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[2026] CSOH 101
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OUTER HOUSE, COURT OF SESSION

[2026] CSOH 96

CA5/26

OPINION OF LORD LAKE

In the cause

JIGSAW BIDCO LTD

Pursuer

against

TERRY ALLAN AND OTHERS

Defenders

Pursuer: McBrearty KC et Manson; Morton Fraser MacRoberts LLP
1st and 3rd Defenders: Thompson KC et Massaro; Shepherd & Wedderburn LLP
2nd Defender: Ower KC et McWhirter; Brodies LLP
4th Defender: Dean of Faculty KC et Tosh; Stronachs LLP

6 October 2026

[1] Prior to February 2023, the defenders between them owned all the shares issued by Global Energy (Engineering and Construction) Limited. In terms of a Share Purchase

Agreement ("SPA"), they each sold the shares they owned to the pursuer. As is common for such agreements, it set out a number of statements defined as Warranties. In terms of Clause 7.2, the sellers warranted that each of the Warranties was true and accurate as at the date of the SPA. The pursuer avers that in some respects the Warranties were not true and accurate at that date and have brought this action against the defenders seeking damages for breach of contract.

[2] The SPA defines "Claim" as meaning, "a claim for breach of any of the Warranties (other than the Title and Capacity Warranties)". Clause 8.7 of the SPA is in the following terms:

> "The Sellers shall not be liable for a Claim [ ] unless notice in writing providing reasonable details as to the nature of the Claim or the claim under the Tax Covenant (in so far as it is known to the Buyer) and, as far as is reasonably practicable, the amount claimed, has been given by or on behalf of the Buyer to the Sellers:
>
> 8.7.1 [ ]
>
> 8.7.2 [ ]
>
> 8.7.3 in any other case, within the period of eighteen months commencing on the Completion Date."

The parts omitted from the passage quoted relate to Tax Warranties and Indemnity Claims and do not have a bearing on the issues that are in dispute. The term "Completion Date" is defined as the date of the agreement – 8 February 2023. Clause 8.14 of the SPA states:

> "Nothing in this Clause 8 applies to exclude or limit the liability of the Sellers if and to the extent that a Claim [ ] arises or is delayed as a result of fraud or wilful concealment by any of the Sellers, their agents or advisers."

[3] The pursuer avers that the period of 18 months specified in Clause 8.7 expired on 8 August 2024 (Article 44). The pursuer does not make any averment of notice having been given prior to that date or at any time since. The defenders have taken pleas that the action is barred in terms of Clause 8.7. The pursuer has responded with averments that there was

wilful concealment of their Claim and relies on Clause 8.14 to argue that the time limit in Clause 8.7 does not apply as a result. The defenders responded to say that the effect of Clause 8.14 is not to disapply Clause 8.7 for good but is only that time passing during which there was wilful concealment does not count towards the 18 month limit in Clause 8.7. A further issue was raised as to whether Clause 8.14 disapplies the limits in relation to all defenders or only a defender that has engaged in fraud or wilful concealment. Subject to one qualification which I note below, the parties considered that this matter turned on the proper interpretation of the SPA and could be resolved on the pursuer's pleadings as an issue of relevancy and I heard a debate accordingly.

The correct approach to interpretation

[4] There was no dispute as to the approach that should be taken to interpret the SPA. The authorities as to the correct way to construe contracts were reviewed by Lord Drummond Young in *Ashtead Plant Hire Co Ltd* v *Granton Central Developments Ltd* 2020 SC 244, paragraphs [9] to [17]. He summarised the correct approach to interpretation by reference to the judgment of Lord Clarke in *Rainy Sky SA* v *Kookmin Bank Co Ltd* [2011] 1 WLR 2900, paragraph 14 as follows:

> "[T]he ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant . . . . [T]he relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

Lord Drummond Young also noted the following further principles which should be applied:

> "[11] Two further principles of construction are important. First, in interpreting a contractual provision the court should adopt a purposive approach.

