OUTER HOUSE, COURT OF SESSION

[2017] CSOH 138

CA86/16

OPINION OF LADY WOLFFE

In the cause

FIELDOAK LIMITED (IN RECEIVERSHIP), a company incorporated under the Companies Acts (Company Number SC161516) and having its registered office at Citywide Estates, 1016 Cathcart Road, Mount Florida, Glasgow G42 9XL

Pursuer

against

CITYWIDE GLASGOW LIMITED, a company incorporated under the Companies Acts (Company Number SC330299) and with its registered office at 1016 Cathcart Road, Mount Florida, Glasgow G42 9XL

Defender

Pursuer: Sellar QC, Barne; HBJ Gateley
Defender: Logan; Campbell Smith LLP

27 October 2017

Background

[1] This case concerns a dispute between the pursuer, a property company now in receivership, and the defender, the letting agent (as the defender would have it) or the former letting agent (as the pursuer contends) under a management agreement after-mentioned.

The Properties

[2] The pursuer was in the business of acquiring and letting mainly residential property. The properties comprised 107 residential properties and five commercial properties in or around Glasgow (together "the Properties"). The Properties fall into three categories.

(i) The first category comprises 19 properties, in respect of which the pursuer granted individual licences to occupy in favour of YMCA Glasgow, trading as Y People ("Y People" and "the Y People Properties"):

(ii) The second category comprised 14 properties, in respect of which the pursuer granted a "global licence to occupy" in favour of Orchard & Shipman (Glasgow) Limited ("O&S" and "the O&S Properties"); and

(iii) The third category comprised the remainder of the Properties, in respect of which the pursuer granted individual leases for each property ("the Leased Properties").

The Management Agreement

[3] The pursuer employed letting agents under management agreements. In particular, by a management agreement dated 31 October 2014 ("the Management Agreement"), the pursuer appointed a partnership known as Citywide Estates & Letting ("the Partnership") to be its managing agent. Giovanni Guidi and Dario Guidi were the only partners of the Partnership. Although there was no express novation of the Management Agreement in favour of the defender, the pursuer now accepts that the Management Agreement was so novated by an agreement (albeit called an assignation) dated 2 November 2015, between the Partnership and the defender.

[4] Clause 11 of the Management Agreement provided for 12 months' notice of its termination, to be given not less than 30 days prior to the anniversary of that agreement.

[5] The pursuer was not a party to that novation or assignation (the form of the transfer matters not for present purposes ("the assignation")) and it never expressly consented to it. The receivers received a copy of the transfer agreement only on 18 August 2016, after the Summons in this action had been served, on 23 June 2016.

The Issue

[6] Joint receivers were appointed to the pursuer on 21 December 2015 ("the Receivers"). They terminated or revoked the Management Agreement by letter dated 14 January 2016 ("the Revocation"). For a significant period of time, the defender disputed whether the pursuer had effectually terminated the Management Agreement. By the time of the proof in this action, it was accepted that the pursuer had revoked the Management Agreement. However, the defender's position is that, subsequent to the Revocation, the pursuer has either waived or revoked (the defender's position is not clear) the Revocation, or that the pursuer has novated the Management Agreement. This impasse persisted, and the pursuer raised the present action seeking declarator:

(i) that the Management Agreement had been terminated and that the defender had no continuing authority under it, and

(ii) in the alternative to (i), that the Management Agreement was unenforceable as against the pursuer by reason of the appointment of receivers.

As there was reference in submissions to the fact that the pursuer had concluded for, but not sought, *interim* interdict, I should record that in the Summons the pursuer concluded for interdict, and interdict *ad interim*, against the defender from continuing to hold itself out as

having authority from the pursuer and from having authority to collect rental or other payments in respect of the Properties.

The Parties' Positions

The Pursuer's Case

[7] The pursuer's position is straightforward and clearly set out in the Summons. The pursuer terminated the Management Agreement, leaving the defender with a right only to claim damages. The Management Agreement is in any event unenforceable by specific implement. The Receivers are frank in their acknowledgement that there is little prospect of payment of any dividend to unsecured creditors, which would include any claim for damages by the defender for any breach established by the defender of the Management Agreement. The defender remained in physical control of the Properties, hence the need for the orders sought.

The Defender's Case

[8] The defender's position is less straightforward. For a considerable time after the Revocation (in January 2016), the defender had maintained that the Management Agreement could not be terminated and that it subsisted. This was the substance of the advice tendered to the defender by its legal advisers, Baillies. It was only shortly before the Proof that the defender accepted that that advice was wrong. The maintenance of that position has, perhaps, obscured the defender's analysis and articulation of its alternative position, which has latterly emerged. While the defender now accepts that that Revocation was effective, the defender continues to resist the pursuer's action on one or more grounds, albeit it is not entirely clear what those grounds are.

The Defender's Pleadings

[9] The relative pleadings from Answer 9.1 of the defences are as follows. The pleader sets out at length certain conduct and communings. I have highlighted the averments apparently directed to the legal bases the defender relies upon.

> "Explained and averred that the defenders have provided a management service in accordance with the terms of the Management Agreement since the appointment of the Receivers without hindrance. This has involved collecting rents and accounting for the same, carrying out necessary repairs, dealing with tenants and obtaining Gas Certificates, Electrical Certificates in respect of electrical appliances and all other necessary works to ensure that the tenancies comply with the legal obligations upon Fieldoak as landlord and on the defenders as managers of the properties. All of the Gas Certificates obtained by the defenders were sent to the Receivers by letter dated 8th March 2016. By an exchange of e-mails on 6th April between the defenders and the Receivers the defender quoted for obtaining the required Gas Safety Certificates. By e-mail timed at 18.38 Kirsty Duncan on behalf of the Receivers instructed the defenders to arrange this. On 21st April 2016 the defenders wrote to the Receivers by e-mail pointing out that a series of properties required gas safety inspections in May 2016. It was explained that these related to properties that the defenders were no longer receiving rent for. It provided a quotation for the provision of the Gas Safety Certificates. No reply was received. The defenders proceeded to obtain the said certificates. In respect of 4/1 25 Trongate, Glasgow, the tenants had been paying rent to Cairn but confirmed that they had heard nothing about any renewal of the Gas Safety Certificate. The defenders obtained that for the pursuers. Such certificates and the checks on which they are based are not only a legal requirement but are a matter of public safety. In allowing and instructing the obtaining of such certificates for the premises still managed by the defenders the pursuers have adopted the Management Agreement. A list of all the invoices paid by the defenders on behalf of the Receivers is produced. On 29th January 2016 the defenders sent a cheque to the Receivers in the sum of £22,121.51 together with an accounting for the period from 21st December 2015 to 21st January 2016. The accounting showed that repairs had been carried out to the value of £3255.07 and debt collection work at a cost of £369. The said cheque was cashed by the Receivers on 17th February 2016. On 26th February 2016 the defenders sent a cheque to the Receivers in the sum of £24,706.65 together with an accounting for the period 22nd January 2016 to 19th February 2016. The statement included a fee for entering into 3 new leases and repairs of £6,288.19 marketing (in respect of void properties) of £2,502. The said cheque was cashed on 14th March 2016. On 4th May 2016 the defenders sent a cheque to the Receivers in the sum of £13,759.75 together with an accounting for the periods of 22nd February 2016 to 21st March 2016 (during which period the expenses incurred by the defenders exceeded the rental income received) and for the period from 22nd March 2016 to 21st April 2016. The accounting included repairs of £5,206.26 and marketing (in respect of void properties) of £2,502. In respect of a request from the pursuers the said

statement contained a detailed statement of the costs incurred on the pursuers' behalf itemising each account paid. The said cheque was cashed by the Receivers on 8th June 2016. The defenders have continued to provide the services specified in the Management Agreement and to account for the rental income received for a period in excess of 9 months since the purported notices and the pursuers have allowed them to do so. Each of the said accounts showed that substantial work was being carried out by the defenders on behalf of the pursuers. On receipt of said statements the pursuers did not instruct the defenders to cease the carrying out of said work nor did they make alternative provision for the meeting of the various statutory requirements that are imposed upon the Landlords of let property. The pursuers are or should be aware that the properties owned by the Company are not of the highest quality. Many are let to vulnerable tenants with a range of disabilities in respect of which they receive benefits including housing benefit to pay the rent. Such properties need a high level of maintenance. As with all properties they require to have all the relevant certification. The regime for such let properties is about to change again with additional requirements. The defenders have had a rolling program in respect of the housing stock under their management to have contractors carry out that work. It is anticipated that as the new regime comes into force this will be increasingly difficult with electricians, gas safety specialists and others being in very high demand. The bills incurred by the defenders reflect that program and are to the benefit of the pursuers who will be in a position to fully comply with the new regime, at least in relation to the properties still managed by the defenders. The documentation in relation to the flats being managed by the defenders was first sent to the receivers by letter dated 8th March 2016. This letter explained that there were "rolling programs" in respect of various statutory and safety obligations imposed on landlords. By e-mail dated 4th August 2016 Kirsty Duncan of the receivers wrote to the defenders. She acknowledged various documentation that had been requested by the receivers and then said: "Please also confirm that the landlord statutory requirements are being attended to and legionella inspections have been completed." The defenders replied on or about 8th August 2016 stating: "As per your list we shall send an updated list of documents regarding Gas Safety Certificates, EPC and Legionella inspections as well as EICR certification in all cases where we are attending to statutory requirements. All gas certification we have responsibility for are being attended to. EICR, EPC and Legionella are all on a rolling program and we shall send those we have and when others have been obtained we shall also send these to you." **By these and the other actions hereinbefore referred to the receivers allowed the defenders to incur costs on behalf of the receivers and to undertake the work required of a property manager such as the defenders without objection and in a way consistent with them accepting that the defenders were continuing to act as property managers on their behalf.** The terms of the correspondence between Joanna Harran of the defenders and Kirsty Duncan of the receivers are referred to beyond which no admission is made. It is explained and averred that this had to be looked at in the context of the work that was being undertaken by the defenders. This particular flat was a flat supposedly being looked after by another manager on the receivers behalf." (Emphasis added.)

[10] The only plea relative to the merits is the defender's second plea-in-law, in the following terms: "The pursuers having **waived** any right to repudiate the contract by their actions the defenders should be assoilzied." (Emphasis added.) The defender was ordained to lodge a supplementary note of issues ("the Supplementary Note") to clarify its position as to the legal bases on which it continued to resist the pursuer's action.

The Defender's Supplementary Note

[11] In the Supplementary Note, lodged on 16 May 2017, the defender accepted that, contrary to what had been asserted by the defender's agents (Baillies) and to its position in the defences, the Receivers had validly terminated the Management Agreement. Thereafter there is set out a variety of actings, by the Receivers and by the defender, and communings passing between the parties. In broad terms this reflects averments in the pleadings set out above. It is then stated (at para 5): "In the light of the above largely undisputed evidence the defender maintains … that the [Management Agreement] purportedly terminated by the pursuer was **either novated upon on the same terms and condition or the notices of termination were waived with the effect that [the Management Agreement] was continued**." (Emphasis added.) (The use of "purportedly" is inapposite; the defender has now conceded that the Revocation of the Management Agreement was effective and the Proof was conducted on the basis of that concession.) Certain cases said to be relevant to waiver (eg *Armia Ltd* v *Daejan Developments Ltd* 1979 SC (HL) 56) or novation were referred to. It was suggested that "there is a small complication" in the novation case, as the Management Agreement was "novated on slightly different terms."

The Conduct Relied Upon by the Defender

[12] From the defender's pleadings (set out at para [9], above) and its Supplementary Note, I have endeavoured to identify the different kinds of conduct founded upon. In support of these grounds, the defender appeared to rely on the following:-

(i) The pursuer's receipt and encashment of three cheques from the defender representing the net rent after deduction of the defender's charges;

(ii) The Receivers' request for statements of account and the defender's provision of the same, disclosing the deductions made for work said to be undertaken on the pursuer's behalf, such as repairs, factoring and debt collection (this is said to demonstrate the Receivers accepting deduction of fees for the provision of services and to evidence work done by the defender);

(iii) The provision by the defender of services under the Management Agreement, such as maintenance and regulatory work (the provision of certain safety certificates for some of the properties) by the defender in respect of the Properties (said to demonstrate the Receivers' reliance on the defender for compliance with resulting safety requirements);

(iv) An occasion when the pursuer specifically instructed the provision of a gas safety certificate for one of the properties; and

(v) The Receivers' asserted failure not to seek interdict *ad interim* to stop the defender from acting under the Management Agreement (this factor emerged in evidence and submissions) after the letter of 23 February 2016.

In the light of these factors, the defender contends that while the Receivers were (on behalf of the pursuer) entitled to terminate the Management Agreement, their subsequent conduct

was inconsistent with reliance on the Revocation, and the defender conducted its affairs in reliance on the Receivers' actings.

Legal Principles

[13] The parties produced a statement of legal principles and issues in dispute ("the Statement of Legal Principles"), being those agreed (in para 1, below) and those relied upon by each party but not agreed by the other (in paras 2 to 6, below). This was in the following terms:

> **"(i) Agreed statement of principle**
>
> 1. The following is an accurate statement of the law:
>
> > 'The receiver, who has been appointed under a floating charge over all of the assets of the company, acts as manager of the company superseding the managerial power of the directors. On his appointment the company's pre-receivership contracts remain in force but the receiver is not personally liable for those contracts: section 57(4) of the [Insolvency Act 1986]. The receiver can cause a company to decline further performance of a contract. By so doing the receiver puts the company in breach of contract. But it is not the practice of our courts to order specific implement against a company in receivership for reasons which are analogous to those which apply in a liquidation. The company in receivership cannot perform the contract except through the receiver who, if he acted, would incur personal liability. If the company failed to act, it would incur liability for contempt and it would be unfair on its creditors to punish it with a fine: *MacLeod v Alexander Sutherland Ltd* [1977 SLT Notes (44)]. The court has regard to the reality of the company's insolvency and the task which the receiver has to perform in realising the secured assets for the benefit of the charge holder and respecting the rights of the company's other creditors.' [In support of this, reference was made to *Joint Administrators of Rangers Football Club Plc, Noters* 2012 SLT 599 at para 48.]
>
> **(ii) Legal principles on which the pursuer seeks to rely**
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> 2. A contract of agency will not be enforced by the courts by way of a decree of specific implement:
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> 3. Subject to certain exceptions that are not relevant to the present case, the actual authority of an agent is terminated by notice of revocation given by the principal to the agent; but this is without prejudice to any claims for damages that the

principal or agent may have against the other for breach of any contract between them. [The following were cited in support: *Re D&D Wines International Ltd (In Liquidation)* [2016] 1 W.L.R. 3179 at para 6. Burn-Murdoch, *Interdict in the Law of Scotland*, p165 at para 187.]

4. If the defender's authority as the pursuer's agent has been revoked, it is unlawful for the defender (i) to continue to hold itself out as having continuing authority from the pursuer in respect of any of the properties owned by the pursuer (and which are listed in schedule 2 to the Summons), and, in particular, (ii) from continuing to hold itself out as having such authority to collect, or otherwise intromit with, any of the rental or other payments which are due to the pursuer in respect of any of the properties.

(iii) Legal principles on which the defenders seek to rely

5. That, if a contract is terminated by notice, it can be novated by the subsequent actings of the parties if those actings are compatible with the contract still being in force. [The defender cited the following: *McIntosh & Son -v-Ainslie* (1872) 10 M 304; *MRS Distribution Ltd-v-DS Smith (UK) Ltd* 2004 SLT 631; *Arnold-v-Britton* 2015 AC 1619.]

6. That it is open to the Court to infer waiver of a contractual right by the conduct of a party. [The following was cited in support: *Armia Ltd -v- Daejan Developments Ltd* 1979 SC (HL) 56.]"

Before I set out the parties' agreed statement of the issues in dispute (recorded in para [13], below), it may assist here to set out some of the legal submissions heard after the Proof. This is because, generally, there was ultimately no real dispute about the legal principles for waiver or novation. In doing so at this stage, it will become apparent that the issues genuinely in dispute are more narrowly focused than the evidence elicited in the Proof before me. I have already set out the defender's approach, as recorded in the Supplementary Note. In his written submissions, Mr Sellar QC set out more fully the law relating to novation and waiver.

The Pursuer's Legal Submission on Novation

[14] In respect of novation, Mr Sellar's submission on the law was:

"**Novation**

24. There are different forms of novation. One form is where one obligation is substituted for another, or where a new contract is substituted for an old contract or where one obligant is substituted for another. In any of these forms, novation requires the consent of the parties to the old contract. To establish novation, there must be evidence that it was the intention of the parties to discharge the old obligation. In other words, the parties must have intended to replace the old obligation with the new obligation."

After applying these principles to the facts (this submission is recorded below, at para [75])

Mr Sellar said:

"28. Turning to the case law, it can be seen there is no merit in the defender's novation argument. In *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2002] 1 All E.R. (Comm) 737 the Court of Appeal at paragraph 13 said the following:

> '(1) A court will only imply a contract by reason of the conduct of the parties if it is necessary to do so. It will be fatal to the implication of a contract that the parties would or might have acted as they did without any such contract. In other words, it must be possible to infer a common intention to be bound by a contract which has legal effect. If there were no such intent the claim would fail.

29. At paragraph 30, the Court of Appeal expressed itself in the following terms:

> 'It cannot be said, let alone with confidence, that the conduct of the parties is more consistent with the existence of the contract sought to be implied than with its absence. The implication of the alleged contract is not necessary to give business reality to the commercial relationship between M & S and Baird. In agreement with the judge, I do not think that Baird has a real prospect of success on its claim in contract.'

30. On this approach, where conduct between parties is consistent with there being no contract between them, the court will not imply a contract between them. The pursuer shall refer to this as the 'necessity point'.

