



OUTER HOUSE, COURT OF SESSION

[2025] CSOH 122

A352/23

OPINION OF LORD SANDISON

In the cause

PIPELINE CLEANING SOLUTIONS LIMITED

Pursuer

against

CORETRAX TECHNOLOGY LIMITED

Defender

Pursuer: Tariq KC; Harper MacLeod LLP
Defender: Manson; Clyde & Co (Scotland) LLP

23 December 2025

Introduction

[1] In this commercial action the pursuer seeks £10 million in damages from the defender by way of reparation for breaches of contract and patent infringement. The defender maintains that the contractual aspects of the case stated against it have prescribed, that the pursuer's claim is barred by a contractual "hold harmless" clause, and that its case in relation to the loss said to have been sustained is in any event irrelevant or lacking in essential specification. It seeks decree of absolvitor in respect of the supposedly prescribed elements, and decree of dismissal without enquiry in respect of the remaining elements. The matter came before the court for a discussion of its preliminary pleas.

Background

[2] The pursuer is a Scottish company which holds an EU patent with a priority date of 20 December 2008, for a fluid product used for cleaning pipes and tanks in the oil industry context, named "Uptake". In October 2016 it entered into a "Bilateral Confidentiality Agreement" with the defender, another Scottish company. The form of contract which they used contained a clause where the purpose of the agreement was intended to be stated, but the parties did not fill that clause in. The pursuer maintains that the agreement was in relation to the supply of Uptake to the defender in terms of a then-proposed Purchasing Agreement.

[3] The parties then entered into that agreement, in terms of which the pursuer agreed that the defender would have the exclusive right to purchase, market and re-sell Uptake from it within the geographical areas of the United Kingdom, Norway, the Netherlands, Denmark, Saudi Arabia, the United Arab Emirates, Oman, Kuwait and Dubai for use in post-drilling and pre-completion wellbore cleanup, swarf recovery and downhole slops handling, for an initial 3-year period from 1 January 2017, to be extended for a further three-year period unless previously terminated, and thereafter by mutual agreement.

[4] The pursuer supplied Uptake to the defender for a period, and provided it with technical information about its processing and use, but claims that in the course of 2018 the defender began to supply to its customers a product designed to perform the same functions as Uptake, called SwarfSweep. The pursuer maintains that SwarfSweep's formulation infringed its patent in Uptake, and was developed by the defender by way of the use of confidential information disclosed to it and falling within the ambit of the Confidentiality and Purchasing Agreements. The defender denies these claims. It purported to terminate the Purchasing Agreement on 5 December 2018. The pursuer maintains that it was then

supplying its customers with a product called Uptake, but which was in fact probably SwarfSweep.

[5] The pursuer claims that as a consequence of the defender's breaches of the Purchasing Agreement and Confidentiality Agreement, and its infringement of the patent, it has suffered loss and damage in the form of lost profit on anticipated sales of Uptake. It maintains that, once the efficacy of Uptake had been established in the market, it would have made substantial and profitable sales and that the defender's actions caused a loss of market confidence in the product and delayed it in doing so.

Relevant statutory provisions

[6] The Prescription and Limitation (Scotland) Act 1973 as amended *inter alia* provided at the times material to this action as follows:

"6.— Extinction of obligations by prescriptive periods of five years.

- (1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years—
- (a) without any relevant claim having been made in relation to the obligation, and
 - (b) without the subsistence of the obligation having been relevantly acknowledged, then as from the expiration of that period the obligation shall be extinguished:

...

9.— Definition of 'relevant claim' for purposes of sections 6, 7 and 8.

- (1) In sections 6, 7 and 8A of this Act the expression '*relevant claim*', in relation to an obligation, means a claim made by or on behalf of the creditor for implement or part-implement of the obligation, being a claim made—
- (a) in appropriate proceedings ..."

Relevant contractual terms

[7] The Confidentiality Agreement between the parties contains *inter alia* the following provisions:

“Confidential Information’ means all the information disclosed and to be disclosed by one Party (‘the Disclosing Party’) to the other Party (‘the Recipient’) (whether written, oral or in any other form or whether marked or identified as being confidentially proprietary or under the control of the Disclosing Party) and relating to the Disclosing Party’s business, whether of a technical, financial or business nature, and including all forms of Intellectual Property relating to the Disclosing Party and including this Agreement and the fact that the Parties are in discussion or working together;

...

‘Intellectual Property’ means any patent, patent application, trade mark, service mark, trade mark or service mark application, trade or business name, registered or unregistered design right, copyright, Know How or other similar industrial, commercial or intellectual property right;

‘the Purpose’ means [statement of the broad purpose for which the information is to be exchanged as above]’

...

2. Recipient’s Undertakings

The Recipient undertakes:

2.1.1 that it will comply with the obligations incumbent upon them under the terms of this Agreement regarding the protection of the secrecy of the Confidential Information and agrees to indemnify the Disclosing Party against all costs and expenses, damages or loss (including but not limited to legal expenses) which may arise through any breach of this Agreement. Accordingly the Recipient will not without the consent of the Disclosing Party communicate or otherwise make available the Confidential Information to any third party other than:

2.1.1.1 a director, employee or representative of the Recipient who requires the Confidential Information in connection with the Purpose and then only if the director, employee or representative is bound by conditions of secrecy no less strict than those set out in this Agreement, which

conditions the Recipient hereby agrees at its own expense to enforce at the request of the Disclosing Party; and

2.1.1.2 Upon the request of the Disclosing Party, the Recipient must provide to the Disclosing Party a list of those persons to whom the Recipient has disclosed the Confidential Information;

2.1.2 Not to use the Confidential Information for other than for the Purpose ...”

The Purchasing Agreement between the parties contains *inter alia* the following provisions:

“1. Definitions

1.1 GEOGRAPHICAL AREA defines the countries and regions across which this AGREEMENT shall apply as are more fully defined in Appendix 1 to this AGREEMENT. The PARTIES agree that the GEOGRAPHICAL AREA may only be amended by the written agreement of both PARTIES;

1.2 PRODUCT is defined as PCS UPTAKE™ fluid cleaning technology;

1.3 TECHNICAL SCOPE means post drilling and pre-completion wellbore cleanup, swarf recovery and downhole slops handling

2. Subject

2.1 PCS hereby agrees to sell the PRODUCT exclusively to CORETRAX for use only in respect of the TECHNICAL SCOPE in the GEOGRAPHICAL AREA and for the duration as specified in Clause 3. CORETRAX hereby agrees to purchase the PRODUCT from PCS and to use it only for the TECHNICAL SCOPE across the GEOGRAPHICAL AREA for the duration as specified in Clause 3.

...

5. Confidentiality

The PARTIES shall keep this AGREEMENT and any information, which either PARTY learns about the other in strict confidence and shall not disclose the same to any third party without the prior written consent of the other PARTY. This confidentiality undertaking shall not apply to the genuine dissemination of PRODUCT related information by CORETRAX in accordance with this AGREEMENT, provided this has been agreed in writing and in advance with the PCS.

6. Patent and Proprietary Rights

6.1 All designs, drawings, or other technical information relating to the PRODUCT, and the intellectual property rights therein made or acquired by PCS prior to or during the course of this AGREEMENT shall be and remain the property of PCS unless otherwise set out in this AGREEMENT.

6.2 CORETRAX shall save, indemnify, defend and hold harmless PCS from all claims, losses, damages, costs (including legal costs), expenses and liabilities of every kind and nature for, or arising out of, any alleged infringement of any patent or property or protected rights arising out of or in connection with the performance of the obligations of CORETRAX under this AGREEMENT

- 6.3 PCS shall save, indemnify, defend and hold harmless CORETRAX from all claims, losses, damages, costs (including legal costs), expenses and liabilities of every kind and nature for, or arising out of, any alleged infringement of any patent or proprietary or protected right arising out of or in connection with the performance of the obligations of PCS under this AGREEMENT or from CORETRAX use of any materials supplied by PCS, provided these are used in accordance with the provisions of this AGREEMENT.
- 6.4 CORETRAX acknowledge the PRODUCT is protected by patent in all relevant markets and will take measures to ensure the patent rights of PCS are maintained. CORETRAX will inform PCS without delay if they become aware of any circumstances that may threaten the patent rights of PCS. CORETRAX will in addition take measures to protect PCS' patented rights in the PRODUCT including ensuring the PRODUCT is stored securely and drawing the attention of Customers to the patent rights of PCS.
- 6.5 CORETRAX will take all steps to ensure the PRODUCT is not made available for analysis either by or on behalf of itself or any customer or other third party and will neither permit nor induce any analysis or reverse engineering process to take place.

...

9. Indemnities

- 9.1 In the carrying out of the SERVICES each PARTY shall save, indemnify, defend and hold harmless the other PARTY from and against any claims, losses, damages, costs (including legal costs) expenses and liabilities in respect of;
- (a) Loss or damage to property of the indemnifying PARTY whether owned, hired, leased or otherwise provided by the indemnifying PARTY arising from, relating to or in connection with the performance or non-performance of the SERVICES; and
 - (b) Personal injury including death or disease to any personnel of the indemnifying PARTY arising from, relating to or in connection with the performance or non-performance of the SERVICES; and
 - (c) Subject to any other express provisions of the AGREEMENT, personal injury including death or disease or loss of or damage to the property of any third party, to the extent that any such injury, loss or damage is caused by the negligence or breach of duty (whether statutory or otherwise) of the indemnifying PARTY.
- 9.2 All exclusions and indemnities given under Clause 9.1 (save for those under Clause 9.1(c)) shall apply irrespective of cause and notwithstanding the negligence or breach of duty (whether statutory or otherwise) of the indemnified party or any other entity or party and shall apply irrespective of any claim in delict, tort, under contract or otherwise at law.

