OUTER HOUSE, COURT OF SESSION

[2020] CSOH 70

CA120/18

OPINION OF LORD CLARK

In the cause

(FIRST) RONALD SOMERVILLE, (SECOND) CHARLES SHAW and
(THIRD) NICK FELISIAK

Pursuers

against

DAVID McGUIRE

Defender

Pursuers: McIlvride QC; Harper Macleod LLP
Defender: Thomson QC; TC Young LLP

10 July 2020

Introduction

[1] The pursuers and the defender are shareholders in a private limited company. Relations broke down and as a consequence they entered into a contract to have the defender's shares independently valued, with a view to the defender being bought out. An expert was appointed. The present dispute is about: (i) which of the exchanges between the pursuers and the defender constitute the terms of that contract; (ii) what those terms mean; and (iii) whether the expert is barred from continuing in that post, as a result of apparent bias. The case called for a proof before answer.

Background

[2] The pursuers and the defender are shareholders in 5 PM Limited ("the company"), which was incorporated in 1999. In rounded figures, the respective shareholdings of the parties are as follows: first pursuer, 35.4%; second pursuer, just under 20%; third pursuer, 7.7%; defender, 35.4%. Thus, together the parties own over 98% of the shares. The remaining shares are held by two others. The first and second pursuers and the defender are the directors of the company. Since 1992 the defender has been a non-executive director. The executive directors are the first and second pursuers.

[3] From around January 2012, the pursuers and the defender have been in dispute about certain issues relating to the affairs of the company. The defender raised proceedings against the company and the present pursuers in the sheriff court. The parties came to recognise that the dispute could be resolved by the defender relinquishing his shares in the company at a fair price. The first and second pursuers proposed purchasing the defender's shares at a price determined by a valuation conducted by Johnston Carmichael, chartered accountants. The defender did not accept the proposal. The first and second pursuers and the defender then jointly instructed Grant Thornton, chartered accountants, to provide a valuation of the defender's shares. Grant Thornton issued their letter of engagement on 22 March 2013 ("the Grant Thornton letter"). Their valuation was issued on 16 July 2013. They subsequently agreed to withdraw that valuation and offered the parties an opportunity to make representations on any of the factual matters upon which they intended to rely. The defender declined that opportunity. No further valuation was made by Grant Thornton.

[4] As at 8 November 2016, there was pending before Glasgow Sheriff Court a summary application by the defender, raised by him against the company and the present pursuers. He sought interdict against his removal as a director of the company or, alternatively, an order in terms of section 996 of the Companies Act 2005 that the company or the first and second pursuers purchase his shares in the company or, alternatively, an order for the winding up of the company. The defender's claims were opposed by the pursuers. By letter dated 8 November 2016 ("the offer"), the pursuers' solicitors wrote to the defender's solicitors making certain proposals to settle the dispute between the parties. One of the proposals was for the purchase of the defender's shares based on what was described as "the Method 2 valuation". This was a valuation of the defender's shares by an independent expert in accordance with the methodology identified in article 10.2 of the company's Articles of Association. It was a condition of the offer that if the defender elected that his shares were valued in accordance with Method 2 he would thereafter use all reasonable endeavours to instruct and cooperate in such an expert valuation.

[5] Article 10.2 of the company's Articles of Association provides, so far as relevant, that the price payable to the defender for his shares is to be such price as "the Expert shall certify to be their fair value" and that

> "The Expert will value the shares on a going concern basis as between a willing seller and a willing buyer ignoring any reduction in value which may be ascribed to the [shares] if they represent a minority interest and assuming that the [shares] can be freely transferred."

Article 10.2 further provides that "The Independent Expert's decision on the Sale Price shall be final and binding". "The Expert" for the purposes of article 10.2 is

> "an independent chartered accountant (who shall act as an expert and not as an arbiter) nominated by the parties concerned or, in the event of disagreement, appointed by the President of the Institute of Chartered Accountants of Scotland" ("ICAS").

[6] Following the offer dated 8 November 2016, the defender continued to pursue the summary application in the sheriff court. The defender and his solicitors entered into correspondence from November 2016 with the principal solicitor for the first and second pursuer, Mr Rod McKenzie. A recurring theme of the correspondence was that the defender wished the offer, insofar as it relates to the valuation procedure, to be "Hoffman compliant", meaning that it should comply with the principles set out by Lord Hoffman in *O'Neill* v *Phillips* [1999] 1 WLR 1092, at 1107-1108. By email dated 2 December 2016 the defender advised Mr McKenzie that he had withdrawn his instructions from his former solicitor. Thereafter, the defender and Mr McKenzie corresponded directly about the offer. In due course another solicitor was appointed by the defender and corresponded with Mr McKenzie until February 2017. After sundry procedure in the sheriff court action a proof was set down for January 2018. On 1 November 2017 the sheriff refused a motion by the defender to discharge that diet of proof. On that date the defender then indicated that he would accept the offer. Subsequently, the defender accepted the offer in writing, by letters in identical terms bearing no date but delivered to the pursuers' solicitors and to each of the pursuers on or about 27 November 2017. On 8 March 2018, at the request of the pursuers, the president of ICAS nominated and appointed Mr Stewart MacDonald, a chartered accountant with the firm Scott-Moncrieff, to act as the expert.

[7] Mr MacDonald wrote to the parties on 29 March 2018 confirming his agreement to act as the expert and setting out the terms on which he was prepared to do so ("the first letter of engagement"). In the first letter of engagement he indicated that he estimated that his fee for providing a valuation of the defender's shares would amount to around £5,000 plus VAT and requested payment of £5,000 plus VAT prior to commencing the valuation

exercise. That sum was paid by the company, which agreed to meet Mr MacDonald's whole fees in connection with the valuation. Thereafter at a meeting on 16 April 2018 attended by the first and second pursuers and the defender, Mr MacDonald discussed with them the procedure he proposed to adopt in carrying out his valuation and the terms on which he was willing to act as expert. The minutes of the meeting were taken by Mr MacDonald's colleague, Ms Kay Thomson. The minutes stated that the defender had asked Mr MacDonald if he "was familiar with "Hoffman"?" and recorded that Mr MacDonald confirmed that he was. Thereafter, the defender maintained that this was incorrect and that Mr MacDonald had in fact said "No" to his question. Subsequently the defender requested a private meeting with Mr MacDonald in order to provide him with further information. That private meeting took place on 17 May 2018, with Kay Thomson also present. The notes of that meeting record that the defender believed that the pursuers' solicitors "did not tell ICAS about an agreement between him and the other side that the valuation would be Hoffman compliant" and that Mr MacDonald replied that he would update his draft letter of engagement accordingly. Mr MacDonald issued to the parties a second letter of engagement on 5 July 2018. In that second letter of engagement he indicated *inter alia* that in view of the matters which had been raised by the parties at the meeting on 16 April, he now estimated that his fee was likely to amount to around £15,000 plus VAT. The revised letter did not contain the update referred to in the notes of the meeting with the defender on 17 May 2018. Mr MacDonald requested that the parties confirm their acceptance of the terms of the second letter of engagement by signing a docquet to that effect appended to each copy letter and by returning the signed copy letters to him by 11 July. The pursuers did so. The defender did not do so. In an email to Mr MacDonald dated 11 July 2018 the defender stated "Having received legal advice in relation to your disregard of my proposed amendments to the LOE I

confirm that l do not agree with your final version. I therefore will not be signing." In those circumstances Mr MacDonald has been unable to begin the process of valuing the defender's shares. Before Mr MacDonald can begin that process, each of the parties requires to agree to the terms of his letter of engagement.

The pleadings

[8] In the principal action, the pursuers seek declarator that the terms of the contract are contained in the offer issued on 8 November 2016 and the defender's acceptance dated 27 November 2017. The pursuers averred *inter alia* that:

> "In order that Mr MacDonald may begin the process of determining the fair value of the defender's shares it is necessary that the terms upon which he is to do so are agreed with him. The terms of the second letter of engagement are reasonable. The methodology Mr MacDonald proposes to employ in determining the fair value of the defender's shares is consistent with the parties' rights and obligations under article 10.2. The defender is obliged in terms of the contract between the parties constituted by the letter from Harper Macleod dated 8 November 2016 and the defender's written acceptance to use all reasonable endeavours to instruct and cooperate in such an expert valuation, and to execute all documents required to achieve the agreed reduction in the share capital of the company and the payment of the Agreed Sum to the defender. The defender is in consequence obliged in terms of the parties' agreement to sign and return to Mr MacDonald a copy of the second letter of engagement in acknowledgement of his agreement to its terms. He has failed to do so. In those circumstances the pursuers are entitled to an order for specific implement of the defender's obligation as concluded for and, in the event that the defender fails to implement such an order, are in the alternative entitled to decree granting warrant and authority to the Deputy Principal Clerk of Session to sign and return a copy of the second letter of engagement on the defender's behalf."

