to the pursuers' challenge to the relevancy of the averments about an implied term. He acknowledged that cases such as *F Brown plc* and *Moyarget Developments Ltd*, stated that pleadings were required. But, he said, in those cases it was necessary to refer to extrinsic facts. That may have been part of the arguments in those cases. Here, he said, it was not essential to do that. One just had to read the terms of the Option Agreement and one could see that more fell to be implied. Mr Upton maintained that, had parties been asked, they would assuredly have agreed to implication of the term he had averred. Clause 5.4, for example (that the pursuers were to "provide all necessary assistance to [the defender] in connection with" the planning applications), was just the flip side of the term to be implied. This was really an exercise of construing the express terms of the Option Agreement, and then of implication of the necessary term, consistent with the discussion in *Marks & Spencer plc*. In response to a question from the court that, if there was a positive obligation in the Option Agreement, such as clause 5.4, why was it necessary to imply the mirror image or negative version of that obligation, as I understood him, Mr Upton acknowledged that it might not be required on a certain approach to clause 5.4.

The Averments of Loss on the Alternative Basis

[35] In relation to this challenge, Mr Upton resisted the suggestion that the averments setting out the alternative basis for loss were irrelevant. He referred to paragraph 13a of the Court of Session Practice Note No 1 of 2017 and the desired brevity of pleadings. The view had been taken earlier that it was premature to provide this level of detail. The defender was not in default of the Practice Note. It was simply premature to flesh out these

averments. If the court was not with him, it should not delete these but should afford the defender an opportunity to enrol a motion in respect of these.

[36] He renewed his motion that the court should allow a Proof before Answer on all averments and it should repel, or at least reserve, the pursuers' preliminary plea.

Reply on behalf of the Pursuers

[37] Mr Thomson sought to clarify a number of points in his reply.

1) Retention was a subset of the doctrine of mutuality and, for the reasons stated by Lord Clarke in *Forster*, operates only during the currency of the parties' contract. While it is therefore correct that the defender seeks to invoke retention, notwithstanding that the Option Agreement was terminated, Mr Thomson did not rest with that submission.
2) He accepted that, in theory the defender could withhold performance based on the mutuality principle, but this was subject to the terms of the Option Agreement and also assumed the defender could otherwise comply with the requirements of that principle.
3) His criticism of the defender's averments was not a semantic one, as Mr Upton appeared to suggest. Rather, Mr Thomson argued that the principle of mutuality depended on:
    (i) the respective obligations being counterparts to one another, and
    (ii) the exercise of any withholding had not been excluded by the parties' contract.

4) His principal argument was that, properly construed, the Option Agreement negates both (i) and (ii) of the principals of mutuality. The obligation to deliver the discharge was not a counterpart of the obligation to make reparation. And properly construed, clauses 7.5 and 11.3 of the Option Agreement could not be clearer. The defender was under an obligation to deliver the discharge of the Standard Security.

5) In relation to his reliance on clause 3.3 he did not, *pace* Mr Upton's understanding to the contrary, argue that this contained a complete code of the parties' rights in the event of breach. Were that the case, then the defender's claim for damages in the counterclaim would be irrelevant. Rather, the significance of the reference to clause 3.3 in clause 7.5 was that it was clearly envisaged by the parties that the right to terminate might be exercised even if one of the parties (including the pursuers) was in material breach of the Option Agreement. Accordingly, by the time one got to clause 11.3, having exercised the right to terminate in clause 7.5, the unqualified obligation was for the defender to deliver a discharge of the Standard Security. This excluded any right to withhold delivery based on the mutuality principle.

6) It all turned on what the Option Agreement actually said. Mr Upton's references to abstract *dicta* about mutuality were of no assistance in determining the proper interpretation of the Option Agreement.

7) In relation to the characterisation question, Mr Thomson referred to the fact that the source of the obligation was also relevant for the purposes of jurisdiction. The place of the performance of the obligation was one of the special jurisdictions, ie this was under the Option Agreement. However, there was a

separate ground of jurisdiction for an obligation to pay damages. Albeit this example related to a different area of law (namely, of jurisdiction), this illustrated that the obligations *under* the Option Agreement were different from an obligation to pay damages *for* breach of it.

8) In relation to the implied term, if the defender states that there are all of these positive obligations under the Option Agreement and it is permissible to imply terms expressed as the negative of these obligations, this did not work. Clause 5.4 already contained a negative obligation. More fundamentally, it was incumbent upon a party seeking to imply a term to establish that the contract will not work unless the implied term were included. Mr Upton did not argue this.