...

11. General Provisions

- 11.1 Both PARTIES shall comply with all applicable laws, rules and regulations of any governmental or regulatory body having jurisdiction over the provision of the SERVICES.

11.2 CORETRAX shall obtain all licences, permits and authorisations required by the applicable laws, rules and regulations for the sale of the PRODUCT within the GEOGRAPHICAL AREA, save to the extent that the same can only be legally obtained by PCS.

11.3 For the purposes of this Clause 11.3 the expression 'Consequential Loss' shall mean:

- (i) consequential or indirect loss under Scots law; and
- (ii) loss and/or deferral of production, loss of product, loss of use, loss of revenue, profit or anticipated profit (if any), in each case whether direct or indirect to the extent that these are not included in (i), and whether or not foreseeable at the effective date of commencement of this AGREEMENT.

Notwithstanding any provision to the contrary elsewhere in this AGREEMENT, PCS shall save, indemnify, defend and hold harmless CORETRAX from PCS's own Consequential Loss and CORETRAX shall save, indemnify, defend and hold harmless PCS from CORETRAX's own Consequential Loss, arising from, relating to or in connection with the performance or non performance of this AGREEMENT.

11.4 Both PARTIES shall uphold the highest standards of business ethics in the performance of this AGREEMENT. Honesty, fairness and integrity shall be paramount principles in the dealings between the PARTIES.

...

11.7 This AGREEMENT constitutes the entire agreement between the PARTIES hereto with respect to the sale of the PRODUCT and supersedes all prior negotiations, representations or agreements related to this AGREEMENT, either written or oral. No amendments to this AGREEMENT shall be effective unless evidenced in writing and signed by both PARTIES.

...

11.9 Subject to Clause 11.10, the aggregate liability of PCS in respect of loss, damage or claims arising out of a supply of the PRODUCT against a purchase order issued under or by virtue of this AGREEMENT, shall be limited to the value of the relevant purchase order.

11.10 The limitation of liability in Clause 11.9 shall not apply to any claims in respect of death or personal injury, nor in respect of claims arising in respect of fraud or fraudulent misrepresentation; neither shall it apply to the indemnities provided in Clauses 9.1(a) and 9.1(b) and Clause 11.3.

11.11 The PRODUCT is sold with no warranty whatsoever except as provided for in this Clause. Where it is shown that PRODUCT is deficient to the reasonable satisfaction of PCS, then PCS will at their sole option either refund the price of the PRODUCT in question or replace the PRODUCT in question. The warranty provided for in this Clause requires to be exercised within 30 days of use of the PRODUCT and will not apply where the PRODUCT has been used wrongly or negligently or has been mis-used or where it has not been used in accordance with PCS' advice or instructions. The warranty will not apply where the PRODUCT is used either outside the TECHNICAL SCOPE or GEOGRAPHICAL AREA except with the prior written agreement of PCS.

12. Disputes and Termination

...

Either PARTY will have the right to terminate this AGREEMENT with immediate effect in the event of the other PARTY being in material breach of this AGREEMENT and failing to remedy such breach within 30 days of being called upon by the other PARTY in writing to do so.”

Submissions for the defender

[8] On behalf of the defender, counsel dealt first with the issue of prescription. The pursuer had concluded for an award of damages against the defender to which it maintained it was entitled by virtue of its having sustained economic loss as a result of breach of contract and patent infringement. Those claims were subject to the short negative quinquennial prescription provided for by section 6 of the Prescription and Limitation (Scotland) Act 1973. In terms of section 11(1) of that Act, the quinquennium began when there was a concurrence of *damnum* and *injuria*: *Gordon’s Trustees v Campbell Riddell Breeze Paterson LLP* [2017] UKSC 75, 2017 SLT 1287 at [15] – [16]. Section 11(3) of the 1973 Act did not operate to postpone the commencement of the prescriptive period in circumstances where the creditor was actually or constructively aware of loss, as a matter of objective fact: *Gordon’s Trustees* at [20] – [22]; *WPH Developments Limited v Young & Gault LLP (in liquidation)* [2021] CSIH 39, 2022 SC 28, 2021 SLT 905 at [30] – [36].

[9] The pursuer had averred when it first became aware of loss, namely 23 November 2018, and, therefore when, on its case, the quinquennium began. Although the defender considered that the quinquennium had in fact begun before that date, it was prepared for the purposes of the debate to proceed on the basis that that was indeed the relevant date. On that basis, any claims made in the action for the first time more than 5 years later (ie after 23 November 2023) would have prescribed. The pursuer had served the summons on 17 November 2023. That was within the quinquennial period. However, it was necessary to

identify the nature and extent of the claims which had been made and the grounds of action which had been articulated in the summons as served in order to ascertain the extent to which, if at all, it operated to interrupt the running of prescription and, therefore, whether the claims and grounds added later by adjustment on 1 April 2025 and in a minute of amendment intimated on 12 June 2025 came too late.

[10] The court had to be astute in recognising the very material difference between the development of a claim which had already been made within the quinquennium and the making of new claims based on different obligations, juridical bases, breaches or facts: *Devos Gebroeder NV v Sunderland Sportswear Ltd (No 2)* 1990 SC 291 at 302 – 304, 306 – 307; 1990 SLT 473 at 477 – 478, 479; *G & A Estates Ltd v Caviapen Trustees Ltd (No 2)* 1993 SLT 1045 at 1049 – 1050D; *J G Martin Plant Hire Ltd v Bannatyne, Kirkwood, France & Co* 1996 SC 105 at 110D – 111C, 1996 SLT 1192 at 1195J – 1196D; *McClure Naismith LLP v Harley Haddow Partnership* [2017] CSOH 125, 2018 SCLR 257 at [17] – [23]; and Johnston, *Prescription & Limitation*, (2nd Edition) at 2.18 – 2.19.

[11] Insofar as relevant for present purposes, the summons served on 17 November 2023 contained a bald averment of breach of contract, without identifying the obligations in the agreements which were said to have been breached. It contained averments of patent infringement within the meaning of section 60 of the Patents Act 1977. It also alleged that loss and damage had been caused to the pursuer as a result of breach of the Purchasing Agreement and the infringement of the patent, which was particularised to the extent of averring that the loss came in the form of lost sales and which was quantified in the sum of £6 million. No claim was made to the effect that any breach of the Confidentiality Agreement had given rise to any loss in respect of which reparation was being sought.

[12] It followed that the pursuer had made no relevant claim in the summons to the effect that it had sustained any loss or was making any claim for reparation as a result of a breach of the Confidentiality Agreement. There could be no question that any quinquennium running relative to a claim for damages for losses caused by a breach of the Confidentiality Agreement was interrupted by service of the summons. Secondly, the pursuer had not identified any obligations in the Purchasing Agreement which were being founded upon as having been breached. It had not attended to the fundamental task of identifying the obligations and grounds of action being founded upon. In these circumstances, it followed that the summons did not act as an effective vehicle for the interruption of prescription in respect of any claim for damages based on an obligation to make reparation for a breach of either of the contracts at issue in this case.

[13] On 1 April 2025, the pursuer had adjusted into the summons averments about claimed breaches of clause 2.1.1 of the Confidentiality Agreement, and of clauses 5 and 6.5 of the Purchasing Agreement, together with averments to the effect that the defender had engaged in a reverse engineering process and a very general averment that the pursuer sought damages for a breach of the Confidentiality Agreement.

[14] The pursuer did not actually aver that it had sustained loss as a result of a breach of the Confidentiality Agreement until it intimated a minute of amendment on 12 June 2025. However, in any event, the April averments and claim had already come too late. The summons when served did not identify any of the contractual obligations which were said to have been breached or the respect or respects in which any obligations were breached. On the authorities, a generalised and unparticularised assertion of breach of contract in relevant proceedings did not operate to interrupt prescription in respect of any and all claims for breach of contract which the pursuer might later deign to identify.

[15] It would be offensive to the purpose of the statutory prescription were matters otherwise, as a creditor enjoyed a relatively generous window of time within which to make a sufficiently cogent and relevant claim in appropriate proceedings to interrupt the running of time against it, and the debtor ought properly to enjoy certainty and repose should that not be done. The defender should therefore be assoilzied from the pursuer's claims for reparation for breach of contract.

[16] Counsel then turned to the issue of the contractual indemnity clause in the Purchasing Agreement. The pursuer sued for damages in respect of only one head of loss, namely loss of anticipated profits. Such a claim fell within the contractual term "Consequential Loss", which was defined in clause 11.3(ii) as including inter alia "loss of revenue, profit or anticipated profit (if any)". By clause 11.3 of the Agreement, the parties agreed to save, indemnify, defend and hold harmless each other in respect of their own Consequential Loss arising from, relating to or in connection with the performance or non-performance of the Agreement. On a proper construction of the natural and ordinary meaning of the words and phrases used by the parties in the jointly understood contractual, commercial and legal context which obtained when the contract was agreed, it was clear that a properly apprised objective and reasonable person would have understood that the parties intended that neither of them was to have any liability to the other for any claim by the other for damages for loss of profits, whether made under the contract or collaterally.