[9] The defender's answers included the following averments:

> "…the letter dated 8th November 2016 and the Defender's letter delivered on or about 27th November 2017 did not represent the entirety of the correspondence which, together, constituted the contract between the parties. Rather, that correspondence included (i) the representations and assurances which were given to the Defender by the Pursuers' then solicitor, Rod McKenzie of Harper Macleod LLP, and (ii) the position adopted by the present Pursuers in the proceedings before Glasgow Sheriff Court at the instance of the present Defender, in the period between 8th November 2016 and 27th November 2017. The letter dated 8th November 2016, at paragraph 15,

expressly invited the Defender to raise any concerns or queries which he had with the terms of the letter dated 8th November 2016. So far as point (i) is concerned, the Defender duly entered into correspondence with Mr McKenzie concerning the terms of the letter dated 8th November 2016. That correspondence is detailed in the schedule produced by the Defender pursuant to paragraph 3 of the Court's interlocutor dated 25th April 2019. In the course of that correspondence, the Defender sought confirmation that the Pursuers' offer was 'Hoffmann compliant', by which the Defender meant that he sought confirmation that the Pursuers' offer was to be regarded as being subject to the requirements of an offer to purchase his shares in the Company at a 'fair value' as set out in the speech of Lord Hoffmann in *O'Neill* v *Phillips* [1999] 1 WLR 1092, 1107-1108, the relevant parts of which (pages 1107C to 1108B) are referred to for their terms which are held to be incorporated herein *brevitatis causa*. Mr McKenzie so understood the Defender. Mr McKenzie confirmed that the Pursuers' offer was to be understood as being subject to those requirements…The correspondence which passed between the Defender and Mr McKenzie (referred to in point (i), above) falls to be considered as part of the contract which was concluded between the parties when the Defender issued his letter accepting the Pursuers' offer. *Separatim* if such correspondence does not in itself form part of the contract between the parties, it in any event on any view forms part of the admissible surrounding circumstances against which that contract falls to be construed… In either case, however, on a proper construction of the parties' contract, it was an express term of that contract that the valuation of the Defender's shares was to be undertaken in accordance with the requirements set forth in *O'Neill* v *Phillips*, as set out above. Further and in any event, in the offer letter dated 8th November [2016], the sum to be paid to the Defender was defined as the 'Agreed Price'. The Defender's acceptance of the offer set forth in the letter dated 8th November [2016] was on the basis of 'Method 2', as set out therein, that is to say, on the basis of an expert valuation of the Defender's shares which had as its purpose the identification of the fair value of those shares. In that respect, however, the letter dated 8th November [2016] also proceeded on the basis that the 'Agreed Price' would be paid by the Company from funds held in its share premium account, and on the basis of a reduction in the capital of the Company. At the very least, the terms of the offer letter dated 8th November [2016] was [*sic*] not absolutely clear as to what was to happen in the event that the 'Agreed Price' was in excess of the amount available to the Company to purchase its own shares. On that basis, in the course of the correspondence which passed between Mr McKenzie (on behalf of the present Pursuers) and the Defender, as referred to in point (i), above, the Defender sought clarification as to what was to happen in that event. Mr McKenzie confirmed that, in such a scenario, the Defender would be entitled to seek payment of any further sums so due from the Pursuers themselves… Meantime, it was an express term of the contract between the parties that the procedure for the valuation of the Defender's shares had to comply with the guidance set forth by Lord Hoffmann in *O'Neill* v *Phillips*. In that respect, it was an express term of the contract that the parties were to have 'equality of arms' such that 'both should have the same right of access to information about the company which bears upon the value of the shares and both should have the right to make submissions to the expert' (*O'Neill* v *Phillips*, page 1107H). The Pursuers have failed, over a period of many years, to provide to

> the Defender the information and documentation required and requested by him in exercise of his right to 'equality of arms'….Without such information and documentation, the Defender is unable to make meaningful submissions to any expert concerning the valuation exercise. As a result, the Pursuers are in material breach of the express terms of the contract. The letter of engagement which is the subject of the first conclusion of the Summons likewise makes no provision for the Defender to have any access to information or documentation concerning the Company. Nor indeed does that letter address the other issues which, on a proper construction of the parties' contract, are the subject of agreement between the parties, as to be addressed in the Counterclaim to follow hereon. In consequence of the Pursuers' material breach (which the Pursuers have not remedied) the Defender is excused performance of any counterpart obligation owed by him under the contract. The execution of any letter of engagement or appointment is plainly the counterpart of the Pursuers' obligation to provide the required information and documentation to the Defender. Accordingly, the Defender is not presently under any enforceable obligation to execute the letter of engagement to which reference is made in the first conclusion of the Summons. In any event, quite apart from the Pursuers' breach of contract, the Defender is not obliged to execute the letter of engagement to which the first conclusion relates since that letter of engagement does not properly reflect the terms of the parties' contractual agreement, in respect that the Letter of Engagement does not make provision in relation to the right to 'equality of arms', referred to above. In that respect, a right to make submissions to the valuer, and any right on the part of the valuer to call for information, do not make up for the absence of the logically prior right on the part of the Defender to have full 'equality of arms', without which a right to make submissions and representations to the valuer is illusory."

[10] Shortly prior to the proof a minute of amendment was tendered on behalf of the defender, to add averments to the effect that Mr MacDonald was disqualified from acting as an expert as a result of apparent bias. The grounds for that contention were averred to be that Mr MacDonald wrongly continued to deny that at the meeting on 16 April 2018 he had confirmed his lack of familiarity with *O'Neill* v *Phillips,* had ignored most of the reasonable proposed revisions to the letter of engagement suggested by the defender, and had agreed at the meeting with the defender on 17 May 2018 that the letter of engagement would include express reference to the principles in *O'Neill* v *Phillips* but had not made that revisal. Senior counsel for the pursuers opposed the motion to amend, including on the basis that Ms Kay Thomson (who was present at the meeting on 16 April 2018 and took the minutes) would

require to be precognosced, but she had not been cited as a witness and was unavailable to give a precognition prior to the proof commencing. I decided to allow the amendment, but as the proof was about to commence in seven days or so, I made clear that the pursuers could add Ms Kay Thomson as a witness, if so advised. I also allowed the pursuers to lodge either answers to the defender's minute of amendment, or if that was not possible prior to commencing the proof, to lodge their own minute of amendment, if it was necessary to respond to the defender's new averments. In due course, the pursuers did so and averred that there was no apparent bias. The pursuers also averred that the defender told Mr MacDonald that the pursuers' solicitors had failed to disclose to Mr MacDonald that it was agreed between the parties that the defender's shares were to be valued on the principles stated by Lord Hoffman in *O'Neill* v *Phillips*. The averments went on to state that on making enquiries Mr MacDonald was advised by the pursuers' solicitors that this was untrue and accordingly he did not make the proposed amendment to the draft letter of engagement.

[11] In the counterclaim, the defender seeks three declarators. Firstly, that the contract was constituted by the correspondence referred to above, or alternatively if constituted by the offer and the acceptance, that the contract falls to be construed with reference to the correspondence in the intervening period and that in either event it was an express term of the contract that any purchase of the defender's shares was to be at "fair value" as set out, and as subject to the requirements detailed in, the speech of Lord Hoffmann in *O'Neill* v *Phillips*. Secondly, that the defender is not obliged to agree to the letter of engagement issued by Mr MacDonald. Thirdly, that in terms of the contract, in the event that the "Agreed Sum" is in excess of the amount then available to the company to purchase the defender's shares, on a proper construction of the contract, the defender is entitled to pursue

payment of any outstanding balance from the present pursuers and that, until such time as the "Agreed Sum" is paid in full, the defender (a) is not prevented from continuing to pursue his application for orders under section 994 *et seq* of the Companies Act 2006, against *inter alios* the present pursuers, which is in dependence before Glasgow Sheriff Court; and (b) is entitled to retain his membership of the company. The pursuers contend that there are no grounds for any such orders.

The issues

[12] The issues in dispute between the parties are therefore:

(i) whether, in terms of the contract between the parties, the valuation of the defender's shares in the company required to be carried out in a manner which complied with the principles set forth in the speech of Lord Hoffmann in *O'Neill* v *Phillips*;

(ii) if so, what that means, on a proper construction of the contract;

(iii) whether the expert is disqualified from acting on the ground of apparent bias;

(iv) whether the third conclusion in the counterclaim should be sustained.

Evidence

[13] Ronald Somerville (the first pursuer) was the first witness led on behalf of the pursuers. He is a director of the company and also, along with the defender, a director of three other companies. Mr Somerville and the defender each hold 50% of the shares in those other companies. He commented on a number of the key documents. He explained that the defender had access to a substantial amount of information concerning the company, including what was referred to as the "backstage" material. This could be accessed remotely

by electronic means and covered a wide range of details of the company's affairs. The defender also received the monthly management accounts. Mr Somerville accepted that the relationship with the defender had broken down, although they remained bound together in various businesses. They each have a negative view about the other and a series of grievances. Referring to the contract with the defender, it was correct that in a contract of this kind the purchaser wishes to pay as little as possible and the person whose shares are to be bought wishes to be paid as much as possible. If the defender requested relevant information for valuation purposes it would be provided to him. Legal advice as to what is relevant information had been taken.

[14] Mr Somerville agreed that the Grant Thornton letter did refer to the defender having full and unfettered access to company records, but he explained that this had been conceded because the defender "wasn't giving an inch". This resulted in the defender requesting all emails over a three-year period and receiving about 50,000 of them in hard copy. Mr Somerville accepted that if there was an email in respect of a new business opportunity it would not be accessible on the "backstage" platform. He spoke to the history of the sheriff court litigation. Mr McKenzie had engaged in the correspondence after the offer dated 8 November 2016 on the pursuers' instructions. Mr McKenzie's view, which was the common sense view, was that the expert valuer was best placed to decide about what information was appropriate and relevant to the valuation. Reference was made to meetings which the defender had held with the company's staff during the Grant Thornton valuation process. Several members of staff had been upset and stressed by that process. Mr Somerville's recollection was that at the meeting on 16 April 2018 Mr MacDonald confirmed that he is familiar with the Hoffman principles. It was understandable that the defender

was concerned that Mr MacDonald had not inserted in the draft letter of engagement a reference to the procedure being "Hoffman compliant".

