



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 14

CA114/20

OPINION OF LORD CLARK

In the cause

GWR PROPERTY CO LIMITED

Pursuer

against

FORREST OUTDOOR MEDIA LIMITED

Defender

Pursuer: Thomson QC, McLelland; Brodies LLP
Defender: Walker QC, Massaro; BTO Solicitors LLP

3 February 2022

Introduction

[1] The pursuer leases an area of land on which a digital media display (known as an advertising totem) has been constructed. The pursuer and the defender entered into missives with the intention that the land and totem would be sub-let by the pursuer to the defender. The missives contain a suspensive condition, that the obligation to enter the sub-lease does not take effect until notice of completion of the works has been given. The defender resiled from the missives on the ground that completion had not occurred. The pursuer seeks declarator that the suspensive condition was purified and that the defender had no right to resile from the missives. Payment of £480,000 is also sought by the pursuer,

a sum due by the defender under the missives on the date of entry. The case called for a debate, with the pursuer challenging the relevancy and specification of the defender's averments and seeking decree *de plano*.

Background

[2] In 2018 and 2019, the pursuer entered into a series of contracts with a view to the construction and use of the advertising totem on land at Glasgow Airport. The first contract was a head lease under which the pursuer leases land from Glasgow Airport Limited ("GAL"). The head lease was dated 28 November 2018 and 25 January 2019, amended by missives dated 29 September and 1 October 2020. The second contract was a licence for works, entered into and then amended on the same dates as the head lease, under which GAL authorised the pursuer, on specified conditions, to carry out works to construct the advertising totem on that land. The third contract was a building contract dated 22 October 2018, based on the April 2013 version of the NEC 3 Standard Form Engineering and Construction Contract (Option A: priced contract with activity schedule), under which Wildstone Build Limited ("Wildstone") contracted with the pursuer to carry out the works to construct the advertising totem. The fourth contract was missives under which the defender, in defined circumstances, undertook to sub-let the land, and the advertising totem erected upon it, from the pursuer. The missives are dated 1 June 2018, and have been amended by subsequent missives dated 11 and 12 October 2018. The missives included a draft of the head lease which in turn included a draft of the licence for works. They also contained a draft of the sub-lease to be entered into in fulfilment of the missives.

[3] The terms of the missives included the following:

"4. SUSPENSIVE CONDITIONS

4.1 The Missives shall be suspensively conditional upon the Head Tenant giving notice to the Sub-Tenant that Completion (as defined in the Licence for Works) of the Works has occurred pursuant to the provisions of the Licence for Works.

4.2 The Head Tenant shall intimate in writing to the Sub-Tenant when they consider that the Advertising Totem has been properly completed and that the digital displays on the Advertising Totem are able to function fully. The Sub-Tenant shall be permitted to inspect the Works at such reasonable time as may be agreed between the Head Tenant and the Sub-Tenant in advance of Completion and due regard shall be paid by the Head Tenant to all representations reasonably and properly made in writing by the Sub-Tenant to the Head Tenant in respect of the carrying out of the Works.

4.3 If the Sub-Tenant (acting reasonably) is not satisfied that, despite Completion having occurred, the digital displays are able to function fully they shall be entitled (within a period of ten Working Days of being advised that Completion has occurred) to raise that with the Head Tenant for attention by the Head Tenant and if the Head Tenant does not agree with the Sub-Tenant then the matter shall be referred, on application by either of the parties (within a period of ten Working Days from such disagreement being intimated to the Sub-Tenant), to an independent and suitably qualified person (who may be a chartered architect if such person is suitably qualified to determine the matter in dispute) who shall inspect the Works and issue his written determination within five Working Days of written request to do so by either party.

4.4 The independent person appointed pursuant to Clause 4.3 shall act as an expert and not as an arbitrator and shall determine whether the digital displays on the Advertising Totem are able to function fully or what (if any) outstanding matters require to be attended to before the foregoing can be determined.

4.5 If the independent person determines that the digital displays on the Advertising Totem are able to function fully, then Clause 4.1 hereof shall be deemed to have been purified as at the date of such determination being intimated to the parties.