[17] That conclusion followed from a proper application of the principles of contractual interpretation as formulated and explained in *Ashtead Plant Hire Co Ltd v Granton Central Developments Ltd* [2020] CSIH 2, 2020 SC 244, 2020 SLT 575 at [9] – [17], and from *Farstad Supply AS v Enviroco Ltd* [2010] UKSC 18, 2010 SC (UKSC) 87, 2010 SLT 994. The scope of the provision in governing claims under collateral contracts or under patent law was confirmed

by giving effect to the meaning of the phrase "...arising from, relating to or in connection with..." in accordance with the observations in *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40, [2007] Bus LR 1719 at [11] – [12].

[18] The proper construction commended by the defender followed from four features of the unitary exercise of construction. Firstly, beginning with the exclusion of a claim for loss of profits (and leaving temporarily to one side the scope of that exclusion) the words and phrases adopted by the parties in clause 11.3 were not reasonably capable of having more than one meaning. On the contrary, their meaning was totally unambiguous; the pursuer obligated itself to indemnify, defend and hold the defender harmless from any claim for loss of profits made by or available to the pursuer; and the defender obligated itself to indemnify, defend and hold the pursuer harmless from any claim for loss of profits made by or available to the defender. There was no other meaning reasonably available standing the language and syntax which the parties had chosen to use.

[19] Secondly, the proper construction to which the natural and ordinary meaning of the words and phrases adopted gave rise was supported by the decision and reasoning in *Farstad*. The general approach of the law in relation to a "hold harmless" indemnity provision such as appeared in the present case was an important element of the legal context against which the parties contracted and from which default position they did not choose to depart (cf *Ashtead* at [21]). The critical part of the clause in *Farstad* used almost exactly the same formula of words as appeared in clause 11.3 in the present case, viz "shall defend, indemnify and hold harmless". Indeed, the wording in clause 11.3 in the present case was even stronger than the wording in *Farstad* because clause 11.3 used the additional word "save".

[20] In analysing the clause at issue in *Farstad* the court approved and commended the analysis originally adopted in the Outer House [2008] CSOH 63, 2008 SLT 703: see Lord Clarke JSC at [24] – [25]; Lord Hope DPSC at [40]; and Lord Mance JSC at [49]. It had there been held that the phrase “hold harmless” might, in some circumstances, be equated with “indemnify” but, properly analysed, added something beyond a simple obligation to indemnify and was understood generally as a limitation or exclusion of liability. By adopting the phrase “defend, indemnify and hold harmless” the pursuer in *Farstad* had agreed not only to indemnify the third party but, in addition, had renounced any right to claim damages in the circumstances envisaged by the clause. An obligation to “hold harmless” therefore went beyond a mere obligation to reimburse under an indemnity: [24] - [27]. Similar points had been made in the Supreme Court. The expression “defend, indemnify and hold harmless” had there been held wide enough to include an exclusion of liability for loss and provide a defence for one party to claims made by the other party (Lord Clarke JSC at [27]; and Lord Mance JSC at [56] (with whom Lords Hope DPSC and Rodger JSC agreed at [36] and [45])). Where the phrase was used in favour of both parties to the contract, it should be seen as a carefully considered balance between the interests of both parties (Lord Clarke JSC at [28] and Lord Mance JSC at [58]). Further, Scots law recognised a principle to the same effect as the doctrine in English law of circuity of action, which was encapsulated in the brocard *frustra petis quod mox es restiturus* and the phrase in issue could be seen as giving effect to that (Lord Clarke JSC at [32] – [34]; Lord Hope DPSC at [44]; and Lord Mance JSC at [59]). Commercial common sense would recognise the clause as a scheme clearly intended to govern risk between contracting parties (Lord Mance JSC at [59]). Applying that analysis, clause 11.3 was clearly intended to have the purpose of giving effect to a common intention that risks and liabilities arising between the parties ought to be

controlled in advance in order to create certainty for the parties' relations and affairs going forwards. In other words, the parties took account of the possibility that one or both of them might act in breach and sought to limit the scope of the claims which could be made against the another in that eventuality.

[21] Thirdly, the purpose identified accorded with the commercial context of the contract. It was in accordance with commercial sense to allocate risk and liability. The parties were seeking to govern an arrangement wherein a nascent, untried and untested product was going to be used and put into the marketplace at the defender's financial, commercial and reputational risk with its customers and prospective customers. Despite that, the defender agreed to limit the claims which it could make against the pursuer should something go wrong. It was unsurprising, therefore, that in order to achieve a balance of risk the pursuer also agreed to exclude any claims it might have for loss of profits arising from breaches on the part of the defender. This was an example of the type of *quid pro quo* and predictability that the court would expect to see when considering the business conduct of parties to a commercial contract (*Ashtead* at [16]).

[22] Fourthly, the purpose and effect of clause 11.3 was reinforced further by consideration of the internal contractual context of the agreement itself. Using the same phrase ("save, indemnify and hold harmless") the parties made provision at clause 6.3 to expressly exclude all claims, losses [and] damages of every kind and nature for, or arising out of, any alleged infringement of any patent or proprietary or protected right. Clause 11.3 had to be read in a way which was consistent with that provision. That was achieved when one recognised that clause 11.3 was designed expressly to operate as the supreme governing provision in the hierarchy, having been introduced by the phrase: "Notwithstanding any provision to the contrary elsewhere ...". "Notwithstanding" was synonymous with "in

spite of” or “regardless of” and was a qualifying phrase used to ensure that one provision qualified or took effect over another: *Commissioner for Railways v Avrom Investments Proprietary Ltd* [1959] 1 WLR 389 at 401 – 402; *Chiswell Shipping and Liberian Jaguar Transports Inc v National Iranian Tankers Co (The World Symphony and The World Renown)* [1992] 2 Lloyd’s Rep 115 at 118 and 119. Clause 11.7 of the Purchasing Agreement in turn made that agreement the governing one as between the two sets of contractual arrangement between the parties. The Confidentiality Agreement was not denuded of any legal effect by these stipulations, but the supremacy of clause 11.3 of the Purchasing Agreement made it clear that its terms equally extended to claims for Consequential Loss based on the Confidentiality Agreement, and indeed to such claims based on the law of patent infringement more generally.

[23] The parties very clearly intended that any claim which either of them might make against the other could not include a claim for loss of profits. They did not cut down entirely the ability for claims to be made or remedies to be invoked, but did expressly seek to control the scope of any such claims, in both directions. Clause 11.10 of the Purchasing Agreement further limited liability for such claims as might still properly be made, reinforcing the overall impression of a carefully thought-out scheme for the exclusion and limitation of possible liabilities.

[24] The exclusion of a claim for damages for loss of profits arising from breach of contract or patent infringement was consistent with the widely framed hold harmless scheme to which clause 11.3 gave rise. That was the cohesive outcome which a reasonable commercial person would expect given the broad approach ordinarily taken when the court encountered phrases such as “arising from, relating to or in connection with”: cf *Fiona Trust* at [11] – [12]. The use of such a phrase plainly indicated that something more than rights

and obligations under the Purchasing Agreement was being contemplated by the parties as falling within the scope of the scheme, and it was difficult to see what that could be other than the Confidentiality Agreement and the exploitation of the patent. The parties could be seen to have wanted the certainty that any claim arising out of their relationship was not to include a claim for loss of profits. Such an outcome was the type of clear one which the court would expect commercial parties to seek to achieve. A construction that the parties were agreed that claims for loss of profits could not be made under the Purchasing Agreement but could still be made under the Confidentiality Agreement or the general law of patents would undermine the certainty and balance which clause 11.3 was designed to create.

[25] Separately, the parties had identified that the most likely remedy which would be invoked upon breach was termination and they had identified a clear time limitation for the remediation of breaches (within 30 days of a material breach): clause 12. The court could discern from this an intention on the part of the parties that a swift and clean break from the agreement (and the parties' commercial relationship) without the prospect of claims arising for consequential loss was deemed to be the most efficient and certain way of regulating matters. Each party was left knowing exactly where it stood on the basis of the arrangements entered into.

[26] Furthermore, whilst certain possible heads of damage had been excluded, others had not. There was no attempt to exclude liability for property damage. Nor was there anything in the agreement which would operate to exclude other remedies which would have been available to the pursuer in the event of actual or anticipated breach such as interdict, delivery or an accounting for profits. The extent of the mutual exclusion was simply in respect of "consequential loss" forming part of a damages claim.

[27] In conclusion, a proper construction of clause 11.3 in its relevant legal and commercial context led to the conclusion that the parties intended that neither of them should be able relevantly to make a claim against the other for damages for loss of profits caused as a result of the breach by either of the contracts at issue or by dint of patent infringement. That the pursuer was barred from making the claims advanced in this action was the only conclusion reasonably available on the words adopted in the clause. That result was a sensible and commercial one which accorded with what one would expect standing the commercial and legal context of the contract. The parties, when organising their affairs in connection with the purchase of the pursuer's product, intended that claims for consequential losses such as loss of profits were not to be made against one another, howsoever arising and on any legal basis. The court should respect and give effect to that clear intention. The pursuer was therefore bound to fail in obtaining the order for payment of damages it sought.

[28] Counsel finally turned to criticise the relevancy and specification of the pursuer's case on breach, causation and quantum. The pursuer had no relevant case in which claimed loss was comprehensibly causally linked to the specified averments of breach. Firstly, its whole case on causation turned on averments that it anticipated making substantial profit from the supply of Uptake which the defender prevented because of its breach of contract and patent infringement. However, nowhere did the pursuer claim that the breaches founded upon caused prospective customers to buy the defender's product, SwarfSweep, when they would otherwise have bought Uptake. It simply made averments that the defender's business grew financially in 2018/2019. This was fatal to the pursuer's prospects of succeeding because it had not set up any factual basis for the court to find that any loss of profits which had been experienced was caused by contractual breach or patent

infringement on the part of the defender. Growth in the defender's business could not properly provide the basis for a finding that any such increase was caused by any breach or infringement on the part of the defender or, crucially, that its increase in turnover was caused by concomitant lost sales which would otherwise have been enjoyed by the pursuer.