31. The issue of the parties' respective intentions is also important: where one party knows that it is the other parties intention not to enter into a contract, no contract can be implied. The pursuer shall refer to this as the 'intention point'. In *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] 1 Lloyd's Rep. 475 Smith J said at paragraph 228:

> '228 However, there are circumstances in which the parties to what would objectively be held to be contractual are not legally bound by it under English law. If the other parties actually and reasonably believed that the defendants intended to make a contract, there would be a concluded

> contract, but not if the other parties knew or would reasonably have believed that that was not the defendants' intention and not, in my judgment, if the other parties had simply formed no view one way or the other as to whether the defendants so intended. That is the opinion expressed by Professor Sir Gunter Treitel in Chitty on Contracts, (2008) 30th Ed at para 2-004, and I agree with it. The defendants submit that they are not contractually bound even if on an objective assessment they and the claimants evinced an intention to be bound.'"

Mr Sellar noted that *Maple Leaf Macro* had been affirmed by the Court of Appeal ([2009] EWCA Civ 1134, [2010] 2 All ER (Comm) 788) and in which Longmore LJ (at para 22) paid "tribute to the careful and thorough judgment of Andrew Smith J". Reference was also made to the text in similar terms at paragraph 2-004 of the 32nd edition of *Chitty on Contracts.*

[15] Returning to Mr Sellar's submissions in relation to the question of intention and what may be inferred from a parties' inactivity, he referred to the following:

> "32. In *Paal Wilson & Co A/S* v *Partenreederei Hannah Blumenthal, The Hannah Blumenthal* [1983] 1 AC 854, the House of Lords had to consider *inter alia* whether a delay by a party in prosecuting an arbitration claim meant that the arbitration agreement had been abandoned by agreement. The Court found that a party (X) could only establish that an arbitration had been abandoned by the apparent inaction of the other party (Y) if X could prove not only that Y's conduct was such as to induce a reasonable belief in X that Y intended to abandon the arbitration, but also that X did in fact believe that Y so intended. At page 915E, Lord Diplock said:
>
> > 'To the formation of the contract of abandonment, the ordinary principles of the English law of contract apply. To create a contract by exchange of promises between two parties where the promise of each party constitutes the consideration for the promise of the other, what is necessary is that the intention of each as it has been communicated to and understood by the other (even though that which has been communicated does not represent the actual state of mind of the communicator) should coincide. That is what English lawyers mean when they resort to the Latin phrase consensus ad idem and the words that I have italicised are essential to the concept of consensus ad idem, the lack of which prevents the formation of a binding contract in English law.
> >
> > Thus if A (the offeror) makes a communication to B (the offeree) whether in writing, orally or by conduct, which, in the circumstances at the time the communication was received, (1) B, if he were a reasonable man, would understand as stating A's intention to act or refrain from acting in some specified manner if B will promise on his part to act or refrain from acting

> in some manner also specified in the offer, and (2) B does in fact understand A's communication to mean this, and in his turn makes to A a communication conveying his willingness so to act or to refrain from acting which mutatis mutandis satisfies the same two conditions as respects A, the consensus ad idem essential to the formation of a contract in English law is complete.
>
> …
>
> The facts in the instant case, however, are very different from those of The Splendid Sun. As my noble and learned friends, Lord Brandon of Oakbrook and Lord Brightman, both point out, they are inconsistent with any actual belief on the part of the sellers that the buyers had agreed to abandon the arbitration before their letter of July 30, which stated their intention of continuing with it.
>
> Your Lordships were urged to hold that the absence of any actual belief on the part of the sellers did not matter so long as someone in the sellers' position could not unreasonably have drawn the inference from the apparent inaction of the buyers that they had abandoned the arbitration at some date between their letter of December 12, 1979, when they were manifestly treating the arbitration as being still alive, and July 30, 1980, when they wrote to the sellers forwarding their expert's report and asking for a hearing date for the arbitration to be fixed. The absence of actual belief on the sellers' part that the buyers had abandoned the arbitration, however, would mean that there had in fact been no injurious reliance by the sellers; and to treat that ingredient of consensus ad idem as unnecessary would introduce into the law of contract a novel heresy which your Lordships should, in my view, be vigilant to reject.'"

Mr Sellar also referred to the speech of Lord Brandon of Oakbrook in *Paal Wilson* at page 914 A to C.

The Pursuer's Legal Submission on Waiver

[16] Mr Sellar's written submission dealt with the legal principles governing waiver. In short, it was contended:

> "Waiver can be express or implied. Waiver involves the abandonment of a right. Whether or not there is waiver is a question of fact. The party relying on waiver need not have suffered prejudice by reliance on the waiver. There must, however, have been a conduct of affairs on the basis of the waiver; in other words, there must be reliance."

[17] Mr Sellar noted that the law of waiver has most recently been considered by Lord Doherty in the case of *AWG Group Limited* v *HCP II Properties 101 GP Limited* [2017] CSOH 69. The relevant part of that opinion is as follows:

> "[14] The essence of waiver is the abandonment of a right (*Armia Ltd* v *Daejan Developments Ltd, supra,* per Lord Fraser of Tullybelton at p 69, Lord Keith of Kinkel at p 72; *James Howden & Co Ltd* v *Taylor Woodrow Property Co Ltd*, *supra,* per Lord Kirkwood at p 865 E-F; *Scottish Lion Insurance Co Ltd* v *Goodrich Corporation, supra*, per the Opinion of the Court at para 45). (It is also possible to waive a claim or a privilege (see eg *Reid & Blackie, supra,* para 3-09)). Waiver may be express or inferred from facts and circumstances. Whether waiver is implied is to be determined objectively upon a consideration of all the relevant evidence (*Armia,* per Lord Keith at p 72; *Scottish Lion*, per the Opinion of the Court at para 47). That requires an objective analysis of the conduct of the person asserting the right which is said to have been waived (*Scottish Lion*, per the Opinion of the Court at para 47). Where the issue is whether abandonment of a right should be inferred, the test to be applied was described in *Presslie* v *Cochrane McGregor Group Ltd, supra,* by Lord Morison (delivering the Opinion of the Court) at page 292B-C. After observing that it was abundantly clear that the pursuers had acted in reliance on their belief that the defenders had abandoned the right to insist on arbitration he continued:
>
> > 'The only question which accordingly appears to us to arise in this case is whether the facts and circumstances founded on by the pursuers give rise to the inference that the first defenders had abandoned their right by the time that they sought to enforce it. Parties were agreed, in our opinion correctly, that the test to be applied in determining this question was appropriately expressed in the similar case of *Inverclyde (Mearns) Housing Society Ltd v Lawrence Construction Co Ltd* [1989 SLT 815] in which the Lord Ordinary (Lord McCluskey) stated at p 821 that: 'The court must consider whether the actings (including failure to act) of a party must be construed as being inconsistent with an intention to insist upon his contractual right to go to arbitration.'
>
> [15] Since counsel were not at one on the issue of reliance it is appropriate that I set out my understanding of the law. In *Armia Ltd* v *Daejan Developments Ltd* at page 69 Lord Fraser concluded (the emphasis is added):
>
> > 'In the present case the reason why the plea of waiver fails is not that the respondents suffered no prejudice (although in my opinion that is true) but that the appellants never abandoned their right to refuse the title offered, *and the respondents never conducted their affairs on the basis that they had*.'
>
> While the view has been expressed (*Reid & Blackie, supra,* para 3-26) that what Lord Fraser said about reliance was *obiter* given his conclusion that there was insufficient evidence of abandonment, that is not a view which I share. It would, of course, have been sufficient for Lord Fraser to have decided the issue of waiver on either of the two grounds he gave, perhaps then going on to express a view *obiter* on

the other. However, that is not what he did. Rather, he was careful to say that the plea of waiver failed for both the reasons which he identified. Both grounds formed the basis of his decision. His speech was the leading speech, and Lords Diplock, Edmund-Davies and Russell of Killowen agreed with it. It follows that, at the very least, the majority of their Lordships decided the waiver point on the basis that the person claiming waiver had to show that he had conducted his affairs on the basis that the right asserted against him had been abandoned.

[16] I say at the very least because I recognise that it is debatable whether Lord Keith adopted the same approach. He noted (at the foot of p 71) counsel for the respondents' submission that

> '… it is sufficient for the party relying on a plea of waiver to establish that he has acted in some way in reliance on a belief induced by the words and conduct of the other party, and that he need not show that he has acted to his prejudice.'

However, Lord Keith's speech undoubtedly focussed mainly upon the appellants' conduct - the evidence which the respondents said justified the inference of abandonment - and he concluded that the inference was not justified. I say mainly because at page 73 he remarked:

> 'The respondents' attitude throughout was that the title burdened by the restrictions was all they were obliged to tender.'

It is arguable that that sentence indicates that Lord Keith did indeed consider the respondents' conduct, and that it may reasonably be inferred that he concluded that they had not conducted their affairs on the basis that the appellants had abandoned the right to resile. It seems likely that if he was taking a different view from Lord Fraser on the issue of reliance, or wished to reserve his opinion on the point, he would have made that clear.

[17] In any case, even if the issue of reliance is only dealt with in the speech of Lord Fraser, that speech represents the majority view. One of the *rationes* derivable from it is that in a case of implied waiver the person claiming waiver of a right must show that he conducted his affairs on the basis that the right had been abandoned. In my opinion that *ratio* is also supported by the treatment of *Armia* in subsequent decisions. In *Lousada & Co Ltd* v *J. E. Lesser (Properties) Ltd, supra,* Lord Justice Clerk Ross observed at page 189:

> 'Counsel for the defenders submitted … it was recognised in the speeches in *Armia Ltd v Daejan Developments Ltd* that it must be shown that the pursuers had altered their position in reliance upon the alleged waiver on the part of the respondents. Counsel accepted that it was not necessary to show that the pursuers had acted to their prejudice but he contended that it was necessary to demonstrate that the pursuers had acted in some way in reliance on a belief induced by the alleged conduct of the defenders.

> In my opinion senior counsel for the defenders was well-founded in making those submissions, and it is necessary to consider whether it can properly be inferred from these averments that the defenders were abandoning their right, and whether the pursuers had acted in reliance upon a belief induced by the conduct of the defenders.'

Lord Murray (p 193) agreed with the Lord Justice Clerk, and it is clear that Lord Dunpark held the same view on this point (p 193). In *Presslie* v *Cochrane McGregor Group Ltd*, *supra,* the court made reference to *Lousada* and noted (at p 291F):

> 'It was stated by the Lord Justice-Clerk (Ross) at p 189 in relation to the plea of waiver that it was: 'necessary to consider whether it can properly be inferred … that the defenders were abandoning their right, and whether the pursuers had acted in reliance upon a belief induced by the conduct of the defenders'.'

In *James Howden & Co Ltd* v *Taylor Woodrow Property Co Ltd*, *supra,* Lord Kirkwood noted (at p 868C):

> 'There is certainly authority in *Armia* and *Lousada*, which is binding on us, for the proposition that Howden must show that they conducted their affairs on the basis of Taylor Woodrow's waiver of their right to resile …'

Lord Allanbridge (p 874) agreed with Lord Kirkwood. In the Outer House decision of *Moodiesburn House Hotel Ltd* v *Norwich Union Insurance Ltd, supra,* Lord Macfadyen carefully reviewed the authorities at paragraphs 43-44. He concluded at paragraph 44:

> '…I am of the opinion that it is not open to me, in the Outer House, to take the view that Lord Fraser's dictum about reliance was not part of the ratio of *Armia.* That aspect of the decision was endorsed in the Inner House in *Lousada v Lesser (Properties).* Moreover, in *James Howden v Taylor Woodrow,* notwithstanding the doubt which he expressed as to why waiver had to be accepted before becoming effective, Lord Kirkwood … expressed the view that *Armia* and *Lousada* were binding authority for the need for the party pleading waiver to show that he had conducted his affairs on the basis that there had been abandonment of the right. I am therefore of opinion that I am bound to proceed on the basis that for a relevant case of waiver there must be averments that the pursuers conducted their affairs on the basis that the right to found on the breach of the FCEC had been abandoned by the first defenders.'

I respectfully agree with Lord Macfadyen's analysis. Even if, contrary to my opinion, I am not bound to proceed on that basis, the guidance in *Armia* and the subsequent Inner House cases would nevertheless be of very high persuasive authority. As an Outer House judge it would be wrong for me to decline to follow that guidance."

Mr Sellar submitted that the facts do not support any inference that the Receivers abandoned the notices of revocation. He also noted that the defender did not rely on any alleged abandonment.

[18] In his own submissions after the Proof, Mr Logan did not challenge the correctness of any of Mr Sellar's legal propositions or those recorded at paragraphs 2 to 4 of the Statement of Legal Principles (in para [13] above). In respect of the legal principles for waiver, Mr Logan was content to adopt *AWG Group* as a correct statement of the law. He referred to the cases of *MRS Distribution Ltd* and of *Baird* without adverse comment (cases Mr Sellar had referred to), though he doubted the relevancy of the cases of *Paal* and *Maple Leaf Macro*, as applied to the facts of this case. I accept Mr Sellar's submissions on the law of waiver and novation as being a correct summary of the law. I turn to the parties' articulation of the issues in dispute, in the Statement of Legal Principles.

The Parties' Identification of the Issues in Dispute

[19] The Statement of Legal Principles also recorded the parties' identification of the factual issues in dispute. These were:

> **"(iv) Issues in dispute**
>
> 7. Whether the conduct of the receivers after the service of their notices was compatible with them insisting upon those notices or whether they waived their right to insist upon them by their subsequent conduct?
>
>   a. The pursuer's position is that the receivers' conduct was compatible with the notices.
>
>   b. The defenders' position is that the receivers' conduct amounted to a waiver of their right to insist on the notices.
>
> 8. If the receivers' conduct was not compatible with the notices, whether the contract between the parties was continued on its previous terms or novated on different terms?

a. The pursuer's position is that the Management Agreement was terminated as a result of the notices and was never novated or waived.

b. The defenders' position is that the notices had the potential to terminate the contract but they were waived by the subsequent actings of the pursuer. Alternatively, the contract between the parties was novated on the same terms as before and that the pursuer accepted this by conduct.

9. If so, what has been the contractual relationship, if any, between the parties since the service of the notices and whether the declarator sought is compatible with that relationship?

a. The pursuer's position is that the Management Agreement was terminated as a result of the notices and that the declarator sought states the legal position.

b. The defenders' position is that the relationship is only compatible with either a waiver of the notices or the novation of the contract and that in either event declarator should be refused."

[20] In the light of paragraph 1 of the Statement of Legal Principles, the defender accepts that the Revocation of the Management Agreement was effective. Accordingly, the live issues are those raised by the defender of waiver and novation and in respect of which it has the onus. Notwithstanding this, no motion was made to ordain the defender to lead at the Proof. There was a considerable volume of materials produced and spoken to at the Proof. Ultimately, however, there was relatively little dispute about the terms of the communings or other documentation spoken to. The dispute between the parties was centred on the legal requirements for waiver and novation, and whether on the evidence either of these bases for resisting the pursuer's action had been established.

[21] I turn to consider the parties' evidence to the extent it was relevant to those issues.

The Agreed Chronology

[22] I have had the benefit of an "Agreed Chronology". While this is not in the formal terms of a Joint Minute of Agreement, it agrees *inter alia* the order and terms of the

communings between the parties. For the purposes of this Opinion, I need only summarise the communications passing between the parties in the immediate aftermath of the appointment of the Receivers to the pursuer, and thereafter for a time passing between the parties' solicitors, for the three months from December 2015 to February 2016. I then record other matters agreed before considering what is the relevant time-frame for the conduct relied upon.

The Communications of December 2015, and of January and February 2016

[23] I do not record the whole of the exchanges between the Receivers and Baillies. As will be seen, it becomes repetitive as the positions of the Receivers and of Baillies, writing variously on behalf of the Partnership or an entity called "City Wide Estates and Glasgow Letting Limited" ("Citywide") or "Citywide Glasgow Limited t/a Citywide Estates Letting" or "Giovanni (John) Guidi", become fixed. The repetition has this significance: throughout these exchanges, and certainly by their end (on 23 February 2016), the defender can have been in no doubt about the Receivers' position in respect of the Revocation, their non-adoption of the Management Agreement and their demands for documentation and funds of the pursuer and cooperation on the part of Baillies' clients. The following communings provide a flavour:

(1) The Receivers sent an email (to an email including the domain name of "citywide.cc") dated 29 December 2015 (No 7/35 of process), shortly after their appointment:

> "Good morning
>
> I have been copied in on an email exchange between yourselves and a Fieldoak tenant which suggests that the tenant should continue to pay rent to Citywide.

> As you will be aware, my colleague Paul Dounis was recently appointed as Receiver over the Fieldoak portfolio – in such circumstances, the assets of the Fieldoak business, including all rents collected, are under the control of the Receivers. And whilst we do appreciate that you were acting on behalf of Fieldoak as property managers, our immediate concern is to ensure that we secure all assets and related income on behalf of the secured lender.
>
> We are happy to meet with you to discuss an orderly transition from Citywide to our nominated letting agents, Cairn. Please feel free to contact either myself, or my colleague Kirsty Duncan to arrange a meeting. Obviously, given the time of year, it might be easier to schedule such a meeting for after the New Year."

(2) The response to this on 5 January 2016 by Baillies (No 6/6 of process), writing on behalf of the Partnership, was:

> "We act on behalf of Citywide Estates & Letting, 1016 Cathcart Road, Glasgow, G42 9XL [ie the Partnership]. Our clients have received your letter of 22nd December 2015 which, as you might appreciate, came as some surprise to them."