> […]
>
> [12] Secondly, in construing a contract a court may have regard to what is generally referred to as commercial (or business) common sense.
>
> […]
>
> [16] It is perhaps useful to mention three features of general business conduct that will frequently be relevant…First, contracts are based on the principle of consideration, or exchange…it is normal to find that the obligations of one party are broadly equivalent to the obligations of the other party. …Secondly, the principle *pacta sunt servanda* applies; parties expect to perform their contractual obligations. For this reason they will normally avoid the risk of unreasonable or disproportionate burdens. Thirdly, predictability is generally regarded as important."

[5] In addition, the defenders referred me to *Multi-Link Leisure Developments Ltd* v *North Lanarkshire Council* 2011 SC (UKSC) 53 where Lord Hope of Craighead said, "Effect is to be given to every word, so far as possible, in the order in which they appear in the Clause in question" (paragraph [11]).

[6] As the words the parties have used must to be understood in the factual and legal context and having regard to the parties' objectives, it is appropriate to start with those matters before turning to examine the wording itself.

Objective/aim

[7] The defenders argued that clauses were intended to achieve a balance between the vendors and the purchaser and that the intention was to limit the duration of their exposure to claims and to avoid stale claims. For the pursuer, it was also submitted that achieving certainty was a goal, but it was relevant that the defenders knew the background situation at the time of the transaction and the buyer did not. I agree that all these are relevant factors, but they do not bear directly on the critical provision – Clause 8.14.

[8] When a company is purchased by people not previously involved in running it, there is a clear imbalance in the knowledge possessed by the parties. That is one of the reasons that share purchase agreements usually require the seller to warrant that certain statements are true. If the seller will not give the warranty in the terms sought or makes a disclosure against it, the purchaser will be better informed of the factual position. That awareness may be reflected in the price to be paid. That approach was adopted here as a means to address the difference in the knowledge possessed by the parties.

[9] While the warranties address the information imbalance, the limitation on warranty claims in Clause 8.7 has a different and counterbalancing purpose. Once the purchaser takes control of the company it is in a position to familiarise themselves with the company so the discrepancy in their knowledge of the situation should reduce or disappear. The inequality in possession of information should be reduced or disappear over time. The vendor, on the other hand, unless there is an element of deferred consideration, is likely to wish to sever their ties with the company and will not wish to have potential claims outstanding for the full prescriptive period. They may want to settle their tax position, reinvest the proceeds of sale in another business or, perhaps, retire. Clause 8.7 reflects these considerations by requiring that any claims be intimated within a defined period and barring claims not made on time irrespective of their merits. While the cut off that it imposes on claims may appear principally to benefit the vendor, the certainty that it provides may benefit both parties. Clearly, it will take some time for the purchaser to become aware of any claims that exist. The parties here have agreed on a period of 18 months as being the time within which the purchaser should be aware of any claim that exists and would be in a position to intimate it then to the vendors.

[10] Clause 8.14 provides an exception to the cut off where there has been wilful concealment or fraud. The obvious justification for this is that, where either has taken place, the 18 month period may no longer be sufficient for the purchaser to become aware of a problem. Fraud may be defined as a contrivance to deceive so both it and wilful concealment entail action on the part of the vendor that has the effect of preventing the purchaser becoming aware of the true position. It is natural that where there has been deliberate action by the vendor to hide something, they should not be allowed to found on the fact that the purchaser did not discover it within the period agreed for claims to be cut off. That, in my view, is the clear objective of Clause 8.14.

[11] The pursuer submitted that the imbalance between the parties in terms of their knowledge of the company and its affairs should affect the construction of the clause. It was submitted that it meant that a reasonable person would construe the contract on the basis that a person in the position of the purchaser would not wish to lose valuable rights. In any event, there was a presumption that the parties should not be taken to have given up valuable rights unless that intention is made clear by express words.

[12] The imbalance in parties' respective knowledge must have been known to the parties at the time they entered into the contract. It is clear, however, that they have sought to address it by means of warranties. That being so, it is not then necessary to construe the terms on the assumption the pursuer is vulnerable or the weaker party or to seek to compensate further for that imbalance which the parties have already addressed. Clause 8.14 is clearly intended as a Clause which will cut off claims after the 18-month period and this necessarily entails that at that time the pursuer may have rights they are unable to vindicate and will lose. This must have been the intention of the parties. The

words used do make it clear that there was an intention that valuable rights would be given up once the specified period passed.

