



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

**[2025] CSIH 20
CA97/23**

Lord President
Lord Doherty
Lord Ericht

OPINION OF THE COURT

delivered by LORD DOHERTY

in the cause

ROCEP-LUSOL HOLDINGS LIMITED

Pursuer and Respondent

against

LINDAL DISPENSER GmbH

Defender and Reclaimer

**Pursuer and Respondent: Lord Davidson of Glen Clova KC, D Welsh; Morton Fraser MacRoberts LLP
Defender and Reclaimer: Tariq KC; Burness Paul LLP**

8 July 2025

Introduction

[1] The principal issue in this reclaiming motion (appeal) is a dispute about the interpretation of a contract entered into by the parties on 14, 24 and 29 September 2015, with a commencement date of 1 January 2016. The key question is whether the defender is liable to pay royalties to the pursuer for the period between 1 October 2022 and 31 December 2023.

The Contract

[2] The contract is headed "License Agreement". The pursuer and respondent is the "Licensor" and the defender and reclamer is the "Licensee". Hereafter, to assist clarity, we refer to the parties as the pursuer and the defender. The contract contains a Preamble, fifteen clauses and an Annex 1. The terms include:

" § 1 Definition

For the purposes of this Agreement, the following definitions shall apply:

'Licensed Patents' shall mean all patents listed in Annex 1. 'Licensed Territory' shall mean all countries for which the Licensed Patents are in force at the date of signature of the present agreement.

'Products' are aerosol cans with actuator (including the dispenser valve system) - hereafter 'Can Products' - or sole actuators (including the dispenser valve system) - hereafter 'Actuator Products' - falling under the scope of protection of one or more of the Licensed Patents.

'Commencement Date' shall mean 1 January 2016 notwithstanding the date or dates of execution hereof. "Improvements" means all improvements, modifications or adaptations to any product or system (including Products) manufactured under all or any of the Licensed Patents and/or the know how and/or the processes and techniques used to manufacture or assemble the same which might reasonably be of commercial interest or value to any party and which may be made, discovered or developed or acquired during this Agreement.

...

"Year" shall mean any period of 12 calendar months commencing from 1st January of any year.

§ 2 License scope

(1) In consideration of the royalties payable by the Licensee under § 3 with effect from the Commencement Date, the Licensor herewith grants the Licensee an exclusive license on the Licensed Patents to manufacture, assemble and thereafter market, sell and promote Products.

(2) The license is granted for the Licensed Territory.

...

(4) The Licensor shall not during this Agreement manufacture or sell or otherwise deal in any products incorporating any system or apparatus identical and/or similar to the system or apparatus detailed within any of the Licensed Patents.

§ 3 Royalties

For the license under this contract, the Licensee shall pay to the Licensor

(1) For the period from the Commencement Date to 31 December 2020

- a) a royalty of € 0.06 (in words: six Euro cent) per Can Product and €0.03 (in words: three Euro Cent) per Actuator Product for the first five million Products sold within one Year, falling under one or more of the Licensed Patents.
- b) a royalty of € 0.04 (in words: four Euro cent) per Can Product and € 0.02 (in words: two Euro Cent) per Actuator Product for sales of Products exceeding five million Products within one Year falling under one or more of the Licensed Patents.
- (2) For the period from 1st January 2021 to 31 December 2023 a royalty of € 0.02 (in words: two Euro cent) per Can Product and 0.01 (in words: one Euro Cent) per Actuator Product falling under one or more of the Licensed Patents.
- ...

§ 4 Records

- (1) The Licensee shall keep separate and detailed books and records relating to the manufacture and sale of all Products manufactured under one or more of the Licensed Patents in such a way that the precise number of Products commercialized by the Licensee and its sub-licensee(s), the customer and the shipment dates are apparent...
- ...
- (3) The Licensee shall supply to the Licensor within 60 days of the end of each Year a certificate in writing by its auditors or accountants certifying the aggregate of all Products manufactured under one or more of the Licensed Patents and sold or otherwise disposed of by the Licensor [*sic*] or any of its sublicensees during that Year and the amount of royalties due...

