OUTER HOUSE, COURT OF SESSION

[2026] CSOH 61

CA101/25

OPINION OF LORD SANDISON

In the cause

(FIRST) LORRAINE MURRAY; (SECOND) IAN JAMES MURRAY; and (THIRD) STEPHEN COSH

Pursuers

against

ATLAS FM LIMITED

Defender

Pursuers: Tosh; BTO Solicitors LLP
Defender: Boffey; DLA Piper Scotland LLP

26 June 2026

Background

[1] The pursuers in this commercial action are former members of a company named Confida FM Limited. They sold their shares in that company to the defender (then known as Atlas Contractors Limited) in terms of a Share Purchase Agreement ("SPA") dated 31 July 2023. Relevant terms of the SPA are set out in the appendix to this opinion.

[2] An initial consideration of £2.15 million in total was paid to the pursuers on 31 July 2023. The SPA also contemplated the further payment of deferred consideration of up to £150,000 and earnout consideration of up to £1.1 million. The first £50,000 of the deferred

consideration was to be payable dependent on the value of the company's net assets at completion of the share sale and purchase transaction in comparison to a particular amount. It is common ground that that value fell below the stipulated amount and that accordingly the first anticipated slice of deferred consideration did not become payable and that £448,000 of the deficit falls to be set off against any earnout consideration which would otherwise fall due for payment. The second anticipated slice of deferred consideration depended on the amount of the company's annualised turnover as at 31 January 2024. Parties are in dispute as to whether any of that element of consideration falls to be paid; for reasons shortly to be explained, the pursuers maintain that it is payable *in toto*, and the defenders say that none of it is payable.

[3] As to earnout consideration, four potential payments of up to £200,000 and a final one of up to £300,000 were contemplated by the SPA, their actual amounts to be determined by reference to the company's financial performance, measured in specified ways, during defined periods. In order to enable the calculation of any sums due by way of the second slice of deferred consideration or as earnout consideration, the defender was *prima facie* obliged to supply the pursuers with management accounts in a specified format for each such period.

[4] The pursuers maintain that no such management accounts were provided by the defender. Their primary position is that in those circumstances, any conditionality attending their right to payment of consideration falling to be calculated by reference to the management accounts flies off, and they seek an order for payment *de plano* of the maximum sums payable by way of such consideration. Alternatively, they seek damages in the same amounts in respect of the defender's supposed breach of contract constituted by its failure to provide the management accounts.

[5] The defender avers that following the acquisition, the company's operations were, from 1 February 2024, and with the agreement of the first pursuer, progressively integrated into the defender's operations, including its billing, accreditation, and operational management functions, with the consequence that it no longer has a separate balance sheet or overheads. It claims that it has provided the pursuers with sufficient financial information, in particular management performance reports from 2023 to 2026, to enable determination of turnover and gross profit as defined in the SPA and thus allow an independent verification of what is or is not due by way of deferred and earnout consideration. It avers that the format of management accounts prescribed by the SPA contains additional information which is no longer available following the integration but is not relevant to the required calculation.

[6] Further, the defender avers that, once it became apparent that there would be no payment of the first slice of deferred consideration and that there would be a shortfall to be taken account of in the calculation and payout of earnout consideration, the pursuers agreed that the timing of the provision of management accounts would be treated flexibly until the shortfall was made up. It maintains that there were various meetings with the first pursuer to review accounts and that she agreed that the format in which the management accounts were being provided was acceptable and sufficient, thus acquiescing in that format and representing that the pursuers were content with it. That is said personally to bar the pursuers as a whole from maintaining that any technical breach of contract in the format of the accounts gives rise to liability to pay what would otherwise not be contractually due to the pursuers under the SPA, although the only relative plea-in-law is to the effect that the pursuers are barred by mora, taciturnity and acquiescence from insisting in their conclusions in the action.

[7] The pursuers accept that an integration exercise has taken place, but maintain that it was carried out without their knowledge or consent. They deny that any management accounts were provided at meetings with the first pursuer, and maintain that there was no agreement to or acquiescence in any departure from the contractual arrangements, and that, in any event, any such agreement or acquiescence would not have constituted an effective variation of the relevant provisions of the SPA or an implicit waiver of any rights and remedies arising under them because the SPA requires any variation of its terms, or waiver of any right arising under it, to be in writing.

Submissions for the pursuers

[8] On behalf of the pursuers, counsel submitted that the SPA provided for potential payment to them of deferred and earnout consideration, dependent on the financial performance of Confida FM Limited in certain financial reporting periods. Paragraph 3.1 of Schedule 4 to the SPA set out the first step in the envisaged procedure for determining whether such payments were due, and if so in what amount, and bound the defender to use its reasonable endeavours to ensure that management accounts in respect of each such period were prepared and supplied to the first pursuer as soon as was practically possible after its expiry, and in any event within 15 business days of the end of each such period. Properly construed, that imported an obligation to use reasonable endeavours to produce management accounts as soon as practically possible and an absolute obligation to produce them within 15 days. Paragraph 5 of Schedule 4 required that those management accounts be supplied in the format set out in Schedule 3. The format of the accounts was plainly regarded as important, so that a failure to produce them in that format amounted to a material breach of contract from which consequences would flow.

[9] As and when the relevant accounts were supplied, Schedule 4 made provision for them to be reviewed, adjusted and agreed or, failing agreement, for notice of any disputed issues to be given and for those issues to be referred to an independent chartered accountant for final determination within prescribed time limits. That contractual framework could not operate unless and until management accounts were supplied by the defender to the first pursuer.

[10] No management accounts had been supplied to the first pursuer in the format, or otherwise in accordance with the procedure, prescribed by Schedule 4. The defender denied in point of form having failed to provide management accounts to the first pursuer, but did not make any positive averment as to how it claimed to have done so. Although the defender was only initially required to use its reasonable endeavours to ensure that management accounts were supplied to the first pursuer, where none been produced it would be in breach of that obligation unless it was able to establish that it did use reasonable endeavours: *Mactaggart & Mickel Homes Ltd* v *Hunter* [2010] CSOH 130 at [58]. It did not offer to do so. Its failure was a breach of contract. It sought to soften the force of that conclusion by describing what had occurred as a "technical breach", but that concept was one entirely unknown to the law of contract. It maintained that it had already provided the pursuers with sufficient financial information to enable an independent verification of what was due to them under the SPA to be carried out and so any "technical breach" of its obligation to supply management accounts had caused no loss to the pursuers. In other words, it suggested that it did not matter that it had not done what it contracted to do, because it had done something else that was essentially good enough. That proposition was fundamentally misconceived. It flew in the face of the principle that lay at the root of the

whole of the law of contract and was enshrined in the maxim *pacta sunt servanda*: *Lloyds TSB Foundation for Scotland* v *Lloyds Banking Group plc* [2013] UKSC 3, 2013 SC (UKSC) 169 at [47].

[11] The defender further suggested that the first pursuer, on behalf of all three pursuers, agreed or acquiesced in the provision of management accounts in an alternative format in respect of earlier accounting periods and, as a result, the pursuers were personally barred from maintaining that any technical breach in format gave rise to a liability to pay them what would otherwise not be contractually due to them. There were three problems with that proposition. Firstly, the defender did not claim to have acted in reliance on any representation or acquiescence on the part of the pursuers. The acts or omissions which were said to amount to acquiescence were averred to have taken place from September 2024. By that time, the defender averred that it had already carried out an integration exercise which rendered it impossible for it to supply management accounts in the format prescribed by Schedule 4 to the SPA. The suggestion that that integration was effected with the first pursuer's agreement lacked material specification. It was appropriate to assume that the defender was unable to say any more on the matter and, on that assumption, it was bound to fail to establish any such agreement: *EFT Finance Ltd* v *Hawkins* 1994 SC 34 at 40D - E, 1994 SLT 902 at 906F - G. In the circumstances, nothing would be achieved by any inquiry. The defender's case of personal bar was bound to fail: *Dragados (UK) Ltd* v *DC Eikefet Aggregates AS* [2021] CSOH 117 at [24] - [26].

[12] Secondly, although the first pursuer was designated as the sellers' representative in the SPA and was entrusted with certain specified functions (eg, to receive any management accounts supplied by the defender), the SPA did not purport to appoint the first pursuer as agent of the pursuers and the defender did not offer to prove that she was appointed as agent with any actual or apparent authority to bind the other pursuers to any agreement.

Personal bar was personal. In the case of acquiescence, it was personal to the person who acquiesced. It did not affect third parties, such as the second and third pursuers: *Brown* v *Baty* 1957 SC 351, 1957 SLT 336.

[13] Thirdly, the proposition advanced by the defender could not be sustained in light of the terms of Clause 11 of the SPA, which provided that any variation or waiver had to be in writing and that any failure or delay to exercise any right or remedy provided by the SPA or by law could not constitute waiver of any such right or remedy or prevent its future exercise or enforcement. In the circumstances, in order relevantly to aver a case of personal bar, the defender would require to offer to prove that there was not only waiver of the right to insist in the supply of management accounts in accordance with Schedule 4 to the SPA, but also waiver of the no variation and no waiver provisions in Clause 11. It made no such offer. Reference was made to *MWB Business Exchange Centres Ltd* v *Rock Advertising Ltd* [2018] UKSC 24, [2019] AC 119, [2018] 2 WLR 1603 at [10], [12] and [15] - [16]; *GPP Big Field LLP* v *Solar EPC Solutions SL* [2018] EWHC 2866 (Comm) at [203.3]; *CGI IT UK Ltd* v *Agilisys Ltd* [2018] CSOH 112 at [46] - [49]; *Sumitomo Mitsui Banking Corp Europe Ltd* v *Euler Hermes Europe SA (NV)* [2019] EWHC 2250 (Comm), [2019] 2 CLC 349 at [64]; and *Barclays Bank Plc* v *VEB.RF* [2024] EWHC 3088 (Comm) at [27] - [30]. For these reasons, the defender's averments in relation to personal bar were irrelevant.