4.6 If the independent person determines that the digital displays in the Advertising Totem are not able to function fully, then the independent person shall specify in his/her written determination any additional works required and/or defects required to be remedied to enable him/her to determine that the digital displays on the Advertising Totem are able to function fully. The Head Tenant will proceed forthwith to carry out any such additional works and/or make good such defects so specified as soon as reasonably practicable and when the required works are so completed and/or the said defects rectified by the Head Tenant, the independent person will be obliged to hold a further joint inspection with a minimum of delay after request by the Head Tenant and to issue his further written deliberation within two Working Days thereafter. The suspensive condition

contained in Clause 4.1 hereof will be deemed to be purified on the date of receipt by the Head Tenant and the Sub-Tenant of such further written deliberation.

4.7 If the condition in Clause 4.1 is not purified or deemed to be purified on or before the End Date (as defined in the Licence for Works) the Sub-Tenant shall have the right at any time thereafter to resile.”

“Completion” is defined in clause 1.1.8 of the licence for works as

“the date on which the Completion Certificate is issued”.

“Completion Certificate” is defined in clause 1.1.9 of the licence for works as

“a certificate in writing properly issued by the Project Manager confirming that practical completion or equivalent has taken place under the Building Contract in respect of the whole of the Works in accordance with the Specification”.

[4] The completion certificate was issued, by a man named Mr Chandler, on behalf of the pursuer on 14 October 2020 and notice of it was given to the defender. The defender avers that practical completion had not taken place and that there were defects in the works in relation to the totem. On 26 October 2020, the defender’s agents sent two letters to the pursuer’s agents. The first letter disputed that completion had occurred under the missives and the second intimated that the defender was resiling from the missives. The three grounds for the defender’s claim that it was entitled to resile are averred in the following terms. First, that the purported completion certificate was not issued in accordance with the express terms of the building contract, the licence for works or the missives and so it did not therefore purify the suspensive condition in clause 4.1 of the missives and fell to be reduced. Secondly, the missives contain the five implied terms set out below, and the purported completion certificate was issued in breach of those implied terms. Thirdly, the purported completion certificate was issued fraudulently and dishonestly by Mr Chandler and his knowledge can be attributed to the pursuer.

[5] In relation to implied terms, the defender avers that if the missives are not to be construed in the manner contended for by the defender, the following terms should be implied into the contract contained in the missives:

“(First)...that the Pursuer would act reasonably and honestly in relation to the purported purification of clause 4.1.

(Second)...that, in respect of any certificate with contractual effect under the Missives, the Pursuer would not appoint a person with a direct or indirect conflict of interest in the issuing of such a certificate as the person required to issue it.

(Third) *esto* a certificate granted by a person with such a conflict of interest can be valid at all (which is denied), ...that the Pursuer will only seek to rely on a purported practical completion certificate issued by one of its employees, such as Mr Chandler, if it genuinely and honestly believes, and has a reasonable basis for so believing, that the said purported certificate had been properly issued by its employee and that the Works were, as a matter of objective fact, practically complete.

(Fourth) ...that the Pursuer will not seek to rely on a purported practical completion certificate issued by Mr Chandler without such a belief and such a basis.

(Fifth)...that the Pursuer will not seek to rely on a purported certificate when it knows, or ought to know, that the Works are not, in fact, practically complete in accordance with the terms of the Licence for Works and that the purported certificate has not been properly issued.”

[6] The defender also makes averments that Mr Chandler has, and had, a personal interest in both the pursuer and Wildstone. The pursuer is part of the same group of companies as Wildstone and was understood by the defender to be a special purpose vehicle used by Wildstone to ensure that its business operated in a tax efficient manner.

Mr Chandler and the companies he controls are averred to have an interest in both

(i) practical completion being certified under the building contract between Wildstone and GAL and (ii) the suspensive condition in the missives being purified and thus the defender

not resiling from the missives. The defender avers that in his multi-faceted capacity as:

(a) the directing hand of the pursuer; (b) the directing hand of Wildstone; (c) the named

project manager under the licence for works; (d) the party apparently responsible under the building contract for certifying practical completion; and (e) the party responsible for issuing the certificate of practical completion referred to in the missives, Mr Chandler knew, or ought to have known, what the state of the works actually was prior to issuing a practical completion certificate. This was therefore knowledge held by both Wildstone and the pursuer. Mr Chandler is said by the defender not to be an independent third party certifier either for the purposes of the building contract or the missives.