[29] Secondly, to the extent that the pursuer attempted to link any of its averments of loss to wrongdoing on the part of the defender, it was only by claiming that the defender had sold its own product to its customers rather than supplying and helping to establish Uptake. However, selling an alternative product was not something which the pursuer averred the defender was obliged to refrain from doing. The only obligation of exclusivity in the Purchasing Agreement (clause 2.1) was incumbent upon the pursuer and not the defender. The defender was not obliged to place a certain or minimum volume of orders with the pursuer. There was no contractual obligation or statutory duty in the 1977 Act to supply Uptake to customers, help to establish it, or refrain from supplying a different product. Put short, the pursuer was complaining about a more general form of economic or commercial wrongdoing on the part of the defender but not about anything which had been anchored in a relevant relationship with any of the contractual obligations or statutory provisions mentioned in the pleadings.

[30] Thirdly, the pursuer made a series of averments about the profits it hoped it would achieve, but did not aver that it would more probably than not have made these profits but for the defender's breaches.

[31] Fourthly, the defender did not have fair notice of the pursuer's case on quantum. The pursuer had not explained how the annual net profit figures it stated were made up, or the influence which the proper performance of the defender's obligations would have had on them. This was an area of the case which the defender ought to be able to put to a skilled

witness for analysis. The pursuer had not produced an expert report which might have been a suitable means of giving the notice required. What was averred was not sufficient to justify the allowance of a proof dealing with a question as complex as a loss of profit analysis caused by breach of contract and patent infringement.

Submissions for the pursuer

[32] On behalf of the pursuer, senior counsel submitted that its averments in their entirety should be admitted to probation and that the defender's preliminary pleas should be repelled.

[33] Dealing first with prescription, the pursuer averred that it first became aware of potential loss on 23 November 2018, when the quinquennium accordingly began for the purposes of the present debate. The action was served on the defender on 17 November 2023 and was thus commenced within the quinquennium. The defender's submission that the claims had prescribed was incorrect. They were timeously raised. The court would not, in general, allow a pursuer to change the basis of its case if it only sought to do so after the expiry of a time-limit which would have prevented it at that stage from raising fresh proceedings: *Pompa's Trs v The Magistrates of Edinburgh* 1942 SC 119, 1942 SLT 118.

Changing the method of formulating the case did not amount to changing the basis or substance of it: *McPhail v Lanarkshire County Council (No 2)* 1951 SC 301, 1951 SLT 167.

Whether a particular case fell on one side of the line or another was inevitably a question of degree: *Hynd v West Fife Co-operative Ltd* 1980 SLT 41.

[34] The pursuer had not changed the basis or substance of its case after the expiry of the quinquennium. The summons as signeted and served on 17 November 2023 adequately formulated its claims of breach of contracts against the defender. In addition to the claim for

patent infringement, the contractual claims relating to breaches of the Purchasing Agreement and Confidentiality Agreement had always formed part of the action. The pursuer had averred that in supplying its own products to customers the defender had breached the Purchasing Agreement and Confidentiality Agreement, and had a plea-in-law based on breaches of (plural) contracts. Both agreements were produced with the summons. The pursuer had referred to the definition of “Confidential Information” in the Confidentiality Agreement and the obligations on the parties in terms of clause 2.1.2 thereof not to use Confidential Information other than for the purpose for which the parties had entered into the Confidentiality Agreement. It had specified its claim by reference to the defender’s actions in formulating and supplying its own products instead of that of the pursuer. Its claim as now adjusted remained one of a breach of clauses 2.1.1 and 2.1.2 of the Confidentiality Agreement. The essence or substance of the claim had not changed.

[35] The pursuer had further referred in the summons to the Purchasing Agreement, and had specified its claim by reference to the same actions of the defender. In the adjustments of 1 April 2025, it had added a reference to clause 5 of the Purchasing Agreement relating to the parties’ obligations of confidentiality and had identified that the defender was in breach of clauses 5 and 6.5 of that Agreement. Again, the essence or substance of the claim had not changed. The pursuer had added further specification to its claim in the adjustment period. That was the refinement of an existing claim and not the introduction of a new claim.

[36] The pursuer accepted that it had added by adjustment a new reference to the Confidentiality Agreement in its averments of loss. That was an error of omission in the original summons. However, that new reference did not change the essence of its case, which had always been about breaches of both the Purchasing Agreement and Confidentiality Agreement. As a matter of legal principle, a claim that was irrelevant in law

could still interrupt prescription: Johnston at 5.13. Provided the obligation founded upon by a pursuer was adequately brought into issue, what mattered was the substance of the position and not perceived inadequacies in the pleadings: *Royal Insurance (UK) Limited v Amec Construction (Scotland) Ltd (No 2)* [2008] CSOH 107, 2008 SLT 825 at [21]; *Tecjet Ltd v Kier Construction Ltd* [2024] CSOH 60, 2024 SLT 1168 at [16] and [17]. A technical approach was not what was called for in this context. Unlike the situation in most of the cases cited by the defender, the pursuer had not changed the basis or structure of its case, or added a new case by way of adjustment or amendment. It had merely added further specification to its existing case in the adjustment period. It was entitled to do so. In short, its claims had been made timeously.

[37] Senior counsel next addressed the defender's claim that clause 11.3 of the Purchasing Agreement represented a contractual bar to the making of a claim for loss of profits. A comprehensive analysis of the approach to be adopted to the task of the construction of commercial contracts was to be found in *Glenfiddich Wind Limited v Dorenell Windfarm Limited* [2025] CSOH 62 at [53] – [62]. A contract had invariably to be construed contextually and in no serious field of discussion was it possible to reach an intelligent view on the meaning of a particular passage without placing that passage in context (*Ashtead* at [10]). In interpreting a contractual provision, the court required to adopt a purposive approach, meaning that it should have regard to the fundamental objectives that reasonable persons in the parties' position would have had in mind (*Ashtead* at [11]). Put another way, the substance of the parties' agreement, construed objectively, should prevail over niceties of wording. A reasonable person in business would not ordinarily enter into bargains that operated in an arbitrary manner (*Ashtead* at [12]). The interpretation of clause 11.3 contended for by the defender abandoned each of these principles on contractual

construction and was wrong on at least four grounds. The overarching purpose of the contractual arrangements between the parties was to assist the pursuer in developing Uptake and gaining access to relevant markets. If the defender stopped selling Uptake, the central purpose of those arrangements would be frustrated and the pursuer's opportunity to profit from its sale would similarly be adversely impacted. Those considerations had to be borne in mind in the task of construing clause 11.3.

[38] The claim for loss and damage arising from the defender's patent infringement was not a claim "arising from, relating to or in connection with the performance or non-performance" of the Purchasing Agreement. The Purchasing Agreement provided the defender with an exclusive right to purchase, market and re-sell Uptake for use in post-drilling and pre-completion wellbore cleanup, swarf recovery and downhole slops handling in certain geographical markets. It was not an agreement granting to the defender any rights in the pursuer's patent. Clause 11.3 therefore could not reasonably be construed as contractually barring a claim arising from patent infringement.

[39] Second, properly construed, clauses 6.2 and 6.3 of the Purchasing Agreement were specific mutual "hold harmless" provisions relating to parties' potential infringement of any proprietary rights belonging to a third party. Clauses 6.1, 6.4 and 6.5 dealt expressly with the pursuer's patented product, and placed contractual obligations on the defender to respect and protect the pursuer's intellectual property rights in it. In clause 6.3, the pursuer was obliged to save, indemnify, defend and hold harmless the defender from all claims, losses and damages for patent infringement arising out of or in connection with the pursuer's obligations under the Purchasing Agreement or from the defender's use of any materials supplied by the pursuer, provided those were used in accordance with the provisions of the Purchasing Agreement. A partially reciprocal obligation was placed on the

defender in clause 6.2, recognising that the defender had no supply obligations under the Purchasing Agreement. The parties had agreed to regulate their allocation of risk by way of an indemnity clause relating to claims of patent infringement brought by third parties for breach of a third party's proprietary rights by the wrongdoing party. Further, where the pursuer was responsible for the supply of a product for use by the defender in terms of the agreement, the pursuer additionally indemnified the defender for any breach of a third party's proprietary rights in the course of that supply. Read as a whole, clause 6 did not operate so that the pursuer was obliged to "hold harmless" the defender for any claims arising from the defender's infringement of the pursuer's patent. Rather, it operated so that neither party might pass on any losses to the other party where the wrongdoing party had infringed a third party patent (or other proprietary) right. It would be an absurd outcome legally and commercially if clause 6, when read contextually and purposively, were to both impose obligations on the defender to protect the pursuer's patent on the one hand (clauses 6.1, 6.4 and 6.5) and then immediately excuse the defender for any consequence of breach of the pursuer's patent on the other hand (clause 6.2). Reasonable business people were most unlikely to contract to allow a wrongdoing party to benefit from its own wrongful acts. In these circumstances, the defender's submission that clause 11.3 should be construed widely to achieve that outcome contradicted and undermined the agreement at clause 6. Such a construction ought to be rejected.