After enclosing a copy of the Management Agreement, the letter continued:

> "In your letter of 22nd December 2015 you ask for substantial information. You will appreciate that our clients will require to go to some trouble and cost in correlating such information and copying the documentation that you have requested. Please confirm that you are prepared to meet these charges which would fall out with the terms of the existing Agreement.
>
> Our clients have also advised us that you have written to the various tenants by letter of 22nd December 2015 suggesting that Cairn Estate Agency had been appointed Property Letting Agents. Our clients' Contract has not been terminated and is not terminated simply by the appointment of a Receiver. Our clients' view is that the Contract for management of the properties continued to subsist of course on the basis that they are now required to report to you as Joint Receiver rather than the Directors of the Company. We also note that Cairn Letting Ltd have written to each of the tenants and again we must say that we are surprised by this given the existence of the ongoing Agreement.
>
> Your letter of 22nd December to the tenants and Cairns' letter of the following date has created a significant amount of confusion in the minds of the tenants, some of whom had already processed payments for rental quite properly to our clients, Citywide Estates & Letting.

> Please confirm that you, as Receiver and as such an Agent for the Company, are prepared to honour the existing Contract between Citywide Estates & Letting. It would be appreciated if this confirmation could be remitted by return."

(3) The Receivers' agents, HBJ Gately ("HBJ"), wrote on 6 January 2016 to Baillies (No 7/3 of process), in respect of their client Citywide Estates and Letting (Glasgow) Limited (referred to in the letter as "Citywide") in the following terms:

> "We act on behalf of Paul Dounis and Adrian Allen who are the receivers of the Company (the "Receivers"). We understand you act on behalf of Citywide.
>
> We understand Citywide are directing tenants of properties owned by the Company to pay rent to Citywide instead of the agents appointed by the Receivers. We have been provided with no legal basis for such action and Citywide should cease all actions in relation to the properties of the Company.
>
> Please provide an account of all rents received by Citywide since the appointment of Receivers and all monies currently held by Citywide on behalf of the Company. These sums are now payable to Receivers. Please confirm that Citywide will make arrangement for immediate payment to the Receivers.
>
> Please also confirm that Citywide will advise all tenants that the rent is properly due to the Receivers and can be paid to their agents.
>
> In the event Citywide fail to do so, we will have no option other than to seek court orders to enforce our clients' exclusive right to the Company's property and the rents collected therefrom. We will also seek an award of damages against Citywide together with an award of expenses in raising the action."

(4) Baillies replied by letter dated 7 January 2016 (No 7/2 of process), albeit now acting on behalf of "Citywide Estate & Letting (Glasgow) Limited". Nonetheless, Baillies asserted that their client was entitled to deduct its commission.

(5) By a further letter, on 14 January 2016 (No 6/7 of process), the Receivers wrote to Baillies, copying the letter to Citywide Estate and Letting (Glasgow) Limited. In that letter, they explained that they had not previously been aware of the Management

Agreement and they stated (under reference to section 57(4) of the Insolvency Act 1986) that they have no personal liability. They then stated:

> "Furthermore, the mere existence of the Management Agreement and the appointment of Receivers as agents of the Company does not amount to adoption of the Management Agreement. As is clear from the correspondence issued to the Tenants and to Citywide, the Receivers have not and do not adopt the Management Agreement, and no new contractual arrangement has been entered into by the Receivers with Citywide.
>
> Accordingly, Citywide has no continuing authority on behalf of the Company as agents to collect rents and manage the properties, which authority now vests solely in the Receivers and their appointed agents. Your client is on notice that any contact with tenants or any steps taken by them in relation to the properties and/or the tenants constitutes wrongful interference in the secured properties of the Company, acting by the Receivers All rights, entitlements, pleas and claims in this respect are strictly reserved.
>
> Without prejudice to the foregoing, and subject at all times to the following conditions, we confirm for the avoidance of doubt:
>
> 1. the Receivers have not adopted and shall not be deemed to have adopted any contract, including without limitation the Management Agreement, or other arrangements with Citywide concerning the property of the Company in place prior to the date of this letter and our previous correspondence;
>
> 2. the Receivers have not and shall not be deemed to have entered into any new contract or arrangement regarding the property of the Company with Citywide to give rise to any liability of the Company or the Receivers to Citywide whether under the Act or otherwise;
>
> 3. any liabilities of the Company under the Management Agreement or other arrangements are unsecured claims against the Company only, and which will require to be adjudicated upon in the normal way;
>
> 4. any and all sums received by Citywide from tenants of the Company whether before or after the date of the Receivers appointment are held by Citywide on trust for the Company and shall be paid over immediately without deduction, set off or otherwise; and

> 5. Citywide is not, without further express agreement of the Receivers (and on such terms as the Receivers shall deem appropriate) to conduct any further actions whether in terms of the Management Agreement or otherwise as regards the Properties, any rental income therefrom, any management and liaison with tenants."

After referring to Citywide Estates and Letting (Glasgow) Limited ("Citywide"), the Receivers explained that:

> "Citywide have no legal entitlement to retain the keys to the property, please arrange for these to be delivered to this office by no later than 22 January 2016.
>
> Please note that if the keys are not returned for this property, a locksmith will be instructed to change the locks."

After referring to the Receivers previous letter to Citywide of 22 December 2015, the letter requested the following information:

> "
> - Confirmation as to whether Citywide hold any funds;
> - Copy lease documents;
> - Copy securities;
> - Schedule of properties owned by Fieldoak & managed by Citywide together with tenants details, if occupied, agreed rent, payment date, statement of account for each property;
> - Keys for all unoccupied properties.
> - Details of building insurance in place.
>
> I am aware that Citywide have collected rent since the appointment of Receivers and monies currently held by Citywide on behalf of the Company. These sums are now payable to the Receivers. Please arrange for these funds to be paid into the Receivers bank account, details below, by no later than 22 January 2016.
>
> …
>
> Citywide must provide a full accounting of the rents ingathered for the three years preceding the appointment of the Receivers.
>
> We note your request for the payment of fees and charges for the provision of information and compliance with our above requests. Our requests constitute a request for information and property relating to the affairs of the Company, and as such the Receivers are entitled to the funds requested as property of the Company pursuant to Section 234 of the Act and to compel such payment by

order of the Court if necessary. The Receivers are entitled to the production of the information by Court order if not delivered voluntarily by Citywide pursuant to Section 236 of the Act. In both instances, the Receivers are so entitled without requirement or entitlement on the part of Citywide for the payment of fees or charges.

Please confirm that Citywide have notified all tenants that the rent is properly due to the Receivers.

Please note, should Citywide fail to do so, the Receivers shall seek court orders to enforce their exclusive rights to the Company's property and the rents collected therefrom.

Please note that the Joint Receivers do not adopt the management services agreement."

(6) In the Receivers' letter of 19 January 2016 (No 6/8 of process) addressed to Baillies, they formally revoked the Management Agreement on behalf of the pursuer:

"… I write to advise, subject at all times to the conditions, set out in my letter dated 14 January 2016, that the Management Agreement between Citywide Estates and Lettings and the Company is terminated and cancelled by the Receivers and any and all authority of Citywide on behalf of the Company has been and is in any event hereby terminated forthwith.

Please confirm forthwith that Citywide have notified all tenants that the rent is properly due to the Receivers.

Please note, should Citywide fail to do so, the Receivers shall seek court orders to enforce their exclusive rights to the Company's property and the rents collected therefrom.

Please note that the Joint Receivers do not adopt the management services agreement."

In the Summons the pursuer relies on one or other of the letters of 14 and 19 January 2016, just noted. As it is now agreed that the Receivers' revocation was effective, it is not necessary to determine by which of those two letters that was effected. For convenience, I refer to these as "the Revocation").

(7) Dario Guidi responded by email dated 22 January 2016 (No 7/4 of process), and after referring to the Receivers' communications "**both to ourselves** and our solicitors" (emphasis added), and stated:

> "We note your request to account for income and expenditure and in this context we shall seek to send a statement of income and expenditure relative to the period of receivership, namely from 21st December 2015 to 21st January 2016.
>
> We note you provided bank details for any remittance due in your letter of Thursday, 14th January which was received by us on 15th January. Any funds due will be paid to this account.
>
> Going forward we normally, as a company, provide an income and expenditure statement within seven working days of the months end in arrears.
>
> I trust this successfully answers your queries in the letter of 14th January to our solicitors and to your email."

For completeness, I note that there was no evidence as to which entity Mr Guidi purported to be writing on behalf of.

(8) Baillies replied by letter dated 25 January 2016 (No 6/9 of process), now writing on behalf of "Citywide Glasgow Limited t/a Citywide Estates & Letting" (ie the defender):

> "We refer to your letters of 14th and 19th January. Firstly as you will be aware the appointment of the Joint Receivers does not *ipso facto* terminate the Contract between the Company Fieldoak Ltd and our clients Citywide Glasgow Ltd. The terms of the Agreement have no Clause which dictates the termination of the Contract in such circumstances and our clients are accordingly entitled to insist upon performance. We understand that your letters of 14th and 19th January seek to repudiate the Contract but again you will appreciate that our clients do not need to accept that repudiation. Our clients are quite entitled to insist upon performance and that is what they seek to do.
>
> While we appreciate that our clients might have a right to damages if they were to confirm the repudiation of the Contract we are of the view that such a right of damages would be notional only since it is likely that the Receivers will simply have no funds to meet any such claim. That being the case our clients [*sic*] only real remedy is for performance. You will appreciate that this matter was discussed in general in the case of Clark and Whitehouse as Joint Administrators of Rangers Football Club Plc.

> We note your threats of legal action with some interest and should be obliged if you would confirm what you consider would be your authority for such an action. Please be assured that any such action will be defended along the lines which we have indicated above."

(9) HBJ Gateley replied on behalf of the Receivers, on 27 January 2016 (No 6/10 of process), identifying Baillies' client as the defender. After referring to previous correspondence, they stated:

"As a preliminary point, please note, as is made clear by the Receivers' correspondence, no admission or acceptance has been made as to the purported Contract you have produced, between the Company and, you say, Citywide Glasgow Ltd. The Receivers consider that they are entirely within their rights to effect a termination of such a Contract in any event in circumstances where it is either (a) invalid on the grounds of ineffective execution and/or (b) by reason of such Contract being voidable at the instance of the Company, acting through the Receivers, having been entered into between connected parties to the disadvantage of the creditors of the Company and so in breach of the duties of the sole director of the Company, as Citywide Glasgow Ltd was aware through the common director.

Without prejudice to, and under reservation of, the Receivers' rights pleas and entitlements, as is clear from the Receivers' letters, the apparent Contract being a pre-receivership contract, is not adopted, the Receivers have declined further performance of the same.

You assert, in response, that your clients (whichever entity that may actually be) are entitled to insist upon performance, and such is their real remedy. We note, with considerable interest, your reference to the discussion in *Clark & Whitehouse, Re Rangers Football Club plc*. We agree such discussion is entirely relevant to the present matter, and refer you specifically to the Opinion of Lord Hodge ([2013] 2 BCLC 436 at paragraph 48), which confirms the following:

a) The Receivers act as manager of the Company, superseding the managerial power of the directors of the Company;

b) On appointment, pre-receivership contracts remain in force, but the Receivers are not personally liable for those contracts (see s.57(4) of the Insolvency Act 1986);

c) The Receivers can cause the Company to decline further performance of a contract;

d) Whilst such action may put the Company in breach of contract, it is not the practice of the Courts to order specific implement against a company in receivership. The reasons for that practice are succinctly and clearly stated in the above citation.

The Receivers' authority as manager of the Company has been exercised by the appointment of their agents in respect of the Property of the Company. Your client's authority under the purported contract has not been adopted or continued and is not going to be performed further to the appointment of the Receivers. It is clear that the Courts will not entertain your assertion of a right to insist upon performance.

Should your clients continue to interfere in the actions of the Receivers and their appointed agents with regard to the ongoing management of the properties and the tenants, and the collection of rents, the Receivers will be entitled to raise an action in the Courts against them to prevent such interference, and for any damages caused by your clients' continued actions.

We require your immediate and unequivocal confirmation by return that your clients accordingly will undertake no such further actions whether in terms of the purported contract or at all, as the Receivers have required.

In the meantime, we note that the Receivers' requests for information as set out in their letter of 14 January 2016, have not been met fully by your clients. In the absence of co-operation and production of the required information, the Receivers will raise a further action for production of the information and an account of your clients' dealings with the Company, as requested, pursuant to Section 236 of the Insolvency Act 1986."

(10) This letter may have crossed with Baillies' own, of 28 January (No 7/5 of process) and which referred to the Receivers' earlier letters of 14 and 15 January (but not this last one). Baillies' letter was still addressed to the Receivers:

"... Firstly as you will be aware the appointment of the Joint Receivers does not *ipso facto* terminate the Contract between the Company Fieldoak Ltd and our clients Citywide Glasgow Ltd. The terms of the Agreement have no Clause which dictates the termination of the Contract in such circumstances and our clients are accordingly entitled to insist upon performance. We understand that your letters of 14th and 19th January seek to repudiate the Contract but again you will appreciate that our clients do not need to accept that repudiation. Our clients are quite entitled to insist upon performance and that is what they seek to do.

> While we appreciate that our clients might have a right to damages if they were to confirm the repudiation of the Contract we are of the view that such a right of damages would be notional only since it is likely that the Receivers will simply have no funds to meet any such claim. That being the case our clients' only real remedy is for performance. You will appreciate that this matter was discussed in general in the case of Clark and Whitehouse as Joint Administrators of Rangers Football Club plc.
>
> We note your threats of legal action with some interest and should be obliged if you would confirm what you consider would be your authority for such an action. Please be assured that any such action will be defended along the lines which we have indicated above."

This impasse persisted. Baillies maintained that, in law, the defender could insist on performance.

(11) By a further letter of 3 February 2016 (No 6/11 of process, Baillies wrote (on behalf of the "Citywide (Glasgow) Limited t/a Citywide Estates and Letting") to the effect that the Management Agreement had not been terminated, that their clients insisted on implement and stated that their clients were a properly constituted limited company, that Dario Guidi was the sole director and shareholder and that the company had the benefit of an assignation of the Management Agreement. They also sought payment of the costs of supplying the information requested. The Receivers maintained their entitlement to terminate, and that they had terminated the Management Agreement.

(12) I do not record the terms of the Receivers' letters to O&S and Y Peoples (in which they explained that any authority of the Partnership or the defender had been revoked, and that all correspondence and rental proceeds were to be sent to the receivers), or a further letter from Baillies, now writing on behalf of "our client" whom they identified as "Giovanni (John) Guidi", and, after referring to the Receivers' letter of 27 January 2016 (No 6/12 of process), requesting payment of fees to provide the level of information requested. HBJ next wrote to Baillies on 23 February 2016 (referring to the Partnership and to the defender as Ballies' clients) and reiterated the Receivers' position:

> "Our clients' position in relation to the Receivers' entitlement to decline further performance of the purported Management Agreement ('the Contract') has been set out at length in previous correspondence and, in particular, in our letter of 27 January 2016. The position as set out in that letter remains unchanged.

We would simply add that, contrary to what you state in your letter of 3 February, Lord Hodge in the *Rangers* decision specifically states at paragraph 48 that a Receiver can cause a company to decline further performance of a contract and that it is not the practice of the Courts to order specific implement of purely contractual rights against a company in receivership.

In addition, and separately from, the Receivers' entitlement to decline further performance of the Contract on the ground of the receivership, as confirmed in the *Rangers* decision, all authority which may previously have been granted to Citywide and/or Citywide Limited by the Company to deal in any way with the Company's properties, including collecting rents and managing the properties, whether in terms of the Contract or otherwise, has been revoked by the Company, now acting through the Receivers.

In the Receivers' letter to you of 14 January 2016, they confirmed that Citywide had no continuing authority on behalf of the Company as agents to collect rents and manage the properties, and that Citywide was not to conduct any further actions as regards the properties. That revocation was further confirmed in their letter to you of 19 January 2016, but for the avoidance of any doubt, any authority which Citywide or Citywide Limited may have had as agent of the Company, whether under the Contract or otherwise, has been revoked and they have no continuing authority to collect rent or deal with the properties in any way whatsoever.

The Company's entitlement to revoke that authority derives not from the Receivers' separate entitlement to decline further performance but instead from the general law of agency. It is a well-established principle of agency law that an agency contract can be revoked by either party unilaterally, without the agreement of the other party, and without providing notice, and the courts will not enforce such a contract by specific implement. If the revocation constitutes a breach of contract, then the remedy of the former agent is limited to damages. In that regard, we would refer to MacGregor, '*The Law of Agency in Scotland*' at paragraph 10-02 and Bowstead and Reynolds, '*Agency*' (12th ed) at paragraph 7-045.

Accordingly, please confirm within seven days of the date of this latter that it is now accepted that Citywide and/or Citywide Limited have no continuing authority to deal with the properties. Should you fail to provide this confirmation within that timescale then our clients will have no option but to apply to the Court for a declarator that your clients' authority has been revoked and an interim interdict to prevent them from dealing further with the Company's property.

> The Receivers also require all of the information, documents, items and sums of money requested in their letter of 14 January 2016 to be delivered to them, also within seven days of the date of this letter.
>
> As agents, your clients have a duty to account to their principal, and therefore your clients are required under the law of agency to provide what is being requested. Should your clients fail to comply with this request, then the Receivers will require to seek orders from the Court in terms of, among other things, sections 234 and 236 of the Insolvency Act 1986. We trust however that that will not be necessary."

Other Agreed Matters

[24] The Agreed Chronology records a number of other matters, in addition to the dates and terms of the communings between the parties in the three months from December 2015 to February 2016, just noted. These additional matters include the following:

(1) On 29 January 2016, the defender wrote a cheque for £22,121.51 ("the first cheque"), in accordance with the statement of account for the period from 21 December 2015 to 21 January 2016 ("the first statement of account") (No 7/6 of process). The Receivers cashed the first cheque on 17 February 2016.

(2) On 26 February 2016, the defender wrote a cheque for £24,706.65 ("the second cheque"), in accordance with the statement of account for the period from 22 January 2016 to 19 February 2016 ("the second statement of account") (No 7/6 of process). The Receivers cashed the second cheque on 14 March 2016.