[7] In its averments, the pursuer states that when Mr Chandler issued the completion certificate he was, by that time: (a) a director of the pursuer (having been appointed to that position on 17 June 2020); (b) a director of Wildstone (having been appointed on 17 July 2017); and (c) the owner of 0.477% of the share capital in DC Cyclone Equity Co Limited, which had by that time become an intermediate parent company of both the pursuer and Wildstone. Mr Chandler still holds these positions and retains that indirect financial interest in both the pursuer and Wildstone. Companies in the various group corporate structures are identified in the averments and reference is made to a limited partnership agreement and an asset management agreement among various entities. The pursuer avers that at the time the missives and building contract were concluded the pursuer formed part of a group of companies of which "the Landmark Group" was the ultimate owner. The Landmark Group was aware of Mr Chandler's role. It knew Mr Chandler was a director of Wildstone but was content with his appointment as project manager. The pursuer refers to Mr Chandler's financial interests in various companies in the groups and accepts that at the time the missives and building contract were concluded in June and October 2018, Mr Chandler therefore had an indirect financial interest in the value of the pursuer's assets and also had an indirect financial interest in Wildstone, as the owner of 5% of the share

capital in Wildstone Capital Limited, which in turn owned 70% of the share capital in Wildstone. However, he was not a director of the pursuer, and had no ownership interest in it, at that time.

Submissions

Submissions for the pursuer

Issue 1: whether the purported completion certificate was issued in accordance with the parties' contract?

[8] The pursuer's case rested on the suspensive condition in clause 4.1 of the missives having been purified by its notice of 14 October 2020, to the effect that completion had occurred as defined in the licence for works. On a proper construction of the missives, the notice had that effect. The defender's averments on alleged defects and/or incomplete works were lacking in specification and irrelevant. They described certain features of the totem when completion was certified, but did not specify by reference to any of the relevant contracts in what way those features constituted defects or incomplete works of any contractual significance, or why their presence precluded certification of the works as complete. The defender had failed to aver why incomplete works (if present) would prevent the purification of clause 4.1.

[9] The defender had an explicit contractual right, under clauses 4.2 to 4.7, to prevent purification of clause 4.1 if defects within a limited and defined class were present, but it did not found on that right. As the missives made clear, the right to challenge completion itself, based on the presence of any other defects, was explicitly conferred on another party (GAL) under another contract (the licence for works). It was inconsistent with that contractual scheme for the defender to challenge purification of clause 4.1 of the missives by reference to

defects outside the defined class to which its express right related. The draft licence for works appended to the missives explicitly excluded third party rights. The building contract did likewise. The defender's averments contending for a construction of the missives, and for the implication of terms, were accordingly irrelevant.

[10] The parties were alive to the possibility that completion might be certified under the building contract in circumstances unacceptable to GAL or the defender. It was also clear that they contracted to deal with that possibility. That was entirely consistent with the limited nature of the obligations imposed upon the defender in terms of the sub-lease (cf *Apcoa Parking (UK) Ltd v Crosslands Properties Ltd* [2016] CSOH 63).

Issue 2: Implied terms

[11] Reference was made to the principles as expressed in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Limited* [2016] AC 742; *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472; and *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601. The second implied term contended for by the defender was irrelevant. Since the existing terms already recognised and provided explicit regulation of this risk, there was no basis for inferring the parties must also have intended this additional term. In any event, the proposed term would constrain the normal freedom of the pursuer and Wildstone to appoint their choice of project manager. Having already accepted that the project manager's certificate could be challenged by GAL on broad grounds, and the defender on limited grounds, there was no basis for finding that the pursuer must also have intended to constrain itself in this way. The other four implied terms contended for, as well as being inconsistent with the contractual scheme, would not meet the test of business efficacy.

Issue 3: Fraud

[12] A project manager appointed under a building contract acted for the most part, as an agent of the employer, subject to a duty to act impartially and fairly as between the employer and contractor when carrying out a certification function. Those duties arise from the function the project manager is engaged to perform under the building contract (*Keating on Construction Contracts*, 11th ed, 23-014 *et seq.*; *Sutcliffe v Thackrah* [1974] AC 727; *Costain Limited v Bechtel Limited* [2005] EWHC 1018). It followed that the project manager's duties in performing his certifying function were not owed to third parties. It was for the parties to the building contract to determine the appointed project manager's suitability for the role and to police, in their own contractual interests, his performance of it. The parties to a building contract were free to appoint whomsoever they may choose to be the project manager. Insofar as they agree, there is no limitation on who they may appoint (cf *Imperial Chemical Industries Limited v Merit Merrell Technology Limited* [2017] EWHC 1763, *Costain, op. cit* (para [12])).