Further Reply on behalf of the Defender

[38] Mr Upton sought a reply to Mr Thomson's last comments. He objected that there was no notice of the argument that the two obligations were not counterparts to one another. He argued that the Standard Security had been given for all of the obligations contained in the Option Agreement, including the breach of the express clauses referred to in the defences. In return for these express obligations, the pursuers had provided the Standard Security. Likewise, the Standard Security also secured the pursuers' obligation to pay damages for breach of an obligation in the Option Agreement. There was, therefore, no disconnect between the provision of the Standard Security and the fact that it secures performance of the obligations under the Option Agreement and breaches of them. The first requirement for the application of mutuality, as identified by Mr Thomson, was satisfied.

Discussion

1) The Pursuers' Entitlement to a Discharge and the Characterisation Question

[39] The defender's principal argument was that it was entitled to rely on the doctrine of mutuality of contracts to resist the otherwise admitted right of the pursuers to delivery of the discharge in terms of clause 11.3 of the Option Agreement. On this approach, the defender simply relied on a common law remedy (of whatever nomenclature) extrinsic to the Option Agreement and which could only be excluded by clear language. In any event the defender also argued that the scope of clause 11.1 of the Option Agreement was habile to include security for the defender's claim for damages. It was in the context of this last contention that the characterisation question arose.

[40] In relation to the characterisation question and the observations of Lord Diplock in the case of *Photo Production Ltd*, it is in my view clear that, in the absence of decree of implement of an obligation under a contract, breach of a primary obligation under the contract gives rise to and is replaced by a secondary obligation on the part of the party in default. While it is correct that Lord Diplock thereafter states that the contract in question is just as much "the source" of the secondary obligations as the first, in my view the context of that observation is his discussion of the freedom of the parties (subject to certain limits not here relevant) to contract out of such implied obligations. It must be borne in mind that the term under consideration in that case was an exclusion clause and the court was considering whether it was habile to exclude breach by the defendants of the implied duty to operate with due regard to the safety of the premises.

[41] Mr Upton is therefore correct when he argues that without the Option Agreement there would be no secondary obligation to pay damages. However, in my view, that basic observation does not greatly assist in elucidating the issue as argued by the parties in this

case, and which concerned the exercise of a common law self-help remedy as a shield to deflect the pursuers' claim. Either the defender relies on the common law doctrine of mutuality of contracts to retain or withhold performance, in which case the scope of clause 11.1 is, strictly speaking, irrelevant, or that remedy is as a matter of construction within the scope of clause 11.1. In that latter circumstance, if correct, there is a curious conflation in Mr Upton's argument of a common law remedy extrinsic to the Option Agreement and that remedy being within the scope of what parties' agreed, and hence intrinsic to the Option Agreement.

[42] I turn to consider the scope of clause 11. Clause 11 has the heading the "CHATTISHAM SECURITY", being the Standard Security as I have defined it. While by clause 2.4.1 it is stated that headings to clauses do not affect the construction of a clause, it is clear from the subject-matter of clause 11 that it concerns the Standard Security. Clause 11.1 defines the purpose for which the Standard Security was granted, namely "[a]s security for implement of [the pursuers'] obligations under this Agreement". That language is in my view clear and straightforward. It encompasses the primary obligations brought into existence by the Option Agreement. It does not extend to secondary obligations which come into existence only upon a breach of the Option Agreement. In practical terms, having regard to the structure and purpose of the Option Agreement, the principal obligation of the pursuers was to convey the Subjects or parts of them (the Sales Parcels, as defined in the Option Agreement) on a phased basis if certain conditions were met and if the options were exercised. This is, in my view, the natural and ordinary meaning of clause 11.1, construed in the context of the Option Agreement. This is also borne out by clause 11.2.

[43] Clause 11.2 provides that "initially" the Standard Security shall extend to the Subjects but it further stipulates for a restriction of the Standard Security to be granted by

the defender to those parts of the Subjects ("the Allocated Subjects") that are allocated by the planning authority for residential development. In other words, if some parts of the Subjects do not attract the status of Allocated Subjects, those parts fall to be excluded from the Standard Security. By implication, the pursuers become free to deal with those parts of the Subjects that did not acquire the status of "Allocated Subjects". The fact that the Standard Security is to be confined to allocated parts of the Subjects demonstrates, in my view, a strong correspondence between the Standard Security and the principal obligations incumbent upon the pursuers. If the Standard Security were intended to secure other, unspecified obligations, or even to extend to a security for a common law remedy, such as the defender contends for, then clause 11.2 would be materially inconsistent with the extension of the Standard Security to these other obligations or remedies. Indeed, it would be difficult meaningfully to relate the wider scope of the Standard Security (on this approach) to the provision for restriction of the Standard Security permitted under clause 11.2.