(3) On 8 March 2016 Giovanni Guidi wrote to the Receivers stating that he is sending "all gas certificates for all of the properties" to the Receivers (No 7/23 of process). There is also reference in that letter to a "rolling programme" to upgrade the properties to the latest electrical safety regulations, with the

stated intention to do so "by the end of November 2016", and to obtain legionella risk assessment certification, which was "scheduled to be completed by June 2016". (Mr Logan attached significant weight to this letter, which I shall refer to as "the rolling programme letter".) (It should be noted that in the copy letter produced (at No 7/23 of process) there is no mention of the defender and the letter was signed "G G Guidi". Mr Dario Guidi stated in evidence that the original had been sent on the defender's headed paper. However, it should also be noted that a signed copy of this letter was produced in the course of the proof (and lodged as item 24A of the Joint Bundle). It contained no letterhead and otherwise did not mention the defender by name.

(4) While this was not recorded in the Agreed Chronology, on the evidence the Receivers did not reply to the rolling programme letter.

(5) On 4 April 2016, a letting manager at "Citywide Estates and Letting" (this was the name of the Partnership but was also the trading name of the defender, used by Baillies in their letter of 3 February 2016) emailed Kirsty Duncan in the Receivers' offices indicating that the annual gas safety certificate for 15 Drumoyne Place was due by 13 April. Ms Duncan replied by email on the same date requesting a quote "for the gas safety certificate for this property". She also asked to be advised of "any properties in the Lightfoot Limited or Fieldoak Limited portfolio's [*sic*] which do not have current gas safety certificates". (This exchange is produced as No 7/30 of process). After a quotation (totalling £85) was supplied by the letting manager (whose emails were issued in the name of "Citywide Estates and

Letting"), Ms Duncan emailed back on 6 April 2016 instructing this work on the basis of the quotation provided (No 7/31 of process). I refer to these exchanges collectively as "the Drumoyne Place exchanges".

(6) On 7 April 2016 Kirsty Duncan emailed the letting manager noting that the rent for the period to 20 February 2016 had not been received (No 7/32 of process). She requested a cheque for the "net rent" to be paid. She also requested a "breakdown of the rents received per property since 21 December 2015 together with invoices supporting the amounts deducted from the rent. For example, copy invoices for repairs/factors etc."

(7) On 13 April 2016 Baillies wrote to the Receivers "on behalf of John Guidi" (No 7/14 of process), suggesting that Dario Guidi would be prepared to make an offer for the purchase of the pursuer.

(8) On 4 May 2016 the defender sent a cheque for £13,759.75 ("the third cheque") in accordance with a statement for the two periods from 22 February to 21 March 2016 and 22 March to 21 April 2016 ("the third statement of account"). The Receivers cashed the third cheque on 8 June 2016.

(9) On 17 June 2016 books and records relating to the pursuer were provided to the Receivers. (A further bundle of documents was provided in respect of Lightfoot Limited, an associated company of the pursuer.)

(10) On 23 June 2016 the Summons initiating this action was served by the pursuer on the defender and on the Partnership. (It should be noted that the Summons originally called the Partnership and its two directors, Dario and Giovanni Guidi, as the first three defenders, as well as the defender as the fourth defenders). On 24 June 2016 Baillies wrote on behalf of Dario Guidi,

Giovanni Guidi and the defender confirming that the Partnership "terminated some time ago" and questioning why the first to third defenders were called in the Summons. (It should also be noted that, as from December 2016, the pursuer's action was maintained only against the defender.)

(11) On 4 August 2016, Kirsty Duncan sent an email (No 7/21 of process) ("the August email"). In the Agreed Chronology this is described as an email "to the defender", but I note that the email address is that used when contacting the letting agent in the name of the Partnership. Under the heading of "Documentation", she referred to a letter of the Receivers of 1 February 2016 (this letter was not produced in process) and, under reference to an attached spreadsheet, she identified "a significant amount" of documentation that was missing. She requested the missing documentation and also sought confirmation that "the landlord statutory requirements are being attended to, and legionella inspections have been completed". Under the heading of "Accounting", she referred to the Receivers having cashed the cheques "issued by Citywide" but stated that "this does not constitute adoption of [the Management Agreement], which as you are aware was terminated". Kirsty Duncan also noted that a full accounting had not been produced to the Receivers and she requested an accounting in respect of deductions made and for other information. Under the heading of "Vacant units" she stated that "no lease agreement was to be entered into without the express consent" of the Receivers. In the undated response to this email, it was stated that "We hope to be in a position to provide this information by 1 September".

(12) On 11 August 2016 the Receivers served a petition under section 236 of the Insolvency Act 1986, seeking *inter alia* an order that Dario Guidi produce an affidavit containing an account of his dealings with the pursuer and also to produce all of the books and records of the defender. Dario Guidi lodged answers to that petition on the following day.

(13) On 18 August 2016 the Receivers received a copy of the assignation of the Management Agreement in favour of the defender.

(14) On 15 September 2016 Giovanni Guidi wrote to the receivers and enclosed financial information relevant to the pursuer.

(15) On 23 September 2016 the Summons was lodged for calling.

The Relevant Timeframe for the Purpose of Considering the Evidence of Conduct and Communings

[25] Neither party particularly sought to analyse what was the relevant timeframe within which to consider the conduct the defender relied on. While I will consider the oral evidence below, it is useful to start by identifying the appropriate timeframe for the factual matters in dispute. The communications passing between the parties for the three months to the end of February 2016 are agreed. I have already set out the tenor of these (in para [23], above), if not their full terms. The salient features of these communings are the intransigence of the parties' positions, the defender's adherence to the (incorrect) proposition that the Receivers had no power to terminate the Management Agreement and that it remained in force at that time, the Receivers' insistence that it had been terminated, and their stated intention not to adopt it. By the time of the Receivers' letter of 23 February 2016, it may fairly be said that the parties' positions were entrenched and they were at an impasse.

[26] Before considering the start and end points for the relevant timeframe, I make four observations about the terms of those communings.

(1) At the very least, those communings preclude any issue of reliance (on the part of the defender) or conduct instructing waiver (on the part of the Receivers) contemporaneous with their being sent and received;

(2) The forceful, unequivocal and repeated terms in which the Receivers (or their agents) wrote to the defender (and its agents), will inform the quality of the conduct or communings that are required to overcome, as it were, those robust expressions of the Receivers' stance that the Management Agreement had been terminated and that the Receivers were not to be taken as adopting it.

(3) The fact that the defender was proceeding at that time on the basis that the Management Agreement remained in force is not irrelevant to the issues of waiver and novation. For so long as it held that belief, it was, by implication at least, unlikely to have relied on any conduct of the Receivers for the purposes of novation (there would be no need for novation if the Management Agreement subsists) or waiver of the Revocation (if, as the defender believed at this time, that the Receivers' Revocation was ineffectual in law).

(4) Further, in the light of that correspondence, the defender had actual knowledge that the Receivers' positon was that they were not bound by the Minute of Agreement, and which knowledge is inimical to the implication of any novated minute of agreement in identical or similar terms.

[27] Given the stringent terms of the Receivers' letters sent in January and February 2016, these letters can afford no support for either limb of the defender's case; indeed they negate both. Accordingly, the earliest possible starting point for conduct relevant to either of the

defender's grounds of waiver or novation is at some point after receipt of HBJ's letter of 23 February 2016.

[28] Looking to the possible end point for the relevant timeframe, it should be noted that the Receivers instructed the present action, and the Summons was served on the defender and on the Partnership, on 23 June 2016. The terms of the declarator sought could leave the defender in no doubt as to the Receivers' position at that time in respect of the termination of the Management Agreement. It matters not, in my view, that the Summons was not lodged for calling until 23 September, at least in circumstances where in the interim (i) the Receivers' Kirsty Duncan emailed Baillies stating that the Receivers "have cashed the cheques issued by [the Partnership] but this does not constitute adoption of the management agreement, which as you are aware was terminated.", and (ii) the Receivers only received a copy of the assignation of the Management Agreement in favour of the defender on 18 August 2016.

[29] In the light of the foregoing, in my view, the relevant timeframe in which to consider the parties' conduct and communings is, essentially, between the third week in February and the third week in June 2016.

[30] It was accepted that the onus rested with the defender and that it must lead evidence of a sufficiently compelling and cogent character to establish the requisite reliance (for the purpose of waiver) by the defender of the conduct of the Receivers and to establish the necessity and intention points (for the purpose of novation). Accordingly, it is appropriate that I first consider the defender's evidence.

The Evidence of the Defender Relevant to the Issues of Waiver and Novation

[31] The defender led the evidence of two witnesses, Mr Dario Guidi and Mr Giovanni Guidi.

Dario Guidi

[32] In examination in chief, Dario Guidi explained that he had been in the business of property management for 25 years. By 2013 he was in charge of the defender. His brother, Giovanni Guidi, did not have any role in the defender. It was put to him that the Receivers were "quite incessant" in seeking further information and that he, Dario Guidi, still contended that the Management Agreement was still in place. Mr Guidi accepted both propositions. He explained generally that the nature of the tenants of some properties, such as the Y People Properties, generated additional work. Many of the tenants had addiction issues or were being reintegrated into society. For example, it took longer to explain things to such tenants and more callouts were required. Many of the other properties were ex-local authority properties. The amount of regulation had increased over the years and this was particularly onerous for properties of this type.

[33] Mr Dario Guidi spoke *inter alia* to the advice the defender had had from Baillies that the Receivers' revocation of the Management Agreement was ineffective and that the defender was entitled to insist on performance of the Management Agreement. This was reflected in the terms of the correspondence, referred to above, and some of which was put to Mr Guidi. (I note that this remained the defender's position even in the most recent adjusted defences (see answer 4.4) lodged on 16 May 2017. However, in the Supplementary Note, lodged on the same day, it was accepted that that advice was incorrect.) Dario Guidi confirmed that the defender accepted and followed that advice at that time.

THE STATEMENTS OF ACCOUNT AND THE RATIONALE FOR SOME CHARGES

[34] Mr Guidi explained that the normal practice of the letting agents was to send statements 7 days in arrears. It was put to him that the defender had sent a breakdown of statements of account to the Receivers, at their request. He agreed. The statement of account lodged as No 7/20 (JB 30) was put to him an example of the kind of breakdown of rents or statement of account sent to the Receivers. (This statement actually relates to a different company, Lightfoot.) These statements might contain deductions or a list of invoices, but not the invoices themselves. Mr Guidi also explained that the defender began to make deductions, even in respect of "outstanding" invoices, ie ones that had not yet been paid by the defender. He did so because he was concerned that the Receivers "would take control of the income stream" and that they would take the tenants away from the defender. The defender was worried that the Receivers would take away the letting business for the Properties from the defender.

THE ROLLING PROGRAMME LETTER

[35] Mr Guidi was asked about the rolling programme letter (summarised above, at para [25(3)]). This was sent to the Receivers by Giovanni Guidi. Dario Guidi said that Giovanni was an employee of the defender. That letter stated "all gas certificates for all of the properties" were being sent to the Receivers. There was also reference in that letter to a "rolling programme" to obtain outstanding EPCs (energy performance certificates) and legionella risk assessment certification. Dario Guidi explained that not all of that work could be undertaken. This was due to a number of factors, the age of the properties in the portfolio, the need for a certain standard in the electrical works, the need to upgrade the fuse boxes and the limited number of contractors to undertake this work. No reply was received

from the Receivers to this letter. After reference to the letters passing between the Receivers and Baillies in January and February 2016, Mr Logan referred to the rolling programme letter and asked Dario Guidi if, following that letter, the defender did take on the rolling programme of work. Dario Guidi stated that the defender did. When asked why, he stated that he believed that the Management Agreement was still enforceable and so the defender continued with this work, and it did so because of the obligations under the regulatory regime.

THE SIGNIFICANCE OF THE REGULATORY REGIME

[36] It was then put to him that the defender nonetheless did some of this work (ie that said to be associated with this rolling programme). He explained that under the regulatory regime and the system of registration, letting agents could themselves be liable (ie in addition to the landlord) for non-compliance. For example, a letting agent could be liable if a tenant was injured by reason of non-compliance with the safety requirements of the regime applicable to these types of properties. He also confirmed that the defender did the work because it knew it would get paid. This was because it was in control of the income stream. In response to a question as to what the defender would have done it if had not controlled the income stream and there was therefore a risk that it wouldn't get paid, he stated that the defender would have resigned from the management of the Properties.

THE AUGUST EMAIL

[37] In respect of the August email, it was put to Dario Guidi that this demonstrated that the landlords' statutory obligations were being met by the defender and that the Receivers were either ignoring the defender or the defender was being asked for the product of that

work. Mr Dario agreed with this: the "work" included the ongoing process of certification. He confirmed that the defender had prepared a spreadsheet (No 7/34 of process), which showed what certificates were in place for the properties listed. (There was no evidence that this was produced to the Receivers until it was lodged as a production in these proceedings. Dario Guidi did not suggest that it had been.) That spreadsheet did disclose that "Cairn" were also listed as agents but Dario Guidi stated that this was only in respect of a handful of properties.

THE DRUMOYNE PLACE EXCHANGES

[38] Mr Dario also spoke to the Drumoyne Place exchanges and he emphasised the importance of gas certification. He also spoke to similar work being done for a property at the Trongate. This was included in an email dated 21 April 2016 (bearing to be from the Partnership as the letting agent) to Kirsty Duncan advising that a gas safety inspection was due in May 2016. Dario Guidi explained that he spoke directly to the tenant and carried out the work. It was not suggested that the Receivers replied to this email or that the defender advised the Receivers at the material time that that work would be, or was, done. Dario Guidi also spoke to a landlords' pack of obligations and he stated that this kind of work was done by the defender.

THE DEFENDER'S RELIANCE ON BAILLIES' (INCORRECT) ADVICE

[39] At this point in his examination in chief, Mr Logan attempted to put a question to Dario Guidi, to the effect that in the performance of these works the defender "relied on the ongoing relationship" with the pursuer. Mr Sellar objected to this question, as there were no averments of reliance. The question was allowed under reservation. In answer, Dario Guidi

explained that the defender had proceeded as it did because of the advice that the Management Agreement was enforceable. He confirmed that, if there had been no Management Agreement, the defender would not have done this work.

CROSS-EXAMINATION

[40] In cross, Dario Guidi accepted that his concern was that the Receivers are going to take back the business of managing the Properties from the defender and that this was the whole point of resisting this action. He accepted, in the main, that he had seen the letters sent and received in January and February 2016. He accepted that the terms of the letters from, or on behalf of, the Receivers were clear. The advice he had had from Mr Glass of Baillies was that the Receivers could not revoke the defender's authority under the Management Agreement. Indeed, under reference to Baillies' letter of 25 January 2016, he stated that it remained his view that the Management Agreement remained in force.

[41] Mr Sellar put it to Dario Guidi that it was now conceded on behalf of the defender that Baillies' advice was incorrect. Mr Guidi stated that if he had known that, the defender would not have proceeded in the manner that it did. It was put to him that, if he or the defender had known the correct position (ie that the Receivers did have power to revoke the Management Agreement), that none of the work, especially the regulatory work, would have been undertaken by the defender. Dario Guidi accepted quite frankly that this was correct: none of the work that had been referred to - the regulatory work and the costs incurred - would have been done had the defender known the correct legal position. He confirmed that Baillies' legal advice had never changed throughout this period.

[42] In relation to the duties of the Receivers, Dario Guidi accepted that one of their duties was to ingather monies, including rent, and that if someone else was in *de facto*

control of the pursuer's Properties that it was consistent with those duties for the Receivers to enquire about those Properties. He accepted that the defender had retained the keys to the Properties. The defender had kept these because it thought it had a right to manage the Properties under the Management Agreement. He was also aware that Lord Tyre had made comments in the course of the hearing on the defender's motion for *interim* interdict in December 2015 that could be seen as a criticism of the Receivers' Letter to the Occupiers. It was put to him that in these circumstances, to the extent that the defender provided services to the pursuer, these were received only under duress and without the Receivers having a free choice in the matter. Mr Guidi accepted that that was how the Receivers could view it, from their perspective.

[43] In relation to the work done consequent upon the Drumoyne Place exchanges, Dario Guidi accepted that was a one-off. He accepted that this was not consistent with the Management Agreement subsisting. The August email was put to him by way of contrast, and as being in very different terms, especially in that it did not contain any instruction by the Receivers to the defender. He endeavoured to construe the August email as an instruction to ensure that this was all in place. He was not aware, until hearing evidence in this case, that receivers normally did not contract as a contracting party. Nor had he ever been advised of the duty of a director to cooperate with receivers.

[44] In an extensive passage of cross, a number of discrepancies were put to him between the terms of the Management Agreement and what the defender actually did (eg the difference in the commission rate under the Management Agreement and the higher one charged in the several statements to account; a retention fee being charged for the O&S and Y People Properties, notwithstanding that these rents were not collected by the defender; a fee being charged, even in respect of rents not yet received). While Dario Guidi provided

explanations for what was done in each case and why there was departure from the Management Agreement, he accepted that these were at variance with the terms of the Management Agreement. The explanation essentially was the defender's desire to protect itself, eg in relation to outlays.

[45] In respect of other matters, Dario Guidi accepted that the Receivers had not been supplied with the assignation of the Management Agreement in favour of the defender until August 2016. He accepted (eg under reference to an error at para 10 of his own witness statement and other errors such as those in his email of 24 December 2015 and Baillies' letter of 7 January 2016) that there was a blurring of roles as between the defender and the Partnership, and that this could cause confusion. He accepted that while in evidence he suggested that Giovanni Guidi was an employee of the defender, the Receivers had never been told this. He also accepted that the principal copy of the rolling programme letter, sent under the name of Giovanni Guidi, was not sent on headed paper and that the natural inference was that Giovanni was not acting on behalf of anyone or, if he was, it was on behalf of the pursuer (of which he was a director).

