SHERIFFDOM OF LOTHIAN & BORDERS AT EDINBURGH

[2018] SC EDIN 12

CA9/16

JUDGMENT OF SHERIFF WILLIAM HOLLIGAN

in the cause

BRITANNIA INVEST, A/S a company incorporated in Denmark and having its registered office at c/o Nielsen Norager, Frederiksberggade 16, 1459 Copenhagen K, Denmark

Pursuers

against

THE SCOTTISH MINISTERS, having places of business at Victoria Quay, Leith Docks, Edinburgh and St Andrews House, Regent Road, Edinburgh, EH1 3DG

Defenders

Pursuers: Thomson QC instructed by Burness Paull
Defenders: Barne QC, Instructed by NHS Scotland Central Legal Office

Edinburgh, 4 January 2018

The sheriff having resumed consideration of the cause Finds in Fact:

[1] The pursuers are the registered proprietor of the building known as Mainpoint (previously known as West Port 201), situated at West Port, Edinburgh, being the subjects registered in the Land Register of Scotland, under title numbers MID76215 and MID76249 ("the building").

[2] By virtue of them becoming the registered proprietor of the building, in or around 2015, the pursuers became vest in the landlords' part of the lease between West Port S.A.R.L ("West Port S.A.R.L") and the defenders dated 9 July, 13 August and 23 August 2013 and registered in the Books of Council and Session on 18 September 2013 ("the lease"). 5/1/1 of process is a true copy of the lease.

[3] The subjects let in terms of the lease are the first, second and part of the third floors of the building, together with the common parts ("the premises").

[4] The date of entry under the lease was 30 July 2012.

[5] The ish of the lease is 29 July 2022.

[6] NHS Education Scotland ("NES"), an entity for which the defenders were responsible, began looking for premises in or about 2010.

[7] After competitive tender NES appointed GVA to act on their behalf in conducting a market search as to available property and to advise them on the acquisition of premises. Mr Simon Capaldi was the principal person instructed on their behalf.

[8] In or about 2012 the market favoured tenants' interests.

[9] Prior to 2012 there had been difficulties in the construction of the building. The original developer became insolvent. Parts of the building had been let by 2012.

[10] In 2012 the defenders became interested in taking a lease of part of the building.

[11] Mr Capaldi was instructed by NES to negotiate terms.

[12] Mr Peter I'Anson, surveyor, was instructed to negotiate terms on behalf of West Port S.A.R.L.

[13] The method of negotiation between agents was by drafting heads of terms being a document which recorded the agreement of parties to the major terms and conditions.

[14] During the course of the negotiation Mr Capaldi was instructed by the defenders to include within the service charge a cap.

[15] A cap on a service charge is not uncommon in the market.

[16] It is common for a cap on a service charge to have a gap between the initial expected expenditure and the cap which acts as a buffer in favour of the landlord.

[17] A cap is beneficial to a tenant as providing protection against significant increases in service expenditure.

[18] Mr Capaldi and Mr I'Anson settled upon heads of terms. 5/2/1 of process is a copy of the final heads of terms as agreed between Mr Capaldi and Mr I'Anson. It is dated 1 May 2012.

[19] At all material times Mr I'Anson and Mr Capaldi acted within the scope of their authority.

[20] The heads of terms were not intended by the parties to be legally binding.

[21] Clause 10 of the heads of terms provided that there would be a service charge which equated to £4.64 per square foot. West Port S.A.R.L, were happy to cap the service charge at £5.00 per square foot but allowing for annual RPI uplift. The cap excluded utilities.

[22] It is common for service charges to increase in line with inflation.

[23] In the market, it is very uncommon, if not unheard of, for the cap on service charges to be calculated upon actual expenditure.

[24] At the time of negotiating the service charge cap Mr Capaldi was aware of the service charge budget.

[25] At no point during the negotiation of the heads of terms did either Mr Capaldi or Mr I'Anson intend that the cap on the service charge would be calculated upon actual expenditure. Their intention never changed.

[26] Mr Richard Rennie, Burness Paull, was instructed to act on behalf of the landlords in the preparation of the lease (or similar documentation).

[27] In or about 2 May 2012 Mr Rennie prepared and sent to Diane Black, solicitor acting for the defenders, a draft lease. 5/5/1 and 5/5/2 are copies of the email and draft lease.

[28] Clause 5.13 contained the provisions concerning the service charge cap. It provided:-

> "5.13 Notwithstanding the foregoing provisions or any other provisions of this Lease the Tenants liability for Service Charge shall be capped so that it shall be a maximum of:
>
> 5.13.1 [*insert £5 multiplied by agreed area per missives – provisionally £184,731],* (exclusive of VAT) for the first calendar year of this Lease running from the Date of Entry, and accordingly pro-rated for the period from the Date of Entry to the end of the first calendar year;
>
> 5.13.2 [*insert figure from 5.13.1 above],* (exclusive of VAT) subject to annual RPI increases for each subsequent calendar year during this Lease".

[29] On or about 11 May 2012, Ms Black returned the draft lease with revisals. The revisal made provision for the lease of separate floors. She also asked for a worked example to illustrate how a service charge cap would operate on a year to year basis.

[30] A worked example was provided. 5/5/9 is a copy of the example dated 13 June 2012.

[31] By excluding utilities the cost per square foot of the service charge was calculated to be nearer £3.79.

[32] A difficulty highlighted in the worked example was that the lease year and the service charge year ran differently, making calculation of the RPI uplift difficult.

[33] By email dated 15 June 2012 (5/5/11 of process) Mr Rennie returned the draft lease to Ms Black, further amended, together with a copy of the service charge budget. The relevant part of clause 15.3, as so amended, provided:-

> "5.13 Notwithstanding the foregoing provisions or any other provisions of this Lease, the Tenant's liability for that element of the Service Charge that does not include the cost of utility suppliers shall be capped so that it shall be a maximum of ~~[*checking should this be separated for each floor?*].~~
>
> 5.13.1 The rate of £5 per square foot exclusive of VAT for the first ~~12 month~~ period ~~of this Lease~~ running from the date of entry to 31 December 2012;
>
> 5.13.2 For each subsequent period of 12 months commencing on 1 January 2013, the ~~first anniversary~~ rate payable in the ~~Date of Entry~~ and ~~accordingly pro rated for the period from the Date of Entry~~ period to the ~~end of the first calendar year [clarify and consider an example]~~ [~~the rate of £5 per square foot~~] foregoing 31 December

(exclusive of VAT), subject to annual RPI ~~increases for each subsequent 12 month period during this Lease [check agents happy]~~".

For the forgoing purpose:

(a) the first increase (for calendar year 2013) shall be calculated by reference to the comparative RPI dates and figures at (a) date of entry and (b) ~~the date of commencement of the second year of the period~~, 31 December 2012."

[34] Mr Rennie's intentions in changing the draft were to cater for calculation of the RPI increase to the cap, given that the lease commenced during a service charge year and to ensure that the RPI increase would apply to the amount of the cap plus the RPI increase for the previous year and not decrease in the event of deflation.

[35] Ms Black raised the question with Mr Rennie whether utilities were excluded from the service cap and the duration of the first period before the RPI increase was applied.

[36] By 19 June 2012, Linda Dewar, head of property and facilities management in NES, calculated that the amount of the service charge per square foot was £3.79 which was lower than she had expected. She believed this made the arrangement less attractive. She raised this with Mr Capaldi. 6/13 of process is a copy of her email to him dated 19 June 2012. By email dated 20 June 2012 (6/14 of process), Mr Capaldi responded that he would provide a solution in due course. Her state of mind as to the interpretation and drafting of clause 5.13 was not communicated to anyone else.

[37] For the landlords, utilities were always excluded from the calculation of the service charge. The parties agreed that utilities should be excluded and that it would be 18 months from the date of entry before the RPI increase would fall to be applied. The draft lease was adjusted to take account of the foregoing

[38] The transaction settled in or about the date of entry on 30 July 2012.

[39] Clause 15.3 as finally drafted provides:-

"5.13 Notwithstanding the foregoing provisions or any other provisions of this Lease, the Tenant's liability for that element of the Service Charge that does not include the cost of utility supplies shall be capped so that it shall be a maximum of:

5.13.1 The rate of £5 per square foot (exclusive of VAT) for the first period running from the Date of Entry to 31 December 2013;

5.13.2 For each subsequent period of 12 months commencing on 1 January 2014, the rate payable in the period to the foregoing 31 December (exclusive of VAT), subject to annual RPI increases.

For the foregoing purpose:

(a) the first increase (for calendar year commencing 1 January 2014) shall be calculated by reference to the comparative RPI index figures at (a) the Date of Entry and (b) 31 December 2013;

(b) the second increase (for calendar year commencing 1 January 2015) shall be calculated by reference to the comparative RPI figures at (a) 31 December 2013 and (b) 31 December 2014

(c) the third increase (for calendar year commencing 1 January 2016) shall be calculated by reference to the comparative RPI figures at (a) 31 December 2014 and (b) 31 December 2015, and so forth thereafter;

(d) where RPI has fallen during any of the calculation periods, the Service Charge cap will remain at the previous level for the ensuing 12 month period and will not decrease; and

(e) for the avoidance of doubt, the service charge cap will not include utility costs and charges".

[40] Before acquiring the building in 2015, the pursuers through their advisers, Danmerc Limited, instructed the preparation of the reports on the building. 5/4/1 of process is copies of a joint report by Ryden & Lewis Ellis and DWF Solicitors.

[41] Neither report disclosed any issue as to the operation of the service charge. The reports described the service charge in accordance with the practice in the market and was in accordance with the understanding of Mr Capaldi and Mr I'Anson.

[42] The pursuers acted on the strength of the advice in proceedings to acquire the building.

Finds in Fact and Law

[1] Clause 5.13 does not give effect to the common intention of the parties to the lease at the date when it was made.

[2] That in all the circumstances of the case, decree of rectification as craved in crave four of the record ought to be granted.

THEREFORE

Puts the matter out by order in order to give effect to this judgement; reserves all questions of expenses; assigns 17 January 2018 at 9 30am at the Sheriff Court, Chambers Street, Edinburgh as a diet therefor.

Note

[1] This action concerns a lease of commercial premises in Edinburgh, more particularly part of the building known as Main Point, West Port, Edinburgh ("the building"). The lease is between West Port S.A.R.L ("West Port S.A.R.L") and the defenders dated 9 July and 13 and 23 August 2013 and registered in the Books of Council and Session on 18 September 2013 ("the lease"). 5/5/1 is a copy of the lease. The subjects comprised within the lease are the first, second and part of the third floors of the building, together with the common parts ("the premises"). The date of entry was 30 July 2012. The duration of the lease is 10 years from the date of entry. In or about 2015 the pursuers purchased the building and thus acquired the landlords' interest.