[14] Where a debtor impeded or prevented the purification of a condition precedent to his liability, the condition was held purified: *Mackay* v *Dick & Stevenson* (1881) 8 R (HL) 37, 45 per Lord Watson; *SDG Tulloch Homes Ltd* v *European Development Company (Hotels) Ltd* [2016] CSOH 36 at [22] - [24]; *Scottish Ministers* v *Scotland Gas Networks plc* [2023] CSOH 77 at [40]; McBryde, *The Law of Contract in Scotland* (3rd Edition, 2006),

paragraph 20.17; cf *King Crude Carriers SA* v *Ridgebury November LLC* [2025] UKSC 39, [2025] 3 WLR 707.

[15] The supply of the management accounts by the defender to the first pursuer and their subsequent agreement or determination were conditions precedent to the defender's obligation to make payment of the deferred and earnout consideration. As debtor in those obligations, it had prevented the purification of those conditions precedent by failing to supply management accounts. There was nothing further that the pursuers, as creditors, could do to fulfil those conditions. They fell to be treated as purified. In the circumstances, it was clear that the defender was liable to make payment of the deferred and earnout consideration as concluded for. Alternatively, and in any event, it was clear that the defender was in breach of contract, and the pursuers were entitled to damages therefor: *King Crude* at [100].

[16] Decree *de plano* should be pronounced as concluded for. Alternatively, there should be excluded from probation the defender's averments directed at resisting it being found in breach of contract, and restricting any further procedure to an inquiry as to the quantum of damages.

Submissions for the defender

[17] On behalf of the defender, counsel submitted that proof before answer should be allowed. The defender offered to prove that, on a proper construction, and applying the calculations provided by the terms of the SPA, no further sums beyond those already paid were due to the pursuers. Indeed, it offered to prove that the pursuers had been overpaid and owed a balance back to it. Material had been made available to the pursuers to vouch and verify the defender's calculation of what was due (or not due) to them.

[18] The pursuers' analysis, and the outcome they sought from the action, was ambitious. It avoided engaging in the reality of the situation, which was that the company underperformed and that under the bargain struck, they had already had what they were entitled to. The pursuers' case asked the court to consider a technical breach under the SPA to support the conclusion that the entirety of the potential remaining consideration due to them under the SPA was now payable. That analysis was wrong and in any event sat ill at ease with the compensatory principle, produced a windfall result, and offended against the concepts of fairness and justice in remedies.

[19] The *nomen juris* of "condition precedent" might not be an entirely helpful one. It reflected a fashion, imported from English law, to classify certain clauses of contract. While that might be thought a more sophisticated analysis, Scots law had long recognised that such an approach tended to obscure, rather than to assist. The adoption of such an analysis might cause more uncertainty about breach and its consequences, rather than lend any greater clarity: *Turnbull* v *McLean and Company* (1874) 1 R 730. The more simplistic, but perhaps reliable, question which Scots law asked, was: "was there a breach, and what is the loss caused by that breach?". When posed through that lens, the answer, in this case was, obviously, none (or at the very least, that factual enquiry would be necessary before reaching that conclusion on the facts). Latterly, that wisdom had also been recognised in English law, with the Supreme Court recently departing from the analysis of Lord Watson in *Mackay* v *Dick & Stevenson* in *King Crude*. The Supreme Court's reasoning in *King Crude* was to be preferred. It avoided the extremity of the aspirational result contended for by the pursuers' primary case.

[20] The absence of the availability of a "condition precedent" analysis did not cause the pursuers any prejudice. Rather, it allowed the court to ascertain (i) the nature of the breach;

(ii) its result and (iii) what would compensate by way of damages for that breach, instead of delivering a windfall to the pursuers, to which they would not otherwise be entitled. The breach in this case was curable. It was acknowledged that the cure might not be easy to deliver in precisely the format demanded in Schedule 3 (because of the company's integration), but any absent information from the prescribed format would have no bearing on the calculation or its outcome. Put short, the complaint was truly one of form over substance. The provision of information in any particular documentary format did not alter the result of the calculations on what was payable.

[21] In relation to the defender's case of personal bar, reference was made to *McMullen Group Holdings Ltd* v *Harwood* [2011] CSOH 132 per Lord Hodge at [69] - [76] and to *Serco Ltd* v *Forth Health Ltd* [2020] CSOH 48 per Lord Ericht at [38] - [44], in both of which cases observations were made about the equitable and flexible nature of personal bar and its related concepts, and where pleas that its effect had been restricted or ousted by clauses analogous to Clause 11 in the SPA currently under consideration had been thought appropriate for reservation for decision after proof before answer.

Decision

[22] The basis upon which the pursuers seek decree *de plano* in respect of the maximum sums which could be payable in respect of the second slice of deferred consideration and all the tranches of earnout consideration is that the failure of the defender to furnish management accounts in the form contemplated by Schedule 3 to the SPA amounted to an impediment or prevention placed by it in the way of purification of a precondition to its liability to make payment of those sums, and that the law in such circumstances regards that precondition as satisfied, a principle most closely associated with the speech of Lord Watson

in *Mackay* v *Dick & Stevenson*. The recent decision of the UK Supreme Court in *King Crude*, that that principle does not and should not form part of the law of England, necessarily calls into question whether it is and should be part of the law of Scotland.

[23] Erskine's Institute (Bell's Edition, 1773) at III, I, 6 states that:

> "… A conditional obligation, or an obligation granted under a condition the existence of which is uncertain, has no obligatory force till the condition be purified; because it is in that event only that the party declares his intention to be bound, and consequently no proper debt arises against him till it actually exist; so that the condition of an uncertain event suspends, not only the execution of the obligation, but the obligation itself … Such obligation is therefore said in the Roman law to create only the hope of a debt. Yet the granter is so far obliged, that he hath no right to revoke or withdraw that hope from the creditor which he had once given him …"

[24] At III, iii, 85 it is noted under reference to the Digest, 50.17.161 (see below) that:

> "Conditions, where they depend merely on accident, must actually exist before the granter becomes liable; but where the non-performance is owing to the opposition made by him whose interest it is that condition shall not exist, the law, which suffers no person to profit by his own fraud, looks on it as purified or fulfilled."

[25] Bell's Principles (4th Edition, 1839) at §50, states:

> "If the debtor, bound under a certain condition, have impeded or prevented the event, it is held as accomplished …"

citing for this proposition Pothier's *Traité des obligations*, part 2, chap. 3, sec. 198ff. (see below).

[26] In *Pirie* v *Pirie* (1873) 11 M 941, an individual sought to frustrate his brother's right to hold and use a capital sum left by their deceased father by preventing the persistence of the state of affairs which required to pertain for that holding and use to continue. Lord Justice Clerk Moncrieff stated at 949:

> "There can be no higher authority on such a question quoted in this Court than the rules and principles of the civil law. Far more scientific than the law of England, and far more copious than our own, the civil law in this case, as in many others, furnishes the only repository where such difficulties are satisfactorily solved. To this authority I shall shortly refer, and I think it clear and conclusive.

> There are three texts in the Digest on this subject. The first is in L. 35, tit. 1, 81, in relation to conditions in testaments – '*Tunc demum pro impleta habetur conditio, cum per eum stat qui, si impleta esset, debiturus erat*.' [Paulus 21 quaest.] The second is in L. 45, tit. 1, 85, sec. 7, and relates to conditions in contracts – '*Quicunque sub conditione obligatus, curaverat ne conditio existeret nihilominus obligetur*.' [Paulus 75 ad. ed.] The third is in the 161st law of the last title, *De Regulis Juris*, and is of general import. It is in these terms – '*In jure civilis receptum est quotiens per eum cujus interest conditionem non impleri, fiat quominus impleatur, perinde haberi ac si impleta conditio fuisset; quoad ad libertatem, et legata, et ad heredum institutionem perducitur*.' [Ulpianus 77 ad.ed.]
>
> These texts, for my present purpose, require no comment at all. They are perfectly precise and to the purpose. … "

[27] His Lordship noted that the Digest texts had been fully illustrated by the commentators, citing Robert Joseph Pothier, *Pandectae Justinianae in novum ordinem digestae* (1748 - 1752), i. 35, tit. 1, secs. 11 - 20; his *Traité des obligations* (1761), part 2, chap. 3, sec. 212:

> "*C'est une regle commune à toutes les conditions des obligations, qu'elles doivent passer pour accomplies, lorsque le débiteur qui s'est obligé sous cette condition en a empêché l'accomplissement … Ceci est une consequence de cette regle de droit,* in omnibus causis pro facto accipitur id, in quo per alium mora sit quominus fiat, L. 39. de reg juris. *On ne peut néamoins dire, que c'est par le fait du débiteur qu'une condition n'a pas été accomplie, & qu'elle doit en conséquence être reputée pour accomplie, lorsque ce n'est qu'indirectement, & sous dessein d'en empêcher l'accomplissement, qu'il y a mis obstacle ...*"
>
> ("It is a rule common to all conditions of obligations, that they be taken to be accomplished when the debtor, who is obliged under such condition, has prevented its accomplishment … And this is a consequence of the rule of law, *in omnibus causis pro facto accipitur id, in quo per alium mora sit quominus fiat*, L. 39. *de reg juris*. It may however be said, that it is by the act of the debtor that a condition is not accomplished, and that it ought not to be considered as accomplished, when it is only indirectly, and without any intention of preventing its accomplishment, that he has placed an obstacle in the way of it …)";

his *Coutume d'Orléans* (1740, 1760) in the introduction to tit. 16, sec. 5, 2; and also to Jean Domat, *Lois civiles dans leur ordre naturel* (1689), Tit I, Sect, IV, XVII:

> "*Si l'évenement ou l'accomplissement d'une condition est empêché par celui des contractans qui a interêt qu'elle n'arrive point, soit qu'elle dépende de son fait, ou non, la condition à son égard sera tenue pour accomplie. Et il sera obligé à ce qu'il devoir faire, ou*

> *donner, ou suffrir au cas de la condition*" (for which the passage in the Digest at 50.17.161 was cited).
>
> ("If the occurrence or accomplishment of a condition is prevented by that one of the persons contracting who has an interest that it should not arrive, whether it depend on his own act or not, the condition, so far as he is concerned, shall be held as accomplished, and he shall be held to that which he was bound to do, to give, or to suffer, as if the condition had been accomplished.")