§ 5 Reports and payment

- (1) The Licensee shall submit a report within 30 days after the expiration of each calendar quarter (i.e. 31 March, 30 June, 30 September and 31 December in each Year) detailing the information referred to §4(1) and the royalties due. Within the same period, the Licensee shall effect payment of the royalties due to the Licensor by transfer of cleared funds to the Licensor's nominated bank account. The payment shall be made in currency of the home country of the Licensee, all costs of the payment being borne by the Licensee.
- ...

§ 6 Warranties and product liability

The Licensor guarantees the existence of all Licensed Patents on the date of signature of the agreement and that Annex 1 shows the complete list of patents concerning the Products...

§ 7 Improvements

- (1) Improvements on the patented technology or assets developed by the Licensee shall be owned by the Licensee.

- (2) The Licensor shall inform the Licensee about Improvements of the patented technology developed by the Licensor or patent applications concerning such Improvements. The Licensee shall have a preferential right to conclude a license agreement concerning such Improvements or such patent applications or patents.

§ 8 Invalidation of Licensed Patents

In case of invalidation of one or more of the Licensed Patents prior to 31 December 2020, the parties shall negotiate with best efforts a reduction of the royalties taking into account the importance of the Licensed Patent(s) which has (have) been invalidated.

§ 9 Commencement, Replacement of existing agreements, Termination

- (1) The present agreement enters into force on the Commencement Date.
...
- (3) Subject to other provisions herein for earlier termination, the present agreement ends automatically on 31 December 2023.
...
- (5) In the case of a material breach of agreement by one party, the other party shall have the right to terminate this agreement by written notice of termination where the party in breach has failed to remedy the breach within a reasonable time after having been advised in writing of such breach which shall not in any event be more than 28 days.
- (6) With respect to the Licensor, a valid reason for termination under § 9 (4) would include a non-compliance with the reporting and payment periods for royalties as set out in § 5. For the Licensee, a significant reason for termination would be the invalidation of all Licensed Patents listed in Annex 1, prior to 31/12/2020.
...

§ 10 Maintenance of the Licensed Patents

The Licensor shall maintain the registration of the Licensed Patents for the remaining duration of such Licensed Patents. If one or more of the Licensed Patents lapse due to non-payment of the renewal fees, the Licensee can choose to reduce the applicable royalty rate(s) detailed in § 3 by half or terminate this Agreement.
...

Annex 1- Rocep Lusol Holdings Limited
Patent Schedule as at 25th, August, 2015 (B. D. Frutin registered as Inventor)

Description	Patent Number	Country/ Region	EPO Member State	Expiry Date
Double Piston Can (Millennium Pack Piston)	738657	Australia		7 th October 2018
	64483	Bulgaria		
	2306550	Canada		
	98811387.2	China		
	302746	Czech Republic		
	04336	Estonia		
	1021357B	Europe		
			Austria	
			Belgium	
			Denmark	
			Finland	
			France	
			Germany	
			Greece	
			Ireland	
			Italy	
			Luxembourg	
			Netherlands	
			Portugal	
			Spain	
			Sweden	
			Switzerland	
			United Kingdom	
	226540	Hungary		
	4160256	Japan		
	191458	Poland		
	6321951	United States		

Valve Actuator	778056	Australia		22 nd
(Linroc Cam and Lever	239472612	Canada		December
Pack)	42295B3	Europe	Austria	2020
			Belgium	
			Denmark	
			Finland	
			France	
			Germany	
			Ireland	
			Italy	
			Netherlands	
			Portugal	
			Spain	
			Sweden	
			Switzerland	
			United Kingdom	
	4620315			
	6820777	Japan		
		United States“		

The defender's performance of the contract

[3] The defender paid royalties to the pursuer for, and provided reports and certificates relating to, its commercialisation of Can Products and Actuator Products from the commencement date of the Agreement until 30 September 2022. However, it refused to pay royalties or provide reports or certificates thereafter. Neither party terminated the contract before 31 December 2023. It ended automatically on that date (§ 9(3)).