[40] Third, the pursuer had a separate contractual claim for breach of clauses 2.1.1 and 2.1.2 of the Confidentiality Agreement. That was plainly not a claim "arising from, relating to or in connection with the performance or non-performance" of the Purchasing Agreement. The purpose and nature of the Purchasing Agreement and the Confidentiality Agreement were not the same. The Confidentiality Agreement was a standalone and

distinct arrangement, which preceded the Purchasing Agreement. The “hold harmless” scheme in the Purchasing Agreement could not reasonably be read across to apply to claims arising from breaches of the Confidentiality Agreement. Clause 11.7 of the Purchasing Agreement was an “entire agreement” clause which was said to supersede any other agreements related to it. However, the Confidentiality Agreement was not an agreement in respect of the sale of Uptake per se. It instead regulated the parties’ access to each other’s confidential, technical, commercial, financial and marketing information. The pursuer alleged that the defender had breached specific provisions of that separate arrangement. Further, the Confidentiality Agreement could not be construed as “negotiations, representations or agreements related to” the Purchasing Agreement. Therefore, the Purchasing Agreement did not supersede the Confidentiality Agreement. It followed that the “hold harmless” scheme in the Purchasing Agreement could only apply to contractual claims for breach of the Purchasing Agreement.

[41] Fourth, clause 11.3 contained mirroring obligations and the Purchasing Agreement required to be read as a whole in order to give the clause in question its proper context and purpose in the contractual document. The defender’s construction ignored the word “own” in each instance where it appeared in clause 11.3. Properly construed, clause 11.3 provided that a wrongdoing party should relieve an innocent party of any consequential losses caused by the wrongdoing party. In this context, “own” was used to indicate that the consequential loss emanated from conduct of the wrongdoing party (ie it denoted the source or cause of the consequential loss) rather than in the possessive sense, to denote who had suffered the consequential loss. That made sense in the context of the Purchasing Agreement as a whole. Clauses 11.9 and 11.10 thereof were limitation on liability clauses with clause 11.10 stating that there was no limit on liability under clause 11.3. If the defender was correct and

clause 11.3 was properly construed as a mutual hold harmless clause, there would be no need to limit any liability (the value of which, according to the defender, would always be nil). The proper construction of clause 11.3 was that Party A agreed to save, defend, indemnify and hold harmless Party B for Consequential Loss caused by Party A arising from or connected with Party A's performance or non-performance of the Purchasing Agreement. The alternative construction, that parties agreed that claims for consequential losses were not to be made against one another, was inconsistent with the commercial purpose of the parties entering into the Purchasing Agreement. As the defender accepted, the joint rationale for entering into the Purchasing Agreement was to assist the pursuer in developing Uptake's level of application in the field and its access to the market. Therefore, the parties knew that if the defender ceased selling Uptake to its customers in the geographical markets in which it had been given an exclusive right to do so, the commercial rationale for the Purchasing Agreement would not be achieved as Uptake could not be established in those markets. The pursuer would suffer significant consequential losses as its profits depended on developing Uptake's level of application in the field and access to the geographical markets in which it had partnered with the defender. The defender's construction would mean that, having obtained an exclusive right to sell Uptake in its predominant geographical markets, it could effectively thwart the pursuer's business by not selling it in those markets and, with the benefit of the pursuer's confidential information, develop its own product and sell that product instead in those same markets. The defender could do so with impunity in the knowledge that the pursuer would have no financial claims against it under their contract (and it went so far as to suggest that clause 11.3 also barred all claims under a separate agreement and for patent infringement). Such a construction defied business common sense and would produce a commercially absurd outcome, one that no reasonable

person would understand the “hold harmless” scheme in the Purchasing Agreement as having been designed to facilitate. In this context, a mutual indemnity clause that allowed a wrongdoing party to benefit from its wrongful acts which not only caused unlimited loss and damage to the innocent party to the contract but also allowed the wrongdoing party to avoid any liability for that loss and damage was unlikely to be the outcome that reasonable and responsible business people intended. The construction contended for by the defender would achieve that very result. Clause 11.4 required the parties to uphold the highest standards of business ethics in the performance of the agreement, and stated that honesty, fairness and integrity were to be paramount principles in their dealings. That was irreconcilable with the defender’s construction of clause 11.3. The pursuer’s construction of clause 11.3 was to be preferred because of its consistency with both the operation of clauses 6.2 and 6.3 and the purpose of the Purchasing Agreement, as well avoiding an outcome that was commercially unsound and illogical.

[42] Clause 11.11 made it clear that Uptake was sold with no warranty, save that where it was shown to be deficient to the reasonable satisfaction of the pursuer, then the pursuer would, subject to certain conditions, at its sole option either refund the price of the product in question or replace it.

[43] Senior counsel finally turned to deal with the criticisms of the pursuer’s averments on causation and quantum of loss.

[44] The pursuer’s pleadings had always framed its loss and damage arising from the defender’s breaches of contracts and patent infringement in terms of lost sales of Uptake. In particular, it was averred that the value of the pursuer’s total sales of Uptake to the defender in terms of the Purchasing Agreement amounted to around £71,000 before the defender’s purported termination of the Agreement in December 2018; that the pursuer made no profit

from those sales as the proceeds were absorbed into its start-up costs and early research and development of Uptake; and that the pursuer reasonably estimated that its anticipated net profits from the sale of Uptake but for the defender's wrongful actions would have been around £10,000,000. That was a relevant case in causation and quantum of loss. It could be distilled as follows: the Purchasing Agreement provided the defender with an exclusive right to purchase, market and re-sell Uptake for use in post-drilling and pre-completion wellbore cleanup, swarf recovery and downhole slops handling in the United Kingdom, Norway, the Netherlands, Denmark, Saudi Arabia, the United Arab Emirates, Oman, Kuwait and Bahrain. The European and Middle Eastern markets were the predominant markets for such use of Uptake. The defender knew that it was being supplied with Uptake at a discounted rate as part of the pursuer's commercial objective to establish it on the market. It accepted that the parties' joint rationale for entering into the Purchasing Agreement was to assist the pursuer in developing Uptake's level of application in the field and its access to the market. After Uptake had been established in the relevant markets, the pursuer anticipated making substantial profit from its supply. The defender's breach of the Purchasing Agreement and the Confidentiality Agreement and its infringement of the patent deprived the pursuer of the ability to establish Uptake through its exclusive arrangement with the defender in these markets. Rather than supplying Uptake to its customers and helping establish it, the defender instead formulated and supplied its own product to its customers and referred to that product by the same name as the pursuer's. This delayed the pursuer from establishing Uptake in these markets. When the defender stopped supplying Uptake to its customers, that also caused others in the industry to begin to lose confidence in it. The pursuer had only recently come to be in the position of being able to establish Uptake for use in post-drilling and pre-completion wellbore cleanup, swarf recovery and downhole slops

handling. It was in advanced confidential negotiations with interested parties in the Middle East. It had lost profits in the intervening period from the defender's breach of contracts and patent infringement, estimated in the sum of £10,000,000.

[45] Although the issue was one of relevancy and specification, rather than proof at this stage, the pursuer had produced support for its averments on causation and quantum of loss. It had produced an email of 21 June 2017 sharing notes of the meeting between parties on the previous day, when the defender was reporting to the pursuer that Uptake had performed well and that other businesses were trying to react to its success by developing equivalent products, and showing that the defender was seeking to expand the geographical markets in which it would have an exclusive right to purchase, market and re-sell Uptake. The pursuer had prepared a business plan and financial projections in or around April 2017 for the following 4 years. Those projections were conservative as they were based on the projects already underway with the defender and additional smaller revenue from a proposed arrangement with another company. In the plan, the pursuer's projected taxable net profits were: (i) Year 1: £918,553; (ii) Year 2: £1,980,654; (iii) Year 3: £3,534,570; and (iv) Year 4: £5,344,002. The projected total profits in those 4 years were £11,777,779.

Around 15% of the projected total costs and net profits were attributable to the proposed project with the other company. Once that separate project was removed from the projections, the business plan provided a basis for the pursuer's reasonable estimate that its lost profits arising from the defender's breach of contracts and patent infringement would be around £10,000,000. Ultimately, the question of whether that sum was realistic was a matter for proof. The pursuer had averred a relevant case in causation and quantum of loss.

[46] For those reasons, the defender's challenge to the relevancy and specification of the pursuer's case should be rejected and all averments should be admitted to probation.

[47] Upon reflection, senior counsel considered that the statement of the pursuer's case on causation and quantum of loss might advantageously be improved, and sought leave to amend its pleadings. I granted such leave despite the defender's opposition thereto, and heard further brief submissions from parties on the amended averments at an adjourned diet. On behalf of the pursuer, its case in this regard was summarised along the following lines. The rationale of the Purchasing Agreement was to assist the pursuer in the introduction of Uptake to the market, it being a manufacturer and the defender being a service provider in the relevant markets. The defender had initially reported that Uptake had been well received and that other market operators were seeking to emulate it. It was then alleged that the defender used the knowledge it had gained from its association with the pursuer to produce its own competing product and had marketed it instead of Uptake. The pursuer had actual knowledge that the defender had supplied a customer, Total, with its own product, SwarfSweep, as an equivalent to Uptake. The conclusion that it had supplied that product to others might be supported by inference. There was no point in it having formulated SwarfSweep if it did not intend to sell it, and it had a financial incentive to do so in preference to Uptake, especially given the lack of other competing products in the market. If it had not created SwarfSweep by abusing its relationship with the pursuer, and marketed it, customers would have purchased Uptake and the pursuer would have profited from such sales to the extent claimed.