[28] Lord Cowan at 952 regarded the matter as one of the true construction of the will. His Lordship also cited the passage from Pothier's Obligations set out above and referred to the support it received from the civil law texts also noted. Lord Benholme stated at 952 - 953 that, in his younger days, "whenever the principles of the civil law could in such cases of equitable construction in equity be applied", they were recognised as the law of Scotland, and observed that:

> "the case is to be solved on a very general principle, - namely that where a party pleads a condition, which he himself has been the means of defeating, he cannot take any benefit from the failure of that condition",

in support of which the passage from the Digest at 50.17.161 was cited. Lord Neaves stated at 953 that:

> "the civilians have laid down the principle, that wherever a man for whose benefit a condition is created prevents the fulfilment of the condition he cannot claim as if the condition had failed".

That proposition was said to flow from the civil law principle that "*Pro impleta habetur conditio quum per eum steterit qui, si impleta esset, debiturus erat*" (a variant of the Digest at 35.1.81 set out above), which was described as "a principle founded on equity, and which we are bound to apply, on grounds of plain justice, independently of the authority which the civil law possesses".

[29] It was not only in the Scottish courts that the principle expressed in the Digest at 35.1.81 was being applied at this time; in the Supreme Court of the Cape of Good Hope,

another jurisdiction inclined towards the civil law, it and Pothier's Obligations 2. 3. 212 were cited by De Villiers CJ in *Myburgh & Co* v *Protecteur Fire Assurance* Co (1878) 8 Buchanan 152 at 157 in holding that an insurance company which had previously categorically refused to entertain a claim could not rely on the subsequent failure of the claimant to comply with a policy obligation to furnish proof of the claim within a defined period as a ground to refuse it, on the basis that, the company having rendered the furnishing of such proof nugatory, it had in effect prevented its accomplishment.

[30] One turns to *Mackay* v *Dick & Stevenson* itself, beginning in the Inner House at (1880) 7 R 778. The action was one for payment of the price of an excavator which had been supplied to Mackay by Dick & Stevenson in terms of a contract which required him to provide a properly opened up face at a specified railway cutting for a trial of the machine, in anticipation of the price being payable when the machine at the trial completed a particular amount of work. Reasons to doubt the machine's claimed capabilities manifested themselves and Mackay ultimately refused to make available the facilities required for the stipulated trial, or to accept the machine at all. Lord Shand reviewed the evidence (heard in the sheriff court where the action commenced) and concluded on the facts at 787 that Mackay had been bound to provide the means of testing this machine by a properly opened up face and had failed to do so. He had rejected the machine, and refused to give a test. The machine was not tested, because Mackay had declined to fulfil his obligation to give a properly opened up face. His Lordship held that Dick & Stevenson's obligation to furnish a machine capable of carrying out a certain amount of work:

> "must be held as fulfilled, because the defender declined to afford the means of a test … The test was one for which the defender alone could furnish the means, and all that the pursuers could do was to bring the machine forward for the test. The defender having declined to give the means of carrying out the stipulated test I think it must be held that the test has been fulfilled. The law applicable to the

> case is stated in section 50 of Bell's Principles — 'If a debtor bound under a certain condition have impeded or prevented the event it is held as accomplished. If the creditor have done all that he can to fulfil a condition which is incumbent on himself it is held sufficient implement.' And that view is supported by Pothier founding upon passages from the Roman law."

[31] Pothier on Obligations at 2. 3. 212 was then cited. Regret was expressed that the disposal of the case did not turn on the merits, ie whether the machine was or was not actually capable of performing to the agreed standard. Lord Deas agreed with that sentiment, and held that Mackay should have been absolved as events which had occurred before the proposed trial had justified him in rejecting the machine and that he had in the course of the proceedings offered to provide a proper trial, an offer which Dick & Stevenson had, in his Lordship's view, unreasonably declined. Lord Mure held that it was an essential condition of the contract that a face should be opened up by Mackay of such a description as would enable the pursuers to bring the powers of the machine into full and fair operation. He had not done that, which justified the conclusion that the price was payable, although the precise legal basis for that conclusion was not further explained. Lord President Inglis concurred with Lord Shand and Lord Mure.

[32] In the House of Lords (1881) 8 R (HL) 37, Lord Blackburn's speech commenced with a discussion of the effect of section 40 of the Court of Session Act 1825, which dealt with the competency of review in the House of Lords of findings of fact below (and was still being argued about over a century later - *Laing* v *Scottish Grain Distillers Ltd* 1992 SC(HL) 65). At the conclusion of his remarks on that issue, his Lordship observed at 40 that he had had the advantage of perusing the speech about to be delivered by Lord Watson, and that as he agreed entirely in all Lord Watson said "on this subject", he would not repeat it. Unlike Lord Tyre in *SDG Tulloch Homes Limited* v *European Development Company (Hotels) Limited* (*infra*), I do not find it possible to regard those remarks as extending to a concurrence by

Lord Blackburn in everything contained in the speech of Lord Watson. It is in my opinion very clear that all Lord Blackburn was saying was that he agreed with Lord Watson on what the latter said about the import of the 1825 Act (a subject which Lord Watson treated in detail over the course of more than two pages of his speech). Lord Blackburn then turned to the substantive issue in the case, holding that the bargain was that Dick & Stevenson were to supply a machine capable of performing at a certain standard which was to be brought to Mackay's cutting and tested, the result of the test being agreed to be conclusive as to Mackay's obligation to accept and pay for the machine. His Lordship then observed that:

> "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."

[33] It was thus noted that, once the machine had been delivered by Dick & Stevenson to the nominated testing place timeously to be worked in a fair test, Mackay was implicitly obliged to let them have access to a part of the cutting, put by him in such a condition that the machine could be fairly tested by working at it, and to assist in working it there until there had been a fair test. Having had the machine timeously delivered, he was contractually obliged to keep it, unless on a fair test it failed to do the stipulated quantity of work, in which case he would have been entitled to call on Dick & Stevenson to remove it. As he was by his own default not in a position to call upon them to take back the machine, on the ground that the test had not been satisfied, he was contractually obliged to keep and pay for it.

[34] Lord Blackburn's decision accordingly turned not only on the recognition of an implied term in the contract that Mackay was obliged to do all that was necessary to facilitate the contractual trial, but also on the view that, properly construed, the contract

required him to keep and pay for the machine once it had been delivered to him, unless he was able to demonstrate that it had then failed the trial which was envisaged. As the Supreme Court later put it in *King Crude*, Lord Watson regarded success at the trial as a condition precedent to payment, whereas Lord Blackburn reasoned that there was a condition subsequent in the contract that Mackay did not need to pay if the machine failed at trial, and as that condition subsequent did not occur, he was bound to pay. It was this latter view which enabled the conclusion to be drawn that Mackay was liable to pay the contractual price and was not merely liable for damages for breach of contract in respect of having failed to supply the facilities for the trial.

[35] Lord Watson at 45 was also of the view that it was plainly implied in the terms of the contract that it was incumbent on Mackay to provide a properly opened up cutting face for the trial of the machine, and continued:

> "The respondents were only entitled to receive payment of the price of the machine on the condition that it should be tried at a proper working face provided by the appellant, and that on trial it should excavate a certain amount of clay or other soft substance within a given time. They have been thwarted in the attempt to fulfil that condition by the neglect or refusal of the appellant to furnish the means of applying the stipulated test; and their failure being due to his fault, I am of opinion that, as in a question with him, they must be taken to have fulfilled the condition. The passage cited by Lord Shand from Bell's Principles (section 50) to the effect that, 'If the debtor bound under a certain condition have impeded or prevented the event, it is held as accomplished. If the creditor has done all that he can to fulfil a condition which is incumbent on himself, it is held sufficient implement,' expresses a doctrine, borrowed from the civil law, which has long been recognised in the law of Scotland, and I think it ought to be applied to the present case."

[36] Lord Chancellor Selborne agreed with both of the other speeches and found it unnecessary to add anything further.

[37] In *Paterson* v *McEwan's Trs* (1881) 8 R 646, a condition of a feu contract held a feuar bound to make a road in front of his feu if a connecting one was made through adjoining

ground then owned by third parties. For reasons which had nothing to do with the condition (fraudulent intent having been alleged but not proved), the feuar subsequently purchased such of the adjoining ground as rendered it no longer possible for anyone else to make the connecting road which would have satisfied the condition. The question was whether in such circumstances the condition should be treated as fulfilled. After the case had been argued before the First Division, it was reheard with the judges of the Second Division also then consulted. The Inner House decision in *Mackay* was cited in argument; the judgment of the House of Lords, given 11 days before advising, was not.

[38] Lord President Inglis at 652 noted that, when the feu contract was entered into, the obligation in question depended upon the fulfilment of a condition which was not within the power of either of the parties to it, but was rather a casual condition, which depended for its fulfilment upon the will of third parties. At 654 his Lordship referred to "the well-known rule of law, that where a condition is prevented from being fulfilled by the party who is bound in the conditional obligation it shall be held as fulfilled", and stated that:

> "It is quite true that if a man has it in his power to perform conditions the fulfilment of which gives rise to a binding obligation against himself, then he is not entitled to refuse so to do; and still farther, if he obstructs or prevents the condition from being fulfilled, the condition will be held in law as being fulfilled."