The commercial judge's decision

[4] In this commercial action the pursuer sought an accounting from the defender for products sold or commercialised between 1 October 2022 and 31 December 2023, and payment of such sum in royalties as was brought out by that accounting, failing which payment of €350,000. The defender maintained that no accounting was due because, on a true construction of the contract, § 3 royalties were not payable for any period after 22 December 2020, the later of the two expiry dates of the Licensed Patents; and that after

that date there was no § 4 obligation to keep records or provide certificates and no § 5 obligation to submit reports. After 22 December 2020 there had been no Can Products or Actuator Products “falling under one or more of the Licensed Patents” within the meaning of § 3(2). Indeed, whatever the defender manufactured, assembled, marketed, sold or promoted was not a Can Product or Actuator Product because it did not “[fall] under the scope of protection of one or more of the Licensed Patents” in terms of the definition of Products in § 1. If, contrary to the defender’s argument, the defender had a § 3(2) obligation to make royalty payments after 22 December 2020 and had obligations to keep records and provide reports and certificates, those obligations were the counterpart of the pursuer’s § 2(1) obligation to grant the defender “an exclusive license on the Licensed Patents”. Once all of the Licensed Patents had expired the pursuer was in breach of § 2(1), which breach entitled the defender to withhold performance of its obligations. The defender further contended that if it was contractually obliged to make royalty payments after the expiry of the patents, the obligation was unenforceable because it was contrary to the prohibitions contained in sections 2 and 18 of the Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union.

[5] The commercial judge interpreted Annex 1 as describing two groups of patents. The first group of 11 patents related to Double Piston Cans: those patents’ natural expiry date was 7 October 2018. The second group of 5 patents related to Valve Actuators: those patents’ natural expiry date was 22 December 2020. It was clear from § 3 and other provisions such as § 8 and § 9(6) that the contracting parties regarded the end of December 2020 as a significant date. § 3(2) provided that royalty payments were to continue after that date, albeit at reduced rates. The defender benefited from provisions of the contract which continued to bind the pursuer after 22 December 2020, eg the pursuer’s § 2(4) obligation not

to sell or otherwise deal in any products incorporating any system or apparatus identical and/or similar to the system or apparatus detailed within any of the Licensed Patents. The judge interpreted the phrase “falling under the scope of protection of one or more of the Licensed Patents” in the § 1 definition of Products as meaning “within the scope of the claims of one or more of the Licensed Patents”. That interpretation was to be preferred to the defender’s construction, construing the phrase in the context of the contract as a whole. The judge did not deal expressly with the defender’s further argument that after expiry of the later patents the products which were produced by the defender were not products “falling under one or more of the Licensed Patents” (§ 3(2)) or “manufactured under one or more of the Licensed Patents” (§ 4(1) and § 4(3)), but it may reasonably be inferred that he interpreted those phrases in a similar way, *viz*, as meaning falling within the scope of the claims of one or more of the Licensed Patents.

[6] The judge also concluded that the defender was not entitled to withhold performance of its § 3(2) obligation to pay royalties and its §§ 4(1), 4(3) and 5(1) obligations. A reasonable person reading the contract objectively would appreciate that the Licensed Patents were to expire on the two dates stated in Annex 1, that no valid patent rights could be conferred or otherwise dealt in after those dates, and that the contract had made provision for that circumstance by a reduction in the royalties payable after the later date. The reasonable reader would not conclude that the § 3(2) obligation to pay royalties and the §§ 4(1), 4(3) and 5(1) obligations were dependent on the continuing conferral of patent rights on the defender after the expiry of all of the Licensed Patents. It followed that the pursuer was not in breach of § 2(1) and the defender was obliged to perform its §§ 3(2), 4(1), 4(3) and 5(1) obligations.