[2] The lease provides that the defenders, as tenants, are bound and obliged to pay to the pursuers service charge payments as the same are provided for in clause 5 of the lease. The

pursuers raised the present action seeking payment of certain service charges. Clause 5 of the lease sets out the liability for, and calculation of, the service charge. The dispute initially concerned the interpretation and application of clause 5 of the lease and, in particular, clause 5.13 which provides a cap in relation to the defenders' liability for the service charge. At an earlier point in proceedings the matter came before me by way of debate after which I issued a judgment. In that judgment I accepted the interpretation contended for by the defenders. The pursuers then amended their pleadings to include a crave for rectification. In short, the pursuers say that clause 5.13, as interpreted by the court, does not express the common intention of the parties as to how the service charge cap should operate. They seek decree of rectification to reflect what the pursuers say was the common intention of the parties. The matter of rectification came before me by way of proof before answer.

[3] Much of the evidence was not in dispute. The parties lodged witness statements together with a lengthy joint minute of admissions. I heard evidence from the following witnesses: Lars Sindberg; Peter I'Anson; Susan Cameron; Simon Capaldi; Richard Rennie; Neil McVicar; James Caddick and Linda Dewar.

[4] The evidence of Mr Alan Foley came by way of statement only. All of the witnesses, with the exception of Linda Dewar, were witnesses called by the pursuers.

[5] As currently framed clause 5.13 of the lease provides as follows:

> "5.13 Notwithstanding the foregoing provisions or any other provisions of this Lease, the Tenant's liability for that element of the Service Charge that does not include the cost of utility supplies shall be capped so that it shall be a maximum of:
>
> 5.13.1 The rate of £5 per square foot (exclusive of VAT) for the first period running from the Date of Entry to 31 December 2013;
>
> 5.13.2 For each subsequent period of 12 months commencing on 1 January 2014, the rate payable in the period to the foregoing 31 December (exclusive of VAT), subject to annual RPI increases.

> For the foregoing purpose:
> …
> (f) the first increase (for calendar year commencing 1 January 2014) shall be calculated by reference to the comparative RPI index figures at (a) the Date of Entry and (b) 31 December 2013;
>
> (g) the second increase (for calendar year commencing 1 January 2015) shall be calculated by reference to the comparative RPI figures at (a) 31 December 2013 and (b) 31 December 2014
>
> (h) the third increase (for calendar year commencing 1 January 2016) shall be calculated by reference to the comparative RPI figures at (a) 31 December 2014 and (b) 31 December 2015, and so forth thereafter;
>
> (i) where RPI has fallen during any of the calculation periods, the Service Charge cap will remain at the previous level for the ensuing 12 month period and will not decrease; and
>
> (j) for the avoidance of doubt, the service charge cap will not include utility costs and charges".

[6] The remedy which the pursuers seek is rectification of clause 5.13.2 so that, if rectified, it will read:

> "For each subsequent period of 12 months commencing on 1 January 2014, the rate of £5 per square foot (exclusive of VAT) subject to annual RPI increases".

Evidence

[7] The commercial background to this matter helps to explain the context in which the negotiations for the lease took place. Mr Rennie's firm (Burness Paull) were first instructed to act for West Port S.A.R.L in 2009. Following acquisition of the site, the building was erected. There were difficulties: there were disputes as to the works. The developer became insolvent. However, West Port S.A.R.L was able to undertake a number of lettings before, at some unspecified date, it became insolvent. The pursuers acquired their interest in the premises following a purchase by them from the administrators of West Port S.A.R.L in 2015. By early 2012 part of the building had been let out (the ground floor east to

Sainsbury's and the two upper floors). By the time of the lease there was documentation relating to leases of parts of the building which was available for use as a style. All of the relevant professional witnesses were agreed that the market in 2012 favoured tenants: the financial environment remained difficult and the difficult history of the premises added to the challenges.

[8] Mr Rennie first became involved with the defenders in or about spring 2012. The defenders are the Scottish Ministers. However, in commercial terms, the real tenants were NHS Education for Scotland, a division of the NHS which, for reasons of brevity, I shall call "NES". In or about 2010 NES were looking to rationalise their accommodation by moving to one set of premises and by making better use of space. After a competitive tender, Mr Simon Capaldi's then firm, GVA, were appointed to act on behalf of NES as property consultants and advisers. Their brief was to search for, and negotiate in relation to, properties which might suit the requirements of NES. It would appear that this project coincided with the appointment of Ms Linda Dewar to the newly created post of head of property and facilities management at NES.

[9] Mr Capaldi's firm carried out a market search to identify potentially suitable properties. A long list was narrowed to a list of four properties, including the building. Mr Capaldi's instructions were to identify a modern building, fit for purpose with low maintenance costs. Given the state of the market there was an adequate supply of properties. Mr Capaldi's evidence is that he was instructed to identify a building which was managed and maintained by way of a service charge. He was given what he described as a "total quoting budget" but not a specific service charge budget.

[10] The method of negotiation was by way of heads of terms between agents. Initially there was more than one property under consideration but I need only concern myself with

the building. Mr Capaldi was instructed to act on behalf of NES in their negotiation as to the heads of terms. For the landlords his opposite number was Mr I'Anson of Rydens. The evidence of both is that the heads of terms were the subject of proposal and counter-proposal: there was significant negotiation as to the content of the heads of terms. The material was closely analysed by both surveyors. Given the state of the market Mr Capaldi was able to negotiate a number of favourable incentives which made lease of the building financially attractive to NES. Mr Capaldi reported back to Ms Dewar who was able to make her own assessment as to the overall suitability of what was being proposed. She would report back to the Board of NES who had ultimate responsibility for the decision. From the perspective of West Port S.A.R.L, the retention of NES as tenant had much to commend it. Mr Capaldi considered the Heads of Terms a "good deal" for the defenders. That included the cap on the service charges as he and Mr I'Anson understood it. At various points in the evidence NES were described as having a "AAA covenant" which I took to mean that the defenders were likely to honour their commitments, financial and otherwise.

[11] There is no dispute that after negotiation and several drafts, Mr I'Anson and Mr Capaldi settled upon heads of terms. The version relied upon by both sides is 5/2/1 of process: the document is prepared on Ryden notepaper and contains 22 headings. It is unnecessary for me to set out all of the headings. In short, it includes provisions as to the parties; the duration of the lease; the rent; the date of entry; and other terms material to the proposed letting. For present purposes the material clause is clause 10 which provides:

> "Service Charge A copy of the service charge budget for the premises is attached and equates to £4.64 per sq. ft.
>
> The tenant will be responsible for the reimbursement of the building insurance premium which will be issued.

> Our clients are happy to cap the service charge at £5 per square foot, but allowing for annual RPI uplifts. The cap excludes utilities which will be charged at the prevailing rates".

The document ends with the following text:

> "These heads of terms are not intended to form part of a legally binding contract and the correspondence of which it is part is expressly subject to completion of formal legal missives in accordance with Scots Law".

[12] Although Mr Capaldi was instructed to secure a property, managed by way of a service charge, it was his evidence that it was only during the negotiation of the heads of terms that he was asked to include a cap on the service charge.

[13] There is no dispute that it was not the task of either surveyor to negotiate finally the terms of the lease. Their function was to negotiate the heads of terms which would, in due course, become the foundation for a lease (in which I include any other cognate documents). The drafting of such documents would be left to solicitors. There is however no suggestion in the evidence or from either party that, in negotiating the heads of terms, either Mr I'Anson or Mr Capaldi was acting anything but within the scope of their authority. That is what they were instructed to do and that is what they did.

[14] The evidence of all of the relevant witnesses is that a cap on a service charge is not uncommon. The key provisions in the head of terms were that the service charge was capped at £5 per square foot but allowing for an annual RPI uplift. Utilities were excluded from the cap and would be charged separately. Such provisions were unremarkable in their terms. The advantage to a tenant of a cap is that, subject to RPI increases, the tenant will not be faced with large increases in service charges from year to year. It was also the evidence of Mr I'Anson and Mr Capaldi that the cap would usually be fixed at or about £1 or £1.50 above the current budget figure which allows a degree of flexibility in favour of the landlord. It was the evidence of both Mr I'Anson and Mr Capaldi that at no time did either

of them consider that the cap should be based upon actual expenditure. Both witnesses were clear that they did not negotiate for, nor intend, such a result and that such a result would have been at odds with the market norm. Neither witness had come across such a provision in other leases. Ms Dewar was asked for her opinion as to whether clause 15.3 as currently drafted and interpreted would be unprecedented in the market. Quite fairly, she accepted that she did not have the expertise to comment upon it (page 17C of the transcript).

[15] Clause 10 of the heads of terms narrates that a copy of the service charge budget "is attached" and equates to £4.64 per square foot. In his witness statement Mr Capaldi (at paragraph 4.2) says that he saw the "current service charge budget" and refers to 5/3/2 of process. That document comprises two pages and gives a total cost of £437,500 and a total square footage. The document breaks down the service charge between two parts of the building giving a figure of £0.99 and £3.79 respectively, the total of which is £4.78 and not the £4.64 provided for in the heads of terms. In cross examination Mr Capaldi accepted (at page 35C) that, whatever service charge budget he had sight of, it could not have been 5/3/2. However, I do not think anything turns on that. In her evidence, Ms Dewar was unable to say exactly when she saw the service charge budget. 6/5, being an email from Ms Dewar to Ms Black, the in-house solicitor acting for NES, suggests that she had a copy of a service charge budget but not one of sufficient detail to allow her to analyse it. It is not until 19 June 2012 that Ms Dewar appears to make calculations in relation to the service charge budget. 6/12 and 6/13 are copies of emails which Ms Dewar sent to Ms Black and Mr Capaldi concerning the calculation of the service charge. In substance, Ms Dewar calculated that, excluding utilities, it would appear that the service charge was closer to £3.79 per square foot and not either £4.64 or £4.78. Mr Capaldi was clear in his evidence that in calculating the service charge budget it is normal practice to exclude utilities. The latter can be variable.

[16] Having reached agreement on the heads of terms, they were then passed to Mr Rennie for the preparation of the relevant documents. Parts of the building had already been let to other tenants. Mr Rennie was understandably keen to use or adapt the existing documentation. The particular mechanism selected to give effect of the heads of terms is not of importance for resolution of this matter; suffice to say that it included what later became the lease. Having received the heads of terms dated 1 May 2012, Mr Rennie lost no time in contacting Ms Black. In emails dated 2 May Mr Rennie sent to Ms Black a copy of the heads of terms, plans and a draft lease (5/5/1 and 5/5/2). Further documents followed on 4 May (5/5/3) and 8 May 2012 respectively (5/5/4).