[48] In response, counsel for the defender conceded that the pursuer had now explicitly claimed that it would have made profits but for the alleged wrongs of the defender, but otherwise maintained his objections to the relevancy and specification of these elements of the pursuer's case. In particular, it was clear that the operative cause of the pursuer's claimed loss of profit was the defender's failure to offer Uptake for sale, and the difficulty for

the pursuer was that the defender was under no obligation, contractual or otherwise, to do that.

Decision

Prescription

[49] In *Pompa's Trustees v Edinburgh Magistrates* 1942 SC 119 at 125, 1942 SLT 118 at 122, Lord Justice Clerk Cooper noted as a matter of generality, so far as relevant for present purposes, that the court would not allow a pursuer to "change the basis of his case" if he sought to do so "only after the expiry of a time limit which would have prevented him at that stage from raising proceedings afresh". Changing the basis of a case falls to be distinguished from changing the formulation of the same ground of action; an appropriate analogy was whether a pursuer was seeking to change the foundation of his action, or only making alterations in the superstructure: *McPhail v Lanarkshire County Council* 1951 SC 301 per Lord President Cooper at 309 (Lord Carmont and Lord Russell concurring). Lord Keith added at 310 that the substance of that action had not been changed; it was originally a common law action on the basis of negligence and remained such, albeit with "the averments of duty and breach of duty somewhat altered". What was proposed did not amount to the bringing of a new action outside the applicable time limit. The observations in these cases, although not made in the context of the particular prescriptive scheme introduced by the 1973 Act, in effect provide the parameters for decision which continue to operate today. The principal difficulty with them is that they do not in themselves provide any clear criteria for the determination of into which category any particular set of circumstances may fall.

[50] An example of the difficulties which may arise appears in *NV Devos Gebroeder v Sunderland Sportwear*, in which Lord President Hope affirmed at 1990 SC 303, 1990 SLT 477 that a pursuer should not be prevented from developing or restating a claim after the expiry of the quinquennial prescriptive period if it remained fundamentally the same as that which he had asserted before that point. A practical rather than a technical approach was required, but a claim for implement of one obligation would not save from prescription a different obligation for implement of which no claim had been timeously made. Whether a claim was fundamentally the same or fundamentally different was a question encompassing both matters of fact and law. In the case before the court, it was plain that an obligation of recompense was essentially different from an obligation under a contract, and that was not a mere question of degree (this seemingly a reference to the observation of the First Division in *Hynd v West Fife Co-operative Ltd* 1980 SLT 41 at 43 that whether a particular case would fall on one side or the other of the line sketched in *Pompa's Trs* was "inevitably one of degree"). Lord Dunpark agreed with the Lord President's analysis: 1990 SC 306 – 307, 1990 SLT 479. Lord Coulsfield did not disagree materially in the formulation of the question which had to be answered, namely whether, having regard to the facts founded upon and to any legal ground or grounds referred to, the claim timeously advanced could on a fair reading be regarded as founded on the obligation which was later sought to be enforced. His Lordship also echoed the Lord President's observation that a practical approach should be adopted and that it would be wrong either to try to define obligations in a strict way or to apply a narrow or technical reading to the claim founded upon (1990 SC 309, 1990 SLT 481), but concluded that it had been implicit in the pursuer's case all along that the defender would require to give credit for the value of the goods it had used, that no genuinely new matter of fact had been introduced into the case after the expiry of the quinquennium, and

that the recompense claim lately introduced, although certainly advanced on a different legal basis from that originally proponed, fell nonetheless to be regarded as another way of putting the claim all along implicit in the facts and circumstances narrated by the pursuer, that it was due to be paid for the defender's use of the cloth supplied to it (1990 SC 310, 1990 SLT 481 – 482).

[51] Two observations may be made about Lord Coulsfield's dissent in *Devos Gebroeder*. Firstly, its concentration on whether the facts and circumstances of a late case, as opposed to its legal basis, were fundamentally different from that timeously advanced might be thought to correspond more closely with what has subsequently been identified by the Inner House as the underlying rationale of the requirement to make a relevant claim for the purposes of the 1973 Act, namely that a defender should thereby be given fair notice that a claim is being made against him (*Link Housing Association Ltd v PBL Construction Ltd* [2009] CSIH 54, 2009 SC 653 at [17], echoing observations made about the Law Reform (Limitation of Actions, etc) Act 1954 in *Boyle v Glasgow Corporation* 1975 SC 238 at 250 – 251, 1978 SLT (Notes) 77 at 77 – 78). Secondly, the difference in opinion in *Devos Gebroeder* illustrates that, while the difference between a claim in recompense and a claim in contract may well not be one of degree, the question of how any given set of circumstances falls to be categorised for the purposes of the application of the *Pompa's Trs* test may well transpire to be essentially one of impression on which eminent judicial minds may reasonably differ.

[52] It had become established before, and was affirmed in, *Devos Gebroeder* that a claim made in respect of an obligation under one contract did not fall to be regarded as a claim made in respect of an obligation under a different contract: *MacLeod v Sinclair* 1981 SLT (Notes) 38; *Lawrence v JD McIntosh & Hamilton* 1981 SLT (Sh Ct) 73. In the first of a sequence of decisions made in the context of building contract disputes, *G & A Estates Ltd v Caviapen*

Trustees Ltd (No 2) 1993 SLT 1045, Lord Coulsfield, following the rationale of *Devos Gebroeder*, opined *obiter* that it was necessary to consider whether clauses within one contract should be regarded as separate obligations or as different aspects of one obligation in order to determine whether a claim timeously advanced in relation to breach of one clause had also interrupted the prescriptive period in relation to a later claim made in respect of breach of another. In order to do so, it was necessary to consider the whole context and circumstances of the contractual provisions and the nature and substance of the obligation or obligations in question: 1993 SLT 1049 – 1050). That approach was adopted in the Inner House by Lord McCluskey at 1993 SLT 1059, was not dealt with by Lord Weir, and was – as the headnote to the report puts it – “provisionally” adopted by Lord Penrose. In *Cole v Lonie* 2001 SC 610, 2001 SLT 608 at [16], the same approach was taken by another Extra Division, which observed that:

“As a matter of law it is quite clear to us that however contractual obligations may be expressed, they can indeed give rise to more than one default giving rise to an obligation to make reparation for loss, injury and damage in terms of the 1973 Act and so, for the purposes of the Act, *injuria* occurring at different times”.

In *Musselburgh and Fisherrow Co-operative Society Ltd v Mowlem Scotland Ltd* 2004 SCLR 412 at [50], Lord Eassie held in another building contract case that:

“in a contract such as the building contract where there may be a multiplicity of defects each caused by a different specific failure in a general duty such as a duty of care or workmanlike construction the proper approach for the purposes of the quinquennial prescription is to examine each distinct defect and its correlative failure, in construction or design separately.”

His Lordship recognised that it could in practice be difficult to determine that matter and suggested that a pragmatic approach might be indicated. *Huntaven Properties Limited v Hunter Construction (Aberdeen) Limited* [2017] CSOH 57 and 2018 SCLR 257 may be seen as a further example in this series of decisions.

[53] It is not difficult to see how the line of thought reflected in the building contract cases might be considered to flow from the rationale of *Devos Gebroeder*. However, it is not without its difficulties. Although it may be the case that building contracts are apt to lend themselves to the sort of granular analysis which this approach favours, and there is undoubtedly some intellectual satisfaction to be gained in drawing distinctions (whether with or without accompanying differences) amongst the various provisions of complex contractual arrangements, as a matter of generality contracts are made up of bundles of mutual obligations which are liable to shade into and depend upon each other in an essentially unitary manner. The approach taken in this line of authority does not entail that a timeous case explicitly based on one contractual clause will not interrupt the prescriptive period for a case subsequently stated on the basis of another clause; the question is one of substance and not form. That in turn raises the issue that questions of similarity or difference can only be assessed sensibly and accurately if the context in which the matter arises, and the criteria applicable to the determination of the question in that context, are reasonably clear. The only substantive criterion so far identified in the authorities is whether the timeous pleadings did or did not give fair notice of the nature of the claim ultimately being made against the defender (*Link Housing*). It also ought not to be lost sight of that the basic applicable proposition is that one is looking for fundamental difference between the timeous and putatively late claims in order to justify any conclusion that the latter is time-barred.

[54] Thus, in *Assuranceforeningen Skuld International Oil Pollution Compensation Fund (No 2)* 2000 SLT 1348, Lord Gill had to decide whether a claim was time-barred in terms of section 9 of the Merchant Shipping (Oil Pollution) Act 1971. His Lordship held that the same principle applied to the determination of the question of whether a modified version of a

claim that a party sought to add during the dependence of an action had prescribed under both that section and section 6 of the 1973 Act. That was the *Pompa's Trs* test, namely whether the modified version was presented on a fundamentally different basis. On that test, although the claimant had completely changed its narrative as to the formation of the contract giving rise to the losses it sought from the compensation fund, its claim remained one for compensation under section 1 of the 1971 Act in respect of damage caused by contamination resulting from the discharge or escape of oil, and the damage alleged remained the same. The newly formulated claim was not time-barred.