[44] On a proper interpretation, therefore, the scope of clause 11.1 does not extend to securing any right of retention or withholding of performance arising at common law. Putting it another way, as a matter of characterisation, the remedy the defender invokes in his 6th and 7th pleas-in-law is a classic secondary or substitutional remedy. To the extent that the defender endeavoured to argue, on either of these bases, that the Option Agreement extended the Standard Security to secure the exercise of this remedy, I reject this argument as contrary to the clear terms of the Option Agreement.

[45] That leaves the question of whether the defender is entitled to refuse to grant the discharge, either on the basis of retention or withholding arising as a matter of common law, and whether or not the Option Agreement excluded that by clear and unambiguous

language. One curious feature of the debate before me was the contention by each side that tracts of authority relied on by the other were irrelevant and therefore did not need to be responded to in any detail. Mr Thomson, for his part, accepts the case law about mutuality of contract but he argues that these are simply presumptions that can be displaced by – and have here been displaced by – the language of the contract in question. Mr Upton, for his part, did not regard this issue as concerning any question of interpretation of the Option Agreement.

[46] Furthermore, in the argument before me, there was little consensus on the nomenclature of the remedy that the defender invokes. The defender's 6th and 7th pleas-in-law in the principal action refer to retention. Mr Thomson commented that retention does not apply after termination of the contract. He was, however, unconcerned about this. Whatever the descriptor of the remedy the defender seeks to invoke, Mr Thomson argued that it is excluded by the clear words of the Option Agreement.

[47] It is pertinent to recall Professor McBryde's observation in his discussion of the concepts of retention and compensation, that "retention" is a word to be used with care: see paragraphs 20-62 of *The Law of Contract in Scotland*. I note that much of the discussion of retention in the textbooks is mired in explanations as to how it differs from compensation: see, eg, part 9 of chapter 20 of McBryde; and *Gloag on Contract*, chapter XXXV. However, Mr Upton did not refer to the discussion of retention in these works, notwithstanding the use of the language of retention in his pleadings. He did refer to a similar discussion in paragraph 5.21 of MacQueen and Thomson, *Contract Law of Scotland*. However, that appears to relate to retention used in a different and narrower sense than that seemingly invoked by the defender.

[48] Rather, as I understood him, Mr Upton used retention as a shorthand for withholding of performance of contractual obligations accepted to be due, but justified by the principle of mutuality of contracts. (Even then, I was not referred to the discussion of retention in this sense, eg at paragraph 5.14 of MacQueen and Thomson, *Contract Law of Scotland*.) The discussion of the doctrine of mutuality, at paragraphs 2-45 of McBryde on *Contract* and at page 592 of *Gloag* o*n Contract*, is more apposite to explain the defender's position, as are the observations of Lord Clarke in *Forster* at paragraph 15. However, the exercise of the self-help remedy of retention or withholding of performance, based as it is on the doctrine of mutuality, would normally invite an analysis of whether there was the necessary interdependency between the obligation said to have been breached (by the pursuers) and the obligation of performance which is withheld (by the defender) as a consequence of that breach. When Mr Thomson made passing reference to this in his reply, Mr Upton objected on the basis that this particular argument had not featured in the pursuers' Notes of Argument. Given the view I have come to on the interpretation of the Option Agreement I can express my views shortly. I accept Mr Thomson's submissions on this as patently correct. The express or implied terms said to be averred are not the counterparts of the obligation to grant the discharge of the Standard Security. For completeness, I note that there was an observation in one of the texts referred to which suggested that retention was an equitable remedy. Neither party made any submission on that observation or, if that were so, what factors would or should inform the exercise of such a discretion in respect of that remedy.

[49] For present purposes, I am content to accept Mr Upton's submission that what the defender seeks to do is based on the doctrine of mutuality. (Any imprecision in the wording of the defender's pleas can be addressed in due course.) Mr Thomson was unconcerned on

the basis that, whatever the nomenclature for what the defender seeks to do, this has been excluded by the clear words of the Option Agreement. Terminological issues aside, the critical question at the heart of this first argument is whether that submission is correct.

[50] Mr Upton cites the *Gilbert-Ash* tract of authority for the proposition that it requires clear and unambiguous language to exclude a common law remedy. As I understood him, he goes further to contend that there is a presumption to this effect and that it is for the pursuers to overcome that presumption. Mr Upton argues that the cases of *Wood* and others on the interpretation of contracts are irrelevant. I disagree. This case is about the proper interpretation of certain provisions of the Option Agreement and whether or not, by clear words or by interpretation consistent with its commercial purpose, the Option Agreement entitles the pursuers to the discharge they seek of the Standard Security. Essentially, it seems to me however, that this remains a question of the proper interpretation of the Option Agreement applying the usual principles of interpretation. These are well known, are not disputed and do not require repetition here. I apply them in my consideration of parties' competing interpretations of the Option Agreement. I also accept the principle, amply vouched by cases such as *Alexander Stephen (Forth) Ltd* and *Highland Leasing Ltd,* that parties may in their contract make provision for the regulation of their rights following a breach or termination of their contract.