[17] The key element in the documentation is clause 5.13 of the draft lease included within the materials (page 28 of 5/5/2). It was Mr Rennie's task to take paragraph 10 of the heads of terms and translate it into a provision of the lease. The draft provided as follows:

> "5.13 Notwithstanding the foregoing provisions or any other provisions of this Lease the Tenants liability for Service Charge shall be capped so that it shall be a maximum of:
>
> 5.13.1 [*insert £5 multiplied by agreed area per missives – provisionally £184,731],* (exclusive of VAT) for the first calendar year of this Lease running from the Date of Entry, and accordingly pro-rated for the period from the Date of Entry to the end of the first calendar year;
>
> 5.13.2 [*insert figure from 5.13.1 above],* (exclusive of VAT) subject to annual RPI increases for each subsequent calendar year during this Lease".

[18] In his evidence Mr Rennie said that his first draft made clear that in year one the cap was to be £5 and that in subsequent years it was the figure in clause 5.13.1 to which the RPI would be applied. The problem was that the service charge year was different from the term of the lease. Mr Rennie omitted to include in that draft a provision to exclude the utilities from the service charge cap. In his covering email he pointed out the omission to Ms Black,

advising her to adjust the draft, noting for him to do so should she fail to make that adjustment.

[19] It was not until 11 June 2012 that the draft lease was returned by Ms Black (5/5/5). Clause 5.13 was revised. Ms Black explained her reasons at paragraph 15 of the accompanying email:

> "With regard to clause 5.13 I have revised the wording to show the cap of £5 per square foot given the potential for a future assignation of single floors. If we state the total cap this would not be easily understood if floors were to be separated off in future. As the service charge cap will run annually from July with the service charge year running annually from 1 January we discussed it may be helpful to provide an example as to how this will be calculated for future clarification".

[20] Mr Rennie's draft contained a figure calculated by reference to the total floor area. Ms Black's revisal allowed for alienation of separate floors. The problem with the mismatch between the service year and the year of the lease continued: Ms Black suggested a worked example to see how the charge would operate. It would appear that the text of the clause, as amended, continued to proceed upon the basis of £5 being the basis of calculation. Ms Black omitted to adjust the clause to exclude utilities from the cap. Mr Rennie forwarded Ms Black's email to his clients and to Mr I'Anson. I need not go into the detail of the comments. So far as obtaining a worked example is concerned, that fell to Mr Jamie Perrie who provided various calculations set out in an email dated 13 June 2012 (5/5/9). Read short, two points emerged. Firstly, by excluding utilities the service charge fell to £3.79 per square foot. Secondly, it became clear that it would be difficult to operate an RPI increase for different periods of the year. A solution was to begin from an assumed date of entry in July 2011 to the end of the year; then calculate an RPI increase for periods calculated from January to December, rather than split the periods during the year. The issue then was whether the initial cap (from the date of entry) would be for six months (until December 2012) or for 18

months (until December 2013). Mr I'Anson's view was that it was for six months only (email dated 15 June – 5/5/10).

[21] Mr Rennie returned the draft lease to Ms Black by email dated 15 June 2012 together with an email (5/5/11 at pages 30 and 31). As it is this draft which ultimately became the object of this dispute it is necessary to record the draft and set out the evidence of Mr Rennie as to why he made the changes which he did. Clause 5.13, as then amended by Mr Rennie, read:

> "5.13 Notwithstanding the foregoing provisions or any other provisions of this Lease, the Tenant's liability for that element of the Service Charge that does not include the cost of utility suppliers shall be capped so that it shall be a maximum of ~~[*checking should this be separated for each floor?*].~~
>
> 5.13.1 The rate of £5 per square foot exclusive of VAT for the first ~~12 month~~ period ~~of this Lease~~ running from the date of entry to 31 December 2012;
>
> 5.13.2 For each subsequent period of 12 months commencing on 1 January 2013, the ~~first anniversary~~ rate payable in the ~~Date of Entry~~ and ~~accordingly pro-rated for the period from the Date of Entry~~ period to the ~~end of the first calendar year [clarify and consider an example]~~ [~~the rate of £5 per square foot~~] foregoing 31 December (exclusive of VAT), subject to annual RPI ~~increases for each subsequent 12 month period during this Lease [check agents happy]~~".
>
> For the forgoing purpose:
>
> (b) the first increase (for calendar year 2013) shall be calculated by reference to the comparative RPI dates and figures at (a) date of entry and (b) ~~the date of commencement of the second year of the period~~, 31 December 2012
>
> …"

[22] In his covering email (5/5/11/2) Mr Rennie said:

> "In the service charge wording I have made it clear (as per the heads of terms) that it does not cover utilities. I checked with Ryden about how it would work in practice and apparently a cap with increases midway through the service charge term would be very difficult to manage. Accordingly, it is proposed that the initial £5 cap would apply up to the end of the current service charge year and then it would increase based on inflation in the approximately six month period from the date of entry to the end of the current service charge year and so on. While it means that there is potentially an increase after approximately six months of occupation, it is a smaller

> increase than would apply over a 12 month period, so it should all work out neutral for your client".

[23] In his evidence, Mr Rennie explained his thinking. His evidence was that he made the changes to reflect the initial cap only applying for the balance of the service charge year on which the date of entry fell. The cap would increase with effect from 1 January 2013. The wording he used in clause 15.3.2 was intended to refer back to the figure in clause 5.13.1 i.e. "the rate payable in the period to the foregoing 31 December…" He intended that the annual increase was to be made to the previous year's cap and not the £5 figure. He was trying to guard against the rate going down in the future because of deflation. It is worth quoting from his witness statement (at paragraph 25):-

> "So the figures that were known could be used for the first year – £5 per square foot on the measured area. Then as the figures for the subsequent years depended upon the change in the RPI, what I was intending to do was say that for each subsequent year of the lease (from January 2013) the cap would be whatever might have been payable ("payable" here being potentially payable) as increased by RPI. In my drafting, I thought that the reference to "the rate payable" meant the same as "the rate that the tenant could potentially pay" – i.e. the annual increase was to the cap, and not the actual sum the tenant paid in the preceding 12 months. Certainly, had we (and the Tenant's solicitors) wanted to clearly draft for the position that the Tenant is now arguing for, we would not have used the term "rate payable" in 5.13.2 but said "rate paid" instead."

[24] Clause 5.13 largely remained in those terms. On or about 19 June 2012 there were discussions between Ms Black and Ms Dewar about, amongst other things, whether the service charge cap included utilities and whether the cap would endure for six months from the date of entry or eighteen months. 6/12 is a copy of a phone attendance note between Ms Black and Ms Dewar. It was at or about this time Ms Dewar had reached the conclusion that, given that utilities were excluded, the service cap was not as attractive as she had first thought. She raised the point with Mr Capaldi (6/13) who undertook to reply in due course (6/14). There is no evidence of a substantive response.

[25] There seemed to be some uncertainty amongst the parties as to the initial duration of the service charge. Mr I'Anson raised the question with Mr Rennie on 15 June 2012 (5/5/12) who confirmed his understanding that the cap was until 31 December 2012 and then indexed for 12 months.

[26] Ms Dewar reviewed the lease and sent her comments to Ms Black in an email on 27 June. She commented (6/15) at paragraph 18 "utility supplies are excluded from the service charge and the cap level will remain (a compromise!). On this basis we are still pushing for the 18 months – suggest we put this back in the drafting to press the landlord for agreement?" Ms Dewar was asked about the email sent by Mr Rennie dated 15 June accompanying the draft lease quoted above. His explanation as to his thinking (set out in paragraph 12 of the email) was put to Ms Dewar. In her witness statement Ms Dewar said that, insofar as there was said to be a drafting error in clause 15.3, as far as she was concerned the drafting reflected what she expected and wanted to see, namely a cap for an initial period until the level of actual expenditure became clearer and thereafter any increases being linked to actual costs increased by RPI. That is clearly at odds with the evidence of Mr Rennie as to what he intended. Ms Dewar accepted in cross examination that, had she seen his email, she would not have had the view which she did (pages 34/35 of the transcript). Her assumption was that the landlords had altered clause 5.13 on account of negotiations between the parties and a concession had been made by the landlords. Ms Dewar was questioned further in re-examination but, in my view, did not really detract from her evidence in cross examination, namely that she made a unilateral assumption as to the changing of the draft. On 27 June, Ms Black returned the draft lease to Mr Rennie together with an email containing a note of her comments on, *inter alia*, clause 5.13. She said:

> "With regard to clause 5.13 my clients are looking for the service charge cap to be in existence for 18 months. I understand that 18 months was posing administrative problems and in view of that your client proposed six months. I understand that a compromise has been reached by my client in respect of the service charge cap level in that the service charge budget is I understand, including utility costs whereas the capped level is to exclude utility costs. On that basis we are looking for the cap to be £5 for 18 months before any RPI increase".

[27] On 27 June Mr Rennie sent a copy of Ms Black's email to his principals for comment (5/5/15). Mr I'Anson was quick to point out that the utilities had never been part of the service charge cap (5/5/16 – at paragraph 15). He also did not accept a change to the date of entry nor to the 18 month period for the duration of the initial cap. He contacted Mr Capaldi to confirm his position (5/5/17). Mr Rennie circulated a further email dated 28 June (5/5/18) setting out his views. In fact, when Mr Rennie contacted Ms Black by email dated 29 June (5/5/19), on instructions, he conceded the 18 month cap period, running from the date of entry, but on the basis that the contract was concluded the next week. The draft lease was adjusted accordingly. Ms Black replied on 4 July 2012 saying that she awaited instructions "regarding the application of the RPI index for the first service charge cap increase" (5/5/20). On 6 July she confirmed her clients' acceptance of the application of the RPI index from the date of entry (5/5/21). As I understand the evidence the lease was adjusted to reflect these changes and was finalised upon that basis.

[28] After that the matter proceeded to conclusion, the date of entry being 30 July.