Giovanni Guidi

[46] There was a considerable overlap between the evidence of Giovanni Guidi and that of his brother, Dario. Their positions on the issues were broadly consistent. He also confirmed that the advice by Baillies to the defender had been that the Receivers' withdrawal of the defender's authority under the Management Agreement was ineffective. He also confirmed that that advice was the basis on which the defender continued to do the work. In this context he also referred to what he described as the confusion among some tenants following the Receivers' Letter to Occupiers. The safety work was done as a moral

obligation, and also because it was a legal responsibility and a criminal offence if gas safety certificates were not in place. Letting agents could themselves be liable.

[47] In respect of the Management Agreement and the copy of an earlier one, which had provided to the pursuer's creditors, Promontoria, Giovanni Guidi's position was that the Receivers had never asked for a copy of the Management Agreement. It was also an "oversight" that he had not provided them with a copy of the assignation.

The Pursuer's Evidence: Paul Dounis

[48] The pursuer led two witnesses, namely, one of the joint receivers, Paul Dounis, and Kirsty Duncan, who assisted him in respect of the day to day administration of the receivership.

Appointment of the Receivers

[49] Mr Dounis was a Chartered Accountant, holding a position with RSM Restructuring Advisory LLP ("RSM"), and a licensed Insolvency Practitioner (through ICAS). Together with David Allen, also of RSM, Mr Dounis had been appointed joint receivers of the pursuer on 21 December 2015 by Promontoria (Chestnut) Limited ("Promontoria"). Promontoria succeeded as creditors following an assignation in its favour of the debt and securities of the pursuer from the Clydesdale Bank Plc. Kirsty Duncan, also of RSM, assisted the Receivers with the day-to-day management of the receivership. Mr Dounis was aware pre-receivership that the pursuer's company secretary was Dario Guidi. Mr Dario Guidi was also the sole director and shareholder of the defender. Giovanni Guidi was the sole director and shareholder of the pursuer. He had formerly been a director of the defender. At that time, Mr Dounis was not clear as to what the relationship was between the pursuer and

defender. Mr Dounis explained that Promontoria had become concerned at the decline in income received by the pursuer. By 2015, this had declined to about £200,000 from a figure of £527,000 in 2013.

Receivers' Letter to Occupiers and Appointment of Cairn as Letting Agents

[50] Upon their appointment, the Receivers appointed Cairn Letting ("Cairn") to manage the Properties. They also sent out a standard form letter dated 22 December 2015 to the occupiers of the Leased Properties ("the Letter to the Occupiers"), explaining their appointment, advising of Cairn's role and that rentals should thereafter be paid to Cairn. The Receivers' intention was to secure the rental income as soon as possible. The Receivers' also wrote to Giovanni Guidi, as the sole director of the pursuer, advising him of their appointment to the pursuer and that they were now in control. They reminded Giovanni Guidi of his obligations under the Insolvency Act 1986 owed by him to the pursuer, as its director. Giovanni Guidi did not reply to that letter.

Disclosure of the Management Agreement

[51] Early in the New Year, Dario Guidi called Mr Dounis to complain about the Letter to Occupiers and to assert that the defender had a management agreement in place. Mr Dounis was aware that Kirsty Duncan had also had email contact with Dario Guidi on 24 December in similar terms. The defender's agents, Baillies, sent a copy of the Management Agreement under cover of their letter of 5 January 2016. This was the first time that Mr Dounis had become aware of the Management Agreement, which was dated 31 October 2014. However, the Management Agreement sent bore to be between the pursuer and the Partnership, the partners thereof being Dario Guidi and Giovanni Guidi.

Mr Dounis also explained that a copy of the assignation of the Partnership's interest under the Management Agreement in favour of the defender was only produced in August 2016, after this action had been raised.

Concerns Regarding the Management Agreement

[52] In relation to the Management Agreement, Mr Dounis explained that he had a number of concerns about the Management Agreement. These included: the absence of any reporting obligations imposed on the letting agent; at 15% the commission rate was "very high" and the Management Agreement could apparently only be terminated on 12 months' notice, on the anniversary of the Management Agreement. Both parties had to consent to termination. From his experience, his view was that the Management Agreement was disadvantageous to the pursuer. While the Clydesdale Bank Plc had a management agreement that pre-dated the Management Agreement, it was unaware of the Management Agreement and had no copy of it. Promontoria (Clydesdale Bank Plc's successor as creditor) agreed with Mr Dounis' advice that the Management Agreement was not in commercial terms and that it should be terminated. The Management Agreement was a pre-receivership contract. Mr Dounis explained that while the appointment of the Receivers would not automatically terminate a pre-receivership contract such as the Management Agreement, the Receivers were not obliged to continue with it. They would in any event not attract personal liability under or in respect of any breach of the Management Agreement. The Receivers act as agents for the company to which they are appointed. A receiver would only rarely contract in a personal capacity.

The Defender's Interest Under the Management Agreement

[53] By letter dated 14 January 2016 (No 6/7 of process), the Receivers wrote to Baillies regarding the Management Agreement. The Receivers made clear that the letting agents had no continuing authority to act as agents for the pursuer. It was also stated that "Citywide is not, without the further express agreement of the Receivers (and on such terms as the Receivers shall deem appropriate) to conduct any further actions whether in terms of the Management Agreement or otherwise as regards the Properties, any rental income therefrom, any management and liaison with the tenants". This was the first, but not the only time, that the Receivers wrote in such terms to Baillies. The Receivers wrote in similar terms, eg by letter dated 19 January 2016 (No 6/8 of process), terminating the Management Agreement and confirming that the agents' authority (at that time represented to be the Partnership) had been terminated.

The January 2016 Interdict Proceedings against the Pursuer Before Lord Tyre

[54] Shortly after that letter, the pursuer and Giovanni Guidi sought interdict *ad interim* against the Receivers continuing to act, on the basis that their appointment was invalid. Lord Tyre refused to grant interim interdict but at the hearing, which took place over the course of the afternoon of 22 January (a Friday) and the following Monday, 25 January, commented on the Receivers' Letter to the Occupiers. In particular, the Receivers understood him to be expressing concern that that letter would be confusing to the tenant recipients, and that the Receivers' dispute was not with them, but with those asserting rights under the Management Agreement (ie either the Partnership or the defender). Mr Dounis explained that in the light of these comments, the Receivers stepped back from any communications or contact directly with the occupiers of the Properties.

Communings between the Receivers and Baillies

[55] Mr Dounis explained that the Receivers received no cooperation from Giovanni Guidi, as director of the pursuer, and little cooperation from the defender. All communications had been through Baillies, and which had been extensive. The import of these communings was that the Receivers had consistently stated that they were entitled to terminate the Management Agreement and to decline any further performance under the Management Agreement: reference was made to the letters of 27 January and 23 February 2016 (Nos 6/10 and 6/12 of process). In Mr Dounis' view the terms of the Receivers' letters instructing the letting agents to desist, could not have been clearer. In his view, the director of the company was uncooperative. Adequate records had not been produced and the Receivers had to make an application under section 236 of the Insolvency Act 1986. Indeed, in the early stages of the receivership, Dario Guidi had even disputed whether as a matter of law the Receivers were or could be in control of the pursuer.

Statements of Account Produced to the Receivers

[56] The defender did eventually produce statements of account for the period December 2015 to April 2016 (these are collated at No 7/6 of process). Mr Dounis explained that several features of these struck him:

(i) In the first statement of account (for the period covering December 2015 to January 2016), the commission rate was, at 17.5 %, even higher than that in the Management Agreement;

(ii) There was reference to marketing costs;

(iii) There was also reference to bills "received and not paid", (although commission or a deduction appears to have been made for these);

(iv) There was also a fee for "additional administration" in the amount of £5,760. There was a similar entry for a fee for additional administration in the second statement of accounts (for the period relating to January to February 2016);

(v) In the accounting for some of the months, there were also entries for "legal costs" and a fee for setting up new leases;

Mr Dounis explained that the reference to marketing costs was surprising, because the Receivers had told the defender not to enter into new leases. He was also concerned about double-accounting. The entries for additional administrative fees were inexplicable. He also noted that there were management fees charged in respect of the Y People Properties and the O&S Properties. These were managed by letting agents other than the defender or the Partnership. Similar entries for legal fees and marketing costs continued to appear in subsequent statements of account. The defender had produced a further statement of account for the period from April to May 2016, but Mr Dounis said it was difficult to make sense of or reconcile the figures.

Mr Dounis' Position on the Matters Founded on by the Defender

[57] In relation to the matters referred to in answer 9.1 of the defences (set out above, at para [9]), Mr Dounis commented on these matters as follows:

(i) Mr Dounis confirmed that the Receivers did cash cheques when received. There had only been 5 or 6 cheques in six months. This was consistent with the Receivers' obligation to ingather the funds due to the pursuer. The Receivers were also the agents of the pursuer and the funds represented by the cheques were monies due to the pursuer. The defender had accepted that the pursuer was entitled to those funds and had paid them.

(ii) In relation to the defender's letter of 8 March 2016 (No 7/23 of process) enclosing gas certificates for the properties, Mr Dounis explained that the Receivers required to ensure that the pursuer as landlord was complying with all regulatory obligations. He also explained that to that end Kirsty Duncan had prepared a spreadsheet showing those properties where the Receivers were and were not in possession of the gas certificates. This was sent to Baillies on 26 January 2016 (No 6/20 of process).

(iii) There were further exchanges between Kirsty Duncan and Baillies by email of 4 and 6 April 2016 (Nos 7/30 and 7/31 of process) ("the Drumoyne Place exchanges"). The outcome of this exchange was that Kirsty Duncan had instructed a gas safety inspection and installation of a CO2 detector in respect of one property (at 15 Drumoyne Place). Again, this was in implement of the statutory obligations (regarding gas inspections and safety) owed in respect of the Properties. Looking at the realities of the situation, the Receivers could not get direct access to the Properties for which the defender had kept the keys. This was a mandatory obligation imposed by a regulatory regime under which the Receivers were responsible. Being pragmatic, the defender was instructed. This did not, Mr Dounis explained, constitute a departure from the Receivers' position that the authority of the defender (or Partnership) under the Management Agreement had been terminated. This was simply a third-party cost that the Receivers were agreeing could be incurred. It was an isolated instruction. The particular character of this, and the need for the defender to seek specific authority, underlined the absence of general authority on the part of the defender;

(iv) In respect of repairs or other dealings with the Properties, these were, Mr Dounis explained, done without the Receivers' authority, instruction or consent. Indeed, this was done in the face of clear and repeated communications from the Receivers' maintaining that the letting agents' authority had been terminated.

(v) In respect of the August email (from Kirsty Duncan dated 4 August 2016 (No 7/21 of process)), this stated that "The Joint Receivers have cashed the cheques issued by Citywide but this does not constitute adoption of the management agreement, which as you are aware was terminated". The genesis of this email was the continuing concern that the defender was not accounting properly in respect of the rents. No clear breakdowns had been produced. The defender continued to resist any direct meeting with the Receivers, and directed all communications to Baillies.

(vi) The Receivers had asked for confirmation about certain matters and had seen the defender's rolling programme. This was not an instruction to the defender or acquiescence by the Receivers. The defender was deducting £8,000 every month. The Receivers had no visibility and they needed to know if the costs being deducted were referable to anything claimed to have been done by the letting agents. The statements of account disclosed that the letting agents were continuing to grant new leases, in breach of the Receivers' instructions that the Management Agreement had been terminated. The defender's own conduct had the effect of precluding the proper management by the Receivers' appointed agents, Cairn.

Mr Dounis regarded it as "laughable" that any of this constituted a departure from Revocation or showed that the Receivers had changed their minds.

The Extent of the Defender's lack of Cooperation

[58] In relation to the impasse between the Receivers and the defender, Mr Dounis explained that notwithstanding the terms of the Receivers' letters, the defender retained the keys to the Properties. The Receivers had asked for their returns but the defender had refused to return them. The defender had left the pursuer with no choice in the matter. Mr Dounis explained that by reason of the defender's conduct and the comments of Lord Tyre, as the Receivers understood them, they were placed in a difficult position. The Receivers could not take action directly against the tenants and the defender effectively excluded the pursuer from exercising any control. Nonetheless, they were obliged to ingather the pursuer's assets and to preserve its property.

Cross-examination

[59] In cross, after it was put to Mr Dounis that landlord registration was required in each local authority area, he explained that he was unaware of the scheme of landlord's registration with local authorities. Mr Dounis resisted the suggestion that the pursuer had appointed no one else to become the registered manager of the Properties; the Receivers had appointed Cairn. He accepted that there were generally some duties incumbent upon landlords. It was put to him that certain safety steps, such as legionella certificates and gas certificates had been done in relation to the some of the Properties. Mr Dounis accepted that these may have been done but that this was not on the Receivers' instruction. The same schedule (listing certain types of certificates against property addresses (No 7/34 of process))

that had been put to the defender's witness, Giovanni Guidi, was put to him. Mr Dounis explained that the Receivers had never seen this. Various questions were put to him about the schedule, but Mr Dounis explained that this was the first time he had seen this document. It was put to him that the defender had done all of this work. Mr Dounis accepted this, but resisted the characterisation that this was done on behalf of the Receivers. By reason of the defender's stance, they had no choice in the matter. Had they had a free choice, their appointed agents, Cairn would have done the work. He went on to explain that at that time the defender did not recognise the Receivers' ability to revoke the Management Agreement. So the defender proceeded as if the Receivers had not revoked it.

[60] In response to a question about landlord's registration, Mr Dounis accepted that no interim order had been sought in terms of the defender's conduct. He also accepted that, when Giovanni Guidi wrote to the Receivers about what it proposed in the next few months, in the rolling programme letter, the Receivers had done nothing and ignored this. Even assuming the letter was sent on behalf of the defender, Mr Dounis explained that this was because the Receivers had not appointed the defender. It was put to Mr Dounis that he had done nothing to fulfil the regulatory obligations owed in respect of the safety of the Properties, but had let the defender do this. Again, Mr Dounis repeated that the defender had refused to stand down or to give the Receivers access to the Properties.

[61] Other figures were put to Mr Dounis, eg about payments, but Mr Dounis said it was impossible to reconcile the monthly statements with monies said to have been spent. The original information had been provided without any dates. The Receivers had been concerned as there were rents of c £52,000 but costs incurred totalling c £30,000 were deducted, leaving only a balance of £22,000. It was only 3 or 4 months after their appointment that a breakdown was provided which showed outlays and rent. However,

there was still no clarity about bills received and not yet paid. He accepted that by March the Receivers were receiving statements, with itemisation of outlays, albeit without supporting invoices. By April, the Receivers still had not received any invoices. This was the context for Kirsty Duncan sending her chasing email on 7 April 2016. It was put to him that the Receivers were aware that the defenders were undertaking substantial work, instructing substantial repairs and letting vacant properties. Mr Dounis did not agree. He agreed that the defender was paying invoices but the Receivers were not aware of the details of this. He was aware of the statutory obligations but the fact remained, said Mr Dounis, that what the defender purported to do was without the Receivers' instructions or authority. This was not the Receivers' choice. The rolling programme letter was put to him, to establish that the Receivers had knowledge of these works; that these works continued until November 2016 and that this was an indication of what would be done for the next 4 or 5 months.

Mr Dounis again demurred. The rolling programme letter was sent by Giovanni Guidi, who was a director of another company. It was not sent by or on behalf of the defender. (In a later passage of his evidence, Mr Dounis explained he had only learned in the course of the proof that Mr Giovanni Guidi was an employee of the defender.) In any event, Mr Dounis' position was firm: whoever was purporting to do the works, even if the defender, the Receivers had not appointed them. The defender ignored this letter. It was put to him that the Receivers had done nothing to fulfil these obligations but had let the defender do this. Mr Dounis said that this was because of the defender's refusal to stand down and to give them access to the Properties. It was put to him that the Receivers didn't write at that point to the defender to say, "don't do that". Mr Dounis explained, under reference to the communings to 23 February 2016, that the Receivers had already done that. From that point forward, the Receivers were working to get funding in place to raise proceedings. This took

time. The Receivers also took time to consider the legal advice they had received and their options.

[62] In relation to Kirsty Duncan's email of 4 August 2016, enquiring if all of the legionella certificates were being attended to, Mr Dounis was asked if this was not an instruction to the defender. Mr Dounis' position was that this was not. Given the defender's refusal to stand down, the Receivers wished to know that the landlords' obligations were being met. They had no visibility on this matter. A significant number of leases were still missing. Kirsty Duncan was simply writing to ensure that there the landlords' obligations were being met. Again, the rolling programme was put to Mr Dounis, to suggest that the Receivers were aware of this work. Mr Dounis' position did not change. The defender was deducting c £8,000 every month and the Receivers wanted to ensure that the defender was not making deductions for nothing. The defender's stance meant that the Receivers had no way of checking this independently, that the deductions related to work that was said to have been done. The defender's position denied the Receivers having access. In Kirsty Duncan's email of August, the Receivers were doing no more than seeking confirmation that the works said to have been completed had been completed. In relation to cheques, Mr Dounis accepted that 5 or 6 had been cashed in a six month period.

[63] Mr Dounis was also crossed under reference to certain passages in his witness statement. He knew, from searches in companies' house prior to his appointment to the pursuer, that the defender was a dormant company. He accepted he was aware of the Management Agreement by 5 January 2016, but he explained that this was in the name of the Partnership. He accepted that by 3 February 2016 Baillies had stated that this had been assigned, but by that point, Mr Dounis said, it had become letters between lawyers. He maintained his position that the information provided by way of rental statements,

statements of account, leases and invoices was incomplete. The schedule purporting to show details of deposits, payments and so on was put to Mr Dounis. He explained that this had not been produced to the Receivers at the time.