However, that related "only to the subject-matter of the contract in which the conditional obligation is contained" and not to the use of whatever independent rights or properties the obligant might enjoy, the use of which might conduce to the fulfilment of the condition, so that the doctrine did not apply to the case. Interestingly in light of subsequent judicial observations about the "fictional" aspect of the doctrine under consideration, his Lordship observed that to "hold a condition as purified or fulfilled is a very different thing from the condition being purified or fulfilled in point of fact" and indeed went on to raise the point of

whether the question in the case could be treated as one of construction of the feu contract, and in particular whether it could be construed as containing an implied obligation on the feuar to do everything that was in his power which was necessary to lead to the fulfilment of the condition, an idea which was rejected as "very startling" and as something that would require clear expression.

[39] The Lord Justice Clerk (Moncrieff) noted at 656ff that an attempt was being made to bring the case within the well-known legal proposition canvassed in *Pirie* and appearing in the Digest at 50.17.161, "on which the civil law and our own law on this subject is founded" but that the principle had no application in the case because, firstly, it applied only to conditions which qualified contracts which were capable of being specifically performed independently of the condition, not to conditions which rendered a contract incapable of the kind of implementation contemplated by the parties unless some contingency occurred and, secondly, as a matter of common sense, secondly, because it did not apply in cases in which the act said to have impeded or prevented fulfilment of the condition was an incident of the exercise of a separate and independent right, a proposition for which Pothier's Obligations at 2.3.212 and *Pirie* were cited. The potential practical difficulties posed by the fictional aspect of the doctrine were also touched upon.

[40] Lord Deas at 658 thought it a sound rule that "if he who is under a conditional obligation himself renders the accomplishment of the condition impracticable the condition shall be held as fulfilled", so long as the act complained of was not in good faith, which was not the situation in the case at hand. Lord Mure observed that doctrine of law upon which the pursuer relied had no application to the circumstances of the case, on "substantially" the same grounds as the other judges.

[41] Lord Shand took a different view, holding at 661ff that in principle the non-fulfilment of the condition could not be stated as a ground for freedom from the obligation, as the fulfilment of the condition had been rendered impossible by the obligant, but that as the desired road could not be formed other than by using the land subsequently acquired by the feuar which was not subject to the terms of the feu contract, decree enabling the formation of the road could only be granted if there was an implied condition in that contract that the feuar should do nothing voluntarily for the sole purpose of frustrating the making of the road in question, a proposition which, upon consideration of various circumstances surrounding the conclusion of the feu contract, his Lordship found attractive, but ultimately narrowly rejected. Although it might have been thought that breach of such an implied term would have given rise only to a claim in damages rather than to a decree enabling the foundation of the road, it was observed that such a breach would not have been allowed to "prevent justice being done" and that the pursuer would have been restricted to a damages claim only if it had been shown that the feuar could not still fulfil his obligation. Lord Shand was apparently less convinced than were the other judges that the feuar had not acquired the additional ground with a view to becoming the master of the situation.

[42] Lord Young at 664 considered that the question posed by the formulation of the conclusions of the case was whether the feu contract expressly or impliedly imposed an obligation on the feuar, in the event of his acquiring a piece of additional ground, to sell a servitude over it at such a price as the court might appoint, and held that it did not, although his Lordship did further observe that:

> "Of course nobody is entitled to act in fraud of an obligation which he has come under, and he is not entitled to plead anything which he has done voluntarily, even although quite honestly, as a reason why he shall not fulfil his obligation".

Lord Craighill at 666 also held that no obligation had been undertaken by the feuar with reference to the acquisition of other lands or how they might be used, adding that the legal principles and authorities cited were inapplicable for reasons which had been made plain in the other opinions.

[43] In *Sailing Ship "Blairmore" Company, Limited* v *Macredie* (1898) 25 R(HL) 57, it was held that, in determining whether a ship insured against total loss was a total or a partial loss, an improvement in the condition of the ship effected by the insurer himself could not be taken into account, as he was not entitled by his own act to convert a total into a partial loss. As part of his reasoning towards that conclusion, Lord Watson observed at 64 that "The rule of law applicable to contracts is that neither of the parties can by his own act or default defeat the obligations which he has undertaken to fulfil." Lord Shand, by this time sitting as a Lord of Appeal, made no overt reference to such a principle.

[44] In *Kedie's Trs* v *Stewart & McDonald Ltd* 1926 SC 1019, a former partner in a firm was one contributor to a reserve fund maintained by a limited company which came to carry on the business of the firm. The company was initially obliged to pay a proportion of its profits to the fund, and each contributor had certain rights to repayment from the fund if it came sufficiently to exceed its initial amount. The company subsequently changed its articles so that its contributions to the fund became voluntary rather than obligatory, and the fund did not enjoy any excess from which payment would have been due. It was claimed that the change in the contribution rules was a deliberate act aimed at preventing repayment from the fund, and that there was thus a valid claim for repayment of the contribution to the fund out of the general assets of the company in its supervening liquidation.

[45] Lord Hunter (with whom Lord Ormidale concurred) noted Bell's Principles, the Digest, *Pirie*, *Mackay* and *Paterson* as expressing a very sound and important equitable principle but stated at 1029 - 1030 that:

> "Before applying the doctrine as stated by Professor Bell to any particular case, the Court must be satisfied that they have before them a debtor in the sense in which the author uses the term, and that the effect which is given to the non-fulfilment of a condition is the natural and direct result of the failure."

His Lordship expressed the view that, in terms of the arrangements which had been entered into, the company was not a debtor in an obligation to pay money, but was simply obliged to create a particular reserve fund out of which a benefit might or might not have been obtained, breach of which obligation might result in an award of damages. In such a situation, there was no room for appealing to Bell's doctrine. Further, there was no right to immediate payment of anything out of the fund and granting decree for such payment would amount to satisfying a different claim from that which could have been maintained under the contract.

[46] Lord Anderson noted at 1032 that the contention was that a contingent debt was owed which was payable out of the surplus of the fund and that the company had thwarted or obstructed the formation of the fund. It was claimed that that situation attracted:

> "what is known as the doctrine of potestative condition, whereby, in the case where a debtor who is bound subject to a condition does something to prevent its fulfilment, the condition is held to be purified, and the debt falls to be paid as an unconditional obligation".

Reference was made to the Digest, Pothier, Erskine III, I, 6; *Pirie*, *Paterson* and *Mackay*, and to Bell. However, the true construction of the arrangement in question was that what had been acquired was merely a chance, an *emptio spei* and not an *obligatio sub conditione*, which might or might not eventuate in legal right and legal obligation, and if any claim lay in respect of the insufficiency of the fund due to the company's actions, the remedy lay in a claim for

damages, not payment. In any event, the doctrine of potestative condition was applicable only when the obstruction or thwarting by the debtor had been direct and deliberate, ie when it had been resorted to with the sole or main design of obstructing and so defeating the condition and represented in effect a fraud on the contract, which was not the case on the established facts.

[47] Lord Justice Clerk Alness dissented, holding that the arrangement which had been entered into created a contingent right to repayment which was conditional upon the fund enjoying a sufficient surplus. The company had deliberately rendered fulfilment of the condition impossible by cutting off the source from which the fund was to be fed. The authorities already mentioned were again cited as vouching the proposition that:

> "where the debtor in an obligation deliberately obstructs the fulfilment of a condition on which payment of the debt depends, the conditional obligation becomes a pure obligation, and the debt is immediately prestable"

and his Lordship held the doctrine directly applicable to the circumstances of the case. There was no warrant for the proposition that, where a debtor had obstructed the fulfilment of a condition on which his liability depended, he might indulge in speculation as to what would have happened had he not done so. If the result of the course which he had deliberately pursued was to better the position of his creditor, *sibi imputet*. The claim was not simply one for damages, because the company had not rendered the formation of the fund impossible, but had rather frustrated the condition on which the right to share in that fund depended.

[48] *Gloag on Contract* (2nd Edition, 1929) at 279 criticised Lord Watson's approbation in *Mackay* "without any serious consideration" of the second sentence in Bell § 50, namely "If the creditor has done all that he can to fulfil a condition which is incumbent on himself,

it is held sufficient implement" but said nothing about the remaining content of the section, being that which arises here. He observed that:

> "When the condition under which an obligation is undertaken is potestative, so that its accomplishment is within the power of the party conditionally liable, it may be held that his implied obligation is not merely to impose no obstacle to accomplishment, but to take active steps to promote it. This is by no means a general rule."

[49] It might be thought that that passage assumes the possible existence of an implied obligation to impose no obstacle to the accomplishment of the condition in such circumstances, but it does not identify its source or the consequences of non-compliance with it. Gloag then identified the passage from Lord Blackburn's speech in *Mackay* noted above as describing the cases in which an obligation to promote the accomplishment of a condition had been implied, and gave various examples of cases where it might apply.

[50] For a considerable period thereafter the principle in *Mackay* did not attract the attention of the superior courts in Scotland, but experienced a revival of sorts at the turn of the last century. Lord Blackburn's familiar observations on the implication of a term of necessary co-operation were mentioned by Lord Macfadyen in *Scottish Power plc* v *Kvaerner Construction (Regions) Ltd* 1999 SLT 721 at 723C. The same judge recorded submissions made on Lord Watson's remarks in *City Inn Ltd* v *Shepherd Construction Ltd* 2002 SLT 781 at 790J and 791C, but did not find it necessary to state any opinion on them. In *Credential Bath Street Ltd* v *Venture Investment Placement Ltd* [2007] CSOH 208, 2008 Hous LR 2, Lord Reed at [61] and [62] observed that Lord Watson's approach was not based on the concept of an implied term and noted that the principle could not apply to the case before him as the action complained of was capable of justification. His Lordship also mentioned Lord Blackburn's observations, but held them equally inapplicable in the circumstances of the case.