[7] The judge dealt with the defender's competition law defences at paras [51] - [60] of his Opinion. He held that both defences were irrelevant.

[8] On 19 September 2024 the judge pronounced decree *de plano* ordaining the defender to produce a full account of its sales or commercialisation of Can Products and Actuator Products between 1 October 2022 and 31 December 2023. The defender produced an account which disclosed sales totalling €273,891.84. On 31 October 2024, on the unopposed motion of the pursuer, the judge pronounced decree for payment by the defender to the pursuer of that sum.

The reclaiming motion

[9] The defender reclaims (appeals) against the interlocutors of 19 September and 31 October 2024. The competition law aspects of the commercial judge's decision are not challenged. The first ground of appeal is that the judge erred in his construction of the contract, and that on a proper construction the defender is not obliged to account for and pay royalties to the pursuer after 22 December 2020. The second ground of appeal is that the judge erred in rejecting the defender's submission that since 22 December 2022 the pursuer has been in breach of its obligation under § 2(1) to grant the defender an exclusive licence on the Licensed Patents, and that because of that breach the defender is entitled to withhold performance of its obligations under §§ 3(2), 4(1), 4(3) and 5(1).

Submissions for the defender

Ground of appeal 1

[10] The law concerning the interpretation of contracts is well-established and has recently been set out by the court in *Lagan Construction Group Ltd v Scot Roads Partnership*

Project Ltd [2023] CSIH 28, 2024 SC 12 and *FES Ltd v HFD Construction Group Ltd* 2025 SC 51.

The parties' intention is most obviously gleaned from the language which they have used.

Where a contract is a complex and sophisticated one negotiated and prepared by skilled professionals, as was the case here, it should be interpreted principally by textual analysis (*Lagan Construction*, para [10]; *FES*, para [24]). Where no ambiguity arises there is no basis to search for an alternative meaning using commercial common sense or any other aid to the construction of ambiguous phrases (*Lagan Construction*, para [11]; *FES*, para [26]).

[11] On a proper construction of the contract the defender is not obliged to account for or pay royalties for commercialisation of the patented technology after 22 December 2020. That is the conclusion which ought to be reached on an ordinary reading of §§ 1, 2(1), 3, 4(1) and 4(3). § 3(2) does not require the defender to pay royalties for its commercialisation of the technology after 22 December 2020. The obligation to pay royalties only subsisted until all of the Licensed Patents had expired. Even if manufactured items sold by the defender after that date were Can Products or Actuator Products in terms of § 1, they were not Products because they did not "[fall] under the scope of protection of one or more of the Licensed Patents" (§ 1); and they did not "[fall] under one or more of the Licensed Patents" (§ 3(2)). Similarly, the § 4(1) and § 4(3) obligations concerning records refer to "all Products manufactured under one or more of the Licensed Patents". It is clear reading § 2(1) and § 3 together that the liability to pay royalties in § 3 is predicated upon the grant of the exclusive licence in § 2(1). Once the last of the Licensed Patents expired there was no licence (exclusive or otherwise) and therefore no corresponding obligation to pay royalties. The commercial judge erred in deciding otherwise. In particular, he erred in interpreting the phrase "falling under the scope of protection of one or more of the Licensed Patents" in the definition of "Products" in § 1. That phrase is not ambiguous. Its clear meaning is

“protected by a Licensed Patent”. The judge’s interpretation does not give the word “protection” its ordinary and natural meaning. Moreover, the ordinary and natural meaning of the phrase “falling under one or more of the Licensed Patents” in § 3(2) is that it relates to Can Products and Actuator Products which were commercialised before the last expiry date of one of the Licensed Patents. It is not without significance that § 2(4), which imposed an obligation upon the pursuer during the whole term of the Agreement including for three years after the expiry date of the second group of patents, had been carefully drafted to refer to “products” rather than the defined term “Products”.