[51] Returning to the clauses in question, I agree with Mr Thomson's approach that clauses 11, 7.5 and 3.3 are linked and fall to be read together, and to be construed in a manner consistent with the commercial purpose of the Option Agreement. The logical starting point is clause 7.5, as this confers on both parties a right to resile if, in effect, there has been no sale of the kind envisaged within the timeframe allowed by the parties' contract. Having regard to other parts of the Option Agreement, a relatively generous timeframe was

allowed. That is explicable on several bases: it allowed for the allocation of land use by the planning authority and it permitted the developer a reasonable amount of time to generate the planning permission designed to unlock the perceived development value of the Subjects or, more accurately, the Allocated Subjects. As against this, the pursuers would have had the Option Payments referred to. However, it is commercially sensible that, in the absence of progress by the time of the expiry of the generous timeframe allowed, the pursuers would wish to be free to deal with the Subjects. This can only be done by terminating the Option Agreement (by exercising the right to resile in clause 7.5) and by obtaining a discharge of the Standard Security. From the perspective of the pursuers *quâ* landowners, the right to resile would be of no utility if it were not also coupled with the removal of the significant restrictions on their dealing with the Subjects created by the Standard Security. That, it seems to me, is what clause 11.3 seeks to achieve and why clauses 7.5 and 11.3 are read together. I do not accept Mr Upton's competing interpretation. The Standard Security secured the exercise of an option that was never exercised and, following the due termination of the Option Agreement, can now never be exercised. There is no subsisting contractual obligation under the Option Agreement for the Standard Security to secure. I accept Mr Thomson's analysis of the characterisation question. The fact that the grant of a discharge of the Standard Security might, as Mr Upton observed, deny the defender of the benefit of a security which happens to be a Standard Security, is coincidental but not compelling. In my view, the defender's interpretation is inconsistent with the clear language and the commercial purpose of the Option Agreement. In short, I accept Mr Thomson's submission that this is, indeed, the correct construction of the Option Agreement; that that meaning is clear; and that these clauses were habile to exclude and

did exclude any remedy arising as a matter of common law of the kind founded upon by the defender.

2) Challenge to the Implied Term

[52] Parties did not dispute the test for implication. I accept Mr Thomson's submissions, under reference to the cases of *F Brown plc* and *Moyarget Developments Ltd*, that there must be averments enabling the party seeking implication of a term to lead evidence of the basis for implication. The implication of a contract term is not an exercise that takes place in a vacuum. I am particularly persuaded by the observations of Lord Reed in *Moyarget Developments Ltd* at paragraphs 37 to 40, to the effect that there must be averments permitting evidence to be led and enabling the court to draw the desired inference. Mr Upton's suggested manner of distinguishing these cases was unconvincing. In any event, it will not suffice simply to aver the implied term standing that a positive expression of the obligation is contained in the Option Agreement – and that (as Mr Upton contended) the court could reach a view simply by reading the Option Agreement and for which (it was said) no averments of facts were needed. At the very least, it must be shown that it is necessary to imply the desiderated term. If, as Mr Upton contended, the implied term was simply a negative version of what was expressed in the contract as a positive obligation, it respectfully seems to me that the requirement to prove necessity is even more compelling. However, as Mr Thomson rightly observed, Mr Upton did not seek to argue that implication of the terms he proposed was necessary. The defender's averments fail to satisfy the requirements in law for implication. These averments are irrelevant and fall to be excluded.

3) *The Averments of Loss on the Alternative Basis*

[53] I also accept the force of Mr Thomson's submissions about the lack of specification of the defender's alternative basis for calculation of loss set out in the counterclaim. The heads of loss, comprising abortive expenditure, would not be difficult to set out. The defender has been under notice that the pursuers challenged the lack of specification for some time. On the other hand, there is some force in the approach that averments of loss may be set out in brief, pending resolution of legal arguments at debate or determination of the merits. In respect of these averments I accede to Mr Upton's request, to allow the defender an opportunity to augment these.

Decision

[54] It follows from the foregoing that the pursuers succeed in the principal action and are entitled to decree. I accede to Mr Upton's request for time to consider augmenting his averments of the defender's alternative basis of loss in its counterclaim. I shall put the matter out By Order to discuss the pleas to be repelled and sustained in the principal action and counterclaim, the terms of the interlocutor and any motion for expenses that may be made.