[55] When the summons in this action was served on 17 November 2023 it narrated the existence of the pursuer's patent, the Purchasing Agreement and the Confidentiality Agreement. The Purchasing Agreement was incorporated as a whole by reference into the summons and specific reference was made to clauses 1 (in particular 1.3), 3, 6.1, 7.1 and 7.2, and to the Appendix defining the geographical areas covered. In relation to the Confidentiality Agreement, the definitions of Confidential Information and Intellectual Property set out above were referred to, as was clause 2.1.2. It was averred that in or about 2018 the defender began to supply SwarfSweep to its customers and that that product contained fibres which were the same as those in Uptake.

[56] The summons then alleged that:

“In formulating and supplying SwarfSweep ... to its customers the Defenders breached the Purchasing Agreement and the Confidentiality Agreement ... In making, disposing of, offering to dispose of, using or importing or keeping SwarfSweep ... in the United Kingdom without the consent of the Pursuer the Defenders have infringed the Patent.”

It went on to aver that “As a consequence of the Defenders' breaches of the Purchasing Agreement *et separatim* the infringement of the Patent the Pursuers have suffered loss and damage.” The extent of that loss and damage was then said to be reasonably estimated at

£6 million, without any specification. The first plea-in-law for the pursuer was in the following terms:

“1. The Pursuers having sustained loss and damage as a result of the Defenders’ breaches of contracts *et separatim* infringement of the Patent are entitled to damages therefor.”

[57] It may thus be seen that the original summons gave notice that it was alleged that the defender had breached both contracts by formulating and supplying SwarfSweep to its customers. The condescence stated that loss and damage had been suffered as a result of breach of the Purchasing Agreement, and the first plea-in-law stated that such loss and damage had been suffered as a result of breaches of (plural) contracts. That (along with the claim of patent infringement which the defender does not maintain has prescribed) remains the basis of the pursuer’s case. Importantly, the factual basis for the allegation that the contracts were breached was set out, albeit at a fairly basic level, from the start. All that has happened since that is of relevance to the prescription issue is that the particular contractual terms relied upon have been expressly identified (their nature having been all along implicit from the description of how the contracts were supposedly breached), the claim that loss was suffered as a result of breach of the Confidentiality Agreement has now appeared in the articles of condescence in addition to in the pleas-in-law, and more detail about the factual basis of the allegations of breach of contract has been provided. In such circumstances, any suggestion that the case now stated is time-barred must depend upon an assertion that the original statement of claim was in itself insufficiently specific to interrupt the prescriptive period at all in respect of the claimed contractual breaches rather than upon the proposition that a specific case has subsequently undergone too extensive a metamorphosis, no such transformation having occurred.

[58] Previous attempts to argue that an original writ was so deficient as not to be effective to interrupt prescription have not fared well. In *British Railways Board v Strathclyde Regional Council* 1981 SC at 93 – 94, 1980 SLT 65 at 66, Lord Kincaig held that section 6 of the Act was “concerned with obligations in general, and not with the particular circumstances under which the obligation comes into existence, either in fact or in law”. It followed, in his Lordship’s view, that “the obligation need only be capable of identification from the terms of the proceedings to satisfy the test, and no detailed specification need be given of the precise ground or grounds” which were the basis of the obligation. The use of the words “in relation to” in section 9 of the Act supported that view and it was sufficient to identify the obligation as grounded on fault, without detailing the particular grounds of fault founded on. That was a mere matter of specification which could be addressed in the course of the action, even after the expiry of the applicable time-bar period. That view was endorsed in the Inner House (Lord Justice Clerk Wheatley at 1981 SC 97, Lord Kissen and Lord Robertson at 103; 1982 SLT at 58, 61 and 62 respectively).

[59] In *Royal Insurance UK* (a case, unlike *British Railways Board*, in contract), Lord Emslie observed at [21] that:

“As shown by cases such as *British Railways Board v Strathclyde Regional Council* and *Wilson v Lothian Regional Council* [1995 SLT 991, 1995 SCLR 634], even gross procedural deficiencies in a summons or other writ, such as the total absence of conclusions or the virtual absence of a condescence, may be insufficient to preclude interruption of prescription by a relevant claim. Short of fundamental nullity, therefore, it seems to me that the precise form and presentation of a claim are unlikely to be material considerations for the purposes of s 9.”

In *Tecjet*, Lord Richardson at [16] agreed, noting that in light of section 9(1) of the 1973 Act, it was:

“apparent that the ‘relevance’ of a claim is to be determined by reference to the obligation in respect of which it is made rather than by reference to the legal relevance of the averments used to frame it.”

[60] It has sometimes been suggested that the decision in *British Railways Board* depends on the fact that it was a case based in delict, and that while it may well be that substantive late development of such a case does not change its fundamental nature as such, the same cannot be said of cases founded on other juridical grounds. However, it is clear that a case in delict may equally be developed in such a way as to effect in it a fundamental change rendering it out of time. In *JG Martin Plant Hire Ltd v Bannatyne, Kirkwood, France & Co* 1996 SC 105, 1996 SLT 1192, the Second Division (Lord Justice Clerk Ross, Lord Morison and Lord Mayfield) held at 1996 SC 111, 1996 SLT 1196 that a proposed amendment would have the effect of changing the basis of the pursuers' action, as it introduced a different ground of fault, the claimed liability to make reparation would thus arise for a different reason, and the claim contained in the minute of amendment was in consequence time-barred. The *Pompa's Trs* test thus applies equally to delictual cases as it does to others, and the reasoning in *British Railways Board*, *Royal Insurance UK* and *Tecjet*, to the effect that the obligation in question need only be capable of identification from the terms of the proceedings, the precise form and presentation of the claim being unlikely to be material in order to interrupt the running of the prescriptive period in the first place, is equally wide-ranging.

[61] In the present case, sufficiently fair notice of the nature of the claims being advanced was given at the outset and that nature has undergone no fundamental change. I shall accordingly refuse to sustain the defender's prescription plea at this stage. Rather, it will be reserved to cater for the eventuality that the defender succeeds in establishing, as it wishes to attempt to do, that the quinquennium had already expired by the time the summons was served on 17 November 2023.

Indemnity/exclusion of liability

[62] The terms of clause 11.3 of the Purchasing Agreement make it quite clear that the pursuer is granting an indemnity (shading into an exclusion of liability on the *Farstad* analysis) in respect of at least certain consequences of some types of activity or inactivity on the part of the defender. Although counsel for the defender's argument latterly shied away from characterising the words "save, indemnify, defend and hold harmless" as amounting to *voces signatae*, it is quite clear, with or without the benefit of the discussion in *Farstad*, that such words indicate a wide-ranging agreement to prevent the defender having to bear the burden of certain liabilities which might otherwise be its.

[63] The next question is whether the claim advanced by the pursuer against the defender falls within the type of liability with which clause 11.3 deals. It was not disputed that the sums sued for fell properly to be described as loss of anticipated profit and thus within the concept of "Consequential Loss" contemplated by the clause. However, parties disagreed about import of the qualification that the Consequential Loss required to be the defender's "own" in order to be covered by the clause. The pursuer, in particular, argued that the qualification meant that the loss in question had to have been caused by the indemnifying party. The defender in essence argued that the word "own" indicated no more than that the indemnity dealt with by clause 11.3 was in respect of Consequential Loss suffered by the indemnifying party as opposed to such loss suffered by anyone else, the indemnity position in other situations being dealt with by other clauses (eg 6.2 and 6.3 in relation to losses suffered by other parties in relation to any alleged infringement of a patent, proprietary or other protected right, and 9.1 in relation to loss or damage to property of the indemnifying party, personal injury to its personnel, and losses to third parties caused by the fault of that party). Approaching the matter firstly by examining the words used in clause 11.3 as part of

the wording of the contract as a whole, the defender's reflexive construction appears to be the most natural. To describe something as "X's own loss" more obviously indicates loss suffered by X as opposed to loss caused by X, although the latter view is not entirely impossible.

[64] However, in order finally to resolve this issue of construction, it is necessary to adopt the approach described in *Ashtead* and *Glenfiddich Wind*; in brief, to examine the words used in context and purposively, having regard to the fundamental objectives that reasonable persons in the parties' position would have had in mind. The context of the contract under examination is the introduction of the pursuer's new product into the oil industry with a view to establishing it in the relevant market, using contacts and opportunities available to the defender but not to the pursuer. The purpose of the contract was to regulate the basis upon which the defender would purchase and distribute the product.

[65] The difficulty for the pursuer is that none of that points towards a conclusion that reasonable parties in such a position would more obviously have bargained for a consequential loss indemnity dealing with losses caused by one or other party than for an indemnity dealing with losses suffered by one or other party. Each of those choices is one which reasonable parties might well have made in regulating the risk arising from the activities which they had respectively contracted to do.

[66] Nor can it be said convincingly that the pursuer's favoured construction fits more seamlessly with related elements of the contract (at least when those elements are themselves properly construed, as discussed below). There is an undoubtable oddity in the circumstance that clause 11.10 states that the limitation of liability provided for by clause 11.9 is not to apply to the indemnities set out in clause 11.3, but the oddity exists whichever of the competing constructions is correct, given that the clause 11.3 indemnity

entirely excludes liability wherever it bites, leaving no room for a mere limitation in any event. It rather appears that clause 11.10 is simply expressing rather clumsily the proposition, obvious in any event, that where there is an indemnity or exclusion of liability, the general limitation of liability provided for in clause 11.9 finds no application. Further, much of the pursuer's broader argument on what commercial sense indicates depends on the suggestion that the purpose of the contract was to enable the development and establishment of Uptake in the relevant market, and that any reading of the contract which would enable the defender not to sell that product to its customers in the geographical markets in which it had been given an exclusive right to do so, with impunity, was not one to be favoured. However, it is beyond argument that nothing in the parties' arrangements obliged the defender to sell Uptake in any particular quantities or indeed at all, as opposed to giving it the right to do so, and the exercise of construction must proceed in that context.