Business commonsense/absurdity

[13] As is often the case when issues of contractual interpretation arise, all parties submitted that their interpretation was more consistent with commercial common sense and their opponents' interpretation was arbitrary or absurd. For the pursuer it was submitted that an interpretation of Clause 8.14 which meant that the limitation period was only suspended while the fraud or wilful concealment took effect gives rise to arbitrary and absurd results. It was submitted that it was highly improbable that commercial parties would have entered into a contract in which the party wishing to make a claim would be left unclear as to how much time remained to them to give notice of it to the contract breaker. It was claimed that the party wanting to claim would not know for how long the fraud or wilful concealment had taken effect and by how much the 18 month period would be extended. They said that although the guilty party might be aware of the likely length of the extension, the innocent one would not, and the court should not adopt an interpretation which worked to the detriment of the innocent party in this way. It may not always be a straightforward exercise to determine the period during which the fraud or wilful concealment operated. However, as noted in submissions, a similar situation arises in relation to section 6(4) of the 1973 Act and it is operated without undue difficulty.

[14] It was argued also that if the intention of the parties had been to produce a system such as that in the 1973 Act they would have adopted the same wording. I do not think it is possible to make an assumption that merely because the parties have not adopted the wording of a statute, they do not intend that the same result should be achieved.

[15] In making their argument, the pursuer said that if given the meaning for which the defenders argue, the mechanism "reduces the period for a claim from 5 years (as prescription) to 18 months, all to the advantage of the contract breaker" and creates a windfall for the seller. I do not agree with this analysis. I do not think it is correct to characterise the limitation period as being simply to the advantage of the contract breaker nor do I agree that it creates a windfall for the defenders. As has been noted in many cases, the operation of both prescription and limitation will, in many circumstances, create a benefit to a party who has carried out a wrongful act. That is not a reason for the courts to refuse to give effect to these provisions which seek to prevent stale claims. Where there was an apparent intention that some claims would be barred, the operation of the clause is not a windfall. Here, the parties have agreed a different cut off point from that in the 1973 Act, as they are free to do, and the court should give effect to that agreement. I therefore reject the pursuer's argument that the court should avoid an interpretation which limits the time available to claim to a period shorter than the general law.

[16] The pursuer describes the effect of the defenders' preferred interpretation of the clause in various ways such as "capricious", "unfair", "arbitrary", "absurd" and "imbalanced". I do not think any of these adjectives are accurate. If the effect of the Clause is to extend the 18-month period by the length of the time that the vendor's actings have kept them in the dark, that is not arbitrary. The justification is seen quite easily in that time that passed while they were kept in the dark should not count against them. The pursuer did not explain in what respect this was "imbalanced". On the defenders' interpretation, the pursuer is given back time lost as a result of the fraud or wilful concealment. Neither can it be unfair, absurd or imbalanced to extend the time in this way.

If anything, to disapply the time limits altogether because of a brief period of concealment would justify these adjectives, as submitted for the defenders.

[17] When considering the pursuer's argument that they would not know how long they have to raise a claim when they become aware of it as a result of a matter ceasing to be concealed, it is necessary to have in mind that Clause 8.7 does not require that legal proceedings are raised within the 18-month period. It simply requires that the claim is notified to the vendors within that period. In terms of the information that is to be provided in the notification, all that is required is that the purchaser should provide "reasonable details" and, "as far as is it reasonably practical, the amount claimed". This is not an onerous requirement. It is something that could readily be done as soon as the matters come to the attention of the purchaser. It would not require expert reports or forensic analysis. A letter would suffice. That being so, it is not clear why the pursuer is put in a difficult position. If they become aware of something, they can send a letter intimating a claim at once. The dilemma envisaged in the submissions for the pursuer - whether or not to intimate a claim - is an illusory one. The whole concept of the limitation clause is that claims should be communicated at the earliest opportunity and without delay. If the time when the purchaser became aware of a claim was towards the end of the 18-month period, and even more, if it was after that period had expired, the obvious action would be to give notification at once. The purchaser would then have the remainder of the statutory prescriptive period to raise any court action. In the event that there has been fraud or wilful concealment, that period might be extended by the operation of section 6(4).