[12] Senior counsel accepted that the defender’s construction results in § 3(2) having no content, but he submitted that it does less violence to the integrity of the contract than the judge’s construction. He also maintained that the reason the defender had agreed to royalties continuing after 22 December 2020 was that it had been under the misapprehension that one of the patents, 6820777, would expire on 31 October 2022. He acknowledged that this alleged unilateral and uninduced error was not relevant to ascertaining the objective meaning of the language which the parties had used.

Ground of appeal 2

[13] The commercial judge erred in holding that the pursuer is not in breach of its § 2(1) obligation after 22 December 2020. That provision obliged the pursuer to grant the defender “an exclusive license on the Licensed Patents”. The term “exclusive license” in § 2(1) has the same meaning as the defined term “exclusive licence” in section 130 of the Patents Act 1977. So defined, an exclusive licence is a licence “... conferring on the licensee ... to the exclusion of all other persons ... any right in respect of the invention to which the patent or application relates...”. The pursuer is in breach of § 2(1). After 22 December 2020 it could

not confer a licence to exploit any right protected by any of the Licensed Patents. Other rights which the Licence Agreement conferred on the defender and which continued after 22 December 2020 had nothing to do with the rights protected by the Licensed Patents (cf *Bondax Carpets Ltd v Advance Carpet Tiles* [1993] FSR 162, Hoffmann J at p 165). The commercial judge erred in concluding that, properly interpreted, § 2(1) did not oblige the pursuer to grant the defender an exclusive licence to exploit the Licensed Patents after all of the patents had expired. On an ordinary and natural reading of § 2(1) it did oblige the pursuer to do that, and the pursuer was in breach after 22 December 2020. Consequently, the defender is entitled to withhold performance of its obligations to pay royalties (§ 3(2)), keep records (§ 4(1)), supply certificates (§ 4(3)), and submit reports (§ 5(1)).

Submissions for the pursuer

[14] The canons of contractual construction are not in dispute. They are relevant to both grounds of appeal. The contract requires to be construed as a whole. The court ought to identify “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean” (*Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, para [15], quoting Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14).

Ground of appeal 1

[15] § 3(2) obliges the defender to pay royalties for its commercialisation of products up to 31 December 2023. In terms of § 9(1) and § 9(3), the contract period, absent earlier termination, was 1 January 2016 until 31 December 2023. The contract was not terminated

by either party before 31 December 2023. § 10 envisaged the possibility that royalties may continue to be paid even though patents had lapsed due to non-payment of renewal fees. § 5(1) requires the defender to submit a report to the pursuer within 30 days after the expiry of each calendar quarter (being 31 March, 30 June, 30 September and 31 December “in each Year”) detailing the information referred to in § 4(1) and the royalties due, and to make payment of those royalties within the same period. § 4(1) requires the defender to keep separate and detailed books and records relating to the manufacture and sale of all Products manufactured under one or more of the Licensed Patents. § 4(3) requires the defender to supply the pursuer with a certificate certifying those matters within 60 days of the end of each Year. § 3 provides that “For the license under this contract” the defender would pay to the pursuer the royalties referred to in § 3(1) for the period to 31 December 2020 and that it would pay the pursuer the royalties referred to in § 3(2) for the period from 1 January 2021 to 31 January 2023. The royalty rates in § 3(2) were lower than those in § 3(1), in recognition that during that period all of the patents would have expired. That was a fact of which the parties were well aware at the time of contracting. It was clear from the terms of Annex 1. The phrase “falling under one or more of the Licensed Patents” where it occurs in § 3(1) and § 3(2), and the expression “falling under the scope of protection of one or more of the Licensed Patents” in the definition of Products in § 1, mean falling within the claims of one or more of the Licensed Patents, whether or not the Licensed Patents have expired. That construction makes sense when regard is had to the other terms of the contract. It gives content and effect to §3(2), which is plainly what the parties intended. By contrast, on the defender’s construction of those terms § 3(2) would never have had any content: it was defunct from the outset. The parties contemplated that in return for the pursuer granting the defender (i) the exclusive rights to exploit the Licensed Patents before their expiry and