[29] The pursuers acquired the building in or about 2015 and hence the landlords' interest under the lease. Mr Lars Sindberg is the managing director of Danmerc Limited ("Danmerc"). Danmerc advise the pursuers (the pursuers and Danmerc are both Danish companies) as to investment in the property market in the United Kingdom. On becoming interested in acquiring the building Mr Sindberg instructed a thorough investigation of the property be undertaken, a process which he described as due diligence. He instructed

reports from surveyors, Lewis Ellis/Ryden (5/4/1). He also instructed solicitors (DWF) to provide reports. Those reports are contained within the appendix to the report from Lewis Ellis/Ryden. In Mr Sindberg's experience it would be very unusual for a cap to be based upon actual expenditure as opposed to the cap plus RPI. Mr Sindberg has been involved in the acquisition of property in the United Kingdom since 2003. He frequently sees service charge caps but has not come across one which has been held to be interpreted in this particular way. He would regard that as unusual and something which would have been noted in the reports. No such qualification was made. A cap of such a nature might potentially affect the value of the investment. In deciding to recommend the acquisition to the pursuers Mr Sindberg relied upon the reports given to him. The reports from the surveyors make specific reference to the service charge caps at 5/4/1/16 and 5/4/1/21. In short the report analyses the cap as amounting to £5.16 from an original cap of £5 whereas the current service charge was £4.65. A "buffer" of £1.93 per square foot was noted in the report. The report concluded it was unlikely that the service charge cap would be breached. Neither the surveyors nor the solicitors reported the existence of any unusual clauses (5/4/1/23 and 5/4/1/258).

[30] Mr James Caddick is a chartered surveyor with Lewis Ellis; he was instructed to prepare the report. Mr Caddick explained that in reviewing the service charge cap, at the point at which he undertook the review, the cap was £5.16 per square foot. The original cap had been £5 per square foot which had been increased by RPI; the increase for each subsequent year was to be applied to the amount of the cap plus RPI for the preceding year. Given that utilities were deleted from the service charge cap, there was a buffer of £1.93 between the current service charge budget and the cap of £5.16. Mr Caddick was made aware of the tenants' interpretation. Whereas he accepted that the text could be interpreted

as linking the cap to the previous year's expenditure he described this as highly unusual and something he could not ever recall having seen or heard in relation to a service charge cap provision. Neither he nor the solicitors concerned noted this as being an issue which required to be flagged up for Mr Sindberg.

[31] The pursuers led evidence from Mr Neil McVicar. Mr Barne objected to the evidence of Mr McVicar; I heard the evidence subject to the objection. Mr McVicar is the director and head of property management for Scotland at Lambert Smith Hampton. He had no involvement in the negotiations. He was led as an expert witness. His evidence can be taken in brief compass. He was asked specifically to comment upon the service charge cap in the lease. I do not think there is any serious issue that Mr McVicar is anything other than a highly qualified surveyor with considerable experience in multi-let office buildings and their management. He advises developers on clauses in leases for full service charge recovery. He has extensive experience of service charge reconciliations between landlords and tenants. In short, Mr McVicar's evidence was to the effect that the defenders' interpretation of the current service charge cap is one he has never come across. Mr McVicar stated that a service charge cap gives certainty and protects the tenants from spikes in service charges. The rate of £5 per square foot excluding utilities is what he would expect for a building of that nature. Such a level would not discourage landlords from carrying out work. Following the tenants' interpretation that would encourage the landlord to reduce expenditure and minimise the services being provided. He would expect service charge expenditure to increase during the term. With a new build there is less repair and maintenance in the first few years, but that increases with time. A buffer of something between £1 and £1.50 between the cap and the initial expenditure is what he would expect to see. He would not expect there to be a clause based on the previous year's expenditure because there would be

ups and downs in the initial year. Such a clause would not be acceptable to a landlord. In effect it would give an incentive to a landlord to overspend. Just because there is a cap of £5 per square foot does not mean the landlord will spend that. They might be unlikely to do so in the first few years. In Mr McVicar's opinion, if he had been acting for a tenant, he would not advise them to try and cap at the level the service charge was currently running at. The cap should be set at somewhere between £1 and £1.50 over the current level which will allow the landlord to ensure a certain level of services and protect the tenant from spikes in expenditure.

[32] The present dispute arose in or about November/December 2015. It is unnecessary to set that out in detail. 6/27 comprises emails between Ms Dewar and the landlords' agents as to the liability for the service charges for various periods.

Submissions for the pursuers

[33] Mr Thomson lodged detailed written submissions which are lodged in process. Mr Barne did likewise. It is not my intention to record everything which is set out in the written submissions. Both counsel referred me to section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 ("the 1985 Act"). Mr Thomson referred to the following authorities:

> *Thomson* v *James* (1855) 18 D 1; *Muirhead* v *Turnbull & Dickson* (1905) 7 F 686; *Shaw* v *William Grant (Minerals) Limited* 1989 SLT 121; *Angus* v *Bryden* 1992 SLT 884; *Rehman* v *Ahmad* 1993 SLT 741; *Britoil plc* v *Hunt Overseas Oil Inc and Others* [1994] CLC 561; *Norwich Union Life Insurance Society* v *Tanap Investments VK Limited (In Liquidation)* 2000 SC 515; *MacDonald Estates Plc* v *Regenesis* (2005) (*Dunfermline Ltd)* 2007 SLT 791; *Chartbrook Ltd* v *Persimmon Homes Ltd* [2009] 1 AC 1101; *Patersons of Greenoakhill Limited* v *Biffa Waste Services Limited* 2013 SLT 729; *Kennedy* v *Cordia (Services) LLP*

[2016] SC UKSC 59; "*Rectification of Contracts for Common Mistake"* [2007] 123 LQR 116.

For the defenders, Mr Barne made reference to authorities, some of which were common to those of Mr Thomson:

Renyana–Stahl Anstalt v *MacGregor* 2001 SLT 1247; *Bank of Scotland* v *Brunswick Developments* [1987] Ltd 1997 SC 226; 1999 SC (HL) 53; *Rehman* v *Ahmad*; *Angus* v *Bryden; Shaw* v *William Grant (Minerals) Limited*; *MacDonald Estates Plc* v *Regenesis* (2005) *Dunfermline Limited*; *Patersons of Greenoakhill Limited* v *Biffa Estate Services Limited*; *Chartbrook Limited* v *Persimmon Homes Limited; Britoil Plc* v *Hunt Overseas Oil Inc; Kowloon Development Finance Limited* v *Pendex Industries Limited* [2013] HKCFA 35; *Cooperative Society Limited* v *Ravenseft Properties Limited (No 3)* 2003 SCLR 509; *George Wimpey West Scotland Limited* v *Henderson* (11 October 2011), Edinburgh Sheriff Court.

Submissions for the pursuers

[34] For the pursuers, the question is whether the lease falls to be rectified in terms of section 8 of the 1985 Act on the basis that it failed to express accurately the common intention of the parties to the lease at the date when it was made. In particular, the question was whether clause 5.13.2, having been the subject of previous interpretation by the court, did not accurately express the prior intentions of the original parties to the lease, namely the common intention that the service charge would be the initial figure of £5 per square foot, increased annually by RPI. Mr Thomson submitted that the evidence supported the pursuers' position and in particular; a service charge cap which operates as clause 5.13.2 has been held to operate would be unprecedented in the market generally; the parties themselves did not ever discuss (far less agree) a service charge cap which would operate as clause 5.13.2 has been held to operate; the parties' representatives did not ever discuss (far

less agree) a service charge cap which would operate as clause 5.13.2 has been held to operate. The agreed position of the parties' respective representatives (namely Mr I'Anson for the original landlords, and Mr Capaldi for the tenants) at all times had in mind the service charge cap which was to operate as the pursuer contends was the parties' common intention; the initial drafting of clause 5.13.2 was in the terms which give effect to the parties' prior common intention; the change in the drafting of the language of clause 5.13.2 did not come about as a result of any actual change in the parties' common intention, but because of the view taken by the original landlords' solicitor that the revised language did not really express that common intention; it ultimately appears that the only person who claimed at any time to have had in mind a service charge cap which operated as it has been held to operate was Ms Dewar, but even then that was the a subject of a misapprehension as to the position and did not affect or alter the common intention of the parties. Accordingly, (a) there was a prior common intention (that the service charge cap could operate on the basis that the initial cap would be £5 per square foot, and that in succeeding years the cap would be £5 per square foot increased annually by RPI, and so on in succeeding years); (b) that common intention did not change in the period between the agreement of the heads of terms and the execution of the lease; (c) the lease did not give effect to that prior common intention. Accordingly, *prima facie*, the lease falls to be rectified subject only to the defenders' claim that the court ought nevertheless to exercise its discretion not to rectify the lease. In that matter, the pursuers submit that it is clear on the evidence that the pursuers acquired their interests in the lease (a) on the understanding that the service charge cap would operate as the pursuers contend, with the common intention of the original parties to the lease; and (b) that it was reasonable for the pursuer to proceed on that basis given the advice which was then available to it.

[35] On the facts, there is really little dispute between the parties as to the primary facts. By the end of the evidence the defenders' case was based on nothing more than a misunderstanding on the part of Ms Dewar, which she did not discuss with anyone else, regarding the change in wording which was introduced by the revisions intimated on 15 June 2012. So far as the defenders' averments are concerned, it is not true to say that the service charge budget had not been seen by the defenders and was misleading in relation to the inclusion or exclusion of utilities. Mr Capaldi was quite clear that he had seen the service charge budget and there was nothing misleading so far as the issue of utilities was concerned. Mr Capaldi was clear in his evidence that the defenders had secured a very good deal and that good deal had nothing to do with the operation of the service charge. The evidence of Mr I'Anson, was that the £5 cap did offer meaningful protection. Ms Dewar was not in a position to offer any view on the issue. The defenders argued that a £5 cap over 17 months amounts to £3.53 over 12 months. It represented a "jump" to £5, representing a 41% increase which would be unacceptable to a tenant in a strong negotiating position. This was introduced by the defenders just before the commencement of the diet of proof and bore no relationship to anything any of the witnesses said to each other or even considered privately at the time the lease was being negotiated. Ms Dewar accepted that was the case. This was never part of the negotiations which took place at the time. Accordingly, by definition it cannot have any part to play in determining whether or not there was any common intention at the time the parties executed the lease. The lease was subject to many revisions as negotiations ensued, but that did not affect the common intention regarding the way in which the service charge cap was to operate or even that the parties' intention in that respect changed as the negotiations developed. On the evidence, including the unchallenged evidence of Mr Rennie, the revisions to clause 5.13.2 did not arise as a result of

any change to the "deal" but rather because he took the view the revision better explained the way in which the service charge cap was to operate. In relation to the pursuers being the successor to the original landlord, the pursuers have been able to produce compelling evidence as to the nature and content of the common intention of the original parties to the lease. The pursuers bought the building in the reasonable belief that the service charge cap provisions operated in the manner now contended for by it. There is no evidence to support the averment by the defenders that the pursuers simply relied on the language actually used in the lease. The pursuers did take professional advice in relation to the lease. The issue in relation to the language imposed by clause 5.13.2 was not identified in the advice which was given. The pursuers took professional advice which was a prudent and reasonable step.