[15] Charles Shaw, the second pursuer, was the next witness. He had a long and successful career in the drinks industry, reaching high-level positions, before becoming a director of the company. At the time of the Grant Thornton valuation the defender interviewed six or seven staff, some of whom became upset. The defender insisted on seeing some 56,000 emails. Mr Shaw spoke to the background of the sheriff court litigation between the parties. Mr McKenzie was authorised to say what was said in his correspondence with the defender or his solicitors. At the meeting on 16 April 2018 Mr MacDonald stated that he was aware of the Hoffman principles. The defender would have been exercised if Mr MacDonald had expressed unfamiliarity with those principles, but that did not occur. The witness had a dim view of the defender and said that the defender hated him. He spoke to the access the defender had to the company's information. The company would supply all information that Mr MacDonald requested.

[16] Roderick McKenzie then gave evidence. He is a senior solicitor and the former head of dispute resolution of the firm which advises and acts for the pursuers. He explained that the offer in the letter of 8 November 2016 was addressed to the defender's solicitor and made clear that any queries that person had could be raised. He spoke to the further correspondence that had ensued with the defender's solicitor and the defender himself. The defender had said he required full compliance with Lord Hoffmann's criteria and that the offer was not compliant. The defender did not depart from that position in his correspondence. However, any concerns the defender had were not articulated in the form of a qualified acceptance. Mr McKenzie had Lord Hoffman's speech in *O'Neill* v *Phillips* in mind when drafting the offer. One had to look at the offer as a whole and ask whether the

defender has access to material he needs which bears upon the value of shares. In addition to requesting information from the company, the defender had various other rights including his rights as a director to access financial information, to seek a court order, to request information from the company via the expert and if need be to apply for judicial review. The witness accepted that on behalf of his clients he was saying, in the correspondence, that the offer was, and was intended to be, an offer that satisfied the principles set forth in *O'Neill* v *Phillips* and he also accepted that the defender wished an offer that satisfied those principles. They both wanted such a process. If the defender felt he was not getting access to relevant material his first port of call would be the expert, although he was not the only port of call.

[17] The next witness was the expert, Stewart MacDonald. He explained what had occurred at the meeting on 16 April 2018 and who had been present. At the meeting he had said he was aware of the Hoffman principles. That was recorded in the minutes of the meeting, prepared by Ms Thomson. It was correct that he had agreed at the meeting on 17 May 2018 between himself and the defender that he would update the letter of engagement to include the reference to being "Hoffman compliant". He had omitted to do that, which was an oversight. He had made a number of revisions to the original letter of engagement. He explained his experience of carrying out valuations of shares. All valuations that the witness had carried out over more than twenty years were based on Lord Hoffmann's principles and the requirement to be fair to both parties. In share valuations there were commonly elements of contentiousness between parties and he had experience of situations in which there had been a complete breakdown in relations. He also had experience of one party having all of the knowledge and documentation and the other not being in that position. It was possible that those who controlled a company might seek

to downplay the values and prospects of the company's business or might seek to inhibit development of the company until the valuation was completed. He was aware that the pursuers had access to all the information and the defender did not. There was nothing controversial or objectionable in the Grant Thornton letter and the witness did not disagree with what Mr Webster had said in his witness statement, that having full access to personnel and records was what one would expect to see in order that the valuation process is carried out properly and fairly. He had accepted revisions proposed by the pursuers' solicitors to the minutes of the meeting on 16 April 2018 but not those proposed by the defender. Those minutes recorded that Mr MacDonald was to be allowed access to any information which would help him to reach his decision on valuation. His evidence was that he would ask for anything he needed to know and if he did not get that information he would not continue. The information obtained would be shared with everyone. He accepted that the defender might not be able to frame a request for information if he had not seen relevant documents in the first place. If the witness felt it appropriate to interrogate the company's systems by using an information technology expert he would do so. The defender had access to a whole load of information regarding the previous valuation. He would have an idea what he wanted to see and, if asked, the witness would request that information from the company. The defender would have access through him. Mr MacDonald said that if one party brought to his attention something that party considered was worthy of investigation, then invariably he would simply ask for it. He accepted that there may well be instances where an expert would have no way of knowing whether he had been given everything.

[18] Mr MacDonald accepted that Ms Thomson, in her handwritten notes of the meeting on 16 April 2018, had noted no response to the question from the defender as to whether Mr MacDonald was "familiar with Hoffman". However, his response had been "yes". The

recollection of the defender differed from his own recollection. The witness was taken to the email on 16 April 2018 from the defender to his adviser, Mr Webster, which stated that Mr MacDonald had never heard of Lord Hoffmann, and to the defender's diary entry for that day which stated "Stuart has not heard - of valuation??". Mr MacDonald said it was just not possible, given what he had said at the meeting, for the defender to have that view. In relation to revising the draft letter of engagement, the witness had made no conscious decision to recant from what had been discussed with the defender and the failure to revise appeared to the witness to have been an oversight. The intention was to include it in the draft and then leave it for the parties to comment further on the revised draft. The witness had no recollection of being advised by the pursuers' solicitors that the defender's statement at the meeting on 17 May 2018, about an agreement with the pursuers that the valuation was to be on the Hoffman principles, was untrue. He spoke to having rejected the defender's proposed revisions to the draft letter of engagement and accepting the revisions proposed by the solicitors for the pursuers. It would not, on Mr MacDonald's experience, be a normal provision to allow the person whose shares were being valued full and unfettered access to all information the company had; to do that would be extreme. His experience was of seeing styles for letters of engagement issued by the "big four" accountancy firms.

[19] Kay Thomson was the final witness for the pursuers. She worked for the same firm as Mr MacDonald, and had taken handwritten notes of the meeting on 16 April 2018. These did not record Mr MacDonald's answer to the question about whether he was "familiar with Hoffman?", however the witness said that Mr MacDonald did confirm at the meeting that he was familiar. She was very confident in her memory that Mr MacDonald had confirmed this and she had typed up the draft minutes that afternoon, including Mr MacDonald's response, before having any further discussion with Mr MacDonald. In commenting on the draft

minutes which she had circulated, the defender had disputed what Mr MacDonald was recorded as having said, but the defender's comment on that was wrong. She had no doubt about Mr MacDonald's answer. She was aware of him being independent and understanding the principles stated by Lord Hoffmann. She was certain he made a positive response and if he had said "no" that would have surprised her and she would have put in a question mark in the handwritten notes. She was not aware of Mr MacDonald having had any discussions with the pursuers' solicitors on whether or not it was true, as the defender had stated in his proposed revisals to the letter of engagement, that there was agreement about the valuation being on the Hoffman principles.

[20] The parties agreed in a joint minute that, with the exception of one sentence, the evidence in the witness statement of the third pursuer, Nick Felisiak, would stand as his evidence and so he was not called. The pursuers' case was closed.

[21] Two witnesses were led on behalf of the defender, the first being the defender himself. His evidence covered the history of the relationship between him and the pursuers and the general background to the current dispute. He described the kind of information about the company to which he had been given access by the pursuers. While he had been given the management accounts and could see the final accounts at Companies House, and could also access the "backstage" system, he was denied access to further information and was not permitted to go into the company's office. He wished to find out, for example, how the company was coming to its decisions and strategies. He was completely excluded from management. It was wrong of the pursuers to say that if he requested information it would be provided to him. Around the time of the Grant Thornton valuation he had interviewed several members of staff. Mr Webster was with him at these interviews. There was some tension but the witness had not engaged in any inappropriate conduct. The full and

unfettered access given to him for the purposes of the Grant Thornton valuation had resulted in him obtaining 56,000 emails. He expressed his apology if it was his fault for asking for these to be on paper. Mr McKenzie was correct to say that the witness would only be likely to accept a fair offer in the sense used by Lord Hoffmann. In their correspondence, Mr McKenzie had kept on saying his clients thought the offer was "Hoffman compliant". The witness explained his recollection of the meeting on 16 April 2018. He was completely clear that Mr MacDonald had said "no" to the question asked about whether he was familiar with Hoffman. Mr MacDonald had said that in an exasperated way. The entry in the witness's diary to "Stuart has not heard - of valuation??" was written at the meeting and was a reference to Mr MacDonald giving his answer. On the same afternoon the witness sent the email, in the terms noted above, to his adviser Iain Webster, to which Mr Webster responded. The meeting on 17 May 2018 resulted in Mr MacDonald agreeing to put the reference to the valuation process being "Hoffman compliant" into the draft letter of engagement, but he did not do so. The other witnesses, Mr Somerville, Mr Shaw, Mr MacDonald and Ms Thomson, who had been present at the meeting on 16 April 2018 were wrong in their evidence as to what Mr MacDonald had said. The defender was asked about why the diary entry had not been produced until during the course of the proof and explained that he had brought it to the attention of his legal team at a very early stage and had been advised that it was of little value. He agreed that his acceptance dated 27 November 2017 to the offer dated 8 November 2016 contained no attempt to qualify the offer, but the offer had been amended by what was said in the intervening period. He was taken to the correspondence in that period. The offer was accepted on the basis that it was "Hoffman compliant". The acceptances had been produced after a hearing in the sheriff court case at which his motion to discharge the proof had been

refused. The reason for continuing with the summary application when he had eventually realised that the offer was "Hoffman compliant" may have been to do with expenses. He did not accept that he had caused any upset to the staff members when he interviewed them. For the present valuation, he wished to have access to emails generated within the company from 2013 to date, although he was mindful that for the Grant Thornton valuation access to emails over a period of three years was seen as appropriate. He would take advice about which documents were relevant and act on that advice.