[67] In summary, nothing in the context or purpose of the Purchasing Agreement results in any conclusion that an alteration to the natural meaning of the words used to describe the kind of losses covered by clause 11.3 is called for. It follows that the type of loss covered by the indemnity includes the loss of profits which the pursuer says it has sustained in this case.

[68] That, however, is by no means the end of the matter. In order for the clause 11.3 indemnity to be triggered, the loss in question must not only be of the type described in the clause, but also must meet the description "arising from, relating to or in connection with the performance or non performance of this AGREEMENT". The first thing to note from that description is that the loss in issue has to have some association with the performance or non-performance of the Purchasing Agreement. There are, accordingly, difficulties attending the defender's submission that the indemnity extends to losses arising out of the

Confidentiality Agreement and from infringement of the pursuer's patent. The "notwithstanding" phrase which introduces clause 11.3 makes it clear that the clause takes precedence over other clauses in the Purchasing Agreement, but extends no further than that. The terms of clause 11.7 which declare that the Purchasing Agreement:

"constitutes the entire agreement between the PARTIES hereto with respect to the sale of the PRODUCT and supersedes all prior negotiations, representations or agreements related to this AGREEMENT, either written or oral"

do not alter the fact that clause 11.3 itself expresses itself as applying only to losses "arising from, relating to or in connection with the performance or non performance" of the Purchasing Agreement. It was submitted on behalf of the defender that those words should be read very broadly so as to cover essentially every relevant loss having some association with the relationship of the parties as partially reflected in the Purchasing Agreement, along the same lines as the submission to arbitration of "any dispute arising under this charter" was held to encompass a dispute as to whether the charters in question had been validly rescinded in *Fiona Trust*.

[69] The analogy with that case is, however, a false one. The conclusion that the arbitration clause there was apt to cover such a dispute proceeded upon the familiar proposition that a commercial contract ought to be construed, in the absence of any clear indication to the contrary, along the lines that rational businessmen were likely to have intended from the words used. In the context of an arbitration clause, the Appellate Committee of the House of Lord concluded that such businessmen were likely to have intended any dispute arising out of the relationship into which they had entered or purported to enter to be decided by the same tribunal, and that nothing in the clause in question displaced that presumption (see, eg, Lord Hoffmann at [13]). The provision under examination here is not an arbitration clause but a variety of exclusion or indemnity clause.

Although such clauses are no longer subject to the restrictive or even outrightly hostile interpretation which once applied to them, there is no basis upon which to presume that rational businessmen would have intended such a clause to have the maximum effect to which its words might possibly be stretched. Rather to the contrary, one would approach with some hesitation the suggestion that such businessmen would for no very obvious reason give up rights which they would otherwise enjoy as a matter of general law. The words of clause 11.3 indicate clearly enough that the loss which it addresses must be associated (whether that be by dint of arising from, relating to or being connected with) the performance or non-performance of the Purchasing Agreement. When one questions whether there is any reason, whether from the use of that language or from some other obvious matter of commercial common sense, to suppose that it will suffice if those losses are merely associated in any relevant way with the Confidentiality Agreement or indeed the general law of patent infringement, none suggests itself. The arguments advanced by the defender on the question of commercial sense, both in this particular context and more generally, indicate no more than how its favoured construction would suit its own commercial interests, rather than presenting a convincing case as to what reasonable businessmen in the position of each party might be expected to have wished their bargain to achieve.

[70] A conclusion that the parties did not intend the pursuer's patent rights to be inherently adversely affected by clause 11.3 is bolstered by the fact that the Purchasing Agreement makes it clear that the defender is to respect those rights (eg clauses 6.1, 6.4 and 6.5) and is to act in accordance with the highest standards of business ethics (clause 11.4). The idea that the patent rights in question might in practical terms be set at nought in a question between the parties by operation of the clause 11.3 indemnity is very

difficult to reconcile with the presence of such clauses in the same contract. I further observe that the mutual indemnities granted by each party in relation *inter alia* to patent infringement by way of clauses 6.2 and 6.3 are plainly, as the pursuer submitted, directed at infringement of third party rights. In any event, the indemnity granted by the pursuer only extends to losses associated with the performance of its obligations under the contract, or from the use of materials supplied by it, and it is not suggested that those circumstances pertain to the claims which it advances in the present action.

[71] The Confidentiality Agreement suffers from the problem that the core obligation which it places (by clause 2.1.2) on the defender, namely “not to use the Confidential Information for other than for the Purpose” is in point of form at least stultified by the parties’ failure to fill in the blank which the contract form provided for identification of that Purpose, but the lacuna may be filled by the apparent measure of consensus between the parties beyond the four corners of the contract as to what that purpose was, in general terms at least. In any event, clause 2.1.1 provides that the defender is not without the consent of the pursuer to communicate or otherwise make available the Confidential Information to any third party and in turn provides for an indemnity from the defender in favour of the pursuer against all costs and expenses, damages or loss which may arise through any breach of the Agreement. Again, if the pursuer is able to make out a case against the defender based on breach of the Confidentiality Agreement, it is difficult to see why that case should in practical terms be nullified by the 11.3 indemnity which expresses itself as applying to Consequential Loss “arising from, relating to or in connection with the performance or non performance” of the Purchasing Agreement.

[72] Indeed, the narrowest question of construction posed by clause 11.3 is the extent to which it applies to breaches by the defender of the terms of the Purchasing Agreement itself,

in particular the alleged breaches of clause 5 (which effectively replicates the confidentiality obligation contained in clause 2.1.1 of the Confidentiality Agreement) and clause 6.5 (bar on analysis or reverse engineering of Uptake) upon which the pursuer relies. If the defender did breach those obligations, the activity constituting such breaches could not sensibly be described as having the necessary association with the performance of the Purchasing Agreement. The difficult question of construction is whether breaches of the obligations in that agreement can properly be said to arise from, relate to or be connected with “non performance” of the agreement. Put short, is the concept of non-performance of the contract wide enough to encompass positive breach of the contract? That question is particularly acute in a context where the contract set out the terms on which Uptake might be purchased and marketed by the defender, but imposed no duty on it to do so, and where a failure on the part of the defender to purchase might well give rise to loss of anticipated profit on the part of the pursuer. Is that the situation at which the notion of “non performance” in clause 11.3 is directed?

[73] With some hesitation, I conclude that the very general words used to indicate the necessary connection with the Purchasing Agreement fall properly to be regarded as encompassing breaches of that contract such as are relied upon by the pursuer. A narrower construction, though available on the language of the clause, would necessitate the drawing of very fine distinctions amongst activities done or omitted in the context of the Purchasing Agreement, of a kind which cannot be supposed to have been in the minds of the parties as reasonable business entities. It follows that the clause 11.3 indemnity operates in relation to Consequential Loss said to have resulted from breach of the Purchasing Agreement (and that the pursuer’s averments are irrelevant so far as based on such breaches) but does not

operate in respect of losses (whether for loss of profit or otherwise) said to have resulted from breach of the Confidentiality Agreement or from patent infringement.

Causation and loss – relevancy and specification

[74] After a period of some vacillation as to how it wished to express its case in these regards, the pursuer has clarified (though its averments are still far from tidy) that its essential case is that the defender breached the Confidentiality Agreement and the Purchasing Agreement, and infringed the pursuer's patent, and thereby put itself into a position whereby it was able to produce and sell its own substitute product, causing the pursuer to lose profit which it would otherwise have made from the sale of Uptake.

Although that part of the claim based on alleged breach of the Purchasing Agreement is irrelevant because of the indemnity contained in clause 11.3 thereof, the pursuer's case as a whole is able relevantly to proceed on the allegations of either or both of the other wrongs in question. In particular, properly understood as now clarified, the pursuer's case does not depend on the proposition that the defender was under any obligation to sell Uptake; rather, it depends on the proposition that breach of confidentiality obligations and patent law enabled SwarfSweep to be produced and sold in circumstances where otherwise Uptake would have been bought by customers and would have established itself on the market, to the profit of the pursuer. While it may or may not ultimately succeed in establishing those factual propositions, such a case cannot be said to be bound to fail in point of law, and the defender's plea to its relevancy therefore cannot be sustained at this stage.

[75] As to fair notice, the pursuer quantifies its case by reference to figures contained in a contemporaneous business plan which, it says, is a reasonable estimate of how Uptake would have fared in the market, and what profits it would have generated, had the defender

not committed the wrongs complained of. Properly analysed, the defender's complaint is not that it does not understand the pursuer's position in this regard; rather, it is that it does not believe that it will succeed in making it out. That, again, is something that remains to be seen, but is not a proper basis upon which to sustain a plea of lack of necessary specification. The defender expressed a subsidiary concern that it would not be able to marshal any expert evidence which it might wish to lead on the basis of the pursuer's averments on the quantification of its loss. Any proper concern in that regard, however, is a matter that can and will be addressed as a matter of judicial case management in advance of a proof diet, and does not justify the drastic step of refusing the opportunity for such a proof to take place.

Conclusion

[76] I shall sustain the defender's first plea-in-law to the extent of refusing probation to the pursuer's averments based on breach of the Purchasing Agreement. The case will be put out by order to enable parties to address the court on the averments which each maintains are affected by that decision. *Quoad ultra* the action will proceed to proof before answer with both parties' pleas standing.