[36] Mr Thomson then addressed the legal principles and their application to the present case in some detail by reference to the authorities referred to above. Mr Thomson relied upon the opinion of Lord Hodge in *Patersons of Greenoakhill Limited* which he submitted was the correct analysis of the proper approach to construction of section 8 of the 1985 Act. In applying the propositions advanced by Lord Hodge (which I quote below), section 8(1)(a) requires the existence of an antecedent agreement which the document to be rectified fails accurately to express; that earlier agreement does not have to be legally binding. It is not necessary for an antecedent agreement to have some outward objective expression beyond the objective evidence of a continuing common intention. In the present case, from the evidence that requirement is satisfied. The industry standard practice is that (a) service charge caps operate by the cap itself (rather than the previous year's expenditure) being increased by inflation; and (b) the parties' respective representatives had not been instructed to introduce a service charge cap as contended for by the defenders and (c) to the contrary, the parties' respective representatives in fact proceeded on the basis that what they were

negotiating and ultimately agreeing was a service charge cap which was £5 per square foot with that £5 cap then being subject to RPI increases. Mr Rennie's evidence was to a similar effect and was not contradicted. The court assesses objectively the existence of the antecedent agreement; the subjective understanding of each of the contracting parties is not relevant if it had not been communicated to the other parties. The proper approach must be to assess the existence of a prior agreement on an objective basis. The objective evidence in this case supports the pursuers' position. There is not one single piece of relevant, admissible evidence which supports the position taken by the defenders. On the evidence it is indisputable that there was an agreement between the parties as to what the service charge cap was to be and how it was to be increased to protect against the effects of inflation. The defenders' position that the service charge should remain close to the cost being actually incurred, is untenable and contradicted by evidence. Mr Capaldi was clear in his evidence that he was well aware that the quoted figures included utilities as was the normal practice. His evidence and that of Mr McVicar was that there should be a buffer of between £1 and £1.50 in excess of the actual level of service charge expenditure. The only person with a different view was Ms Dewar and she had neither the expertise nor experience to contradict Mr McVicar and Mr Capaldi. The defenders' belated attempt to include utilities was rejected by West Post S.A.R.L. It was never part of the original agreement.

[37] The defenders' objection to the admissibility of Mr McVicar's evidence is ill-founded. If the existence of the prior agreement is to be ascertained objectively in accordance with the normal canons of construction, evidence of the invariable practice of the market is relevant and admissible evidence of the surrounding circumstances on which the parties reached that prior agreement. Accepting that the draft lease was changed, the change to clause 5.13.2

was not in fact a change brought about by any commercial or any legal discussions which had taken place between the parties' representatives. Mr Rennie made the changes because he believed that it better articulated what he and the other witnesses other than Ms Dewar thought the parties' agreement was. It might be expected that if it was the intention of Mr Rennie to make the changes to the clause contended for by the defenders then it would have been the subject of specific discussion and agreement. Ms Dewar gave evidence she thought the "deal" had changed. She said in her evidence that the drafting reflected what she expected and wanted to see. However, that view was never that of West Post S.A.R.L or even between Ms Dewar and Mr Capaldi or Ms Black. It can only be described as a subjective uncommunicated intention. It does not affect the prior agreement.

[38] The pursuers accept that, as a matter of principle, the court has a discretion to exercise in the terms of section 8 of the 1985 Act. That discretion should be exercised in favour of the pursuers. There are no issues concerning the interests of third parties. The defenders are obviously parties to the lease and the effect of rectification would be to put them in the position which they ought to have been in in the first place.

[39] In his oral submission, Mr Thomson emphasised that the agreement referred to was not constituted by the heads of terms but had come into existence prior to the heads of terms and nothing subsequently changed it. The focus by the defenders upon the heads of terms is erroneous. It disregards the evidence of the surveyors. The representatives of the landlords and tenants only ever had in mind the cap as pled. That is consistent with the evidence of the industry norm. One needs to look at the totality of the evidence to see what happened. Up until the adjustment on 15 June, the language of the clause had been to the opposite effect contended for by the defenders. The high point of the defenders' case is that the

language of clause 5.13 led to the effect Ms Dewar contended for, but there is no evidence that the parties spoke to each other to bring about that change**.**

[40] Mr Thomson had lodged, in advance of the proof, certain written objections to passages in the evidence of Ms Dewar. He insisted upon those objections.

[41] In relation to Mr Barne's written submissions, the fact that the heads of terms document was to be superseded by a lease is not relevant. That the heads of terms agreement does not purport to set out the agreed position is contrary to the evidence. One should not see the revisions to the drafting of the lease as being offers and counter offers. Each draft did not delete the previous draft. So far as the authorities are concerned as to whether the court should adopt a "subjective approach" or an "objective approach" Mr Thomson urged me to follow the opinions of Lord Reed and Lord Hodge in *MacDonald Estates* and *Patersons of Greenoakhill Ltd* and to take an objective approach. Ms Dewar was not the decision maker of the defenders. It is not a case of the defenders being held to a contract they did not intend to enter into. That is not what rectification is about. Mr Thomson then went on to address a number of issues concerning the witnesses which I need not record. Otherwise, Mr Thomson adhered to his written submissions and invited me to issue a decision but put the matter out by order. Expenses should be reserved.

Submissions for the defenders

[42] The defenders' position is that the heads of terms document was an informal document which was not legally binding. It was intended to be superseded by a definitive, fully negotiated lease which in fact is what happened. The wording in the heads of terms agreement in respect of the cap does not purport to set out an agreed position ("our clients are happy to cap"). In any event, it is ambiguous and lacking in sufficient detail to evince a

common intention. Furthermore, the cap provision of the lease was subject to detailed negotiation and revised drafting. The revised drafting to the lease from time to time by either party should be viewed as a series of offers and counter offers. The changes made in the course of negotiations effectively elided any prior agreement that may have been captured in the heads of terms. There is a conflict in the authorities as to whether the court, when considering rectification, should take a subjective approach or an objective approach. On either analysis, the pursuers are not entitled to rectification. On a subjective approach even if the landlords did not appreciate the meaning of the revised clause 5.13, the defenders' principal, Ms Dewar, did and it was on the basis of a correct understanding of clause 5.13 that she approved its terms. On an objective approach, even if any common intention can be discerned on the heads of terms (which is not accepted), it was superseded as a result of the revisals and negotiations which took place in relation to clause 5.13. An agreement was reached on the lease as a whole and any prior agreement was superseded. Reviewing matters objectively, this is not the case of an uncommunicated subjective intention. *Esto*, the court concludes that the objective approach is correct, and that there was an uncommunicated subjective intention on the part of the defenders, the defenders rely on the equitable nature of the remedy to invite the court to refuse rectification. The defenders rely on the following points in particular:

i) the landlords introduced the "rate payable" wording into clause 5.13;

ii) the defenders entered into the contract on a correct understanding of clause 5.13 and should not be held to a contract that the defenders did not intend to enter into;

iii) there was no "sharp practice" by the defenders;

iv) the pursuers were not party to the heads of terms or the lease and had the opportunity to assess the wording of the lease prior to purchasing the building. Indeed, the pursuers' interest should have been protected by the due diligence reports.

[43] Like Mr Thomson, Mr Barne had no significant adverse comments to make in relation to the reliability and credibility of the witnesses. Mr Barne then went through the evidence of the various witnesses which I do not intend to record in detail. The following survey is sufficient. Mr Sindberg relied upon the reports reviewing the lease. *Balogun* v *Boyes Sutton and Perry* [2017] EWCA Civ 75 confirms that solicitors are under an obligation to advise a client that wording in a contract may have more than one meaning. That the pursuers may have a remedy elsewhere is relevant as to the defenders' submissions concerning the exercise of the court's discretion. The evidence of Mr I'Anson as to what he thought had been agreed and what the heads of terms meant is irrelevant. Similarly, the evidence of Mr Capaldi as to what the heads of terms meant is irrelevant. Mr Barne maintained his objection to the evidence of Mr McVicar. His evidence is irrelevant to the function to be carried out by the court. His views as to the norms of the commercial property market are irrelevant to whether or not there was a prior agreement and whether or not the common intention continued up until the lease was signed. In relation to the evidence of Ms Dewar, she said that Mr Capaldi did not have any authority to bind NES to make decisions on its behalf. She did not consider herself bound by the heads of terms. The service charge figure at £4.64, set out in the heads of terms, was superseded and only much later did it became apparent that, excluding utilities, the service charge was £3.79 per square foot, which made the arrangement much less attractive. When she discovered the issue she contacted Ms Black and Mr Capaldi to say that she was not happy. By the time she came to

view the draft lease the lease contained the "rate payable" wording with which she was happy as it linked the cap with the actual cost. She assumed that the wording had been introduced by the landlords as a result of the ongoing discussions although she was not aware of the exact content of what was discussed. She confirmed her understanding of the meaning of clause 5.13. It was her evidence that clause 5.13 reflected what she expected and wanted to see namely a cap for an initial period until the level of actual expenditure became clearer and thereafter any increases being linked to the actual costs increased by RPI. In cross examination Ms Dewar conceded that the email from Mr Rennie dated 15 June 2012 (5/5/11), taken in isolation would not suggest that there had been a concession by the landlord. However, in re-examination Mr Barne submitted that Ms Dewar accepted that when reading Mr Rennie's commentary in light of the revised drafting to clause 5.13, she would have understood the word "it" in the third sentence to refer to "the rate payable".

[44] In relation to the law, Mr Barne began his submission by reference to section 8 of the 1985 Act and the opinion of Lord McFadyen in *Renyana Stahl Anstalt.* Section 8 gives to the court discretion whether or not rectification should be ordered. That discretion operates in two stages. Section 8(1) states that the court "may" order rectification; the court has a discretion as to rectification (reference was made to the opinion of Lord President Rodger in *Bank of Scotland* v *Brunswick Developments* (1987) *Limited* 1997 SC 226 at page 231D. Prior agreement is vital. There is no need for the prior agreement to be legally enforceable. It is not an objection that the party seeking rectification was not a party to the prior agreement and the subsequent document. However, that factor may be relevant to the exercise of the court's discretion. The document to be rectified must be intended to express or give effect to the prior agreement. In the present case the pursuers are relying on the heads of terms as evidence of the prior agreement as to common intention. It is not clear whether it is the

pursuers' position that the lease was intended to give effect to the heads of terms or simply to express the heads of terms. Common intention must be discerned from the prior agreement using the normal canons of construction which disregard any expressions of subjective intent *(Rehman* v *Ahmad).* The word "parties" refers to the principal parties; where agents are involved it is the intention of the principals and not their agents that is relevant. There is an issue in the authorities as to whether it is the parties' actual intentions (i.e. the subjective approach) as opposed to their deemed intentions (i.e. the objective approach) that are relevant to rectification. The subjective approach was followed in *Angus* v *Bryden* and *Shaw* v *William Grant (Minerals) Limited*. However, Lord Reed and Lord Hodge took a different approach in the cases in *MacDonald Estates Plc* v *Regenesis* (2005) *Dunfermline Limited* and *Patersons of Greenoakhill Limited* v *Biffa Waste Services Limited*. In Mr Barne's submission, the court should follow the approach of Lord Cameron and Lord McCluskey. However, if the objective approach is preferred the pursuers' case must still fail.