[22] The final witness on behalf of the defender was Mr Iain Webster, the defender's adviser. He had been a practising accountant since 1985 and had experience of the valuation of company shares. He had carried out expert determinations and given expert advice. In relation to the Grant Thornton letter, full access to information was what Mr Webster would expect to see, as parties should get equality of information. The witness, in representing the defender, would exercise judgement as to what was relevant. He would go through the background and list the information that would be relevant. Understanding the dynamics of the business is relevant for valuation purposes. The process for the Grant Thornton valuation was good and was what the witness would expect to be followed in relation to this type of contentious valuation. In response to a question from the court about whether the defender should have full and unfettered access, the witness replied that he should either have full and unfettered access or provision should be made for the expert to have that access. Mr Webster would ask for information which informed the inherent value of the business. After that, one looked for "value enhancers", such as whether the company had barriers to the entry into its market of other competitors, or had products in the pipeline, or had software which could enhance the customer base or whether there might be parties interested in purchasing the company. One would also look at "value detractors", for

example whether the company was very dependent upon economic conditions. From what the witness had seen, the defender did not have access to the information that would allow him to make an informed judgment or indeed for the witness himself to make an informed judgment on behalf of the defender. The expert in the Grant Thornton valuation did not want to access the information herself, but rather she wanted to rely on the parties making their own submissions. He had been present at all of the staff interviews conducted by the defender for the purposes of that valuation exercise and recalled no inappropriate behaviour. If it was for the expert to decide whether the information requested is needed, that is not necessarily a direct route into getting the information which a party or his adviser thinks is relevant. The defender had emailed the witness on the afternoon of the meeting of 16 April 2018 to say that Mr MacDonald did not understand what was meant by the process being "Hoffman compliant". The witness thought that the defender may have asked for electronic copies, rather than paper copies, of the emails at the time of the Grant Thornton valuation.

Submissions

Submissions for the pursuers

[23] Dealing with the relevant legal principles, in relation to construction of contracts reference was made to *Wood* v *Capita Insurance Services Ltd* [2017] AC 1173. The fact that the valuation of shares is referred to an independent third party showed that the parties' object is to obtain an appropriate valuation by a relatively speedy and informal means: *Holland House Property Investments Ltd* v *Crabbe* 2008 SC 619 (at [19] and [23]). An expert, subject to the terms of his remit, is entitled to carry out his own investigations and come to his own conclusions regardless of any submissions or evidence adduced by the parties themselves:

Macdonald Estates plc v *National Car Parks Ltd* 2010 SC 250 (at [21]). The duty of an expert is to act independently and honestly but he is not bound by the rules of natural justice: *Amec Civil Engineering Ltd* v *Secretary of State for Transport* [2005] 1 WLR 2339 (at [38] and [46]) and *Bernhard Schulte & Ors* v *Nile Holdings Ltd* [2004] 2 Lloyd's Rep 352 (at [95]). The parties are at liberty to propose amendments to the terms proffered by the expert, but it is for the expert to then decide on what terms he will carry out the exercise: *Cream Holdings Ltd* v *Davenport* [2012] 1 BCLC 365 (at [36]). If the terms on which the expert is prepared to act are reasonable, the parties are bound to accept those terms: *Cream Holdings Ltd* (at [37]). The appointment provisions under which the expert has been nominated do not themselves impose any duty of disclosure of information: *Cream Holdings Ltd* (at [26]). One party's fear that the expert will be unable to deal adequately with his complaints that the company has not made complete disclosure of all financial and other information relevant to the determination of fair value does not excuse that party from agreeing to the terms proffered by the expert, if the terms allow that party to raise those issues and there is no reasonable basis for supposing the expert will not respond appropriately, although it will be for the expert to decide what he considers necessary to know in order to carry out the valuation: *Cream Holdings Ltd* (at [38]). Apparent bias is not a sufficient ground to vitiate the decision of an expert: *Macro & Ors* v *Thompson & Ors (No 3*) [1997] 2 BCLC 36 (at 64-65); *Bernhard Schulte* (at [94], [98] and [101]).

[24] Parts of the evidence of the defender and Mr Webster were objected to and in any event aspects of the defender's evidence were neither credible nor reliable. The terms of the agreement between the parties were to be found in the offer dated 8 November 2016 and the written acceptances from the defender dated 27 November 2017. The terms of the offer were not amended or varied. It was plain that in correspondence after 8 November 2016

Mr McKenzie expressed the opinion that the offer was "Hoffmann compliant" and that in their answers in the sheriff court litigation the pursuers averred that "said offer is in the terms described by Lord Hoffmann". Why Mr McKenzie would desire that to be the case was readily understandable given the consequences in the defender's unfair prejudice summary application. Nevertheless, Mr McKenzie was simply expressing an opinion on the offer rather than varying its terms. It was clear from a consideration of the emails sent by or on behalf of the defender that, far from seeking confirmation that the offer was "Hoffmann compliant", the defender instead maintained the consistent position that the offer was not "Hoffmann compliant". It would of course have been entirely possible for the offer to contain a provision to the effect that the defender's shares were to be valued in accordance with the principles expounded by Lord Hoffmann in *O'Neill* v *Philips*, or for the defender to have issued a qualified acceptance insisting upon such a condition. Instead, neither happened and the defender accepted in unqualified terms the offer which expressly provided that his shares were to be valued "utilising the valuation methodology for shares provided for in the current Articles of Association of the company". Nothing in the subsequent correspondence was capable of altering the plain meaning of the language used in the offer as to the basis on which the defender's shares were to be valued. The defender was not entitled to withhold acceptance of Mr MacDonald's letter of engagement on the ground that it does not provide that the defender is to have an unfettered right of access to information. By accepting the offer, as it provides, the defender is obliged to sign and return the letter of engagement, unless its terms are unreasonable.

[25] In those circumstances Mr MacDonald was nominated to carry out the valuation of the defender's shares on the basis prescribed by article 10.2 of the company's Articles of Association. As an expert, and having regard to the terms of article 10.2, Mr MacDonald

would not be carrying out a quasi-judicial function. He will be obliged to carry out the valuation exercise fairly but, subject to the terms of any letter of engagement which becomes binding upon Mr MacDonald and the parties, he is entitled to carry out his own investigations, may choose whether or not to have regard to any submissions made by the parties and is not bound by the rules of natural justice. He is not obliged to allow any of the parties unfettered access to all and any information or documentation held by another party. The terms of the letter of engagement are reasonable and the defender is under a contractual obligation to sign, and deliver to Mr MacDonald, a copy of that letter in acknowledgment of his agreement to its terms.

[26] If, contrary to the above, the terms of the offer were varied to include the principles stated by Lord Hoffmann in *O'Neill v Phillips* as terms of the parties' contract, that was done on the express condition that "equality of arms" was deemed to be achieved by the parties having the value of the defender's shares determined by an independent expert under a duty to ensure a fair and reasonable valuation procedure and not on the basis that the defender would have unfettered access to all company information. Alternatively, if the parties must be held to have incorporated into their contract the rights and obligations arising from the principles explained by Lord Hoffman then those principles, properly understood, did not confer upon the defender the right of unfettered access. Lord Hoffman refers to access to information that "bears upon the value of the shares" and this was a filter. One could interpret Lord Hoffman's comments as indicating that it is for the expert to determine what is the relevant information and to ensure that both parties have equal access to it. If the defender sought to persuade the expert that the material was potentially relevant, the expert would determine whether and to what extent disclosure ought to be

required. By signing the letter of engagement the company is contractually obliged to comply with that request.

[27] The defender was not relieved of his obligation to sign and return the letter of engagement by reason of any apparent bias on the part of Mr MacDonald. Apparent bias does not vitiate the decision of an expert and, in consequence, is not a ground upon which a party can successfully challenge the expert's appointment. If, contrary to that submission, apparent bias is a ground upon which the defender is entitled to refuse to sign and return the letter of engagement, the evidence does not establish that Mr MacDonald has acted in such a way that would show a real possibility of bias on his part. As to the first ground upon which apparent bias is contended, Mr MacDonald and Ms Thomson had confirmed in their evidence that the minutes are accurate about Mr MacDonald's reply to the defender's question. Their evidence is corroborated by Mr Somerville, another credible witness. In any event, the defender appeared to retract his accusation of lying and to accept that Mr MacDonald might instead have been mistaken in his recollection. On the other point relied upon by the defender about apparent bias, Mr MacDonald accepted that by reason of oversight he had failed to include the statement about Hoffman compliance in his draft letter of engagement but the defender did, of course, have the opportunity (which he took) to include it in his proposed revisals to the draft. Thereafter it was a matter for Mr MacDonald alone to decide on the terms on which he was prepared to undertake the valuation exercise and to set them out in the letter of engagement. In those circumstances the reasonable observer would conclude that no prejudice had been sustained by the defender.

[28] In relation to the third conclusion in the counterclaim, there was no contractual obligation upon the pursuers in terms of the contract personally to make payment to the

defender of the balance, in the event that the defender's shares are valued at a sum greater than the amount then available to the company. Even if the terms of the offer were held to have been varied subsequently in an email from Mr McKenzie, there was nothing to suggest that the pursuers have assumed a personal obligation to make payment.