[51] In *SDG Tulloch Homes Limited* v *European Development Company (Hotels) Limited* [2016] CSOH 36, Lord Tyre held *obiter* at [22] - [25] that the ratio of *Mackay* was to be found in the speech of Lord Watson, which was supported by that of Lord Shand in the Inner House and the passage from Pothier's Obligations already noted. His Lordship considered that Lord Blackburn had agreed with Lord Watson and that the former's observations on the implication of a term of necessary co-operation based on an analysis of English legal precedent could only have been an *obiter* route to the same result (propositions in which I am unable to concur for reasons already stated). Pothier's text provided the formulation most directly supportive of the argument. Although the case failed on other grounds, his Lordship would otherwise have allowed a proof before answer on the nature and effect of the act complained of as amounting to a material breach of contract forming a proper basis for a claim for damages.

[52] In *Scottish Ministers* v *Scotland Gas Networks plc* [2023] CSOH 77 it was claimed *inter alia* that a commercial agreement required the parties to engage in a process of agreeing reasonably what sums, if any, were properly due to be paid to the pursuers in light of events which had transpired. It was alleged that the defender had refused to engage in that process and that, on the authority of *Mackay*, that meant that the condition of the agreement that any sums to be paid would be as reasonably so agreed was deemed to have been purified and the defender fell to be regarded as having agreed that it was obliged to reimburse the sums concluded for or alternatively that it was liable in damages for breach of contract in the sums which would probably have been agreed had the anticipated process actually taken place. In rejecting the argument based on *Mackay* but allowing proof before answer of the damages claim, I said the following at [40]:

> "The pursuers first seek to rely on the principle set out in *Mackay v Dick & Stevenson*, which is essentially to the effect that a precondition to a particular contractual obligation, if deliberately impeded by the obligant, is to be held as fulfilled. However, in the present case if the condition that the defender should participate in discussions with a view reasonably to agreeing what, if any, sums are due to be refunded to the pursuers is held as fulfilled on account of the defender's refusal so to participate, no answer to the question as to what (if any) pecuniary liability the defender should in consequence of that refusal be subjected is thereby supplied. For that reason I do not consider that the *Mackay v Dick & Stevenson* principle assists in supplying the pursuers with a cause of action for enforcement of the claimed payment obligation in the putative contract. Nor do I consider that recourse to that principle is necessary where, as here, the failure of the obligant in question to do what the contract contemplates may itself properly be regarded as a breach of that contract."

[53] In *Beaton* v *Beaton* [2024] CSOH 41, it was claimed that if the contractual obligation of a company to make a certain payment was conditional on it having first sold a particular property, it had nonetheless breached its obligation to use best endeavours to sell that property within a set time, and it followed on the *Mackay* principle that that condition was deemed to be fulfilled; in other words, the relevant sale was deemed to have occurred and the payment was due. I held that on a proper construction of the contract, the company's obligation to make payment was not conditional on the sale of the property. At [53] I said:

> "I do not find it necessary … here to explore the uncertain limits of the ever-so-slightly antiquated principle in *Mackay v Dick & Stevenson*. In a case like the present, where the company is in frank breach of contract (as opposed to having merely otherwise hindered or impeded the fulfilment of a potestative condition as to its liability), I see no need for appeal to anything other than the larger and more basic principle that it is to be presumed that a party to a contract is not to be permitted to take advantage of his own wrong as against another party: see *Alghussein Establishment v Eton College* [1988] 1 WLR 587; *Crimond Estates Ltd v Mile End Developments Ltd* [2021] CSIH 60, 2022 SLT 570 at [20] …"

[54] Drawing those strands together, then, although the authorities certainly do not speak with one voice, at the close of 2024 it appeared clear that there was a principle of Scots law, perhaps most accurately expressed in Erskine III, iii, 85 to the effect that, although as a general proposition conditions must come to pass before any contractual liability

consequent upon their existence can arise, an exception applies where a person with an interest in the condition not coming to pass causes it not to occur, in which case that person cannot use the failure of the condition to come into existence as a reason for failing to perform an obligation which would otherwise be incumbent on him. Such circumstances are regarded as giving rise to a "fraud on the contract" and to provide an equitable reason to depart from the general law.

[55] Some further refinements of the principle appear from the authorities, as follows:

1. A relevant preventative or obstructive act must be direct and done with the intention of preventing the accomplishment of the condition: Pothier, loc.cit.; Lord Deas in *Paterson*; Lord Anderson in *Kedie*; but cf Lord Young in *Paterson*, who contemplates an "honest" act still constituting fraud on the contract, illustrating that the concept of "fraud" in this context is not a narrow one.
2. An act is not relevant if done in the exercise of some right independent of the contract under examination, even if its natural and direct result is the prevention of the coming to pass of the condition: *Paterson*, per Lord President Inglis and Lord Justice Clerk Moncrieff.
3. (Semble) The condition must be the only thing standing in the way of the enforcement of an obligation of an otherwise ascertained or ascertainable nature: Lord Hunter, Lord Ormidale and Lord Anderson in *Kedie*; myself in *Scottish Ministers*; possibly Lord Justice Clerk Moncrieff in *Paterson*; but cf Lord Justice Clerk Alness (dissenting) in *Kedie*.
4. It may be unnecessary to have recourse to the principle if the act in question is in itself a breach of the contract (myself in *Scottish Ministers* and *Beaton*) but in some circumstances the equities of the situation may call for the consequences of

the act to be implement of the obligation dependent on the unfulfilled condition rather than simply keeping the pursuer to a claim in damages for such a breach: Lord Shand in *Paterson*; possibly Lord Alness in *Kedie* and, on one view at least, Lord Blackburn in *Mackay*.

5. Although the principle is a free-standing one in equity (Lord Neaves in *Pirie*) it may be seen as an aspect of the principles of construction properly applicable to the document under consideration (Lord Cowan and Lord Benholme in *Pirie*) and in any event is not something that may produce a result contrary to its proper construction.

[56] Then came the decision of the UK Supreme Court in *King Crude*. There, contracts for the sale of ships required the buyers to lodge deposits in an escrow account, but they failed, in breach of the contracts, to provide the escrow holders with the documentation needed to open the accounts. The sellers terminated the contracts and claimed for payment of the amounts of the deposits (a damages claim being unattractive as it appeared that the value of the ships had in the meantime increased).

[57] The court described the *Mackay* principle as being "that, where a party wrongfully prevents the fulfilment of a condition precedent (i.e. a precondition) for that party's debt obligation ... that condition is treated as being fulfilled." The question for the court was whether that was a principle of English law, expressly without prejudice to the position in Scotland. It might be thought, then, that the case is of no consequence for the law of Scotland, but some of the criticisms made of the principle by the court were so trenchant as to call into question its place in any modern legal system, and counsel in the present case invited me to regard it as having been fatally undermined by the court's decision that it formed no part of the law of England.

[58] The court gave six main reasons for that conclusion. Firstly, that Lord Watson did not cite or rely on any English authority. This point is essentially neutral for the purpose of determining the place of the relevant principle in Scots law, as ample civil law, institutional and judicial decision could have been cited in support of that place. His Lordship might also have cited *Hotham* v *East India Co* (1787) 1 Term Rep 638, which had been cited in argument in preceding Scottish cases. Further, Lord Blackburn's reasoning differed from that of Lord Watson, as previously noticed, and Lord Chancellor Selborne's speech was described as ambiguous given that it agreed with both of them. The nature of the ambiguity was not specified, and the possible conclusion that the Lord Chancellor saw each speech as setting out a viable rationalisation of a route to the same determination as to Mackay's liability was not dealt with.

[59] Secondly, the English authorities did not speak with one voice on the matter and in many of them, the same result could have been reached by the grant of a remedy in damages rather than in payment. Again, this is not a matter of particular concern for present purposes, although it might be observed that substantial bodies of caselaw on many subjects are rarely entirely uniform in content (as the examination of the relevant Scottish cases already set out shows) and that, at least to a stranger to the nuances of the English approach to decided authority, the treatment of the decision of the House of Lords in *Panamena Europea Navigacion (Cia Ltda)* v *Frederick Leyland & Co Ltd* [1947] AC 428 (where the judicial panel coincidentally included Lord Watson's son, Lord Thankerton) is slightly surprising.

[60] Thirdly (under reference to *Colley* v *Overseas Exporters* [1921] 3 KB 302), acceptance of the principle would fundamentally undermine the law of contract in relation to the sale of goods and land if it were to be applied in respect of a failure to fulfil a condition precedent

to the passing of property, and would potentially adversely affect other types of contract in relation to when a debt accrues. Any cutting back of the application of the principle would require to proceed on a rational basis and without resorting, for example, to the particular intentions of the parties. Fourthly, the rationale and application of any suggested limits on the principle were uncertain and it was undesirable to propound a general principle of law which required significant but unclear qualifications and controls.

[61] These objections are plainly capable of being read over to the Scots law context. It may, however, be observed that the experience of the last 150 years or so during which the existence of the principle has been judicially recognised in Scotland has not been palpably destructive of such aspects of the law, in consequence of the relative infrequency with which appeal to the principle has been made and the limits on its application developed in the case law which have already been noticed. Those limits can all be explained on a principled basis (whether convincingly or not being something that must rest in the eye of the beholder) and the degree of uncertainty surrounding their nature and scope of application is no greater or lesser than the penumbra which almost inevitably attends those aspects of many other established and accepted general principles of law.