(ii) the other rights which the contract conferred on the defender, the defender would pay not only royalties while the patents subsisted but also royalties for periods after the expiry of each of the patents until 31 December 2023. The total consideration for entering into the contract with the defender was to be provided not just over 4 years but during a period of 7 years. Spreading royalty payments over 7 years was a perfectly sensible commercial arrangement. It also recognised that the pursuer undertook obligations towards, and conferred rights upon, the defender, which rights and obligations survived the expiry of the patents. Part of the background circumstances was that, although others could exploit the inventions after expiry of the patents, no-one other than the pursuer or defender would be likely to be able to manufacture items using the various inventions in early course. With others significant delays were to be expected while products were designed, developed, manufactured and marketed. As a result, the obligations undertaken by the pursuer which persisted after 22 December 2022, particularly the obligation in § 2(4), were of significant value to the defender.

Ground of appeal 2

[16] The commercial judge was correct to hold that the reasonable reader of the contract would see that the patents would expire on the dates stated in Annex 1 and that no licence to exploit the patent rights could be granted after such expiry. The reasonable reader would appreciate that the contract had made provision for the patents' expiry by providing that a lower rate of royalties be paid thereafter until the end of the contract. On a proper construction of § 2(1) the pursuer's obligation was to grant the defender an exclusive licence to the patents for the periods up to their natural expiry. The reasonable reader would understand that the parties cannot have intended that the pursuer be obliged to grant the

defender a licence - exclusive or otherwise - to exploit patents which had expired: it would be impossible for the pursuer to do that. Accordingly, the pursuer is not in breach of § 2(1), and the defender is not entitled to withhold performance of its obligations under § 3(2), § 4(1), § 4(3), and § 5(1).

[17] In fact, the pursuer did not grant a licence to any other person to use any of the patented inventions. No-one else had an option to call upon the pursuer to grant him a licence to exploit the patents (cf *Oxford Nanopore Technologies Ltd v Pacific Biosciences of California Inc* [2018] Bus LR 353, where there was such an option but the licence remained exclusive because the option was not exercised). No-one else exploited the inventions. The defender had an exclusive licence while the patents subsisted.

Decision and reasons

[18] There is no dispute about the relevant canons of construction. They are summarised by Lord Hodge JSC in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at paras 10 - 13:

“10 The court’s task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning...

11 ... Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the *Rainy Sky* case, para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the *Arnold* case, paras 20, 77. Similarly, the court must not lose

sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12 This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold* case, para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13 Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions.”

[19] We are told that the parties had skilled professional advisers who were involved in advising on the negotiation and drafting of the License Agreement. Our impression is that the contract is one of moderate complexity, and that the quality of the drafting is at best reasonable. This is a case where we consider that the contract may be construed principally by textual analysis, but contextual factors are not irrelevant. Part of the relevant factual background is that the parties understood at the time of contracting that after the natural expiry of all of the patents a third party who wished to exploit them by bringing new

products to the market would be likely to require to spend a significant period of time developing and launching them.

Ground of appeal 1

[20] We have great difficulty accepting that at the time of contracting the defender believed that one of the patents expired on 22 October 2022. The expiry dates of the two groups of patents were clearly stated in Annex 1, and other provisions of the contract (eg § 8 and § 9(6)) plainly proceeded on the basis that the second group of patents would all expire in December 2020. In any case, even if the defender did have that belief, its (uninduced and unilateral) error is irrelevant to the interpretation of the contract.