Submissions for the defender

[29] It was clear, on basic contract law principles, that the objective intention of the parties was that the valuation required to be carried out in a "Hoffmann compliant" manner. The correspondence following upon the offer could be regarded as being documents which form part of the contract. Alternatively, the correspondence was on any view part of the admissible surrounding circumstances which may be used to inform the proper construction of the contract. On either approach, there was *consensus* between the parties that the valuation of the defender's shares should be "Hoffmann compliant". It was not possible to ascribe to the parties any other intention. What each subjectively understood to be required in order for the contract to be "Hoffmann compliant" was a wholly different point.

[30] As to what the contract required, on a plain reading of Lord Hoffman's words, a distinction is drawn between, on the one hand, both parties having "the same right of access to information about the company which bears upon the value of the shares" and, on the other hand, the form of submissions (written or oral) which is a matter for the discretion of the expert. Critically, the right of access is to be "provided for" in the offer. The right of access is to inhere "in both parties" and not, for example, in the expert. It is not a matter for the expert to decide what documents ought to be produced by the parties. A right conferred on the expert to require the production of documents is not a right of access conferred on the parties, far less is it one which provides "the same right of access" where one of the parties

has all of the documentation and information and the other does not. This conclusion was reinforced by the third of Lord Hoffmann's principles (referred to at 1107F-G).

[31] Further and in any event, the soundness of the defender's construction of the contract was supported by considerations of commercial common sense. It was known to the parties at the time of contracting that the pursuers had access to all of the information and documentation while the defender did not. The pursuers' construction denied the defender access to documentation and information which could be used in submissions to the expert relevant to the valuation of his shares. The defender's construction achieved equality of arms and in addition would allow any valuation to be carried out in circumstances where all relevant material is before the valuer. The letter of engagement prepared by Mr MacDonald was therefore disconform to the requirements of the contract between the parties, properly construed.

[32] The offer dated 8 November 2016 expressly invited the defender to raise any queries he had arising from the terms of the offer, in order that they might be addressed by the pursuers' solicitors. The correspondence which then ensued was in pursuance of that express stipulation and the letters of acceptance must be construed in that context: *Kirin-Amgen Inc Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, (per Lord Hoffman at [64]), quoted with approval in *Marley v Rawlings* [2015] AC 129 (at 144). There was no question here of varying or modifying the terms of the contract but, rather, simply of clarifying and elucidating the meaning of the provisions set forth in the offer. Viewed in that context, rather than acontextually, the acceptance plainly proceeded on the basis that all of the relevant and clarificatory correspondence formed part of the contractual documentation.

[33] Even if that analysis was not accepted, the result was in any event the same since, on any view, the correspondence must form part of the admissible surrounding circumstances:

Rainy Sky SA v *Kookmin Bank* [2011] 1 WLR 2900; *L Batley Pet Products Ltd* v *North Lanarkshire Council* 2014 SC (UKSC) 174; *Arnold* v *Britton* [2015] AC 1619; *Wood* v *Capita Insurance Services Ltd*; *British Overseas Bank Nominees Ltd* v *Stewart Milne Group Ltd* 2019 SLT 1253; *Investors Compensation Scheme Ltd* v *West Bromwich Building Society (No.1)* [1998] 1 WLR 896, (per Lord Hoffman at 912-913). On no view could the correspondence be characterised as "negotiations". It was clear that the common intention of the parties was that their bargain was to be "Hoffmann compliant". To reach any other conclusion would be to attribute to the parties an intention they could not have possessed.

[34] On that approach, the parties were effectively agreeing to incorporate those principles, just as they might incorporate a standard set of terms or conditions, or a statutory test (eg *Enviroco Ltd* v *Farstad Supply A/S* [2010] Bus LR 1008). Having agreed to do so, those principles fell to be construed on an objective basis. The evidence of Mr McKenzie as to alternative means by which the defender might gain access to books and records of the company was irrelevant to the question of construction and in any event did not amount to rights on the part of the defender. On the evidence, Mr McKenzie was clear that he knew the defender would not accept an offer that was not "Hoffman compliant". The evidence about the motivation of the defender in accepting the offer was nothing to the point; it could not affect the proper interpretation. Lord Hoffman made clear that the offer itself should provide for equality of arms. There was plainly also a right to make submissions. It was an obvious misreading to proceed on the basis that this would all be left up to the expert. The letter of engagement provided no right of access and hence it was disconform, even if one built in the limitation that the right is only about access to information bearing upon valuation. The letter of engagement did not give the defender a right to request information from the expert, it only allowed him to draw to the attention of the expert things considered

to be relevant. The case of *Cream Holdings Ltd*, relied upon by the pursuers, could be distinguished.

[35] It was clear that there has been a complete breakdown in relations between the parties. One consequence is that the pursuers will not voluntarily produce documents or information to the defender (at least beyond what they consider to be his bare entitlement as a director of the company). The very real need for equality of arms was manifest, on the evidence. Against that background, the defender was under no obligation to accept the letter of engagement as it did not confer any rights on him to have access to information and documentation.

[36] Even if the defender was to execute the letter of engagement, Mr MacDonald is disqualified from acting on the grounds of apparent bias. The test was that set forth in *Porter* v *Magill* [2002] 2 AC 357 (per Lord Hope at [103]). While it has been held that, in the case of independent experts, actual rather than apparent bias will be required in order to vitiate the decision of such an independent expert (see eg *Macro and Ors* v *Thompson and Ors (No 3)* at 64G-H; and *Bernhard Schulte GmbH & Co KG* v *Nile Holdings Ltd*) that is not the position where the expert has not yet reached the stage of performing his allotted task and of issuing a decision: *Hopkinson and others* v *Maximus Securities Limited and others* [2016] EWCA Civ 1057. In support of the factual basis for the case of apparent bias, reference was made to: the material difference between the defender and Mr MacDonald as to what was discussed at the meeting held on 16 April 2018; the fact that despite agreeing to include reference to "Hoffmann compliance" in his letter of engagement Mr MacDonald failed to do so; that the pursuers' pleadings indicated that Mr MacDonald was given to understand (by the pursuers' solicitor) that he had been misled by the defender, and in addition that such contact would in itself raise issues of apparent bias; and also that Mr MacDonald rejected

wholesale the revisions to the draft letter of engagement proposed by the defender. In relation to the third conclusion in the counterclaim, if the sum due could not be paid by the company then the defender was entitled to pursue payment from the pursuers and to continue with the sheriff court claim. It was not being suggested that the meaning to be ascribed to the contract is one of personal liability.

Decision and reasons

Objections

[37] Prior to commencement of the evidence, objections were taken by senior counsel for the pursuers to certain passages in the defender's witness statement. I sustained the objection in respect of certain types of evidence but in light of the extent of the material objected to I indicated that I required to hear from parties as to the precise parts of the statement which would fall to be covered by my ruling. Before the defender gave evidence, I heard those submissions and I sustained the objection in respect of particular sentences. A number of other matters covered by the parties' witness statements were open to objection and I allowed the evidence to be led subject to competency and relevancy. In closing submissions, senior counsel for the pursuer took objection to approximately twenty-eight paragraphs in the defender's witness statement as being irrelevant because they dealt with the history of the parties' dealings and relationship prior to the Grant Thornton valuation, and to a further twenty-eight or so paragraphs, said to deal with the circumstances of the appointment of the expert, as having no foundation on record and as being irrelevant. While there is some force in these objections, I conclude that the material objected to is of some, albeit very limited, relevance in setting out the history and background and I therefore repel these objections.

[38] Senior counsel for the pursuers also objected to what was described as the opinion evidence offered by Mr Webster. This was said to be inadmissible, on the ground that where a skilled witness, giving his opinions, does not comply with the recognised duties of being independent and impartial, that evidence should be excluded. The requirement of impartiality was one of admissibility not weight: *Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59 (at paras [39] and [40]). The defender's position was that Mr Webster was not called as an independent expert witness. The basis upon which the pursuer objected was unfounded and any skilled witness could offer opinion evidence, it being for the court to decide what weight, if any, to attach to that evidence. I accept the submissions for the defender on this point. I considered Mr Webster to be an able and experienced accountant who had dealt with valuations both as an expert and acting on behalf of a particular party. He gave his evidence in a genuine and straightforward manner. The fact that he was engaged by the defender to act on his behalf did not preclude him from giving his opinion on the matters he was asked about. I therefore repel the objection. Of course, he was not an independent expert called to assist the court and I take that important factor into account, along with the fact that he was engaged to act on behalf of the defender, when assessing the weight to be given to his evidence. His evidence about the carrying out of valuations, including the focus on value-enhancing and value-detracting points, was of some general assistance but overall his evidence was of no particular significance or relevance to the specific issues to be determined, which largely concerned the contract terms and their meaning.

Issue 1: What constituted the parties' contract?

[39] As noted, this issue is whether, as was submitted for the pursuers, the terms of the contract comprised the offer dated 8 November 2016 and the unqualified acceptance dated 27 November 2017, or whether, as was submitted for the defender, a number of documents that passed between the parties and/or their solicitors in the period between the offer and the acceptance also constitute the contract. In advance of the proof, nineteen documents were identified for that purpose by senior counsel for the defender. Apart from two documents, these were items of correspondence, mainly in the form of emails but also including letters. The two other documents were (i) the Note of Argument for the present pursuers lodged in the sheriff court proceedings on 15 November 2017; and (ii) the adjusted answers for the present pursuers in the sheriff court action dated 13 November 2017. In evidence and submissions, the focus was on the correspondence. It was not suggested that the documents lodged in the sheriff court proceedings could themselves be seen as forming part of the contract. That is readily understandable, as they were nothing other than expressions of the present pursuers' position or contentions in that litigation.