Re-examination

[64] In re-examination, Mr Dounis confirmed that he was not aware until questioned in the course of his evidence that Giovanni Guidi had been an employee of the defender. He also confirmed that, while the Receivers had ultimately received a lot of documentation, the Receivers were not satisfied that they had all of the documentation and that it was all correct. They were not satisfied that work claimed to have been done was done. They remained concerned about significant overcharging. He also explained that if court proceedings were raised by him *qua* receiver, then he had a responsibility. If there were adverse awards of costs, he could be personally liable unless he had a suitable indemnity from the security creditor. He needed their approval to cover legal costs and the Receivers' own fees. By June it was clear that the defender's position was fixed and proceedings would be necessary.

The Pursuer's Evidence: Kirsty Duncan

[65] Given that Kirsty Duncan was the manager within RMC assisting the Receivers in respect of the pursuer, there is a considerable overlap in her evidence (especially in relation to the documentation produced) and that of Mr Dounis. As this evidence is not contested, I do not trouble to record those passages of her evidence already covered by Mr Dounis' evidence, unless she was better placed to do so (eg in relation to many of the communications with Baillies).

Inadequacy of Information Provided by the Defender

[66] Kirsty Duncan spoke in detail to the requests for documentation from Giovanni Guidi (*qua* director of the pursuer) and from the defender. Giovanni Guidi and the defender had been uncooperative. They had not provided adequate records. It was essential that the Receivers had the full suite of documentation (eg safety certificates, leases etc) for the portfolio of properties if they were to be able to market them. In respect of the statements of account, Kirsty Duncan was particular concerned that the defender was accounting for or transmitting less than 50% of the rents ingathered. Large amounts were being deducted without any vouching being produced. She referred to the entries for "additional fees" (amounting to £5,760 for the period of December 2015 to January 2016) and "motor expenses" as examples. More importantly, these were not deductions permitted under the Management Agreement, even if it had remained in force.

[67] In relation to some invoices provided by the defender, these were undated and could not be reconciled. In any event, these suggested that the defender was continuing to instruct works and incurring costs without the authority of the Receivers. Kirsty Duncan explained that the statements of account also disclosed that the defender was deducting commission in respect of the Y People and O&S Properties, even though it is not receiving the rent for these properties. The accounting provided was also deficient, as it did not state which tenants had paid rent. The Receivers were unable to identify which tenants are in arrears.

Kirsty Duncan's Communications with Baillies

[68] In relation to the matters referred to in answer 9.1 of the defences:

(i) Kirsty Duncan had sent a spreadsheet to Baillies identifying properties where the Receivers did and did not have gas safety certificates. The rolling programme letter (of 8 March 2016 (No 7/23 of process) referred to a rolling programme to have smoke detectors upgraded, but the letting agents did not disclose which properties were compliant, and which were not.

(ii) In relation to the Drumoyne Place exchanges, Kirsty Duncan explained that she had sent her email partly in response to the rolling programme letter. As she explained, this did not provide complete information particularly as regards to compliance with the statutory regulations. The Receivers needed to comply with the regulatory obligations. To that end, she was seeking information from the defender. That was the context for her email of 7 April 2016. She was asking the defender to confirm that the statutory obligations were being complied with. In part, this was to obtain confirmation that the large sums that the defender was purporting to deduct were in fact being expended on the requisite safety works. This was at a time when the Receivers were still trying to get control of the pursuer's books and records. She was not issuing a general instruction. She had also been advised, by the email of 4 April 2016, which stated that the gas inspection for Drumoyne Place required to be completed in just over a week's time, ie by 13 April 2016. She instructed the necessary work for this specific property, consistent with the regulatory obligations incumbent upon the Receivers in respect of the Properties. This was not an instruction under the Management Agreement.

(iii) It had been represented to the Receivers in an email (bearing to be sent by the Partnership) dated 21 April 2016 (No 29A of the Joint Bundle) that a number of properties required gas safety inspections. However, on checking the records held, some assertions made were incorrect: the inspection for one property (90 Elvan Street) had been completed in March before the date of that email; the inspection for another (1 Robson Grove) was not due for a further 7 or 8 months and the inspection for a further property (25 Trongate) had already been carried out on behalf of the Receivers by Cairn. Given these errors, and her concern that such information as had been provided by the defender was inaccurate, Kirsty Duncan explained that she did not respond to this email.

(iv) In relation to the statements of account provided by the defender, these disclosed that the defender was continuing to enter into new leases. In Kirsty Duncan's email of 4 April 2016 to the defender, she reiterated the Receivers' position and stated that no leases were to be entered into without the joint Receivers' express consent. Nonetheless, the defender purported to charge fees for this but, again, the paucity of information provided meant that the Receivers cannot identify which properties had new leases put in place.

[69] Between April and August 2016 the Receivers were meeting with, and taking advice from, counsel. This lead to this application to the court. In relation to her communications with the defender generally, Ms Duncan explained that the Receivers had never had an account for what the defender held in its hand at the time of their appointment, and which was due to the pursuer. The Receivers were seeking to have any cash in the hand of the

defender to be paid to the Receivers. Receipt of the payments in respect of the rest did not constitute adoption of the Management Agreement.

[70] In the whole of her experience, she had never come across a case where the Receivers had entered into a contract as one of the contracting parties. Any suggestion that the Receivers had revoked the Revocation was inconsistent with the correspondence passing between the parties.

Cross-examination

[71] A number of figures were put to Ms Duncan from one of the schedules produced (this document was substituted in the course of the proof for that lodged as no 55 of the Joint Bundle). It was put to Ms Duncan that for the vast bulk of the portfolios comprising the Properties, the Receivers had relied on the defender to secure the necessary certifications required under the applicable safety regime. Ms Duncan did not accept this, as the Receivers acted "under duress". It was put to her that certain communication, eg the August email, constituted an instruction to the defender. Ms Duncan also rejected this: she was seeking information to see what the position was. In respect of the intimation of a rolling programme, Ms Duncan's position remained, essentially, that documentation to support this was not produced. She was aware that the defender claimed to do some of this work. Anything done by the defender was received under duress by the Receivers. The defender's stance gave them no choice. She accepted that the defender was asked to send the next rental payments, but this was consistent with the Receivers' duties. In any event, the deductions made were not consistent with the Management Agreement. She accepted that after the hearing before Lord Tyre the Receivers had stepped back, but she explained that this was because the Receivers were taking legal advice.

[72] In respect of the rolling programme letter, she explained that a considerable time had passed since the Receivers had received an accounting – the last one being for the period to January 2016. In any event, there were no supporting invoices to support the deductions being made. Even having received them, there remained a sum totalling £60,000 which had not been accounted for. She also accepted that at the outset of the receivership, there had been a confusion of names. The assignation has been referred to but this had not been produced until August 2016. She did not accept the suggestion that the Receivers had just left the defender to it. The defender held onto money owed to the pursuer. They were making deductions, unsupported by invoices, from the pursuer's monies. While these deductions may have related to issues arising from the management of the Properties, this was not voluntarily on the part of the Receivers. Any spreadsheets received remained difficult to reconcile. An entry for "bills not paid" was one example. It was put to her that the first statement (to 21 January 2016) had had a list of invoices attached that had been paid. She explained that in respect of the statements to April, no invoices had been supplied until the Receivers' own application was made to the court under section 236 of the Insolvency Act.

Re-examination

[73] Various matters were put to Ms Duncan that were done by the defender (eg such as deductions for bills not paid, deductions for properties not managed by the defender, and deductions for administrative and legal fees) that did not accord with the Management Agreement. She accepted that these were discrepant. These actings did not mirror what was in the Management Agreement.

Submissions

[74] I have already set out parties legal submissions. I need therefore only set out their submissions on the evidence and as to how those legal submissions fell to be applied to the evidence.

Submissions on behalf of the Pursuer

[75] Mr Sellar began by observing that issues of credibility and reliability were not central to the determination of the action. Even so, he invited the court to find both Mr Dounis and Ms Duncan to be both credible and reliable witnesses. In respect of the defender's witnesses, he accepted that Dario Guidi was generally credible and reliable but that Giovanni Guidi's demeanour in the witness box meant that his evidence should be treated with a degree of caution.

[76] Mr Sellar made a preliminary point, that it was not clear who was the party to any contract said by the defender to have been novated. He argued that the defender did not contend (and, in any event, had not proved) that the parties intended to replace the Management Agreement with a new contract. The notices of revocation were served and were effective in terminating the primary obligations under the 2014 Management Agreement. According to the Supplementary Note, it is the defender's argument that, "In this case … the evidence shows that the pursuer took the place of Fieldoak Ltd after their appointment." However, the pursuer is Fieldoak Ltd (In Receivership). It is therefore not clear, said Mr Sellar, who, according to the defender, are the parties to the new contract. It would appear, though, that the defender is contending that the new contract is between the Receivers personally and the defender. The defender's argument on novation appeared to be that either the Receivers personally entered into a new contract with the defender or that

the parties' actions had the contractual effect of revoking the revocation. He submitted that neither formulation worked.

[77] Mr Sellar considered the first alternative. The terms of any new contract were entirely unclear. It would appear that the defender was contending that the new contract replicated the old contract, particularly in relation to fees and notice period. However, there is no basis for saying that the parties' actions, even if habile to support the creation of a new contract, gave rise to the necessary inference that the new contract simply replicated the old contract. In this regard, Mr Sellar noted that:

(1) The new contract did not relate to all properties owned by the pursuer. This amounted to a departure from the Management Agreement and the definition of "Property" given there;

(2) The new contract apparently allowed the defender to take a fee in respect of rents that it has not collected. The Management Agreement had no such provision;

(3) The new contract apparently allowed a charge to be made for "additional admin". This is not envisaged in the Management Agreement; and

(4) In any case, the evidence of Mr Dounis and Ms Duncan was that the Receivers did not, for obvious reasons, become parties to contracts which concern the company in a personal capacity.

[78] Mr Sellar considered this evidence in the light of the legal principles for novation (set out above). He returned to the necessity and intention points, that were key features of the law of novation. Having regard to the actings of the parties, it was not necessary for the Court to imply or infer that there was a contract between the Receivers and the defender. He put it another way: the parties' actions are not consistent only with a new contract. The

defender therefore failed on the necessity point. Further, he argued that even if, on an objective basis, the Receivers and the defender could otherwise be found to be bound by a contract, the Receivers were not so bound in circumstances where the defender knew that it was not the Receivers' intention to enter into contractual relations with the defender, far less the Receivers in a personal capacity. Rather than entering into new contractual relations, the Receivers stated their intention with consistent and emphatic clarity that they were revoking the defender's authority under the Management Agreement. Accordingly, he argued, the defender therefore fails on the intention point.

[79] In respect of the intention point, Mr Sellar made specific reference to letters set out in sub-paragraphs (5), (6), (9), (11) and (12) of paragraph [23] above. He also referred to the service of the Summons in the present action on the defender and on Citywide on 23 June 2016, to the August email, the lodging for calling of the Summons on 23 September 2016 initiating those proceedings, and to the ongoing procedure in these proceedings. For these reasons, Mr Sellar argued that it was quite clear that the Receivers acted as they did without there being a contract between them and the defender. The ingathering of documents and assets (including rental payments) was part of the function of a receivership. He therefore submitted that the defender's argument on novation failed on the necessity point. The result was that the defender acted as it did without there being any contract with the pursuer other than the Management Agreement, far less some contract with the Receivers personally. All of the matters referred to by Mr Sellar (apart from the procedure in these proceedings) are in substance agreed in the parties' "Agreed Chronology".

[80] Mr Sellar argued that the parties' positions had crystallised with the defender remaining in physical control of the Properties. It is in that context that the events should be viewed. The Receivers were involved in attempting to perform their statutory obligations

under the insolvency legislation, while at the same time being concerned that, as agents for the pursuer, neither they nor the pursuer breached any of the statutory requirements relating to tenancies. Furthermore, he referred to the evidence of Mr Dounis and Ms Duncan that Receivers in general were very careful not to "adopt" contracts, unless there is a good reason for doing so. For Mr Dounis' part, he never intended to do anything that could be viewed as an adoption of the Management Agreement. The Management Agreement was, in his view, detrimental to the pursuer's interests and to have adopted it would have been contrary to his obligations to the secured creditor. The evidence of Ms Duncan was in substance to the same effect.

[81] Within that overall context, Mr Sellar submitted that the following facts should be found to have been established:

(1) From the outset of the receivership, the Receivers were unable to access the properties since the defender retained the keys. This remained the case even at Proof;

(2) In light of Lord Tyre's comments, the Receivers had decided not to make contact directly with the tenants of the Properties;

(3) The pursuer (and the Receivers) had statutory obligations in respect of the properties which the pursuer owned. Standing the physical control which the defender had over the Properties and the fact that the defender was the tenants' pre-existing point of contact, the Receivers were dependent on the defender in dealing with the statutory requirements. In reality, the Receivers effectively had no meaningful choice and acted "under duress" (to use Kirsty Duncan's expression);

(4) The Receivers did not instruct the defender to undertake this work. Rather, the Receivers realised that the parties had diametrically opposed views of the applicable law which could, and would, be resolved only by the determination of the present action. The Receivers also realised that, despite being asked repeatedly by the Receivers and their solicitors to stop, the defender was intent on continuing to manage the Properties and there was nothing they could do to stop that until the court action was determined;

(5) For his part, Dario Guidi made it very clear that the defender continued to provide services because it considered it had not only the legal right to do so, but also the legal and moral obligation to do so. At no point did Dario Guidi suggest that he relied on the actions, and omissions, of the pursuer in effectively permitting the defender to provide managerial services to the pursuer, including dealing with all statutory requirements. Mr Guidi never thought there was a new contract in place between the defender and the pursuer, far less one between the defender and the Receivers. Nor did he suggest that there had been some waiver of the Revocation of the defender's authority. Rather, Mr Guidi's position was that the Revocation was wrong as a matter of law, proceeding on the advice that the defender had received from its solicitors, Baillies. Indeed, Mr Guidi's position, very candidly, was that the revocation of authority was simply invalid. It was Mr Guidi's position that, if he had been given the correct advice, the defender would not have continued to insist on performance of the Management Agreement.

(6) This view reflected the position adopted by the defender's lawyer in correspondence. (Mr Sellar referred to those letters set out in para [23(2), (4)] and, in particular, para [23(8) and (10)].)

(7) Mr Guidi also explained, in response to a question from the Bench, that the reason the defender was retaining funds against "bill received not yet paid" was because he considered the defender's position as managing agent to be precarious and subject to challenge by the Receivers. Mr Guidi could, therefore, have been under no illusion that the Receivers took a very different position from the defender in relation to the enforceability by the defender of the Management Agreement.

[82] More generally, the actions of the Receivers must been seen in the light of the very difficult circumstances in which they were operating. As agents of the pursuer, who owe their duty primarily to the floating charge creditor, they needed to take what steps they could to make sure the Properties were compliant with statute. However, they themselves could not take those steps or arrange for a third party to take them on their behalf. The defender's clear and repeatedly stated position precluded that. Furthermore, the Receivers' communications and actions should not be subjected to close textual analysis with a view to identifying facts supporting novation where none exists. The obvious example was the August email from Ms Duncan. The Receivers' position was consistent throughout: the defender's authority had been revoked. The Receivers were also required to ingather assets. The cashing of the cheques should be viewed in that light.

[83] Mr Sellar turned to analyse the defender's case on waiver, under reference to the relevant legal principles. He submitted that the acts on which the defender relied to support the proposition that, on an objective basis, the pursuer and the Receivers can be taken, in

some way, to have abandoned the right to insist on the Revocation have not been clearly identified. However he noted that, in paragraph 4 of its Supplementary Note, the defender identified, under reference to correspondence, how the defender continued to act as letting agent for the pursuer. He submitted that the matters referred to did not demonstrate, on an objective basis, an intention on the part of the pursuer or the Receivers to abandon the termination notices. In particular, in respect of the ingathering and receipt of documents relating to the pursuer, or the cashing of the cheques tendered by the defender, these were part of the functions of receivership. In relation to the Drumoyne Place exchanges, and the preclusion of a gas safety certificate, this was an *ad hoc* arrangement. Citywide were asked for a quotation to obtain the certificate and were then asked to proceed on the basis of that quotation. Furthermore, according to the defender, this is one of the properties managed by Cairn. This, Mr Sellar submitted, underlined that this was an *ad hoc* arrangement and on no view could have been seen as the defender fulfilling its obligations under the Management Agreement. Mr Sellar submitted that there was, therefore, no basis for it to be concluded that, on an objective assessment of the evidence, the pursuer and the Receivers can be taken to have abandoned the right to insist on the termination notices.

[84] Mr Sellar considered the defender's evidence relevant to the issue of reliance. He noted that it was the defender's clear position that, on advice, it did not consider that the Receivers had the right to terminate the Management Agreement. Dario Guidi stated (at the end of para 11 of his witness statement) that:

> "In the end of the day no agreement was reached and my position remained that my Company were properly appointed to factor the property and that that was what we were going to do."

Further, Dario Guidi confirmed that this was his position in his oral evidence. (Mr Sellar referred to the evidence set out in paras [39] and [41], above.) This view also reflected the position adopted by the defender's lawyer in correspondence: see paragraph [23], above.

[85] Mr Sellar addressed any possible argument made by the defender based on an asserted delay in raising proceedings, and the decision not to seek interim interdict. The delay in raising proceedings was explained by the need to obtain the floating charge creditor's consent, something which took time. In any event, he argued, the passage of time must be viewed in the context where the Receivers could not have made it any clearer what their position was on revocation of the defender's authority. So far as the decision not to apply for interim interdict, this is nothing to the point. It was the raising of these proceedings that signalled the Receivers' intention to seek interdict. No inference, or reliance, could have been placed by the defender on the fact that the pursuer did not apply for interim interdict. Further, it was far from clear that the pursuer would have obtained it. The defender explained in evidence how important the Properties were to its business. Had interim interdict been granted, the effect could have been, in all likelihood, catastrophic for the defender's whole business. That would have been a powerful argument in respect of the balance of convenience. Standing Lord Tyre's comments, the defender would also have had a strong argument for saying that the balance of convenience favoured the *status quo*. Finally, a motion for interim interdict would have been somewhat anomalous since the pursuer, as a contract breaker, would have been seeking relief from the court against a party that was not in breach.