[13] The defender's case based on fraud and dishonesty was irrelevant (indeed, the averments were scandalous and irrelevant) and should not be remitted to probation. First, the mental state of Mr Chandler in issuing a certificate, and of the pursuer in relying upon it, is irrelevant. Second, fraud is "a machination or contrivance to deceive": Erskine, *Institute of the Law of Scotland*, III.i.16. There must be a false pretence and resultant loss (*Marine & Offshore (Scotland) Limited v Hill* 2018 SLT 239, Lord President (Carloway) at [16]). The need for a causative link between the false pretence and the loss means the pretence has to be material and has to be relied upon (*Politakis v John Wood Group plc* [2021] CSOH 7, Lord Clark at [49]). The defender's case of fraud proceeded on the incorrect assumption that it was entitled to receive, and to rely upon, confirmation that the works had reached an

objective standard of completion. That was entirely at odds with a contractual scheme in which both GAL and the defender were given rights to inspect the works and to form their own judgment about the state of those works; and, if unsatisfied, to trigger a procedure in which the transaction to let the totem could not progress except with the approval of an independent third party.

Submissions for the defender

Issue 1: whether the purported completion certificate was issued in accordance with the parties' contract?

[14] The purported completion certificate was not issued in accordance with the parties' contract because completion of the works had not occurred. There was no definition of "practical completion" in the draft licence for works. It does not depend on how it is defined in the building contract and indeed is not a term used in the NEC3 contract. The meaning averred by the defender was that works are not practically complete and practical completion is not achieved in relation to works unless they are constructed in accordance with the requirements of the contract (in this case the missives and the licence for works) and are free from material defects. This approach was consistent with how practical completion is defined in discussion of the JCT standard form contract in *Keating on Construction Contracts* (11th ed) at para 21.158 – 9. This definition was adopted and augmented by Waksman, J in *Mears Ltd v Costplan Services (South East) Ltd* [2018] EWHC 3363 (TCC) in the context of a non-JCT contract (at paras [75]-[82]). The building contract does not correspond with the licence for works and so a completion certificate issued under the building contract did not meet the requirement under the licence for works. In any event, the works that were carried out pursuant to the building contract did not comply

with the design and no project manager could genuinely believe that the works were genuinely practically complete. These were points the defender was entitled to rely upon to resile from the missives.

[15] As to the alleged lack of specification, this is a commercial action and so the question is whether the pursuer has fair notice of the defender's position from the pleadings and the other documentation lodged. In this case, the defender relies upon its defences and an expert report as providing fair notice of the case. Insofar as the pursuer has sought clarity of the defender's legal analysis, that is set out in the pleadings. The pursuer had clear notice of the defender's position.

[16] In addition, the purported building certificate was not issued in accordance with the parties' contract because the person who issued that certificate, Mr Chandler, was not someone entitled to issue such a certificate. Reference was made to leading cases on contractual interpretation. In *Van Oord UK Ltd v Dragados UK Ltd* [2021] CSIH 50, the First Division noted that clear language is required in a commercial contract to place one contracting party completely at the mercy of the other (para [20](iii)). By extension, an interpretation that would place one contracting party completely at the mercy of a third party (in this case GAL) was even less likely to be accepted. At the time the missives were concluded, there was no agreement as to who should be the project manager. The defender did not have an inkling at the time the missives were concluded that the pursuer would seek to appoint a person, such as Mr Chandler, to the role of project manager when he is neither independent nor appropriately qualified. In *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 (TCC), the High Court in England (Jackson J) summarised the legal principles at paragraphs [35]–[36], and noted that the construction manager is “required to act in a manner which has variously been described as independent, impartial,

fair and honest". That case was referred to with approval by Fraser, J in *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2017] EWHC 1763 (TCC). Importantly for present purposes, that case concerned the NEC3 Engineering and Construction Contract (3rd Edn) (June 2005) with amendments June 2006 and September 2011 (para [127]). The parties had therefore agreed, as in *Scheldebouw and Imperial Chemical Industries Ltd*, that the decision-making functions under the building contract (and the licence for works) would be carried out by someone who was not an employee of (or otherwise someone with a material interest in) the pursuer. An express term would have been required to authorise such a person's appointment as project manager. As noted in *Scheldebouw*, this is an issue of construction and not an implied term. Mr Chandler was not therefore a properly appointed project manager at all, nor specifically when he purported to issue the completion certificate, for the purposes of the *missives* the parties agreed. As such, he could not and did not properly issue a completion certificate and clause 4.1 of the *missives* was not purified.