[45] In relation to the heads of terms, they were not legally binding. This does not render the pursuers' application for rectification incompetent but it is an important aspect when considering the limited status of the heads of terms and their relationship to the lease. Reference was made to *Britoil Plc* v *Hunt Overseas Oil Inc*. The heads of terms were always intended to be superseded by a definitive and negotiated lease. They were a stage in the iterative negotiation process between the parties. They were, as Mr Barne described, a "bus stop" and not the "terminus". The lease departs materially from the heads of terms in relation to: the date of entry; the rent and area let; car parking, changes to repairing obligations; the service charge provisions. The lease runs to some 52 pages. It was intended to be the complete expression of the parties' relationship as landlords and tenants. Reference was made to *Britoil* and also the later case of *Kowloon Development Finance Limited* v *Pendex*

Industries Limited. Mr Barne then went on to analyse section 10 of the heads of terms in detail in relation to what it said and indeed what it did not say. The service charge provisions in the heads of terms were both incomplete and ambiguous. Reference was made to the opinion of Lord Eassie *in Cooperative Halls Society Limited* v *Ravenseft Properties Limited (No 3)* 2003 SCLR 509 in which it was held that the power to rectify a document was not available to recast an agreement. Accordingly, the lease was never intended to and as a matter of fact, did not express or give effect to, the heads of terms. The court should be extremely wary of concluding, on an objective basis, that a common intention in respect of the service charge can be found to have persisted from the heads of terms right up to conclusion of the negotiated lease. Returning to the objection to the evidence of Mr McVicar, the existence of the prior agreement and continuing common intention must be assessed objectively. It is trite law that in determining whether a contract has been concluded the court takes an objective approach; the subjective intention of the parties is irrelevant (*Muirhead & Turnbull* v *Dickson* (1905) 7F 686). In respect of contact formation, "matrix of fact" arguments are irrelevant. While such arguments can, in certain circumstances, be germane to contractual construction, they are not germane to issues of contractual formation.

[46] In relation to discretion, there is little discussion in the Scottish authorities as to the nature of the court's discretion. Mr Barne referred to paragraphs [170]-[175] of the opinion of Lord Reed in *MacDonald Estates*. If the objective approach is accepted by the court as being correct and if, on that approach, the court considers rectification is in principle available to the pursuers, the court can still have regard, in the exercise of its discretion, to the actual intention of the parties to the document to be rectified. If one of the parties correctly understands the impugned position and if there has been no sharp practice on that

party's part then it is submitted that the court should have regard to that factor when exercising its discretion.

[47] Summarising his position in his written case, Mr Barne submitted that the court should adopt a subjective approach to the issue of rectification. On the basis of Ms Dewar's evidence rectification should be refused. If the court prefers an objective approach rectification should be refused. The heads of terms were provisional in nature and did not purport to set out an agreed position; they were incomplete and not legally binding; they required further clarification and negotiation. In the course of negotiating and finalising the lease there were extensive revisals and negotiations around the operation of clause 5.13. On an objective approach it is relevant to note that, when asked to do so, the defenders initially did not exclude utilities from the cap. They can be taken to have been unwilling to do so. Thereafter, when the service charge apportionment was made available the defenders initiated negotiations on the basis that the defenders were not content with the service charge cap provisions, standing the exclusion of utilities. The "rate payable" wording was introduced by the landlords; the defenders described this as constituting a "compromise" reached by the defenders in respect of the service charge cap level and the inclusion/exclusion of utilities. One of the negotiated changes to clause 5.13 resulted, in effect, in the service charge being capped at £3.53 per annum for the first 17 months. That was a significant change from the £5 figure referred to in the heads of terms. The figure of £3.53 was much closer to the defenders' projected liability for service charge, excluding utilities, and set out in the service charge budget. The pursuers' proposed rectification of the lease would result in a jump after the initial period from a cap equivalent to £3.53 per annum to £5 per annum (disregarding RPI), being an increase of 41%. As a matter of objective fact an increase on that scale, especially in respect of a newly built property would

be unacceptable to a tenant who was in a strong negotiating position such as the defenders. Ms Dewar did not appreciate that this was the effect of extending the initial period of the cap to 17 months although Mr Rennie did. In these circumstances it was difficult to see what is left of the common intention said to be established by the heads of terms. In all of these circumstances, any such common intention there may have been evidenced by the heads of terms no longer persisted by the time the lease was signed. In relation to the exercise of discretion, the defenders rely upon the following factors. The impugned drafting was introduced by the landlords. English authorities indicate that carelessness on the part of the claimant can be a bar to rectification (*Commission for the New Towns* v *Cooper (Great Britain) Limited* [1995] Ch 259 at page 279); the defenders understood and accepted the drafting put forward by the pursuers and it would be unfair to force the defenders to accept the wording that they did not intend to accept**.** The pursuers were not a party to the lease and they received advice before purchasing the building. The failure of the pursuers' advisers gives the pursuers a remedy elsewhere.

[48] Mr Barne made a number of additional observations in his oral submissions. It is for the pursuers to show that there was a common intention which persisted. It is not for the defenders to show the common intention was varied. When the pursuers say that the court should look at the evidence in the round the question arises as to what was the agreement and where is it found? The defenders object to any argument that the heads of terms was not the agreement. The pursuers plead that agreement was reached on the 1 May. The heads of terms agreement were clearly incomplete. The argument really starts and ends at the heads of terms. Clause 5.13 did not reflect what was in the heads of terms. Clause 5.13 changed through the course of negotiation. The pursuers were seeking to hold onto one part of the clause when the rest changed. So far as the issue of the difference between subjective

and objective is concerned in the authorities, the matter is not that clear cut. Mr Barne referred to the opinion of Lord Reed in *MacDonald Hotels*. The first part of the analysis, contractual interpretation, is objective, but the second part, relating to intention, involves a subjective analysis. As at 27 June, the utilities were still excluded. The reference in the email of 27 June was to "a compromise". Until utilities were excluded Ms Dewar accepted the wording in the clause. The exclusion of the utilities made the cap less attractive. The defenders did not have to show that the "compromise" was a specific subject of negotiation between the parties.

[49] In explaining why the court should follow the approach of Lord Cameron and Lord McCluskey, the reason is that the court should not allow a contract which a party did not sign up to be enforced against it. In relation to the question of discretion, Mr Barne suggested that the case of *Tanap* may be of assistance. Finally, in relation to the objections taken by the pursuers to some of the evidence of Ms Dewar, in relation to paragraph 13 of her witness statement, it contained largely background narrative which was relevant to her state of mind. The court is entitled to have regard to that. Reference was made to the opinion of Lord Hodge in *Patersons of Greenoakhill* who said that evidence may be inadmissible as to agreement of common intention, but it might not be inadmissible for other reasons. The same applies to paragraphs 17 and 19 of her evidence. In relation to paragraph 25 there was record for this particularly at page 14. Mr Barne agreed with Mr Thomson that it would be appropriate to put the matter out by order and that expenses should be reserved.

Decision

[50] The legal basis of the court's power to rectify a document is contained in sections 8

and 9 of the 1985 Act. The principal provision is contained within section 8; the relevant parts of the sections are as follows:

> "8. Rectification of defectively expressed documents
> (1) Subject to section 9 of this Act, where the court is satisfied, on an application made to it, that –
> (a) a document intended to express or to give effect to an agreement fails to express accurately the common intention of the parties to the agreement at the date when it was made;
> …
> it may order the document to be rectified in any manner that it may specify in order to give effect to that intention.
> (2) For the purposes of subsection (1) above, the court shall be entitled to have regard to all relevant evidence, whether written or oral.
> …
> (4) Subject to sections 8A and 9(4) of this Act, a document ordered to be rectified in relation to this section shall have effect as if it had always been so rectified.
>
> 9. Provisions supplementary to section 8: protection of other interests.
> (1) The court shall order a document to be rectified under section 8 of this Act only where it is satisfied –
> (a) that the interests of a person to whom the section applies will not be adversely affected to a material extent by the rectification; or
> (b) that the person has consented to the proposed rectification".

[51] The statutory provisions (which I will refer to as "the rectification provisions") were enacted following recommendations made by the Scottish Law Commission referred to below. The rectification provisions were enacted to address perceived deficiencies in Scots law concerning remedies in relation to defectively expressed writings (see, for example, *Anderson* v *Lambie* 1954 SC (HL) 43). In its report the Scottish Law Commission drew upon English law and practice: in English law rectification is considered an equitable remedy. I was referred to a number of Outer House cases, not all of which speak with the same voice as to the interpretation of the rectification provisions. Mr Thomson relied upon the opinion of Lord Hodge in the most recent of those authorities (*Patersons of Greenoakhill Ltd*). In his opinion Lord Hodge reviewed and analysed the various cases and summarised his understanding of the law. In my respectful opinion, the conclusions reached by Lord Hodge

are a correct statement of the law and are applicable to this case. The relevant passages of his opinion are as follows:

> "[33] To understand what is relevant evidence it is necessary to examine briefly how the law has developed since 1985. Lord Reed discussed the background to the 1985 Act in much more detail in *Macdonald Estates Plc v Regenesis (2005) Dunfermline Ltd 2007* SLT 791, to which I was referred. He expressed only a provisional view, as he did not need to decide the issue in that case. I do not have that option. I agree with his approach and can summarise the principal points as follows.
>
> [34] First, while s.8(1)(a) requires the existence of an antecedent agreement which the document to be rectified fails accurately to express, that earlier agreement does not have to be legally binding. See the discussion of English case law in the Scottish Law Commission's ("SLC") consultative memorandum No. 43, Voluntary Obligations: Defective Expression and its Correction (HMSO, 1979), paras 72 – 82 and the SLC's conclusions in its Report on Rectification of Contractual and Other Documents (HMSO. 1983), Scot Law Com No 79, paras 3.2 – 3.5. See also *Shaw v William Grant (Minerals) Ltd* 1989 SLT 121, *Lord McCluskey* at p.121H; *Macdonald Estates plc* 2007 SLT 791, Lord Reed at p.822, para 159.
>
> [35] Secondly, it is not necessary for that antecedent agreement to have some outward or objective expression beyond the objective evidence of a continuing common intention that I discuss in the fourth point below *(Macdonald Estates plc* at p.821, para. 156*; Britoil plc v Hunt Overseas Oil Inc & Others* [1994] CLC 561*, Hoffman LJ* at pp.578-579*).*
>
> [36] Thirdly, it follows from the first point that all the essentials of a binding legal agreement do not have to be agreed before the contract sought to be rectified has been produced and signed. The error of expression in relation to a particular term of a proposed contract may enter a document or series of documents before the parties have agreed an essential term of a contract and remain uncorrected when that stage has been reached *(Rehman v Ahmed* 1993 SLT 741, Lord Penrose at p.751; *Macdonald Estates plc*, Lord Reed at p.822, para 160**).** In *Rehman* Lord Penrose gave the example of an error of description of a heritable property in an early stage of the missives which the parties' solicitors overlooked when they negotiated the minutiae of the contract and eventually held the bargain to be completed. If there were a common intention that property X was the subject of the transaction, and a letter in the series of missives described property Y and was not corrected before the missives became binding, the missive containing the error could be rectified.
>
> [37] Fourthly, the balance of Scots authority favours the view that the court assesses objectively the existence of the antecedent agreement and that the subjective understanding of each of the contracting parties is not relevant if it had not been communicated to the other parties. Lord Reed expressed a provisional view to that effect in *Macdonald Estates plc* (at pp. 822-823, paras 161-165). He cited in support of his view the opinions of Lord Penrose in *Rehman v Ahmed* at p.752, Lord Cameron of

Lochbroom in *Angus v Bryden* 1992 SLT 884 and Hoffman LJ in *Britoil plc* at pp.578-579.