[18] I do not accept the submission that the effect of this interpretation is that the period of 18 months which the parties have deemed reasonable "could become, very suddenly, a

period of weeks, hours or minutes, depending on the period of concealment or fraud alleged or admitted". The period remains 18 months or more throughout.

Interpretation *contra proferentem*

[19] The pursuer argued that as the clause imposed a time bar that could prevent a claim being brought, it should be construed restrictively as would be the case for an exclusion clause (Lewison, *The Interpretation of Contracts*, paragraph 12.150) and that if there is any doubt over the interpretation of Clause 8.14, application of the *contra proferentem* principle meant that it should be resolved in their favour. Counsel pointed out that in *Grant* v *International Insurance Company of Hanover Ltd* 2021 SC (UKSC) 1 and *Impact Funding Solutions Ltd* v *Barrington Support Services Ltd* [2017] AC 73 the Supreme Court referred to the doctrine in a way that suggested it was still capable of application.

[20] I do not consider the doctrine of interpretation *contra proferentem* assists in this case for a number of reasons. The first is that it does not appear to me that there is real ambiguity. The second is that it is not clear which party drafted the clause and falls to be seen therefore as the *proferens*. Although the pursuer argued that the rule had the effect that ambiguity should be resolved against the party relying on the clause, the rule as stated in MacBryde, *Contract*, is that

> "An ambiguous expression is construed against the interests of the party who has drafted it."

As Clause 8.14 removes the contractual cut off in some situations, it might have been thought that the pursuer was the party that put it forward and that it should therefore be construed against their interests. The final reason is related to this in that the clause we are considering is Clause 8.14 which modifies the 18 month cut off for claims.

[21] There can be no real doubt that Clause 8.7 was intended to restrict the vendors' liability – as I have noted above, that is its purpose. It defines the parties' bargain rather than just seeking to exempt a party from the consequences of having breached an obligation. That has been undertaken. The rule as expressed in Lewison is that "a time bar Clause must be clear and unambiguous if effect is to be given to it". In my view, Clause 8.7 which is the one that imposes the limit, is clear and unambiguous and meets this test.

Ordinary meaning of the words used

[22] I turn now to the meaning of the words used in Clause 8.14 and the issue of whether the effect of fraud or wilful concealment by one vendor disapplies the Clause 8 limits only in relation to that vendor or for them all. In this regard, there was a difference of approach among the defenders. For the fourth defender and the second defender it was argued that each defender has to be considered individually. If *that* defender has been guilty of fraud or wilful concealment, the protection of Clause 8 will be lost to them but it will continue for the others. They draw support for this from the fact that the SPA stipulates that liability is to be joint rather than joint and several and it envisages that warranty claims need not be advanced against all defenders. They argue while a "guilty" seller will be aware of the need to take action, an "innocent" seller will not and will therefore still be in need of the protection given by Clause 8.7.

[23] I prefer the submissions for the pursuer and the fourth defender that where there has been any fraud or wilful concealment, all vendors lose the protection of the limits. The wording of Clause 8.14 is quite clear in this regard. It says that nothing in Clause 8 operates to limit the liability of the "Sellers" where there has been the specified conduct "by any of the Sellers". The SPA has a Clause stating that the singular shall include the plural and vice

versa unless the context requires otherwise and this is such a context. The use of the expression "any of the Sellers" makes it apparent that it is dealing with a single seller and the loss of the entitlement to limit applied to the Sellers. Had it been intended that this was just the miscreant defender it would have been more straightforward to state that. In addition to the linguistic approach, the purpose of the Clause as noted above is relevant. Fraud or wilful concealment may deprive the purchaser of the knowledge they need to bring a claim against any of the vendors and not just the one responsible for the fraud or wilful concealment. It is nothing to the point that in general fraud is a personal matter (*culpa tenet suos auctores*). It would be an error to construe Clause 8.14 from the standpoint of the vendors as if it was punishing them for the fraud or concealment. In context it is a provision that is intended to avoid the time bar in Clause 8.7 operating unfairly.