[86] From all of this, Mr Sellar argued that there has been no reliance by the defender in the conduct of its affairs. On that basis alone, the defender's waiver argument failed. He made the further point about the defender's waiver argument. He noted that the defender

accepted (albeit only latterly) that the Revocation of their authority as letting agents was valid. The defender was therefore using its waiver argument to create legal rights where there are none. In other words, the defender was using waiver as a "sword" rather than as a "shield". This, he submitted, underscored the conceptual incoherence of the defender's waiver argument.

[87] Finally, in relation to the defender's reliance on the fact that the Receivers refrained from obtaining interim interdict, Mr Sellar notes that the defender has cited no authority that would support the proposition that a principal, having revoked an agent's authority by telling the agent in clear terms that his authority has ceased and having raised court proceedings to that effect, can somehow be found to have waived the right to revoke the agents' authority or could bound into a new contract in circumstances where the agent is acting without instructions. Mr Sellar argued that the authorities on which the defender did rely were of no assistance in respect of the facts of this case. Accordingly, the defender's cases on waiver and novation were fundamentally irrelevant, they had no support whatever the evidence. Decree of declarator should be granted.

Submissions on behalf of the Defender

[88] Mr Logan argued that the evidence at proof had shown that over a period of 18 months the defender has provided the services of a letting agent for a portfolio of approximately 100 properties owned by the pursuer. He submitted that more than £500,000 of rent has been recovered, more than £100,000 of repairs and maintenance have been instructed and that in excess of £100,000 of fees were charged on a month by month basis in accordance with a management agreement. Further, he submitted that several hundred tests and certifications had been obtained in respect of Gas Safety Certificates, EICR tests,

PAT tests, EPCs and legionella. Had all this work not been done, he suggested, the pursuer would have faced criminal sanctions and failed to comply with their duties as landlords. He contended that after the hearing on 26 January 2016, the pursuer took a decision to allow the defender to do this work. The pursuer did not seek a court order to stop it. It had month to month statements of that work. The Receivers cashed the cheques that they received for the net rent. As Mr Logan put it, the Receivers "sought to audit the charges" on these statements by demanding and receiving not only invoices but copies of the hundreds and hundreds of invoices vouching the work instructed by the defender on their behalf. He submitted that the Receivers had knowledge that this work was being done in advance through the rolling program letter. The Receivers were aware that this work needed to be done. They had not instructed anyone else to do it. They had sought to audit and check this work and sought its product in terms of the certification and the rent. The pursuer's position, according to Mr Logan, was that all of this has been done without any legal relationship between the pursuer and the defender. It has just happened or it has happened as a result of some, as he put it, "non-existent duress". The defender's position is that this work has been done in accordance with, and on the terms found in, the Management Agreement. This regulated the relationship between the parties before the appointment of the Receivers. He submitted that this is the only explanation that is consistent with the facts of what has actually happened. The defender relies on two bases on which this can happen, notwithstanding the clear intention of the Receivers in January and February 2016 to bring this contractual relationship to an end. These grounds were either waiver, on the basis that failure to follow through on the Revocation by interdict or court order, and which meant that the Revocation was no longer being insisted upon, or novation, on the basis that even if the Management Agreement was brought to an end, in permitting the defender to continue and in relying

upon it doing so, the Management Agreement was recreated on the same terms between the receiver and the defender.

[89] Mr Logan invited the Court to conclude that the conduct of the Receivers post-Revocation was not compatible with their insisting on it; that the Receivers accordingly waived the Revocation, allowing the Management Agreement to proceed. Alternatively, if the Management Agreement was terminated by the Revocation, the same conduct novated a contract between the Receivers and the defender on the same terms. The relationship between the parties since the Revocation was compatible with there being a continuing contractual relationship between them.

[90] In support of these contentions Mr Logan invited the Court to make the findings in facts *inter alia*, of the following:

(1) That the Properties were managed by the defender. The basis of the contract between the defender and the pursuer was the Management Agreement, entered into on 31 October 2014 with the Partnership which had assigned its interest to the defender (by an assignation dated 2 November 2015).

(2) That the former partnership of Citywide Estates and Letting between Dario and Giovanni Guidi ceased trading in November 2015 with its work being taken on by the incorporated company, namely the defender.

(3) That following the appointment of Mr Dounis letters were sent to the tenants of the Fieldoak portfolio on 22nd December 2015. This resulted in extensive correspondence about the effect of the appointment of the receivers (Mr Logan referred to the correspondence set out above, at para [23]). Although there was an initial confusion about the identity of the party entitled to the Management Agreement this was resolved by 27 January 2016. By letter dated 6 January 2016

the legal agents for the pursuer, HBJ, threatened to "seek court orders to enforce our clients' exclusive right to the Company's property and the rents collected therefrom." Despite the position adopted by Baillies, on behalf of the defender, no such orders were sought at that time.

(4) That on 26 January Lord Tyre refused to make interim orders in respect of the recall of the appointment of the Receivers but issued a Note in which he stated that: "I trust however that going forward those issues will be managed by the receiver with due regard to the contractual obligations of the company [ie the pursuer] and also to the best interests of tenants caught up in this dispute through no fault of their own."

(5) That, with one possible exception, a decision was then taken by the Receivers to "back off" and to have no contact with the tenants, leaving the defender to deal with them on their behalf. From that point on the pursuer relied upon the defender to complete the extensive statutory and regulatory framework that applied to residential properties.

(6) That the defender is the registered point of contact for the portfolio of properties with 3 local authorities, Glasgow City Council, North Lanarkshire Council and South Lanarkshire Council. Where these registrations required to be renewed this has been done by the defender on the pursuer's behalf. This was the case prior to the appointment of the Receivers and continued to be the case at the present time.

(7) That by e-mail dated 22nd January 2016, Dario Guidi set out the normal terms of conducting business on behalf of landlords. This was followed up by a letter from Giovanni Guidi dated 8th March 2016 which set out a program of works

that were to be carried out to meet the several regulatory requirements of the landlord over the next several months. This letter was ignored by Paul Dounis.

(8) Following that letter, the defender continued to conduct its affairs as if the Management Agreement was still in force. In particular, it instructed substantial repairs to the Properties and they proceeded with the program of works specified in the rolling programme letter. The defender also issued statements showing the sums ingathered in respect of rent, the costs incurred and sent cheques for the balance. The response of the pursuer was to ask for cheques for the net rent to be paid to an account in the name of "Fieldoak Limited (in Receivership)".

(9) That neither in response to the rolling programme letter nor in response to statements of account (which showed what work was being undertaken by the defender on a month to month basis) did the pursuer write to make it clear that such work was not authorised and should not be done. In fact, the pursuer relied upon the defender to meet its legal obligations in respect of the regulatory framework. In the August email, Kirsty Duncan, the day to day manager of the Receivers, wrote: "Please also confirm that the landlord statutory requirements are being attended to and legionella inspections had been completed." Kirsty Duncan kept a spreadsheet of this material which she added to from time to time when additional information was provided.

(10) That in April 2016, in the Drumoyne Place exchanges, the defender drew to the attention of the pursuer that a gas safety certificate was required for this property, "supposedly" being managed by Cairns. The pursuer specifically

instructed the defender to obtain this certificate. This may have happened in relation to another property at 25 Trongate in similar circumstances.

(11) That the defender was clear that it had legal as well as moral responsibilities to ensure the safety of tenants by the carrying out of these tests and understood that, as letting agents and as point of contact with the Local Authorities, that it had and has a duty to ensure that these tests are done.

(12) That on 23 June 2016 the present summons was served upon Citywide Glasgow Limited and some additional defenders. The summons was lodged for calling on 23 September 2016. The reason for the delays was that there was a complex procedure by which the secured creditor, Promontoria, granted permission to proceed with any action through an intermediary. This resulted in a delay of several months.

(13) That the Summons included a conclusion for interdict and interim interdict against the defender "continuing to hold themselves out as having continuing authority from the Pursuer, or from continuing to hold themselves out as having such authority to collect, or otherwise intromit with, any of the rental, or other payments due to the pursuer in respect of any of the Properties". No such interim interdict has been sought, with the consequence that for the 11 months since the service of the Summons, the defender has continued to ingather and intromit with the rents received for all of the Properties under its control, ie other than for "a handful" of tenants of properties (who paid Cairns) and the O&S and Y People Properties.

(14) That the duties of landlords in respect of tenancies for residential property are extensive (Mr Logan referred to the Tenant Information Pack provided by the

> Scottish Government.) With the exception of the properties transferred to Cairns, all of these duties were undertaken by the defender since the appointment of the Receivers in December 2015. It has done so as the letting agent of the landlord and as the registered point of contact with the relevant local authorities for each of the Properties. As such, it also had legal obligations to ensure that the requirements of the repairing obligation and the safety certificates were met.

In these circumstances, the defender maintains that the conduct of the pursuer either amounted to a waiver of their express intention to terminate the Management Agreement or that the Management Agreement, if terminated or varied, was novated by the conduct of the pursuer and their acquiescence to the actings of the defender.

[91] Mr Logan submitted that it has been shown that, at least in the period from 8 March to 27 June 2016, the pursuer had "backed off" and was content to allow the defenders to continue to provide their services as letting agent undertaking substantial work on the pursuer's behalf and retaining the responsibility that a managing or letting agent has under the current statutory regime. He argued that, had the pursuer proceeded with the threat of interdict made in the letter of 6 January 2016 this situation would not have arisen. Dario Guidi accepted that if the legal advice he had received had been different he would have acted differently. Mr Logan accepted that that legal advice was incorrect, but he argued, the issue was not tested because the pursuer did not follow through on their threat of court action at that time.

[92] In relation to the suggestion that, if further instructions had been given not to undertake the work, they would have been ignored, he said that this was not an answer. It was open to the pursuer to proceed to Court to assert its rights. It did not do so. The internal

reasons for that are not relevant, because the matter should be objectively determined by reference to the pursuer's actions. Its actions showed acquiescence to the defender's dealing with the tenants and dealing with the regulatory requirements from at least 26 January 2016 onwards, and the defenders conducting their business on that basis.

[93] In respect of the evidence that the pursuer has allowed the defender to proceed with the implementation of the Management Agreement "under duress", this was plainly incorrect. The pursuer (or the Receivers) – Mr Logan does not distinguish – made at least two conscious choices. First, in light of the comments by Lord Tyre, the Receivers decided to "back off". They did not need to do this. Secondly, they chose not to bring proceedings for interdict which had been threatened and at that point, Mr Logan contended, would almost certainly have succeeded. Either or both of these choices were available to the pursuer but not adopted. They were not under duress; they made a choice.

[94] Mr Logan turned to the contention that, as the Management Agreement was not particularly commercial, it was not one that a receiver would adopt. Mr Logan suggested that evidence was conflicting on this point. Both Dario and Giovanni Guidi gave evidence that the terms of the Management Agreement and the rate of fees reflected the difficult aspects of the portfolio, the nature of the tenants and the age and condition of the Properties. He noted that neither was crossed or challenged on these points. He submitted that the evidence of Mr Dounis and Ms Duncan on this point amounted to no more than the subjective intentions of a party and, accordingly, were not relevant.

[95] Mr Logan turned to the defender's case based on novation. He accepted that the key authority was the case of *MRS Distribution Ltd.* He stressed the observation in that case, that: "Novation, whether by delegation or otherwise, can be inferred from facts and circumstances; it is not necessary that it should be effected by an express agreement." In this

case the Management Agreement was with the pursuer. He submitted that if a new contract has been created by novation then that contract was with the Receivers as the agent of the pursuer. He noted that although evidence was led that it was not generally the practice of receivers to enter into contracts as principals, it was not contended that it was not perfectly competent to do so. Whether a receiver has in fact entered into such a contract in this case is a question of fact to be determined on the evidence by reference to what the objective observer, informed of the relevant facts, would have taken from the parties' behaviour.

[96] Mr Logan submitted that in the present case, the pursuer has permitted the defender to have exclusive dealings with the tenants, and has relied upon the defender to comply with the statutory regime meeting the legal obligations of the pursuer as landlord. The defender has charged fees for this work by deduction and rendered invoices for those fees. No reduction is sought of those invoices. Mr Logan suggested that the position adopted by the pursuer, on analysis, was quite odd. It accepted that, for 18 months, the defender has administered the Properties and acted as a letting agent on its behalf. It has accepted (subject to audit and minor disputes) the payment of the net rent to its account. The Receivers have pressed the defender to confirm and ensure that the statutory regime has been complied with. But, the Receivers maintained that there is no contract between the parties. Mr Logan submitted that this would be a very surprising and unlikely conclusion. In such an instance, he argued that the Court would readily and normally infer that there was a contractual relationship and the question would be on what terms.

[97] In relation to Mr Sellar's reference to *Chitty on Contract* (paragraph 2-190), he submitted that this is plainly not relevant to this case. The defender's *esto* case based on novation proceeded on the basis that the pursuer was successful in terminating the Management Agreement by the Revocations, in January 2016, and that the conduct was not

sufficient to amount to waiver. In that scenario, there was, he said, no "pre-existing contractual rights". The situation was that a party had been left responsible as an agent for the maintenance and regulation of Properties; the work had been done and charged for without apparent objection (other than calls for vouching of outlays and some minor arguments about particular charges). The benefit of that work has been received and relied upon, and the only issue is what is the contractual basis, if any, on which that work has been done. He submitted that, given that charging has been in accordance with the Management Agreement (again with certain arguable exceptions), that is the only basis upon which the contract can be constituted. The case of *Paal Wilson* had no obvious relevance, because it dealt with the abandonment of a contract, not its formation. He also submitted that the case of *Maple Leaf* was of no assistance to the pursuer. Here, the question was whether the defender would have inferred an intention to be bound by the actings of the pursuer after the rolling programme letter and the email correspondence seeking payment of the net rent on 7 April. The fact that there were, apparently, discussions going on in the background by the Receivers with the pursuer's creditors was entirely irrelevant.

[98] Mr Logan submitted that either because of waiver or because of novation, the pursuer was not entitled to the declarator as first concluded for. The facts of this case, as found at Proof, showed that there was a legal relationship between the parties in the months after the Revocation and that the only sensible way to construe that relationship was a contract based upon the Management Agreement. Decree as first concluded for should therefore be refused. It is evident that the contractual relationship between the parties did not end on the dates specified and, he suggests, it continued to the present day.

[99] Finally, in respect of the interdict, Mr Logan submitted that there was no basis for the granting of an interdict. The evidence of Dario Guidi, the sole director of the defender, that

he would have acted differently had he known that his initial legal advice was wrong gave no basis for reasonable apprehension that he would not accept a decision of the Court on this matter and absolutely no evidence was led to support such a contention. If the defender is successful the question of interdict is of course irrelevant. If the pursuer is successful it is submitted that it should still be refused as unnecessary. He moved the court to sustain pleas in law 1, 2, 3 and to refuse 4 as unnecessary. The pleas in law of the pursuer being repelled. (I do not here record Mr Logan's submissions about the other three defenders.)

[100] Mr Logan had also taken exception to the supplementary authorities as coming too late and as putting "legal impediments" in the way of the defender. As Mr Logan in fact replied to all of these cases, I do not uphold that objection.

Discussion

Preliminary Observations

[101] Before turning to consider the case as presented, I make several preliminary observations. The first concerns the centrality of reliance as part of the legal principles to be applied. There is no dispute about the legal principles of waiver and novation. I have set these out above, at paragraphs [13] to [18], and do not here repeat them. There is also no dispute that the onus rests on the defender to prove the factual basis for waiver and novation. However, in light of the authorities referred to above (especially at para [17]), one of the essentials the defender must prove in a case of waiver is reliance: the defender must here show that, upon an objective consideration of all of the relevant evidence, it had conducted its affairs on the basis that (from some point in time after February 2016) the Receivers waived or departed from the Revocation. If, however, upon an objective consideration of all of the relevant evidence, the defender conducted its affairs the way that

it did for some other reason (eg on the basis of legal advice from its own advisers), that may well displace the requisite reliance. Similarly, for the purposes of novation, I accept Mr Sellar's submission in relation to his necessity and intention points (see paras 30 and 31 of his submissions, set out above in para [14]). In relation to the intention point in particular, on the authorities, the court will not imply any intention to enter into a contract if one party had actual knowledge of the other party's contrary intention, ie that the other party did not wish to enter into the contract sought to be implied or brought into existence on the basis of novation. Given the Receivers' repeated statements that they had revoked the Management Agreement and that they were not to be taken as adopting it, is a compelling factor in the pursuer's favour on the intention point. The defender will require equally compelling evidence to overcome these statements by the Receivers. What does not suffice is simply to ignore these features of the evidence, as Mr Logan sought to do in his submissions.

[102] Whether or not the Receivers waived the Revocation is a matter of fact. The starting point must be to identify the relevant time frame and thereafter to identify what conduct is relied on and whose conduct is relevant. I have already determined that the relevant time frame is between the third week of February and the third week of June 2016 (see para [29] above), and my reasons for that (in paras [25] to [28]). I reject as untenable the proposition underpinning Mr Logan's submissions that the relevant timeframe is the whole period of 18 months, from the appointment of the Receivers to the Proof in this case (see eg para [87]). Having regard to the terms of the correspondence in the period to the 3rd week of February, set out above at paragraph [23], it is untenable to suggest that the Receivers were waiving the Revocation at the very point when they asserted it, and did so under threat of litigation. It is equally untenable, in my view, to rely on any conduct or communings that post-dates

the intimation of this action and in which declarator of the effectiveness of theRevocation as from 14 or 19 January 2016 was sought.