[62] Fifthly, the *Mackay* principle is a legal fiction which obscures transparent reasoning, and requires a proper explanation which is not to be found. Again, these observations may, if justified, resonate in Scots law. However, even if one accepts for a moment the proposition that fiction is a bad thing in the life of the law, which should take place without the narratives and myths great and small which make life in general less bleak and more easy to comprehend, the way of expressing the principle which involves deemed fulfilment of a condition, and which causes the criticism of fictionality, is by no means the only, let alone the best, way of describing its import. The summary of the state of the principle given

above is one example of how it can be expressed without the use of such language. Nothing inherently fictional attends its nature. As is demonstrated by *Paterson* and *Kedie*, it is not applied to the length of treating the world as different from what in fact it is; the only sphere in which it operates is the legal construct of the contract or other document under examination. The justification for the principle which emerges from the authorities is, in essence, that a party to a contract or other legal arrangement should not be able to put himself in a better legal position in terms of that arrangement than would otherwise have been the case by way of conduct which the law regards as unconscionable.

[63] Sixthly, it is preferable to proceed on the basis of sound principles of contractual construction of the express terms of a contract and on the appropriate mechanisms for the implication of terms in order to uphold the importance of freedom of contract, certainty and predictability, especially in a commercial context. These criticisms require a careful examination of the relationship of the *Mackay* principle to the intentions (objectively and contextually ascertained, as the law now requires) of contracting parties. Two linked observations may be made in this context.

[64] In the first place, as already set out, the principle has been seen in the early Scottish authorities as giving effect to what reasonable people in the position of the parties to a contract or the granter of a unilateral document would have wanted in the situation which has come to pass had they thought about and expressed a view on the matter. It has never obviously been taken to the length of imposing an outcome which is clearly contrary to or in conflict with the proper construction of a contract or other document, so long as it is appreciated that that construction must allow for a wide range of possibilities as to how well or badly the words chosen to express the relevant intention have fulfilled that function. To that extent, the principle may be seen as having largely been subsumed into the modern law

of construction and to be supportive of rather than supplementary to that law. It would, however, be a mistake to regard such subsumption as entire. There can be no doubt on the authorities that in Scots law the principle is, in theory at least, more than an aspect of the law of construction and is, rather, a free-standing one in law, based on equitable considerations. Whether the modern law of construction leaves it much room now to shine in practice remains to be seen. The Supreme Court in *King Crude* felt able to treat the English authorities as restricting any presumption that a party to a contract should not be able to take advantage of its own wrong to situations where there was a claimed entitlement to treat the contract as at an end, or else an attempt to obtain a benefit under it. While that may well be as far as those authorities have gone, it is difficult to see any principled justification for such a restriction, at least as a matter of Scots law.

[65] In the second place, the growth in the possibilities for the implication of contractual terms as the law has developed has undoubtedly enabled all sorts of unconscionable behaviour in the context of contractual relationships to be treated as breaches of contract giving rise to claims for damages rather than for implementation of the relevant contractual term. If a claim for damages is seen as providing adequate redress for the wrong done, then recourse to a residual equitable principle allowing for implementation may be regarded as unnecessary, while allowing, as the authorities admit, of the possibility of its deployment where damages would not constitute an adequate or appropriate remedy. Lord Blackburn's speech in *Mackay* itself may be seen as an early step in this process, although it will be recalled that it was not the implication of a term requiring necessary co-operation between contracting parties which furnished the payment remedy in that case. If all that had been established was that Mackay was in breach of contract by not providing a suitable cutting for the trial of the machine, then presumably any damages recoverable in respect of that

breach by Dick & Stevenson would have required to proceed on a demonstration that, had the appropriate facilities been made available, the machine would have passed the test (as Lord Shand and Lord Deas appeared to want to be the outcome but were unable to supply because they did not see their way to implication of a suitable term). Rather, the remedy in payment was rendered possible, on Lord Blackburn's analysis of the case, by resort to an exercise in construction which produced the not inherently obvious conclusion that the machine's failure in the trial was a condition subsequent to the payment liability, rather than its success being a condition precedent to that liability.

[66] Seventhly, the existence of a remedy in damages meant that no injustice would be caused by rejecting the principle as part of English law. The terms of the contract in question would be respected and recovery would not be allowed to exceed loss. These points have essentially already been addressed. The true construction of a contract is supported and not undermined by the proper application of the *Mackay* principle. There may be cases, rare perhaps, where the nature of the bargain or of the unconscionable behaviour, a combination of the two, or some other circumstance in the case, render a remedy in damages inadequate or inappropriate. Application of the *Mackay* principle enables the provision of an apt remedy.

[67] In summary, the *Mackay* principle is too deeply rooted in Scots law to be capable of being blown over by a southerly side wind. It performs a function of some utility, albeit one heavily circumscribed by the limits on its application recognised in the authorities. Its existence as a valid principle of Scots law does not, however, mean that it can be applied, at least at the stage of debate, to the benefit of the pursuers in the present case. That is for three reasons.

[68] Firstly, there is no apparent basis upon which it might be suggested that the defender's failure to provide management accounts was demonstrably done with the direct intention of preventing the accomplishment of the condition to its potential liability, as opposed to simply being a consequence of a corporate reorganisation carried out for other, perfectly proper, commercial reasons. Although the defender's ability lawfully to carry out such a reorganisation is circumscribed by the terms of Schedule 5 to the SPA (which essentially requires the agreement of the pursuers to any such exercise) it was not suggested in argument that it was breach of any obligation contained in Schedule 5 which gave rise, on the application of the *Mackay* principle, to the defender's obligation to pay the second tranche of deferred consideration and the earnout consideration becoming unconditional; rather, the submission was that that consequence flowed simply from a failure to furnish the management accounts required for the assessment process contemplated by Schedule 4.

[69] Secondly, at least on the pursuers' case, the failures of the defender to supply the management accounts were in themselves breaches of contract sounding in damages. It was not suggested on behalf of the pursuers that an award of damages for those breaches was not capable of providing them with appropriate compensation for the wrongs involved; indeed, their position is that an assessment of damages would eventually bring out the same sums that they seek directly by way of the application of the *Mackay* principle. In such circumstances it is unnecessary to have recourse to that principle, as the status of the acts complained of as breaches of contract provides a route to an adequate remedy without the need for equitable supplement.

[70] Thirdly, and perhaps most substantively, the failure to supply management accounts did not in itself result in a situation whereby the sums truly due to the pursuers by way of second slice deferred consideration and earnout consideration were indicated. It would

have been open to the pursuers to seek to argue, taking what might be called the Blackburn line, that the true construction of the contract was that they were entitled to payment of the sums set out in Clause 3.1 of the SPA unless the management accounts were provided and showed otherwise (although certain difficulties would undoubtedly have attended any such attempt), but instead they chose to argue that the provision of the management accounts was a condition precedent to the defender's liability to pay such consideration. Even if the deployment of the *Mackay* principle were to result in point of law in any such conditionality attaching to such liability flying off, the question remains: liability to pay what sums? The answer to that question can only be supplied by an examination of the underlying substantive facts concerning the features of the company's financial performance in the respects identified in Schedule 4.

[71] Although it seems to me that the difficulties attending the pursuers' attempt to rely on the *Mackay* principle are likely to prove insuperable even after proof, I was not asked by the defender to refuse probation to any averments, or to repel any plea, seeking to instruct its application, and so permit the pursuers' case to go to proof before answer as it stands.

[72] I was asked by the pursuers to refuse probation to the defender's averments directed at resisting it being found (apparently definitively) in breach of contract. Again, however, though the prospects of the defender resisting such a conclusion after proof do not seem particularly strong, I do not consider that it can be said at this stage that it is bound to fail in so doing. That is for two reasons; firstly, the defender offers to prove that the financial information that it did supply to the first pursuer was sufficient to enable the assessment exercise contemplated by Schedule 4 to be carried out. If one takes a contextual and purposive approach to the construction of the SPA, as one should, and depending on the extent to which that contention is in fact made out, it may just be that the provision of such

information would enable the conclusion to be drawn that there was no breach, or at least no material breach, of contract.

[73] Secondly, there remains some scope for argument about the consequences of the corporate reorganisation which, it is accepted, took place after the acquisition of the company on the question of what was required to be provided in terms of Schedule 4 to the SPA. If there was what the SPA calls a "Post-Completion Reorganisation" (i.e. "Any transfer of the business and assets of the Company to a member of the Buyer's Group"), before 31 January 2026, then Clause 1.2 of that schedule provides that references in the schedule to "the Company" (presumably including references there to defined terms themselves including those words) shall be deemed to be amended to include any member of the buyer's group to whom that business was transferred. In such circumstances it may be that the accounts which fell to be provided are the accounts of the relevant member of the buyer's group, rendering any extant breach capable of remedy. As already recorded, the defender did submit that any breach which had occurred was curable, and this may be one way by which such a cure could be effected, although the issue was not canvassed in any detail by either side at debate. The extent, if any, to which the pursuers (or the first pursuer, at least so far as her own claim is concerned) would have required to, and did, agree to that reorganisation in terms of Schedule 5, or at least to have acquiesced in it, further remains as yet unclear. It follows that a definitive conclusion as to what the defender's responsibilities actually were, and whether they were breached, materially and irredeemably, cannot yet be reached.