[40] In considering whether the correspondence formed part of the parties' contract, it is correct that the offer dated 8 November 2016 invited discussion, stating that the pursuers would be happy to address points that may be identified by the defender or his solicitor. The correspondence that ensued made clear the defender's position that he wished the question of "Hoffmann compliance" to be specifically addressed and that the offer had failed to do so. That theme was reiterated throughout the correspondence. In an email dated 16 November 2016, the defender's solicitor stated to Mr McKenzie:

> "In relation to the offer contained in your letter of 8 November, I am simply instructed to say that the offer, in so far as it relates to the valuation procedure, is not what might be described as 'Hoffman-compliant…'".

In his reply, by email dated 17 November 2016, Mr McKenzie said that the offer "was drawn up with specific regard to the five elements that such an offer should include, as set out by Lord Hoffmann" and also stated that "The purpose of the offer was to provide a 'Hoffman-compliant' mechanism which would achieve precisely what it was understood was your clients preferred outcome". On 9 December 2016, in his email to the defender, Mr McKenzie stated that the defender had been asking for a "Hoffman compliant" process "and that is what you have been offered." In an email to Mr McKenzie on 12 December 2016, the defender stated that it should be obvious that his solicitor "intends the wording of the acceptance will set to ensure that the agreement between us is fully Hoffman-compliant". In a further email to Mr McKenzie on 13 December 2016, the defender stated that the offer was "manifestly not 'a fair and reasonable' offer" and that "the deficiencies in the offer are blindingly obvious to me". One point mentioned was a suggestion by the defender that the "companies [*sic*] records be made available" to him and "this process would assist in ensuring that both parties have 'equality of arms' in making submissions to the valuer if that is the eventual route". In response, by email on 13 December 2016, Mr McKenzie stated: "The valuer will make such directions as to access to documents and records that he considers acceptable." The email ended with the words:

> "Equality of arms is ensured by having an independent professional appointed by a professional body such as ICAS who will be under a duty in law to ensure a fair and reasonable valuation procedure".

By email dated 2 February 2017, the defender's solicitor requested

> "all email correspondence sent or received by the company between 2013 and the present date using the 5pm email address or any version of it along with all links, attachments and documents referred to in these emails".

In his reply later that day, Mr McKenzie stated "Your client has no right to have open access and/or a copy of every electronic communication sent or received by the company during the referenced period." He added that

> "In the context of a valuation process, if your client wants access to company material which goes beyond his statutory rights [as a director] then he may specify what that information is, why it would be relevant to a valuation of his shares and how he will ensure that it will not be used by your client in a way which [is] against the interests of the company. The directors will consider any request in those contexts. If your client disagrees with the decision of the board on such a request then he will have the option of asking the expert to require provision of the material and ultimately, if he is still dissatisfied, will be able to apply to the court for an order."

The defender's solicitor replied on 8 February 2017, stating *inter alia* that the offer of 8 November 2016 needed to be read along with Mr McKenzie's email of 13 December 2016. He went on to say that the defender:

> "… remains willing to accept an offer which complies with the criteria stated by Lord Hoffman in O'Neill v Phillips. However, he has consulted Counsel about the proposal whose firm view is that it is not Hoffman compliant."

The defender's solicitor then set out two reasons for the proposal not being compliant. The "main reason" was that there would be a cap on what the company will pay. The second reason was that Mr McKenzie was proposing that if there was a shortfall between what the company could pay and the valuation, the defender's remedy would be to continue the litigation. In response, Mr McKenzie stated: "I have my clients' instructions on your proposal. My clients consider the offer made by them to have been Hoffman compliant".

[41] In the submissions for the defender, senior counsel argued that the defender's acceptance plainly proceeded on the basis that all of the relevant and clarificatory correspondence formed part of the contractual documentation. The offer dated 8 November

2016 required an acceptance in writing, which was duly given on 27 November 2017. The letters of acceptance stated:

> "I accept your offer of 8/11/16 and expressly elect for method 2 and I agree to be deemed to have agreed and to act all as provided for in Clause 4 of the offer of 8/11/16 and I agree to be deemed to have agreed to act as elsewhere provided in the offer of 8/11/16."

The acceptance was not in any way qualified and it referred only to the offer dated 8 November 2016, making no reference at all to any of the other correspondence or documents which are now argued to form part of the contract. These other documents comprise many pages and deal with a number of matters. On behalf of the defender, there was no identification of the relevant passages in these numerous documents which were to be taken to constitute part of the contract. This raises considerable difficulties for the suggestion that they do form part of it. It is inappropriate to conclude that an offer which is met by an acceptance is supposed to have added to it words from numerous other documents which also form part of the contract when those words are not identified. Moreover, there is nothing in the further correspondence relied upon by the defender to suggest *consensus in idem* on the points raised. The central feature of the defender's case concerns the right of access to the company's books and records for the purposes of valuation, a matter mentioned by Lord Hoffman, as noted below. It is absolutely clear that this issue was discussed in the correspondence and the positions of the parties were in stark contrast: the defender sought unfettered access and the pursuers expressly refuted any such right of access. It is impossible to see the correspondence as clarificatory on that issue. The proper view is that there was a detailed offer and an acceptance of it, against the background of a lengthy and detailed discussion of various points of difference.

Accordingly, the numerous other documents relied upon by the defender do not constitute part of the contract between the parties.

Issue 2: The meaning of the contract terms

The relevance of the correspondence

[42] In the alternative, the defender relies heavily on this correspondence as indicating the common intention of the parties that the offer, and the valuation procedure, were "Hoffman compliant". In relation to construction of contracts, in *Arnold* v *Britton*, Lord Neuberger (with whom Lord Sumption and Lord Hughes agreed) set out the key principles, including the following:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd* v *Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words...in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

As is well-known, that position is in line with a number of other authorities (eg *Rainy Sky* v *Kookmin Bank Co Ltd; Wood* v *Capita Insurance Services Ltd*) and is the approach taken in Scotland (eg *HOE International Ltd* v *Andersen* 2017 SC 313; *British Overseas Bank Nominees Ltd* v *Stewart Milne Group Ltd; Ashtead Plant Hire Company Limited* v *Granton Central Developments Limited* [2020] CSIH 20).

[43] As Lord Hodge explained in *Luminar Lava Ignite Limited* v *MAMA Group plc* 2010 SC 310 (at [42]) while evidence of prior negotiations is generally inadmissible, evidence of

the factual background to the contract is relevant where the facts are known to both parties and those facts can cast light on either (a) the commercial purpose or purposes of the transaction objectively considered; or (b) the meaning of the words which the parties used in their contract. As Lord Hodge explained, the two cases very often overlap, as the ascertained commercial purpose may give meaning to particular words or phrases. In *Patersons of Greenoakhill Ltd* v *Biffa Waste Services Ltd* 2013 SLT 729, Lord Hodge also discussed the relevance of pre-contractual discussions in relation to the parties' intentions and said:

> "[17] Not everything that the parties knew when negotiating an agreement can be considered when the court construes the contract. For reasons both of relevancy and also of pragmatism the law has set its face against the consideration of parties' statements of intention in the negotiations leading to the contract. There is recent authority for this (*Chartbrook Ltd*, Lord Hoffmann at pp.1115-1121, paras 27-42; *Luminar Lava Ignite Ltd* v *Mama Group Plc* at 2010 S.C., pp.319-321; 2010 S.L.T., pp.153-154, paras 39-45). Again there is also older authority in this jurisdiction (*Buttery & Co v Inglis*, Lord Gifford (dissenting) at (1877) 5 R., pp. 69-70; *Inglis* v *Buttery & Co*, Lord Blackburn at (1878) 5 R. (H.L.), pp.102-103).
>
> [18] The rule excluding statements of intention in pre-contractual negotiations has its limits. In *Chartbrook Ltd* Lord Hoffmann stated (at p.1121, para.42):
>
> > 'The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it.'"

The fundamental distinction drawn by Lord Hodge in these cases is therefore between evidence about the factual background as known to both parties and parties' statements of intention in pre-contractual negotiations. This fits with Lord Neuberger's observation in *Arnold* v *Britton* that subjective evidence of either party's intentions is to be disregarded. It is perhaps of assistance to note what Lord Blackford said in *Inglis* v *Buttery*, where the House of Lords held that no regard should be had to evidence of the parties' prior communings (or

negotiations) that were said to establish their intention as to the meaning of the words in dispute. Lord Blackburn said (at 103):

> "…you may, while taking the words of the agreement, 'look at the surrounding circumstances,' as Lord Ormidale expresses it, and see what was the intention. You do not get at the intention as a fact, as Sir James Wigram in his Treatise on Extrinsic Evidence calls it, but you see what is the intention expressed in the words used as they were with regard to the particular circumstances and facts with regard to which they were used. The intention will then be got at by looking at what the words mean in that way, and doing that is perfectly legitimate."