[21] The meanings of some of the provisions of the License Agreement are clear beyond peradventure. The commencement date was 1 January 2016 (§ 9(1) read together with § 1) and, subject to provisions for its earlier termination, the contract was to end automatically 7 years later on 31 December 2023 (§ 9(3)). The Licensed Patents with which the contract was concerned were the 16 patents listed in Annex 1 (§ 1 and Annex 1). Eleven of those patents related to the Double Piston Can. Their expiry date was 7 October 2018. The remaining 5 patents related to the Valve Actuator. Their expiry date was 22 December 2020. In terms of § 2(4) the pursuer was bound during the whole term of the Agreement not to manufacture or sell or otherwise deal in any products incorporating any system or apparatus identical and/or similar to the system or apparatus detailed within any of the Licensed Patents. In terms of § 7(1), Improvements on the patented technology or assets deployed by the defender were to belong to the defender. Further, in terms of § 7(2) the pursuer was obliged to inform the defender about Improvements of the patented technology developed by it or patent applications concerning such Improvements, and the defender had

a preferential right to conclude a license agreement concerning such Improvements or such patent applications or patents. The definition of Improvements in § 1 is a wide one. It extends to any product or system manufactured under all or any of the Licensed Patents and/or the know how and/or the processes and techniques used to manufacture or assemble products which might reasonably be of commercial interest to any party “and which may be made, discovered or developed or acquired *during this Agreement*” (emphasis added). § 2(4) and § 7 were provisions which could be of significant benefit to the defender even after the expiry of all of the Licensed Patents.

[22] That brings us to § 2(1). In terms thereof the pursuer granted the defender “an exclusive license on the Licensed Patents to manufacture, assemble and thereafter market, sell and promote Products”. On an ordinary and natural reading, the grant was of an exclusive licence to exploit the Licensed Patents by manufacturing, assembling, marketing, selling and promoting Products until the natural expiry of each Licensed Patent. § 2(1) does not purport to grant any greater patent right or rights. That construction is consistent with the fact that the obligation assumed by the pursuer in § 10 is to maintain the registration of the Licensed Patents until their natural expiry. By contrast, the construction urged by the defender does not give the words used their ordinary and natural meaning. More than that, it is absurd. It would involve the pursuer undertaking an obligation which it knew it would inevitably breach on the natural expiry of the patents.

[23] Before leaving § 2(1) we note that the grant is made “In consideration of the royalties payable under § 3”. That is significant. It indicates that the royalties referred to in § 3(2) were part of what the parties agreed would be paid for the grant of the exclusive licence on the Licensed Patents.

[24] We turn to § 3. The reasonable reader would take from the clause that the parties intended that there were some circumstances in which royalties would continue to be paid after 31 December 2020, albeit at lesser rates than up to that date. The opening words “For the license under this contract” could refer to all of the obligations the defender undertook under the License Agreement, or merely to the grant of the exclusive license in § 2(1). We favour the former view, but whether or not that is correct is not critical to our interpretation of § 3(2). As already noted, that sub-clause provides:

“(2) For the period from 1st January 2021 to 31 December 2023 a royalty of € 0.02 (in words: two Euro cent) per Can Product and 0.01 (in words: one Euro Cent) per Actuator Product falling under one or more of the Licensed Patents.”

“Can Products” and “Actuator Products” are defined in § 1 as “aerosol cans with actuator (including the dispenser valve system),” and “sole actuators (including the dispenser valve system)” respectively. The parties cannot have intended that “falling under one or more of the Licensed Patents” meant that the technology used in the products involved the exploitation of an unexpired Licensed Patent. That would make no sense because they knew that by 22 December 2020 all of the Licensed Patents would have expired. The defender’s construction would have involved both parties agreeing to a provision which they knew could never be triggered. On the defender’s approach the clause would be meaningless whereas the pursuer’s construction makes sense of it.

[25] The construction of § 3(2) which we favour sits better with other provisions of the contract than the defender’s construction does. § 2(1) contemplated the grant of the exclusive licence being in consideration of the royalties payable under § 3 - not just those paid under § 3(1). The defined term “Year” (§ 1), which appears in several provisions of the contract, means “any period of 12 calendar months commencing from 1st January *of any year*” (our emphasis). While it remains possible that the particular context in which the word is

used may require that it has a different meaning, there is nothing to suggest that it does not have its defined meaning in § 4(3) or § 5(1). A Year is any year in the 7-year duration of the contract. The § 4(3) obligation to supply a certificate certifying all Products manufactured under one or more of the Licensed Patents and sold or otherwise disposed of during a Year and the royalties due applies to each of the 7 years. The same goes for the § 5(1) reporting and payment obligations.