[74] There remains the pursuers' submission that the defender's averments about personal bar should be refused probation. The current state of authority on personal bar and cognate concepts, so far as relevant for present purposes, may be summarised as

follows: Those concepts are based on elementary considerations of justice whereby the law seeks to prevent one person's inconsistent conduct from unfairly affecting another person (*William Grant & Sons Ltd* v *Glen Catrine Bonded Warehouse Ltd* 2001 SC 901 at 921; *McMullen* at [69]). The law does not adopt a mechanistic approach to waiver or personal bar and the same behaviour can on occasion be categorised as waiver, bar or acquiescence, or even as variation of a contract (*McMullen* at [70]). Waiver essentially describes the situation where A, who knows or is presumed to know of his right, acts in a way which objectively justifies B in thinking that he will not insist on that right and B then acts in accordance with that understanding; if thereafter it would be unfair to B to allow A to enforce the right which he appeared to have abandoned, a plea of waiver will be upheld (*McMullen* at [72]).

[75] From the recent case of *Sarwar* v *Phlo Technologies Ltd* [2026] CSIH 20, 2026 SLT 384, one may draw the proposition that cases involving implied waiver are by their nature fact sensitive [21]. Because of the need to consider the relative actions in their factual context, it will normally be necessary for a court to hear evidence before it can come to a conclusion as to whether waiver has been established [22]. It will only be in rare cases that it will be possible to dismiss a claim of waiver on the pleadings alone [23]. Any requirement for the party arguing for the waiver to have acted in reliance on the warranty arises out of fairness. Fairness usually, but not always, requires reliance [35]. However, the nature of the requirement for fairness varies according to context and may often be a matter best left until the court has an understanding of the full factual context after evidence is led [37]. The same applies to a plea of personal bar: personal bar is fact sensitive and the categorisation as between waiver and personal bar depends very much on the factual circumstances of the particular case [38].

[76] It follows that the pursuers' contention, that the absence of any claim by the defender that it relied on anything done by them or any of them is fatal to any case in personal bar or its cognates which it might otherwise have advanced, cannot be sustained at this stage of proceedings. As *Sarwar* makes clear, the ultimate touchstone is one of fairness, which will usually involve reliance, but may be satisfied by some other issue in the case when the facts are fully ascertained. The second point made by the pursuers, that the acts said to give rise to the personal bar type of defence advanced by the defender relate to the first pursuer alone, would not in itself justify a refusal of probation to the relative pleadings (since they would arguably at least apply to her own position) and is in any event not an entirely accurate summary of the defender's averments, which do include the allegation that the pursuers as a whole agreed that the timing of the provision of management accounts would be treated flexibly until the shortfall created by the deficiency in the value of the company's net assets at completion was made up. If and to the extent that that allegation can be made out, it may be that a personal bar type defence will be found to exist, given the fact-sensitive nature of the entire topic.

[77] The final issue for consideration is the pursuers' argument that any variation or waiver defence which might otherwise exist is blocked by the requirement imposed by Clause 11 of the SPA that any variation of the SPA or waiver of a right arising under it must be in writing, no such writing being claimed to exist. Two points fall to be made in this connection. Firstly, the contractual block is, at least on its face, restricted to variation or waiver alone, not personal bar *per se* or related concepts such as acquiescence. It may be that that is why the defender's relative plea-in-law refers to *mora*, taciturnity and acquiescence rather than specifically to variation or waiver. As the authorities already cited vouch, the same facts may come to be regarded, once precisely established, as falling within the scope

of any of these concepts and their pre-categorisation as solely one or the other is fraught with difficulty. The message from the authorities is clear: first ascertain the facts, then decide into which (if any) type of personal bar defence they constitute, and finally decide whether the contractual block applies to that type of defence.

[78] Secondly, a pactional restriction on the methods by which changes to contractual rights or the ability to rely on them may be affected is itself susceptible to being overcome by one or other of the personal bar type defences. An examination of the authorities on this subject produces the following analysis: In *MWB Business Exchange Centres Ltd*, Lord Sumption (with whom Baroness Hale, Lord Wilson and Lord Lloyd-Jones agreed) held that the law should and did give effect to a contractual provision requiring specified formalities to be observed for a variation. That carried a risk that a party might act on a contract as varied, for example by performing it, and then find itself unable to enforce it, but that risk was mitigated by "the various doctrines of estoppel". Estoppel could not be used so as to destroy the whole advantage of the contractual provision, and at the very least there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality, and something more would be required for this purpose than the informal promise itself.

[79] In *CGI IT UK Ltd*, Lord Bannatyne held that all clauses which laid down a specified procedure for making changes to a contract were *prima facie* enforceable according to their terms. In *GPP Big Field LLP*, Richard Salter QC treated the principle as applicable to contractual clauses prohibiting oral waiver or waiver by conduct. In *Sumitomo Mitsui*, Butcher J accepted that parties to a contract might make provisions which limited the effectiveness which their subsequent dealings might otherwise have had in altering their obligations under that contract, and that, while a non-waiver clause could itself be waived,

not any conduct which would amount to a waiver of the original right would necessarily also amount to a waiver of the non-waiver clause. Something which indicated that the waiver was effective notwithstanding its non-compliance with the non-waiver clause was required. HH Judge Pelling QC in *Barclays Bank Plc* was to like effect.

[80] The two relative authorities cited by the defender, *McMullen* and *Serco*, are examples of cases where the effectiveness of provisions analogous to Clause 11 in the present case was considered a matter best left for decision after establishment of the facts, and although this particular issue did not arise in *Sarwar*, its general approach to the effective necessity of determining the facts before deciding on a personal bar type defence cannot but be regarded as implicitly supportive of the way the issue was treated in those two cases. Again, I have some sympathy for the general proposition that an enquiry into the facts may be unlikely to disclose a situation in which the terms of Clause 11 are found to have been overwhelmed by what happened, but an inkling as to what the result of a proof may be is not a sufficient reason to refuse to allow it to take place. It follows that none of the defender's pleadings relating to personal bar and similar defences may properly be refused probation.

Disposal

[81] The case will proceed to a proof before answer without refusal of probation to any averments, and with all pleas standing.

APPENDIX

Relevant Terms of the Share Purchase Agreement

The Share Purchase Agreement amongst the parties (in which the pursuers are referred to as the "Sellers" and the defender as the "Buyer") contains the following pertinent provisions:

1. INTERPRETATION

1.1 The definitions and rules of interpretation in this clause apply in this Agreement.

…

Annualised Contracted Turnover: the aggregate amount of all sales which are contracted for and remain to be rendered, and where the contracts are not under notice of termination, by the Company (exclusive of any VAT or any other sales tax) for the future provision of the Company's services looking forward 12 months in respect of the Contracts, in each case as at the Relevant Date, but excluding goods and services of a one off nature and contracts introduced by Atlas group companies.

…

Buyer Group: the Buyer, its subsidiaries, its holding company and any subsidiaries of any such holding company;

…

Company: Confida FM Limited, a private company limited by shares incorporated and registered in Scotland with company number SC562819 …

Completion Net Assets: the aggregate assets (disregarding intangible assets such as goodwill) less the aggregate liabilities of the Company derived from the Completion Accounts and shown in the Net Assets Statement, calculated on a consolidated basis in accordance with the accounting principles, practices and policies referred to in paragraph 4 of Schedule 2.

…

Earnout Period: the period from 1st August 2023 to 31st January 2026.

…

Management Accounts: the form of the Management Accounts of the Company as detailed in Schedule 3.

…

3. PURCHASE PRICE

3.1 The Purchase Price is, save as adjusted in accordance with this Agreement, the aggregate sum of £3,400,000 (three million four hundred thousand pounds) and shall be payable as to:

(a) £2,150,000 (two million one hundred and fifty thousand pounds) on Completion ("Initial Consideration");

(b) £50,000 (fifty thousand pounds) ("**First Deferred Consideration**") such to be paid by the Buyer to the Sellers in accordance with the provisions of clause 4;

(c) £100,000 (one hundred thousand pounds) ("**Second Deferred Consideration**") such to be paid by the Buyer to the Sellers in accordance with the provisions of Schedule 4;

(d) £200,000 (two hundred thousand pounds) ("**First Earnout Consideration**") on such being agreed or determined in accordance with the provisions of Schedule 4;

(e) £200,000 (two hundred thousand pounds) ("**Second Earnout Consideration**") on such being agreed or determined in accordance with the provisions of Schedule 4;

(f) £200,000 (two hundred thousand pounds) ("**Third Earnout Consideration**") on such being agreed or determined in accordance with the provisions of Schedule 4;

(g) £200,000 (two hundred thousand pounds) ("**Fourth Earnout Consideration**") on such being agreed or determined in accordance with the provisions of Schedule 4; and

(h) £300,000 (three hundred thousand pounds) ("**Fifth Earnout Consideration**") on such being agreed or determined in accordance with the provisions of Schedule 4,

the provisions of Schedule 4 further applying to any adjustment to and payment of the sums provided for in clauses 3.1(d)-(h) inclusive (such sums together the "**Earnout Consideration**").

3.2 The Buyer shall pay, in accordance with the provisions of clause 3.5, the Initial Consideration immediately following Completion on the Completion Date.

3.3 The Buyer shall pay, in accordance with the provisions of clause 3.5, each of the elements of the Earnout Consideration, on the respective dates specified for payment of the same in as provided for in [sic] Schedule 4.

3.4 If the Buyer fails to make any payment due to the Sellers under this Agreement by the due date for payment, then the Buyer shall pay interest on the overdue amount at the rate of 4% per annum above the Bank of England's base rate from time to time, such interest accruing on a daily basis from the due date until actual payment of the overdue amount, whether before or after judgment, and such to be paid together with the overdue amount.

[Clause 3.5 makes default provision for a means of electronic payment of sums due to the Sellers under clauses 3 and 4.]

4. NET ASSET ADJUSTMENT

On or before the Adjustment Date (or such other date as the parties may agree):

(a) if the Completion Net Assets exceed the Target, then the Buyer will pay (i) the First Deferred Consideration and (ii) an additional sum equal to the excess of the Completion Net Assets above the Target to the Sellers in accordance with clause 3.5 as soon as the Completion Assets are agreed or determined.