There is further assistance in understanding the proper approach to evidence of pre-contractual discussions in the observations made by Leggat LJ in *Merthyr (South Wales) Limited (FKA Blackstone (South Wales) Limited)* v *Merthyr Tydfil County Borough Council* [2019] EWCA Civ 526 (at [43] - [55]). I need not set out the observations in full, but the following comments are pertinent for present purposes:

> "[54] What is not permissible, as the decision of the House of Lords in the *Chartbrook* case confirms, is to seek to rely on evidence of what was said during the course of pre-contractual negotiations for the purpose of drawing inferences about what the contract should be understood to mean. It is also clear from the *Chartbrook* case that it is not only statements reflecting one party's intentions or aspirations which are excluded for this purpose but also communications which are capable of showing that the parties reached a consensus on a particular point or used words in an agreed sense. The exclusion of such evidence was justified in the *Chartbrook* case, not on the ground that it will always or necessarily be irrelevant, but because of the costs and other practical disadvantages that would result from relaxing the rule and because the 'safety devices' of rectification and estoppel will generally prevent the exclusionary rule from causing injustice.
>
> [55] I would accept that there may be borderline cases in which the line between referring to previous communications to identify the 'genesis and aim of the transaction' and relying on such evidence to show what the parties intended a particular provision in a contract to mean may be hard to draw…"

As Lord Wilberforce observed in *Prenn* v *Simmonds* [1971] 1 WLR 1381 (at 1385):

> "The only course then can be to try to ascertain the 'natural' meaning. Far more, and indeed totally, dangerous is it to admit evidence of one party's objective – even if this is known to the other party. However strongly pursued this may be, the other party may only be willing to give it partial recognition, and in a world of give and take, men often have to be satisfied with less than they want. So, again, it would be a

> matter of speculation how far the common intention was that the particular objective should be realised…
>
> In my opinion, then, evidence of negotiations, or of the parties' intentions, and *a fortiori* of [one party's] intentions, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction."

[44] It was submitted on behalf of the defender that the correspondence after the offer and prior to the acceptance did not constitute negotiations, but rather was about achieving clarification. The terms of the correspondence from the defender included repeated references to deficiencies in the offer, stating that it needed considerable revisal and that many important issues remained unresolved, that safeguards required to be put in place and that amendments were required. The points in question were identified. The correspondence is readily capable of being viewed as negotiations. But, whether viewed as negotiations or attempts at clarification, the characterisation of the correspondence may not be of particular significance. It is something that took place and was shared between parties after the offer but prior to the contract being concluded. If it did contain evidence of facts known to both parties which, on the authorities, could properly be taken into account in identifying the genesis or aim of the transaction or in construing the meaning of the words in the contract, that evidence is relevant.

[45] Most of what was said in the correspondence merely involved statements of intention rather than indications of facts known to both parties and it is therefore irrelevant. In any event, the approach taken on behalf of the defender was that the parties' respective understandings of what was meant by "Hoffman compliant" did not matter, the point simply being that according to the correspondence the valuation procedure was to be "Hoffman compliant". However, this is an attempt to focus only upon the use of that

expression in the correspondence without taking into account what the parties said they took it mean. If, against the view I have reached, it is appropriate to have regard to the evidence of what was said in the correspondence, it is clear that Mr McKenzie was not expressing an intention that the procedure would be "Hoffman compliant", whatever that was taken to mean; rather, he was saying that the terms of the offer were considered by him and the pursuers to meet that test. He plainly intended it to be "Hoffman compliant" in order for it to be a valid and effective defence to the unfair prejudice allegation. But that is quite different from saying that the offer and any valuation procedure that ensued were intended to be "Hoffman compliant", no matter what that term meant. The defender's position was that "Hoffman compliant" included what was said in *O'Neill* v *Phillips* (at page 1107H):

> "Fourthly, the offer should, as in this case, provide for equality of arms between the parties. Both should have the same right of access to information about the company which bears upon the value of the shares and both should have the right to make submissions to the expert, though the form (written or oral) which these submissions may take should be left to the discretion of the expert himself."

The defender takes that to mean a full and unfettered right of access to company information rather than, as Mr McKenzie made clear was his position, a right to seek information from the company via the expert. Therefore, if I view the correspondence as part of the surrounding circumstances, it does not assist the defender; on the contrary, it makes clear that there was no *consensus* on the meaning of "Hoffman compliant" and hence no shared intention or aim.

The general context

[46] Leaving aside the pre-contractual correspondence, there was plainly a factual background known to both parties. It is obvious from the context that a reasonable person

would understand that each party did indeed aim to have a contract that was "Hoffman compliant", subject to the important qualification that this was as they respectively understood the meaning of that concept. That is clear from the very fact that the offer was made by the pursuers in the context of seeking to give themselves a defence to the allegation of unfair prejudice made in the sheriff court proceedings. It could only give that defence if it was indeed "Hoffman compliant", as they understood it. It might also be said that the defender could only rationally and sensibly accept the offer if he concluded, or was advised, that it was "Hoffman compliant", as he or his advisers understood it. If it was not, he could readily have ignored or rejected the offer and continued with his action.

[47] The approach to identifying the aim of the transaction is stated by Lord Wilberforce in *Reardon Smith Line Ltd* v *Hansen-Tangen (The "Diana Prosperity")* [1976] 1 WLR 989 (at 996):

> "when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties."

Viewed objectively, I conclude that there was no aim that the agreement would be "Hoffman compliant" whatever that concept meant. A reasonable person in the situation of each of the parties was not aiming for or committing to the application of a meaning of that concept which ran starkly against his understanding. There is nothing in the factual background to support the view that the pursuers were proceeding on the basis that the concept applied whatever it meant and even it if did include full and unfettered access, and that the defender was also proceeding on the basis that the concept applied, again whatever it meant, and even if it did not include full and unfettered access. It is the substance of the aim, and not simply the label attached to it, that may be relevant.

The role of the surrounding circumstances

[48] Senior counsel for the defender submitted that once regard is had to the surrounding circumstances, including the correspondence, it becomes clear that

> "the common intention of the parties was that their bargain was to be Hoffmann Compliant. To reach any other conclusion is to attribute to the parties an intention they could not have possessed… That, in turn, leads one to the second issue of contractual construction which arises, namely, what does Hoffmann Compliance require?"

This reflects what was pled on behalf of the defender, as noted in para [9] above, that the admissible surrounding circumstances had the same effect as an express agreement as to "Hoffman Compliance":

> "In either case, however, on a proper construction of the parties' contract, it was an express term of that contract that the valuation of the Defender's shares was to be undertaken in accordance with the requirements set forth in *O'Neill* v *Phillips*, as set out above."

The submissions for the defender went on to refer to the principles stated by Lord Hoffman and contended that the parties were "effectively agreeing to incorporate those principles, just as they might incorporate a standard set of terms or conditions…". Accordingly, the defender's position was not that any specific terms or language used in the offer or acceptance fell to be construed in a particular way, having regard to these surrounding circumstances. Rather, it was that the "common intention" incorporated into the contract the concept of "Hoffman Compliance". The authorities do not support the proposition that the common intention or aim, as derived from the surrounding circumstances, becomes a term of the contract rather than being, potentially, an aid to interpretation of the words used. In any event, there was no common intention or aim of any substance in relation to "Hoffman Compliance".

[49] For these reasons, I do not accept the alternative contention made on behalf of the defender.

The effect of an agreement that the procedure be "Hoffman compliant"

[50] As I have decided that the defender's case on the constitution of the contract and its meaning must fail, the issue of what is meant by the procedure being "Hoffman compliant" does not arise. However, in light of the submissions on the point, it is appropriate that I briefly express my views on it. The pursuer and the defender each accepted that if there was a requirement that the offer be "Hoffman compliant", this had the consequence of incorporating into the offer the various principles stated by Lord Hoffmann. The key issue was the fourth principle, noted above, which states *inter alia* that "Both should have the same right of access to information about the company which bears upon the value of the shares the right of access to information which bears upon valuation…". Giving these words their natural and ordinary meaning, they do not give a full and unfettered right of access to all information which the defender wishes to see. It is made entirely clear by the qualification used by Lord Hoffman that the right of access is to information which bears upon valuation.

[51] When one takes into account the surrounding circumstances, that construction does not alter. As in many similar cases, this is a contentious dispute which follows on from a breakdown in relations, an absence of mutual trust and indeed a degree of mutual hostility. The pursuers have access to all of the company information and the defender does not. The pursuers wish the company to pay the lowest price and the defender wishes to sell for the highest price. As the expert evidence showed, it is not inconceivable that those running a company might conceal or fail to disclose relevant information (although I make clear that I

say that only as a general observation and not about the present pursuers). These factors do not remove the qualification that the right of access is to information that bears upon valuation, and in particular they do not turn these words into meaning access to all information. Thus, in the present case when in a previous valuation exercise the defender was given full and unfettered access to information and requested all of the emails sent within a three-year period, resulting in some 56,000 emails being sent to him, and has now said in evidence that he may wish to obtain emails over the seven-year period thereafter (which he may reduce on advice), such a request for access to information is not covered by Lord Hoffmann's statement of requirements. In addition, it makes less sense commercially for parties to be able to access every single communication or document. Such a process is likely to prolong the exercise and cause it to be much more expensive. Lord Hoffmann's words must be viewed in the context of his earlier comments when stating the third principle: "The objective should be economy and expedition, even if this carries the possibility of a rough edge for one side or the other…". In my view, any other construction which has the effect that the words mean that a party can request every single item and then make his or her own decision on whether they bear upon valuation, has no foundation.