[24] I do not consider the fact that liability on the vendors is stipulated in the SPA to be joint rather than joint and several has any bearing on this. As between the defenders, liability is apportioned on the basis of their share of the sale proceeds rather than any culpability. The desire to avoid joint and several liability can be seen as a wish on the sellers not to be saddled with the entire liability for a claim if the purchasers decided only to pursue one defender. I do not consider that it has any bearing on the issue of disapplication of the limits.

[25] In my view, the correct position is that if there is fraud or concealment, the time limits in Clause 8.7 cease to apply in relation to that claim in respect of any of the defenders. That is entirely consistent with what is said in the wording of Clause 8.14 when it refers to "the liability of the sellers".

[26] The second issue to be considered in this section concerns the effect of Clause 8.14 and whether it has the effect that time passing while there is fraud or wilful concealment

does not count towards the 18-month time limit, as the defenders argue, or whether the effect is that the time limit is simply disapplied.

[27] The outcome of this depends on the effect given to the words "to the extent that". Are they to be read as a causal link between the fraud or wilful concealment and claims such that those where there is such a link have no time limits (the approach for the pursuer) or are they to be read as saying the disapplication of the limits takes place only to the extent that the claim arose as a result of or was delayed by the fraud or concealment (the approach for the defenders).

[28] For their submission, the pursuer argues that "to the extent that" is intended to denote the requirement for a causal connection between the Claim in question and the fraud or concealment. However, there are two phrases capable of denoting a causal relationship in Clause 8.14; "to the extent that" and "as a result of". The pursuer's approach does not give meaning to the second. In my view, the position of these two references in the sentence indicates how they were intended to apply. The term "as a result of" sits between reference to the Claim arising or being delayed and the reference to fraud or wilful concealment. The expression "to the extent that", on the other hand, sits between and links the exclusion in the opening words to the Claim arising or being delayed. The layout of the Clause therefore sits more naturally with the defenders' construction. In addition, the defenders' construction of the words "to the extent that" accords with the use of the term "delayed" later in the sentence and, in turn, with the existence of a time limit for claims in Clause 8.7 and is consistent with the apparent purpose of the Clause considered above. The apparent objective is that the buyer should not lose a claim as a result of passage of time if the existence of it has been hidden from them, and there is no reason why the time limit should

be removed entirely rather than being adjusted to protect the pursuer's position. If anything, it is the pursuer's interpretation that would result in a windfall to them.

Conclusion

[29] The consequence of the above is that the pursuer's averments are irrelevant as the Claim was not intimated within the time specified in Clause 8.7. Counsel for the pursuer submitted that if this was the view I reached, I should nonetheless not dismiss the action. Prior to the summons being called, a motion was enrolled for recovery of evidence under section 1 of the Administration of Justice [Scotland) Act 1972. I granted an order appointing commissioners to preserve various forms of computer data and commissions were duly executed. Since then, there has not been an order that the preserved data should be subject to interrogation to find any particular entries. In essence, the pursuer seeks that they should now be allowed to do this with a view to establishing that at least one defender was aware of but nonetheless concealed the facts giving rise to the Claim. The defenders argued that debate had been fixed and that the relevancy of the pursuer's case should be assessed in the form that it was at the time of the diet, as the pursuer had had its chance to plead its best case.

[30] In this regard I was referred to *EFT Finance Ltd* v *Hawkins* 1994 SC 34. While it would generally be expected that a party would have pled its case by the time of the debate, the circumstances here are unusual in that the matters which the pursuer alleges are, of their nature. clandestine. In my view they should be given an opportunity to consider whether they are able to establish that the defenders had the necessary knowledge. In the summons it is averred that the pursuer became aware of the need to consider making a claim on 12 August 2024. The action was raised on 3 February 2026. There was therefore a period of

just under 18 months between the pursuer becoming aware of the Claim and raising the action. There would have to be knowledge on the part of a defender for almost all of the 18 month period following conclusion of the agreement if the time bar is not to operate.

[31] The case will be put out by order to consider any motion from the pursuer as to review of the materials preserved from the commissions.