(b) if the Completion Net Assets are less than the Target, then:

(i) the amount of such shortfall shall be set against the First Deferred Consideration on a £ for £ basis;

(ii) in the event that the amount of such shortfall is greater than the amount of the First Deferred Consideration, the Sellers shall not be entitled to receive any sum by way of the First Deferred Consideration and the Buyer shall be entitled to either demand an immediate refund of the further shortfall or to reduce on a £1 for £1 basis any payment due or yet to fall due from the Buyer to the Sellers under clause 3.1(d)-(h) (as may be adjusted by clause 3.2) by an amount equal to any additional shortfall;

(iii) if no payment(s) remain due or yet to fall due from the Buyer to the Sellers under clause 3.1(d)-(h) the Sellers shall as soon as reasonably practicable pay to the Buyers an amount equal to the shortfall

in either case by way of a reduction in the Purchase Price.

...

10. WHOLE AGREEMENT

10.1 This Agreement constitutes the whole agreement and understanding of the parties and supersedes any previous arrangements, undertaking or agreement between the parties hereto relating to the subject matter of this Agreement. Save as expressly provided, and to the maximum extent they may be excluded by contract, this Agreement excludes any warranty, covenant, condition or understanding which may be implied by law. The Buyer acknowledges that it has not been induced to enter into this Agreement by, and so far as permitted by law and except in the case of fraud, hereby waives any remedy in respect of, any warranties, representations, undertakings, promises or assurances not incorporated expressly into this Agreement.

10.2 Nothing in this clause shall operate to limit or exclude any liability for fraud.

11. VARIATION AND WAIVER

11.1 Any variation of this Agreement must be in writing and signed by or on behalf of all the parties thereto.

11.2 Any waiver of any right under this Agreement is only effective if it is in writing and it applies only to the party hereto to whom the waiver is addressed and to the circumstances for which it is given.

11.3 No failure to exercise or delay in exercising any right or remedy provided under this Agreement or by law constitutes a waiver of such right or remedy nor shall it prevent any future exercise or enforcement thereof.

11.4 No single or partial exercise of any right or remedy under this Agreement shall preclude or restrict the further exercise of any such right or remedy or other rights or remedies.

...

16. GOVERNING LAW AND JURISDICTION

16.1 This Agreement and any disputes or claims arising out of or in connection with its subject matter or formation (including non-contractual disputes or claims) are governed by and construed in accordance with the law of Scotland.

16.2 The parties irrevocably agree that the courts of Scotland have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims) ...

...

Schedule 3

Management Accounts

See Attached Format on 7 pages following:

[Blank formats of management accounts are attached]

Schedule 4

Earnout Consideration

1. DEFINITIONS

1.1 In this Schedule 4, in addition to the words and expressions defined in clause 1.1 of this Agreement, the following definitions shall apply:

…

Post-Completion Reorganisation

Any transfer of the business and assets of the Company to a member of the Buyer's Group;

…

Sellers' Representative

Lorraine Murray, one of the Sellers;

...

1.2 in the event of a Post-Completion Reorganisation occurring at any time prior to the expiry of the Fifth ACT Period [i.e. 31 January 2026], references in this Schedule 4 to "the Company" shall be deemed to be amended to include any member of the Buyer's Group to whom the business of the Company is transferred

2. CALCULATION AND PAYMENT

2.1 For the purposes of calculating the First Earnout Consideration:-

2.1.1 if, on [31 January 2024], the Annualised Contracted Turnover is equal to or greater than [£5.000,000, the amount of the Second Deferred Consideration shall be paid by the Buyer to the Sellers within 5 Business Days of the agreement or determination of the relevant Management Accounts for the first ACT Period;

2.1.2 if, on [31 January 2024], the Annualised Contracted Turnover is less than [£5,000,000], the amount of the First Earnout Consideration shall be reduced to such amount of the same as represents the same percentage as the Annualised Contracted Turnover on [31 January 2024] bears to [£5,000,000] (such sum the "Adjusted 1st DC");

2.1.3 having taken into account any reduction provided for in terms of paragraph 2.1.1 above, if the First Period Gross Profit when multiplied by 2 is less than £1,600,000, the First Earnout Consideration or the Adjusted 1st DC (as the case may be) shall be reduced on a £ for £ basis to the figure which is produced by (i) calculating the percentage shortfall in Gross Profit (where £0 is 100% shortfall and £1,600,000 is 0% shortfall) which the First Period annualised Gross Profit bears to [words seemingly missing, presumably £1,600,000] (ii) then applying such percentage to the First Earnout Consideration or the Adjusted 1st DC (as the case may be).

[essentially similar provision is then made in relation to the amount of the Second Earnout Consideration by reference to the date of 31 July 2024, to the Third Earnout Consideration by reference to the date of 31 January 2025, and to the Fourth Earnout Consideration by reference to the date of 31 July 2025]

2.5 For the purposes of calculating the Fifth Earnout Consideration:-

> 2.5.1 if, on close of business on 31st January 2026 (the "**Final Date**"), both (i) the Alternative ACT is equal to or greater than £7,000,000, and (ii) the Gross Profit Percentage is not less than 20%, the full amount of the Fifth Earnout Consideration shall be paid to the Sellers;

2.5.2 if, on the Final Date, the Alternative ACT is less than £7,000,000, the amount of the Fifth Earnout Consideration shall be reduced at the rate of a 1% deduction for each £10,000 (or part thereof) of such shortfall (such resultant sum the "**Adjusted 5th DC**"); and

2.5.3 having taken into account any reduction provided for in terms of paragraph 2.5.2 above, if the Gross Profit Percentage is less than 20%, the Fifth Earnout Consideration or the Adjusted 5th DC (as the case may be) shall be reduced at the rate of £15,000 per 0.1% of shortfall in percentage.

…

2.7 The Sellers' entitlement in terms of paragraphs 2.1 - 2.6 inclusive above shall be satisfied by the Buyer in accordance with clause 3.5 of this Agreement within 5 Business Days after the Relevant Accounts have been agreed or determined in accordance with this Schedule 7 [sic].

3. MANAGEMENT ACCOUNTS

3.1 The Buyer shall use its reasonable endeavours to ensure that Management Accounts in respect of each of the First ACT Period [1 August 2023 to 31 January 2024], Second ACT Period [1 August 2023 to 31 July 2024], Third ACT Period [1 February 2024 to 31 January 2025], the Fourth ACT Period [1 August 2024 to 31 July 2025] and the Fifth ACT Period [1 February 2025 to 31 January 2026] are prepared and supplied to the Sellers' Representative as soon as is practically possible after the expiry of each such period, but in any event within 15 Business Days of the last day of each such period.

3.2 Within 15 Business Days of the date of receipt of the relevant Management Accounts by the Sellers' Representative (the **Review Period**) the Sellers' Representative shall notify the Buyer whether or not the Sellers agree with the relevant Management Accounts.

3.3 The Buyer shall give such assistance and access to information as the Sellers' Representative may reasonably require in connection with any review of the relevant Management Accounts within the relevant Review Period.

3.4 If the Sellers' Representative notifies the Buyer that she agrees with the relevant Management Accounts, or if the Sellers' Representative fails to notify the Buyer that she does not agree the relevant Management Accounts within the relevant Review Period, the relevant Management Accounts shall immediately become final and binding on the parties hereto for the purposes of this Agreement.

3.5 If the Sellers' Representative does not agree the relevant Management Accounts, she shall, within the relevant Review Period, give notice (an **Objection Notice**) to the Buyer of any areas of disagreement and where practicable all adjustments which she considers are required to ensure the Management Accounts comply with this Schedule.

3.6 Following service of an Objection Notice within the Review Period, the parties hereto shall use all reasonable endeavours to agree the adjustments proposed in the Objection Notice as soon as possible.

3.7 If those adjustments are resolved between the parties hereto, the relevant Management Accounts, adjusted as agreed between the parties hereto, shall become final and binding on the Buyer and the Sellers upon such matters being agreed in writing by the Buyer and the Sellers.

3.8 If the Buyer and the Sellers' Representative are unable to agree on any of the adjustments proposed in the Objection Notice within 10 Business Days of the Objection Notice being served on the Buyer, the matters in the Objection Notice which are still in dispute (the **Disputed Matters**) shall be referred, at the request of a party hereto, to an independent chartered accountant (the **Accountant**) for final determination, provided always that, for the avoidance of doubt, no other matter may be referred to the Accountant for determination.

[detailed provision is then made for the appointment of the Accountant and the basis upon which he should proceed, and for him to provide a written decision within one month of the referral to him]

…

5. FORMAT OF RELEVANT MANAGEMENT ACCOUNTS

The relevant Management Accounts shall be in the format set out in Schedule 3.

6. EARNOUT CONSIDERATION PROTECTIONS

The provisions of Schedule 5 shall further apply to the Earnout Consideration and the calculation thereof.

Schedule 5

Earnout Consideration Protections

1. The Buyer undertakes to the Seller that at all times during the Earn Out Period: -
   1.1 it shall not take any action, or cause or permit anything to be done by any member of the Buyer's Group, either (a) in bad faith with the intention of reducing or distorting the financial performance of the Company or the amount of the Earnout Consideration or (b) to divert business, trading opportunities or revenues that would ordinarily have gone through the Company to another company in the Buyer's Group;
   …
   1.3 it shall cause the Company to continue to operate in the normal and proper course of its existing business as a separate entity and independent of any other business carried on by the Buyer's Group except as agreed between the parties;

…
1.5 it shall procure that the Company shall not sell, transfer or otherwise dispose of all or a material part of its business, assets or undertaking, or enter into an agreement to do so;
…
1.8 it shall not cause or permit to occur a material change to the scope or nature of the business of the Company or the manner in which such business is carried on other than as agreed between the parties …