[26] That takes us to the defender's argument about the effect of the definition of Products in § 1. The proposition is that since Products must "[fall] under the scope of protection of one or more of the Licensed Patents" it is clear that the record keeping obligations in § 4 and the reporting and payment obligations in § 5 only apply in respect of products the manufacture etc of which involved the exploitation of at least one of the Licensed Patents before it expired. Therefore, the argument runs, those provisions are consistent with the defender's interpretation of § 3(2) and with there being no obligation to account for royalties after 22 December 2020, and are inconsistent with the pursuer's interpretation of § 3(2) and with there being such an obligation to account.

[27] However, we observe that § 3(2) does not contain the word Products. This issue relates to § 4 and § 5, and it turns upon the meaning of the expression "falling under the scope of protection of one or more of the Licensed Patents" in the definition of Products in § 1. We agree with the commercial judge that the expression is open to construction. Two possible meanings are (i) that the product was manufactured etc exploiting at least one of the Licensed Patents at a time before that patent expired; or (ii) that the product was manufactured etc exploiting technology which fell within the claims of at least one of the Licensed Patents, whether or not that patent had expired. Like the judge, we are satisfied that the reasonable reader, looking at the whole terms of the contract, and being mindful of

the factual background we have described, would conclude that meaning (ii) is what the parties intended (cf *Bristol Repetition Limited v Fomento (Sterling Area) Limited (No 2)* [1961] RPC 222). That interpretation results in consistency between § 3(2), § 4 and § 5. It enables the contract to operate for its 7 year duration in the way that the parties intended. In our view, for the same reasons, the phrase “manufactured under one or more of the Licensed Patents” in § 4(1) and § 4(3) ought also to be construed in a similar way, viz as meaning falling within the scope of the claims of one or more of the Licensed Patents.

[28] In our judgement much less damage is done to the integrity of the contract by giving the disputed provisions the meanings suggested by the pursuer than by giving them those suggested by the defender.

[29] For these reasons we reject ground of appeal 1.

[30] We did not understand either party to rely upon business common sense as an interpretive aid, and we have reached our conclusions without reference to it. Had we had regard to it, it would not have assisted the defender. We see nothing commercially odd about the contract providing for the defender to pay royalties over a period longer than the durations of the Licensed Patents. *Bristol Repetition Limited v Fomento (Sterling Area) Limited (No 2)* is an example of such a licence. Even on the defender’s interpretation of the contract, the parties were content that royalties be paid after the expiry of some of the Licensed Patents which the defender exploited, provided at least one Licensed Patent which had not expired was being exploited. That is a common arrangement where a licence relates to several patents or a group of patents (see eg *Hansen v The Magnavox Electronics Co Ltd* [1977] RPC 301, Lord Denning MR at pp 306-7; *Terrell on the Law of Patents* (20th ed), para 18-98). We are also mindful that the defender was to have the benefit of provisions such as § 2(4) and § 7 during the whole term of the contract, and that it would only be liable to make

§ 3(2) payments if it chose to manufacture and commercialise Can Products or Actuator Products during the period referred to in that sub-clause: whereas, on the defender's construction of the contract, if products were commercialised during that period the pursuer would receive no royalties, notwithstanding the obligations the pursuer continued to require to perform.

Ground of appeal 2

[31] It is common ground that the pursuer duly performed its obligation to grant an exclusive licence on the patents for the periods before their expiry. Ground of appeal 2 is premised upon construing § 2(1) as also having obliged the pursuer to grant an exclusive licence on the patents for further periods until 31 December 2023. The premise is unsound, for the reasons we have explained. It follows that ground of appeal 2 is ill-founded.

Disposal

[32] The reclaiming motion is refused.