[52] However, the defender is to have the same right of access as the pursuers to information which bears upon valuation. When one seeks access to such information, there must, no doubt, be a means of characterising the request which demonstrates that the material has a bearing upon valuation. In his evidence, Mr Webster spoke of value-enhancing and value-detracting information and gave examples of types of information in each regard. Merely by way of example, the defender could request all information concerning any new business opportunity that has arisen or has been identified as the subject of consideration. The defender is to have "the same right of access". This

could be taken to mean that the defender has a right, personally or through a representative, to ask for all information that bears upon valuation. If the words are taken to mean that the defender can request from the company, not directly but through the expert valuer, any information which bears upon valuation, that makes no material difference and satisfies the test of having the same right of access to information which bears upon valuation. On the other hand, if the expert valuer has the authority to refuse to make a request which the defender considers to bear upon valuation, that arguably could be seen as denying the defender the same right of access. If that decision is made by the expert on his view that the information requested cannot have any bearing upon valuation, that leaves open the possibility that the expert may be wrong.

[53] Thus, if, against the decision I have reached, the procedure required to be "Hoffman compliant" and hence required the same right of access to information about the company which bears upon valuation, the issue becomes whether the letter of engagement issued by Mr MacDonald on 5 July 2018 is disconform to that requirement. The timetable set out in the letter of engagement expressly refers to the parties being able to make written and oral submissions to the expert. Mr MacDonald also lists the information that has been provided to him by the parties since his appointment and adds that he will request further information which: "As a minimum, I would expect to include the following". He then lists types of information, including "6) Any other factors which you believe may impact the Company's valuation". He goes on to say:

> "For the avoidance of doubt, I shall be entitled to request further information and explanations as I consider to be relevant to my appointment, from the parties throughout the duration of my work. The parties shall be required to provide such information and/or explanation to me within a reasonable period…"

He states that all of the information will be shared with the parties. The letter of engagement therefore makes clear that he will request further information on any other factors which the parties' believe may impact upon the valuation. The words "believe may impact" mean that he is founding upon their beliefs as to the potential impact, rather than him having to be persuaded by them that it is relevant to valuation. The parties may of course be required by the expert to say why they believe information of a particular type may impact upon valuation. The letter of engagement does not therefore allow full and unfettered access to all company information, but it does allow the expert to access information which the either of the parties believes may impact upon valuation. I was given no real or substantial basis for concluding that the same right of access, albeit exercised indirectly through the expert valuer, would not result in the defender obtaining the same information as he would have obtained had he directly requested information bearing upon valuation from the company. If in a particular valuation exercise there is a failure to disclose relevant information, that could occur whether the request was made directly by the party or by the expert. In the present case the pursuers have accepted the terms of the letter and such a failure to disclose would be a clear breach of their obligations. Accordingly, if the consequences of the procedure having to be "Hoffman compliant" had arisen for determination, I would have rejected the defender's position that the letter of engagement is disconform to that requirement.

Issue 3: Apparent bias

[54] On behalf of the pursuers, it was submitted that once an independent valuer has been appointed, apparent bias will not found a challenge and it is actual bias that requires to be established. Reference was made to *Macro & Ors* v *Thompson & Ors (No 3*) and *Bernhard*

Schulte & Ors v *Nile Holdings Ltd*. However, in *Macro* the test of actual partiality was said (at 65) to apply "when the court is considering a decision reached by an expert valuer" and in *Bernhard Schulte* (at [98]) the reasoning in *Macro* was viewed as referring "to the duty of an expert in issuing a valuation of the shares to act fairly and impartially". I accept the submission by senior counsel for the defender that the position is different where the expert has not yet reached the stage of performing his allotted task and issuing a decision. In *Hopkinson and others* v *Maximus Securities Limited and others* the Court of Appeal held that the appropriate test, before the expert had performed the task entrusted to him, was that of apparent, rather than actual, bias. Patten LJ observed (at [29]) in relation to actual bias that:

> "In relation to an exercise which has not yet taken place, this is likely to be a near impossible task. The difficulty of proving actual bias (which may often be unconscious) has been a strong reason for the development of an objective test of apparent bias as a sufficient basis for demanding the recusal of judges and other adjudicators prior to any actual hearing or determination and I can see no justification for applying a different rule in relation to experts."

In the present case, Mr MacDonald was nominated by ICAS and was appointed as the expert. His letter of engagement has not been signed by the defender and the process of valuation has not commenced. The position is far from any actual determination or the issuing of any valuation. Apparent bias will therefore suffice, if shown. The question is whether, objectively viewed, there is a real risk, for the reasons presented on behalf of the defender, that Mr MacDonald may act partially in carrying out the valuation. As explained in *Porter* v *Magill* (per Lord Hope at para [103]): "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

[55] In relation to the meeting on 16 April 2018, Mr MacDonald accepted that the defender may simply have a different recollection of what was said, rather than have stated

any untruth. As I understood the defender's evidence, he was not suggesting that Mr MacDonald was telling a lie about what happened. I see no basis for concluding that because they differed in their recollections of what was said at the meeting that could give rise to a conclusion of a real possibility of bias. I prefer and accept the evidence of the four witnesses who spoke to Mr MacDonald having answered in the affirmative at that meeting, including the evidence of his long history of familiarity with the Hoffman principles. But the evidence of the defender was plainly his own recollection of events. The fact that on the same afternoon he sent an email to Mr Webster recording his position backs that up. The defender's diary entry was less forceful, given its language. However, I do not consider the defender's evidence on the point to be in any way fabricated. From what appears to have been a somewhat tense and fraught meeting between the parties, understandings of what was said can differ. The second ground for apparent bias concerned Mr MacDonald having been told by the defender at the meeting on 17 May 2018 that the pursuers' solicitors had agreed that the draft letter of engagement should include a reference to the process being "Hoffmann compliant", and Mr MacDonald stating that he would revise the draft letter of engagement to that effect. In his evidence, Mr MacDonald explained that his failure to revise the draft letter of engagement in that respect was an oversight. On behalf of the defender, it was submitted that when one had regard to the averments made on behalf of the pursuers in their minute of amendment (as noted above), that evidence was questionable. It was submitted that Mr MacDonald had therefore made a judgement that the defender had told an untruth and had done so solely in discussion or consultation with the solicitors for the pursuer. The problem with that submission is that there was no evidence led to indicate that what was averred had in fact taken place. I do accept that senior counsel for the pursuer must have had some basis for making that averment but at

the end of the day it was simply an averment and no evidence in support of it was led. I do not regard it as relevant to the issue of apparent bias. Accepting, as I do, the evidence of Mr MacDonald that it was simply an oversight, there is no support for the suggestion of a real possibility of bias. In relation to the rejection of the other revisions proposed by the defender, Mr MacDonald's evidence was that while the majority of the proposed revisions were unobjectionable and reasonable the letter of engagement would normally be two to three pages long, the matters had already been adequately covered and it was not necessary to make them explicit. Once again, this discloses no basis for finding a real possibility of bias. Taken individually and cumulatively, the points founded upon by the defender do not justify any basis for a conclusion of apparent bias.

Issue 4: The third conclusion in the counterclaim

[56] The third conclusion in the counterclaim states:

> "… in the event that the 'Agreed Sum' is in excess of the amount then available to the company to purchase the defender's shares, on a proper construction of the contract, the defender is entitled to pursue payment of any outstanding balance from the present pursuers and that, until such time as the 'Agreed Sum' is paid in full, the defender (a) is not prevented from continuing to pursue his application for orders under section 994 *et seq* of the Companies Act 2006, against *inter alios* the present pursuers, which is in dependence before Glasgow Sheriff Court; and (b) is entitled to retain his membership of the company."

I was not directed to any particular language in the offer dated 8 November 2016 which should be construed to have the meaning which is suggested. The offer sets out that the defender will, if he accepts the offer, receive the Agreed Sum (that is, under Method 2, the sum fixed by the valuer) from the company. It also sets out certain consequences which follow on from payment of the Agreed Sum. None of these terms provide for the position suggested by the defender. In the defender's averments, it is contended that the defender

sought clarification as to what was to occur in that event and that Mr McKenzie confirmed, in the correspondence, that the defender would be entitled to seek payment of any further sums so due from the pursuers themselves. I have already concluded that the correspondence does not form part of the contract and for that reason I reject the defender's submission to grant the declarator. However, even if the correspondence did form part of the contract, Mr McKenzie's comments do not support the defender's position. He said that if the valuation exceeded the sum the company could pay then the defender could either accept that sum, or carry on the existing litigation in the sheriff court seeking an order against the first and second pursuers. He did not state that if the defender accepted only what the company was able to pay, the defender could then seek payment of the outstanding balance from the pursuers. The position is that if the Agreed Sum is paid, then the consequences, of the defender ceasing to be a director and the sheriff court action being settled, will follow. If the Agreed Sum is not paid, those consequences do not follow. The third conclusion in the counterclaim is not sustained.

Conclusion

[57] For the reasons given, I reject the submissions for the defender as to what constitutes the contract and the meaning of its terms, and on the issue of apparent bias. The letter of engagement issued by Mr MacDonald on 5 July 2018 is therefore not disconform to the contract. That is the sole basis put forward for the defender's refusal to sign the docquet. I conclude that the terms of the letter of engagement are reasonable.

Disposal

[58] In the principal action, I shall sustain the first and fourth pleas-in-law for the pursuers, repel the pleas-in-law for the defender and pronounce decree for specific implement in terms of the first conclusion of the summons, reserving meantime the question of whether warrant and authority should be pronounced in favour of the Deputy Principal Clerk of Session to sign and deliver the letter of engagement. In the counterclaim, I shall repel the pleas-in-law for the defender, sustain the second, third and fourth pleas-in-law for the pursuers and assoilzie the pursuers from the conclusions of the counterclaim. In order to ascertain whether the decree for specific implement has been complied with, I shall fix a by-order hearing to call in early course. In the meantime, all questions of expenses are reserved.