[103] In considering issues of waiver and novation it is important, too, to identify what is the relevant conduct (eg by its character) and whose conduct of that character is relevant. I have sought to identify the relevant types of conduct upon which the defender appeared to rely, in paragraph [12]. Mr Logan did not differentiate between the conduct of the pursuer, the Receivers or the defender. To the extent that Mr Logan's submissions proceeded on the basis that either or both of the Receivers contracted in a personal capacity, I reject that proposition as having no foundation in the evidence. The conduct of the Receivers/pursuer is relevant, of course, as the starting point for consideration of whether they (or it) departed from the Revocation. To the extent that Mr Logan appeared to rely on things done by the defender (assuming that it was in fact the defender at the material time, which I comment on below), such as the provision of the services of a letting agent (see eg paras [12(iii)] and [88]), this could only be relevant if the Receivers had knowledge of this or if this was relevant to the issue of reliance.

[104] More importantly, one of the essential factors to establish waiver is to demonstrate that the defender conducted its affairs on the basis of the Receivers' waiver of its rights to rely on the Revocation. In submissions, Mr Logan simply asserted (eg at para [90(8)] that the defender proceeded as if the Management Agreement was in force. That may be so, but it is important to examine critically the basis for that belief. In order to establish the relevant reliance, that belief must be based on some conduct or communing on the part of the Receivers. If that belief was in fact induced by advice tendered by Baillie's, the necessary quality of reliance will be absent. One of the striking features of Mr Logan's submissions is his complete disregard of the evidence of the defender's key witness, Dario Guidi, on just

that point (set out at paras [39] and [41], above). Mr Logan did not suggest that this was irrelevant evidence, he simply ignored it. I am unable to do so. Whether waiver has been established is ascertained by an objective consideration of all of the relevant evidence and this includes evidence of the defender going to the very heart of its motive in providing the services it contended that it did, even if that evidence is inconvenient to its presentation of its case.

[105] It is also necessary to deal as a preliminary point with another feature of the evidence as dealt with by Mr Logan. Part of the evidence led, and which was not contradicted, was that the Receivers perceived themselves as operating under certain constraints. One of these was the intransigence of the defender and its refusal to provide the keys it held for the Properties, notwithstanding the demand by the Receivers to do so. This evidence was uncontroversial. Kirsty Duncan described the receipt of any services thereafter as "under duress". In his submissions, Mr Logan simply dismissed this as "non-existent duress". He otherwise did not deal with this passage of the evidence or its impact on the Receivers. In my view, however, there is considerable force in Kirsty Duncan's characterisation that whatever services the defender performed thereafter, from the perspective of the Receivers, these were unwillingly received. Even if it is established that some letting services were provided to the Receivers, that this was by the defender (and not by one or other of the entities Baillies claimed to represent), and that that the Receivers had knowledge of this, this evidence is bound to be coloured by the duress under which it was received.

[106] Finally, until the defender intimated the assignation of the Management Agreement in its favour to the Receivers in August 2016, there was considerable uncertainty as to the rights or proper role (if any) of the defender in respect of the Properties. The assignation was not provided to the Receivers until about eight weeks after the Summons was served on the

defender, and four weeks before it was lodged. This uncertainty was compounded by the confusion caused by Baillies' use, at times, of the name of the Partnership (instead of the defender's name), the defender's name and the letter issued in the name of Giovanni Guidi. (This confusion may explain why the Summons was originally directed against the Partnership and the Guidi brothers as well as against the defender, a position that was not changed until December 2016.) In his submissions, Mr Logan accepted that there was "initial confusion" about the identity of the person entitled to the Management Agreement, but he suggested that this was resolved by 28 January 2016. The evidence does not support this. So far as the documentation to the court disclosed, the first time Baillies claimed to represent the defender in respect of these matters was only in their letter of 25 January 2016. The Receivers' reply, not surprisingly, was to express a degree of scepticism ("you say", see para [23(9)], above). In March, though, Giovanni Guidi was also writing in relation to the Properties in his own name, namely in the rolling programme letter. The assignation in favour of the defender was produced to the Receivers only in August 2016, after these proceedings were commenced. So far as the Receivers were concerned, at no point during the relevant period was it unequivocally established that the defender had any rights (ie by assignation) under the Management Agreement. Accordingly, throughout the relevant period the Receivers were understandably wary of any claims made on behalf of the defender. The defender is wholly responsible for this state of affairs due, Giovanni Guidi said, to "oversight". In his submissions, Mr Logan did not address the consequences on the Receivers of the late intimation of the assignation or the impact of Baillies' inconsistencies as to who was its client. Mr Logan proceeded on the basis that all of the conduct and communings could be attributed to the defender, even if at the material time the representations made (eg as to who was Baillies' client) were inconsistent with this. As noted

above, the pursuer's knowledge as to the identity of the party they were dealing with evolved. The uncertainty was such that when these proceedings were raised, the pursuer called three other defenders in addition to the defender. There is a risk in retrospectively attributing to the parties a clarity of knowledge or understanding (eg as to who had rights under the Management Agreement or by whom any services were being provided), which, on the communings and other evidence, simply did not exist at the material time. This renders much more equivocal any evidence Mr Logan now relies on as being conduct of "the defender". Furthermore, Mr Logan glossed over the fact that in some instances, the communings were not issued by or on behalf of the defender. The most critical letter in which this was the case was the rolling programme letter, on which Mr Logan placed so much reliance. This was sent by Giovanni Guidi. The evidence about the absence of any letterhead is recorded at paragraph [24(3)], above. While the defender appears to rely on the fact that Mr Giovanni Guidi was employed by the defender at the material time, this was never communicated to the Receivers. Mr Dounis, for example, only learned of this fact during the Proof. On this evidence, I find that it was reasonable for the Receivers to entertain doubts as to whether or not this letter was sent by or on behalf of the defender at the material time. Certainly, on this evidence I would not hold that this letter was sent on behalf of the defender - as Mr Logan rather glibly asserts in the face of this evidence - or that the Receivers were bound to proceed on the basis that it had been sent by the defender.

The Defender's Case of Waiver and the Import of Dario Guidi's Evidence in Respect of the Defender's Reliance on Baillies' Advice

[107] Dario Guidi, at all material times the sole director of the defender, accepted that any work done by the defender was done in reliance on Ballies' advice (now accepted to be incorrect) that the Receivers' Revocation of the Management Agreement had been

ineffective, and that the Management Agreement subsisted. His position was that, had he known the correct position (ie that the Revocation of the Management Agreement was effective), he would have acted differently (ie the defender would have resigned and would not have engaged in any of the work). Dario Guidi's evidence on this point was unequivocal and compelling. This evidence is also, in my view, utterly fatal to the defender's case based on waiver. This evidence places an entirely different complexion on the rolling programme letter, even if it were understood at the material time as issuing from the defender. Mr Logan says (see para [82(7)]) that the pursuer did not write to make it clear that it was not authorising the works. He and Giovanni Guidi also explained that the reasons for undertaking some works were, in part, driven by the defender's own need (as letting agent) to comply with the safety regulatory regime. Indeed, it is striking in my view, that there was no evidence from the defender's witnesses that they acted as they did for any other reason. In relation to the rolling programme letter, neither of the defender's witnesses stated that the defender proceeded to do the work claimed by reason of the Receivers' failure to respond. Significantly, at no point in the defender's evidence did its witnesses justify the work they say the defender did by referring to (much less relying on) any conduct or communings on behalf of the Receivers or on the basis of their purported failure to obtain a court order. The evidence I have just described is inimical to establishing the relevant reliance based on any conduct by the Receivers.

[108] On the whole evidence, viewed objectively, I find that the defender acted as it did on the basis of Baillie's advice, erroneous in law, that the Revocation was ineffective and that the Management Agreement subsisted. It was also motivated, at least in part, to discharge what it understood to be safety obligations incumbent on it as the registered letting agent. The defender did not act in reliance on any conduct or communing of the Receivers. On this

evidence alone, the defender's case of waiver is bound to fail. This conclusion is sufficient to determine the defender's case on waiver. It is only right, however, that I deal with the other chapters of evidence relied upon.

[109] What of the matters founded upon by the defender to establish the Receivers' waiver of their Revocation of the Management Agreement? I turn to consider the various categories of actings or communings relied upon by the defender, as follows:

(1) *The encashment of cheques*: the first cheque was cashed in January 2016, prior to the start of the relevant period. Only two cheques, the second and third cheques, were cashed in the relevant period (see paras [24(2] and [24(8)]). The second cheque was dated only three days after the Receivers' letter of 23 February 2016. There was nothing in the evidence to suggest that this was anything other than in response to, and to comply with, the Receivers' request for the documentation and funds of the defender (see para 25(2)). As a matter of law, one of the central functions of a receiver is to ingather the assets and funds of the company to which he is appointed. I accept the evidence of the pursuer's witnesses that the Receivers' encashment of the second and third cheques was readily referable to the discharge of one of their duties, a matter which Dario Guidi accepted in cross. Any other cheques cashed fell outwith the relevant period I have identified.

(2) *The rolling programme letter*: Mr Logan placed considerable stress on the rolling programme letter. (While there was also reference in the evidence to a spreadsheet prepared by Giovanni Guidi (No 7/34 of process), there was no evidence to show that this had been shown to the Receivers at the material time. When questioned about it, Mr Dounis stated that he had never seen it before. It

can therefore form no basis for the imputation of knowledge to the Receivers of the defender's proposed intentions or the scope of the rolling programme.) It wasn't quite focussed in this way in his submissions, but the underlying point Mr Logan sought to make from the rolling programme letter was that the Receivers were on notice that the defender would be engaging in this "rolling programme". The Receivers never replied to this letter. In my view, that silence was not itself sufficient to instruct any form of implied consent by the Receivers to the defender's proposed works, or waiver by them of the Revocation. This is for four reasons. In the first place, during the relevant period the defender had not unequivocally established its rights under the Management Agreement. Any work the defender purported to do could be seen as being undertaken without authority and at its own risk. Certainly, Dario Guidi was keenly alive to this very risk – hence the additional deductions the defender made outwith the terms of the Management Agreement. In the second place, there is the element of duress already referred to. The Receivers were not free actors, as it were, in respect of the provision of these services for so long as the defender refused to hand over the keys or to cede control of the properties they controlled. In the third place, the Receivers did not give any authorisation in response to the rolling programme letter. They simply did not reply to that letter. The essence of Mr Logan's cross-examination on this point appeared to be that it was incumbent upon the Receivers to write again and tell the defender to desist. Mr Dounis' evidence, amply supported by the extensive communings passing leading to HBJ's letter of 23 February 2016, was that it had already done so. I accept that evidence. In any event, the Receivers' silence is very much coloured,

in my view, by the robust and forcefully expressed position of the Receivers repeatedly stated in the communings in January and February 2016. Having regard to the full terms of HBJ's letter of 23 February 2016, and the impasse the parties had reached by that stage, it is extremely unlikely that the Receivers would - on the defender's approach - commit a *volte face* and abandon their position, and do so within a matter of days of that 23 February letter and after having consistently and repeatedly set out their positions in the preceding months. Compelling evidence would be required to demonstrate such a *volte face*. There was none. Finally, as I have already noted, at no point did the defender's witnesses say that the defender did the works claimed because they were induced by any conduct, communings or inaction on the part of the pursuer. As Dario Guidi frankly acknowledged, he (and the defender) proceeded on the basis of Baillies' erroneous advice. Had he known the correct advice, he would not have provided the services claimed.

(3) *The Drumoyne Place exchanges*: The terms of the emails surrounding this make it clear that this was an *ad hoc* instruction. As such, in my view, it is incapable of supporting an inference of any change in the Receivers' position more generally. The very fact that the defender was seeking a specific instruction, militates against there being an understanding (by the defender that the Management Agreement provided any continuing authority for such works. If it did, then there was no need to seek a specific authority. Dario Guidi accepted this. Rather, the fact that specific authority was sought is suggestive that the defender regarded this as necessary, the inference being either that this was because the Management Agreement did not subsist or he had doubts.

(4) *Other works per the statements of account*: Mr Logan appeared to rely on the statement of accounts, either to show the deductions (ie as evidencing work said to have been done) or the fact that all that was being paid or accounted for were net rental payments. The first statement of account is subject to the same difficulties as the first cheque. It does not fall within the relevant period but comes while the Receivers' were expressly asserting their termination and non-adoption of the Management Agreement. Like the second cheque, the second account was provided very shortly after HBJ's letter of 23 February 2016. Unlike the second cheque, which the Receivers cashed, there was no conduct on the part of the Receivers that the defender could point to as instructing waiver based on the second statement of account. Any silence on their part was not instructive of any inference of waiver, for the same reasons given about the Receivers' non-response to the rolling programme letter. The Receivers' receipt of the second statement is, in my view, appropriately referable to another one of their core duties, which is to seek a due accounting from third parties of those parties' intromission with the assets and funds of the pursuer. This leaves the third statement of account. (No other statements of account were received during the relevant period.) In my view, the third statement of account, which in fact covered two periods, may also reasonably be seen as a reply to Kirsty Duncan's request the previous month for a breakdown (see para [24(6)]). (As Mr Dounis had stated, by April 2016 the Receivers still had not received any invoices: see para [61], above.) That request is again, in my view, undoubtedly referable to the performance of the Receivers of their duties. Kirsty Duncan made a further request in the August email, and in which it was expressly stated

that the Receivers' position was that the Management Agreement had been terminated and that cashing the cheques did not constitute adoption. The defender could not have been in any doubt about this. This was reinforced by the fact that six weeks after the receipt of the third statement of account, and two weeks after the third cheque was cashed, the Summons was served *inter alia* on the defender.

(5) *The omission to seek interim interdict:* I accept Mr Dounis' evidence as to the reasons why proceedings were not raised when they were. There was no challenge to this evidence. I also prefer Mr Sellar's submission on this point. Mr Logan has cited no authority for the proposition that the non-exercise of a remedy instructs waiver. Mr Logan sought to present this as a positive choice or decision on the part of the Receivers, not just to refrain, but thereby also to rely on the defender to provide the services claimed. The evidence from the pursuer's witnesses does not support this contention. More fundamentally, I refer to the matter already noted, that there was no evidence from the defender's witnesses thereafter that (as with the non-reply to the rolling programme letter) they were induced into believing the Management Agreement subsisted on the basis that there was no court order against the defender. Rather, on the whole evidence, it is clear that the defender was acutely aware of the risks of not being paid (eg for outlays), if the Management Agreement had ceased. The additional steps it took, outwith the terms of the Management Agreement, reinforce this. Extra sums were deducted or retained to protect the defender against that eventuality. These features of the evidence are inconsistent with the defender's case (as Mr Logan

presented it) that it proceeded on the basis that the Management Agreement subsisted.

In my view, considering the whole evidence, I am not persuaded that, objectively viewed, the Receivers waived their right to insist on the Revocation.

[110] For completeness, I note that it was not contended that the provision of the pursuer's books and records to the Receivers in June 2016 was consistent with the subsistence of the Management Agreement. Standing the Receivers' repeated requests for these, this is consistent with the Receivers' performance of their duties.

The Defender's Case Based on Novation

[111] In his submissions, Mr Logan did not distinguish between the conduct or communings relied upon for waiver and for novation. So far as I understood him, it was all relevant to both grounds without distinction. I have dealt with most, if not all, of this evidence in the context of the defender's case on waiver. Much of what I have said in my preliminary observations applies with equal force to this ground. So, for example, before there can be consideration of inferring a contract between two parties, there must be clarity as to who are to be the contracting parties. Dealing first with who was to be the counter party to the defender, Mr Logan did not in his submissions distinguish between the pursuer and the Receivers. Furthermore, in relation to the other party, namely the defender, Mr Logan relies on hindsight to contend, in effect, that all of the conduct he relies upon is seamlessly attributable to the defender. This is not borne out by the evidence. The evidence disclosed a considerable uncertainty on the part of the Receivers during the relevant period (and for some time thereafter) as to the correct identity of the party or parties purportedly acting (on their view, without authority) in respect of the Properties from time to time, or

claiming to have rights under the Management Agreement. The fact that the rolling programme letter was sent by Giovanni Guidi in his own name, remains highly problematic for the defender's case on novation. On the evidence, the defender has failed to prove that this was sent on behalf of the defender. This undermines a great deal of the case that Mr Logan sought to construct on the basis of this letter, as purportedly going to the Receivers' knowledge of what was done or that this work was being done by the defender.

[112] In respect of the law to be applied, I accept as correct the necessity and intention points identified by Mr Sellar. I have already noted that the most fundamental obstacle to the defender's case, is the trenchant terms of the Receivers' correspondence not to contract.

[113] In relation to the intention point, Dario Guidi's evidence that he relied on Baillies' advice and proceeded on the basis that the Management Agreement remained in force, because the Revocation was ineffectual, is starkly inconsistent with the intention point. If Dario Guidi believed that the Management Agreement subsisted - which appeared at times to be his belief even at the point of giving his evidence at the proof - he could not have had the requisite intention to create a different agreement by novation. In terms of the differences between the terms of the Management Agreement and what the defender did in the following months, he explained that some of this was simply done protectively by the defender (eg making deductions for rent not yet received) out of concern that the defender would not get paid. In other words, it was explicitly not on the basis that the Management Agreement had been terminated or that he believed that the defender was acting on the strength of some novated variation of the Management Agreement. On this evidence, the defender's case based on novation fails.

[114] Finally, in relation to the necessity point, the conduct of the parties was not consistent with their continuing to be bound by the Management Agreement. Certainly, the

implication of a novated Management Agreement is not necessary in the relevant sense discussed in *Baird*. Rather, the conduct of the parties is consistent with the Receivers having revoked the Management Agreement by 19 January 2016 at the latest, and with the defender refusing to accept that on the basis of the erroneous legal advice provide to it by Baillies. None of that evidence was controversial. None of what followed had the effect in law of altering the parties' positions or rights. The defender fails on the necessity point. It follows that its case based on novation fails.

Disposal

[115] It follows that the pursuer's case succeeds. I shall put the matter out by Order to confirm the terms of the declarator and any ancillary motion that may be made. I reserve meantime the question of expenses.