[38] This approach differs from the provisional view expressed by the SLC in para 80 of the consultative memorandum and also Lord McCluskey's view in *Shaw*, in which he spoke (at p.121H-1) of "actual (not deemed) intentions". But I agree with Lord Reed that the terms such as "agreement" and "intention" are "open textured and capable of development, enabling rectification to develop as a remedy as the law of contract evolves over time" (*Macdonald Estates plc* at p.821, para 158). Since Lord Reed wrote his opinion, the House of Lords addressed the issue in English law in *Chartbrook Ltd*. Lord Hoffmann, having cited authority in support of the conclusion that the antecedent agreement did not have to be legally binding, continued (at p. 1126, para 60): "Now that it has been established that rectification is also available when there was no binding antecedent agreement but the parties had a common continuing intention in respect of a particular matter in the instrument to be rectified, it would be anomalous if the 'common continuing intention' were to be an objective fact if it amounted to an enforceable contract but a subjective belief if it did not. On the contrary, the authorities suggest that in both cases the question is what an objective observer would have thought the intentions of the parties to be".

I find that view persuasive in our law also.

[39] A further consideration in support of the objective approach relates to the outcome of the rectification of a contractual document. Our law ascertains the existence of a contract objectively and a party's undisclosed intention is not relevant. To allow subjective intention to govern the rectification of the contract would be anomalous. In an interesting article on the English law of rectification, Marcus Stone stated: "It would be most odd for the equity to impose on the parties a reformed contract in cases of mistake whose terms have been determined by reference to a different test to the common law's objectively ascertained consensus ad litem" ("Rectification of contracts for common mistake" (2007) 123 LQR 116 at p.128).

While our law of rectification is statutory and is not based on the English law of equity, the same anomaly would exist if the courts looked to the undisclosed subjective intentions of the parties.

[40] I am therefore persuaded that when the court is asked to rectify a bilateral or multilateral document under s.8(1)(a) of the 1985 Act it has to assess the existence of the antecedent agreement and the common intention of the parties objectively. That conclusion will exclude evidence of undisclosed subjective intention. But it is not in my view a matter of regret, as it supports certainty in commercial transactions.

[41] The evidence that is relevant to rectification will include statements which one contracting party (A) has made to the other contracting party or parties (B and C) during negotiations about his intentions because it will show that B and C were aware of A's subjective view. The court has to assess those statements and other

> manifestations of the parties' intention at the time the document sought to be rectified was executed.
>
> [42] It is likely that the court will hear evidence from parties of their uncommunicated subjective intention because that will often be part of the way in which a witness gives his recollection of events. But what is relevant in assessing the existence of the antecedent agreement is not a party's uncommunicated intention but each party's intention manifested to the other parties by statement or conduct.
>
> [43] It may also be relevant to consider the conduct of the parties after they signed the impugned contractual document as that may shed light on parties' intention when they entered into the contract (*Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, Lord Hoffmann at p.1128 para 65). The weight to be attached to such conduct will vary depending on the nature and quality of the pre-contractual evidence.
>
> [44] Where the contract is negotiated by solicitors as well as by their clients, the court looks to the disclosed intention of the principals. This flows from the statutory wording, which refers to "the common intention of the parties". But because the court assesses the intention of the parties objectively, it will look to the communicated statements and conduct of an agent within his authority, actual or ostensible, as well as the communicated statements and conduct of the principal to discover the principal's intention".

[52] Leaving aside the issue of discretion, I understand Mr Barne accepted at least some of the propositions outlined by Lord Hodge. He accepted that the prior agreement need not of itself be legally enforceable (although it may remain a factor in the exercise of discretion); there must be an antecedent agreement; common intention must be discerned from the prior agreement using the normal canons of construction, disregarding expressions of subjective intent. However, Mr Barne drew a distinction as to where it is only one party who is in error. Relying upon certain *dicta* of Lord Cameron at *Angus* v *Bryden* and Lord McCluskey in *Shaw* v *William Grant (Minerals) Ltd*, he submitted there can be no continuing common intention where one party changes ground in the course of negotiation. Mr Barne accepted that Lords Reed and Hodge did not accept that formulation, preferring an objective approach to ascertain whether there was a continuing intention. Mr Barne invited me to follow Lords Cameron and McCluskey rather than Lords Reed and Hodge. In my respectful

opinion, the approach of Lord Hodge is the correct approach and I say that for the reasons quoted in the passages above which are persuasive.

[53] Turning to the evidence, this is not a case in which there are any issues as to the reliability and credibility of any of the witnesses. Indeed, there are no major disagreements as to the material facts.

[54] Initially, the building had its problems. Its construction was not straightforward. However, by the time the defenders expressed an interest, a number of floors had been leased. The market favoured the interests of tenants. This enabled the defenders to obtain a competitive result in their negotiations. The defenders were considered very good tenants to secure: "AAA covenant" was how a number of witnesses described the defenders. The negotiation as to the terms of the let took place between Mr Capaldi and Mr I'Anson. Both are experienced, knowledgeable professionals. On any view the negotiation of a commercial lease is a complicated and skilled process. The vehicle for documenting the agreement was the heads of terms. The document dated 1 May 2012 (5/2/1) represented the final draft of the heads of terms and was the document upon which Mr Rennie prepared his first draft of the lease. Service charges are commonplace in commercial leases. The age of a building is a relevant factor in considering service charges. In the present case the building was relatively new: the older the building, the greater the potential for charges; in a partly occupied building, the more tenants in occupation the greater the demand for services. All of the professional witnesses accepted that service charge caps are very common. They give protection to the tenant against large increases in costs. As a matter of evidence, there is what was described as a buffer between the actual costs of the service charge and a cap (for example the figure of £3.79 (less utilities) representing the actual expenditure and the cap of £5). This gives a protection for the landlord along the lines of that explained in the

report commissioned by Mr Sindberg (5/4/1/21). It contains projections as to anticipated additional expenditure and the relationship between that expected expenditure and the amount of the cap. Mr Capaldi was only instructed to seek a cap on the service charge during the course of the negotiations with Mr I'Anson. Nothing turns on the timing. Clause 10 of the heads of terms documents was an agreement between both surveyors that there would be a service charge of £5 plus RPI uplift, utilities excluded. The evidence of Mr Capaldi and Mr I'Anson was clear as to this understanding. The heads of terms were not legally binding but I have no doubt that it documented the state of negotiations between the parties and the states of mind of both Mr Capaldi and Mr I'Anson at that time. As a matter of evidence both witnesses were clear in their mind that there was to be a service charge cap of £5 per square foot subject to annual RPI uplifts and that was not based upon actual expenditure. Their evidence, together with the evidence of Mr Sindberg, Mr McVicar and Mr Caddick was that an arrangement based upon actual expenditure would not be the market norm. Both Mr Capaldi and Mr I'Anson were clear that the state of mind they had at the point of which the heads of terms were agreed did not change. There is evidence that during the negotiations as to the lease Mr Capaldi and Mr I'Anson were asked for comments on various points, including clause 5.13. The issue which is before me never arose.

[55] Mr Rennie proceeded to prepare a draft lease (I am not concerned with the other surrounding documentation) which was dictated by the heads of terms but, using as a model, some of the existing documentation relating to the leases of other floors in the building. The service charge cap provisions were contained in clause 5.13. The draft lease travelled back and forth between Mr Rennie and Ms Black. There were several alterations to the draft on a number of different issues. I do not view the process of negotiation as offer and counter offer. Sometimes the text contained queries: it was a travelling draft prepared

with the purpose of securing a final text. With the preparation of the lease passing to solicitors, it was the solicitors, rather than the surveyors, who were the responsible agents for the parties. In my opinion, I am not concerned with the alterations to other parts of the lease. It was not suggested that the revisal of other provisions made any material difference to the relevant issue in clause 5.13 – it is that part of the clause which the pursuers seek to rectify. Reduced to essentials, it appears to me that the key issue is the change in the text of clause 5.13 from the initial text, recorded at paragraph [17] above, to the new text, recorded at paragraph [21] above. The change in the drafting was initiated by Mr Rennie. From his evidence there were two issues he sought to address. Firstly, there was a problem in working out how the service charge cap could operate within the term of the lease. Both parties recognised this as being a problem. Ms Black suggested the provision of a worked example. Mr Perrie produced an example which highlighted the problem. The second issue for Mr Rennie was to avoid deflation in the RPI lowering the amount of the cap in succeeding years. It was these concerns which drove the redrafting of clause 5.13. Nowhere is there any evidence to suggest that Mr Rennie and Ms Black changed the drafting of the clause to secure the interpretation now contended for by the defenders. There is no evidence that there was any intention to depart from the understanding between Mr Capaldi and Mr I'Anson. It appears to me that it was always intended that utilities be excluded from the service charge cap. That was the clear understanding of both Mr Capaldi and Mr I'Anson. As I understand the evidence Ms Dewar was the only witness who had, as her state of mind, the interpretation as to clause 5.13 for which the defenders now contend. There is no evidence to show that she ever communicated that understanding to anyone else. Then there is the evidence of the market. As I have recorded, the overwhelming body of evidence is that the interpretation for which the defenders now contend is entirely at odds

with the practice in the market. If one accepts that the initial wording of clause 5.13 was consistent with market practice one has to ask what brought about a change for which the defenders contend? Such a change would not be a minor adjustment but would constitute a significant innovation. There is no evidence that the parties knowingly discussed such a change. Ms Dewar accepted in her evidence that she did not have the experience to comment on whether the defenders' interpretation of clause 5.13 was unprecedented. In or about 19 June, Ms Dewar calculated that the service charge was likely to be only £3.79 per square foot, much lower than the previously stated figures of £4.64 and £4.78. She did raise this with Ms Black and Mr Capaldi but I do not understand there to be evidence that any of these concerns were actively communicated to Mr Rennie to the extent of changing the draft to secure the defenders' interpretation. The issue as to a 41% increase did not figure at the relevant time. In short, taking the evidence as a whole, there was consensus between the parties from a very early stage as to the operation of the service charge cap and that consensus never changed. The drafting of clause 5.13 changed in a way unrelated to that key issue. Other than Ms Dewar's state of mind, there is no evidence that either party changed its position on that issue.

[56] In relation to the chapter of evidence dealing with the pursuers' acquisition of the landlords' interest, considerable care was taken to ensure that what was being acquired was a suitable investment. Mr Sindberg is an experienced professional with extensive experience in the United Kingdom property market since at least 2003. He has been involved in the acquisition of several commercial properties. The pursuers (and I include Danmarc) commissioned reports from professionals, surveyors and solicitors. The reports are lengthy and thorough. Both refer to the service charge cap and both follow the understanding of the pursuers. I regard this evidence as important as to the exercise of discretion as to whether to

grant decree of rectification. The unchallenged evidence of Mr Sindberg is that the pursuers both commissioned the reports and followed the advice contained therein; and that advice favoured the acquisition.

[57] When I ordered witness statements I provided a mechanism for counsel to lodge written objections in advance, a facility which both counsel took although not all objections were insisted upon. In relation to the objections taken by the pursuers as to evidence, I deal firstly with the objection to the evidence of Mr McVicar. Mr McVicar was not a party to the negotiations. He was called as an expert witness. His professional qualifications and expertise are not, I consider, in doubt. The issue is whether his evidence is admissible. In essence, his evidence goes to the practice in the market place at the relevant time. As a matter of fact, his evidence is entirely consistent with the evidence of Mr Capaldi, Mr I'Anson, Mr Caddick and Mr Sindberg. Although there was passing reference to *Kennedy* v *Cordia (Services) LLP* [2016] UKSC 6, this is not the typical case of the use of expert evidence. The absence of a report I do not consider a ground of objection; the evidence of Mr McVicar was initially tendered in a witness statement. Having concluded that the existence of the prior agreement should be ascertained objectively it seems to me that the evidence of the practice in the market place is a fact which is relevant to determining what the agreement was. It is relevant to consider why Mr I'Anson and Mr Capaldi would have agreed something entirely at odds with market norms. I shall therefore repel the objection to the evidence of Mr MacVicar.

[58] In relation to the objection to certain passages in the evidence of Ms Dewar as set out in her witness statement, Mr Thomson objected to some or all of paragraphs 13, 17, 19 and 25. I shall sustain the objection in relation to the second sentence of paragraph 13 on the ground of relevance. The objections taken to the remaining parts are taken on the basis that

it concerns the subjective intentions of the witness. Taken in the round, it seems to me that the statements complained of are evidence of the witness's thinking. There was quite a lot of evidence from other witnesses as to their state of mind at relevant times which is relevant background evidence. I shall therefore repel the remaining objections.

[59] In summary, it is important to keep in mind what the common intention at issue was. The subject is quite narrow. It is the operation of the service charge cap and the RPI escalator. I accept that other topics were the subject of revision but the issue here is whether, viewed objectively, the intention of the parties on the key issue changed. I do not consider that the pursuers' case is based upon the heads of terms as constituting the agreement: I accept that it records what the surveyors agreed. As I have said, both Mr Capaldi and Mr I'Anson were quite clear in their evidence as to what they agreed and what they both understood the position to be. That, as I understand it, is what the first draft of the lease correctly expressed. The change to clause 5.13 was brought about for reasons unconnected with the issues now before the court. There is no evidence to show that, on this cardinal issue, the evidential position reached at the point of the heads of terms ever changed. Whatever Ms Dewar may have had in mind as to the meaning of clause 5.13, as she quite fairly accepted, it was not communicated to any of the pursuer's witnesses. Further, and in any event, it is not clear to me that Ms Dewar must necessarily be taken to be the defenders. A number of the authorities referred to concern sophisticated contractual documentation, including missives and dispositions, heads of terms and contracts. The courts are, understandably, slow to alter such documentation. There are longstanding rules as to the admission of parole evidence to explain, qualify or change a document. However, rectification emerged as a procedure to challenge the sanctity of documents in order to avoid what might otherwise lead to injustice. In my opinion, each case turns on its own facts and

the application of the rectification provisions is not inhibited by the particular nature of the documentation. The key elements (in this case) for rectification are to be found in section 8(1)(a): it is those provisions which require to be satisfied. Returning to the principal elements identified by Lord Hodge, there was an antecedent agreement between the parties as to the operation of the service cap charge – the agreement was reached between Mr Capaldi and Mr I'Anson; it was recorded in the heads of terms and it did not change. The heads of terms were not intended to be legally binding but that does not matter. Whatever else may have changed, the intentions of the parties on this issue did not change. The intention has been objectively proved. The only person with a contrasting state of mind was Ms Dewar and that was not communicated to others and did not influence revisal of the document. The onus of proof lies with the pursuers to prove their case on a balance of probabilities. In my opinion, the pursuers have satisfied the requirements of section 8(1)(a) as to the relevant ingredients and, *prima facie*, are entitled to rectification.

[60] That takes me to the matter of discretion. Both parties accept that the court has discretion to grant, or not to grant, the remedy of rectification. Mr Barne submitted, correctly in my view, that there is little Scottish authority on the subject of discretion. The cases of *Norwich Union* v *Tanap Investments* and *Bank of Scotland* v *Brunswick Developments* do contain some, limited assistance. Mr Barne referred to the opinion of the Lord President in *Bank of Scotland* v *Brunswick Developments*. The decision of the Inner House was appealed to the House of Lords 1999 SC (HL) 53 and the decision reversed on grounds that are not relevant to the issue of discretion. At page 231, the Lord President said:

> "Having considered the matter, the court is not bound to grant the application even if it is unopposed. The court may grant the application if, but only if, it is satisfied of either of the matters set out in subsection (1). Indeed, even if it is satisfied of those matters, the court is not bound to grant the application: it has a discretion, the extent of which is not defined, but which is governed at least in part by the provisions of

> section 9 which are designed to protect the interests of certain persons who will be effected by any rectification of the document in question. The protection afforded by section 9 is necessary because, once pronounced, a decree of rectification is general in effect. That is to say, even though one individual may have sought rectification for his own purposes, if the court orders that a document is to be rectified, then the rectification will affect not only the person who applied for it, but everyone else as well. Finally, it should be noted that, where a decree of rectification is pronounced, then – unless the court orders otherwise – the document will have effect as if it had always been so rectified: section 8(4)".

[61] The *Norwich Union* case is another decision of the Inner House. In giving the opinion of the court, Lord Prosser made a number of observations about the exercise of discretion. The pursuers in that action had lent monies secured by a standard security over commercial premises. In short, the security documentation fell short in giving the security which the pursuers thought that they had. The borrower became insolvent. However, the borrower had granted further security in favour of another lender. The lender became a party to the action. One of the issues was the interest of that lender to defend the action at the instance of the pursuers given the consequences of rectification to them. At paragraph [15] Lord Prosser commented that section 8 requires the applicant to satisfy the court of various matters before the court's discretion to order rectification can be exercised. In his opinion the need to satisfy the court exists, regardless of whether there was any opposition from any other party. The 1985 Act does not deal with the question of who would have title or interest to resist rectification and, provided the court is satisfied as to the specified matters, section 8 itself gives no indication as to what might justify refusal. The pursuers challenged the right of the lender to defend the action at all. The Inner House refused the pursuers' motion to the effect that the defenders had no right or title and allowed the matter to proceed to a proof before answer.

[62] As these authorities show, the wording of the rectification provisions grants to the court the power to grant the remedy, a remedy it is not obliged to grant. The discretion

reflects the equitable nature of the remedy. Section 8 gives no guidance as to in what circumstances the court may grant or not grant the remedy. Given that the rectification provisions are designed to deal with a defectively expressed document, if it is proved that the agreement fails to express accurately the common intention of the parties to the agreement, then it is difficult to envisage in what circumstances the remedy should be withheld. However, it is also difficult to envisage all the circumstances which might arise in a rectification case. In my opinion, characterising the power as discretionary permits the court to withhold the remedy where it would be inequitable to grant it. Whether it would be inequitable to grant it depends upon all the circumstances of the case. Section 9 is designed specifically to deal with the interests of third parties. As there are no third party interests involved in this case considerations relating to section 9 do not, in my opinion, arise. In relation to the exercise of discretion Mr Barne relied upon a number of factors. Firstly, the impugned drafting was introduced by the landlord. The error in the present case was unilateral and the defenders understood and accepted the draft put forward by the pursuers. It would thus be unfair to force the defenders to accept wording they did not intend to accept. It is correct to say that the drafting was introduced by the landlords. However, it seems to me key to this case that there is no evidence to show that on the fundamental issue of clause 5.13 there was ever any change in position by either party. Ms Dewar may have entertained a particular state of mind which, as I have said, she did not communicate to any other party. I do not consider this is a question of compelling the defenders to accept a bargain they never sought. On the contrary, it is a question of ensuring that the document correctly expresses what both parties did intend. I do not consider that this is a matter of "sharp practice" by the defenders but on the evidence it seems to me that they are content to take advantage of a situation which, at the relevant

time, was not truly the common intention of both sides to the bargain. The pursuers may not have been a party to the lease but I do not think that, on the facts of this case, it is a significant factor as to the exercise of my discretion. Nor am I persuaded that the fact that the pursuers obtained advice from professional advisers is relevant to the exercise of the discretion in this particular case. The overwhelming body of evidence is that, in the marketplace, the interpretation contended for by the pursuers is the norm. As I have said, at the end of the day, what the pursuers seek is rectification to bring about a bargain that both parties agreed upon. I do not consider it would be equitable to refuse such a decree, leaving to the pursuers a hazardous and uncertain remedy elsewhere. The pursuers have not been careless; on the contrary, they sought professional advice and acted on the strength of it.

[63] I shall put the matter out by order for counsel to address me on the form of interlocutor to be pronounced consistent with this judgement. Expenses are reserved.