Issue 2: Implied terms

[17] The *missives* contain the five implied terms set out above and the purported completion certificate was issued in breach of those implied terms. The test for the implication of an implied term is that set out in *Marks and Spencer PLC v BNP Paribas Securities Services Trust Co (Jersey) Limited*, in particular at paragraphs [18] – [21]. The test was met in respect of the implied terms contended for. As to the first implied term if the pursuer is correct that the *missives* give the pursuer the right to purify the suspensive condition in clause 4.1 without the defender having the option to dispute that the suspensive condition has in fact been purified, the *missives* would give the pursuer the right to determine unilaterally an important matter giving rise to significant contractual

consequences for the parties. In those circumstances, the law readily implies a term of the kind contended for by the defender: *Re Brown v GIO Insurance Ltd* [1998] CLC 650, Chadwick LJ at p 659 C-F; see also Lewison, *The Interpretation of Contracts* (7th Ed, 2020) at paras 14.16 – 14.19; McBryde, *The Law of Contract in Scotland* (3rd Edn, 2007), at para 9.22; *Gordon District Council v Wimpey Homes Holdings Ltd* 1989 SLT 141; *John H Wyllie v Ryan Industrial Fuels Ltd* 1989 SLT 302. The second implied term is only necessary if the court was not with the defender in its primary argument about the content of this term being part of the express clauses in the missives. The implication of such a term is necessary to give effect to what the parties (objectively) agreed. The third to fifth implied terms were elements of the first implied term and these terms also meet the test for implication of a term.

Issue 3: Fraud

[18] The defender's averred position was that the purported completion certificate was issued fraudulently and dishonestly by Mr Chandler and that Mr Chandler's knowledge could be attributed to both Wildstone and the pursuer. The defender offered to prove that Mr Chandler is (and was when he issued the purported completion certificate) one of the principal directing hands of both the pursuer and Wildstone. The pursuer does not challenge attribution, nor could it: see eg McBryde, paragraph 14.47. The cases relied upon by the pursuer were actions seeking damages arising from a fraud. The defender does not seek damages arising out of a fraud. It did not therefore require to establish that it has incurred loss in reliance on a misrepresentation. Rather, the defender avers that the pursuer's fraud means that the purported completion certificate is of no effect and can be disregarded. This consequence of fraud is taken from Stair, I, ix, 14. Fraud "unravels everything" and would therefore mean that a party is not bound by an expert determination

(*Campbell v Edwards* [1976] 1 WLR 403, Lord Denning MR at p 407). It would unravel an interim application for payment in a construction contract (*Henia Investments Inc v Beck Interiors Ltd* [2015] EWHC 2433 (TCC), Akenhead J at para [17]). By analogy, it would also invalidate a certificate of practical completion (eg *Keating*, para 5.064). The averments justified inquiry.

Decisions and reasons

Issue 1: whether the purported completion certificate was issued in accordance with the parties' contract?

[19] In relation to contractual interpretation, I was referred to the well-known principles stated in English cases such *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, *Arnold v Britton* [2015] AC 1619 and *Wood v Capita Insurance Services Limited* [2017] AC 1173 and also to recent decisions of the Inner House, including *Ashtead Plant Hire Co Ltd v Granton Central Developments Ltd* 2020 SC 244 and *Van Oord UK Ltd v Dragados UK Ltd*. The relevant principles have been neatly summarised as follows: a contract must be construed objectively, contextually, purposively, and in a manner which accords with commercial common sense: *Park's of Hamilton (Holdings) Limited v The Scottish Football Association Limited* [2021] CSIH 61 (at para [17], under reference to *Ardmair Bay Holdings v Craig* 2020 SLT 549, Lord Drummond Young, delivering the opinion of the court, at para [47] *et seq*).

[20] The missives, when entered into, had appended to them the draft licence for works, draft head lease and draft sub-lease. The context therefore includes that there was a series of contracts, each involving different parties and creating different rights and obligations relating to the process of constructing, letting and sub-letting the totem. Third party rights were excluded under the draft licence for works and the building contract. The defender's

rights are therefore those in the missives. It was accepted that the missives were professionally drafted. It can reasonably be inferred that the parties had obtained legal advice on the terms.

[21] The sequence of events for completion started with the issue of a completion certificate under the building contract between the pursuer and Wildstone. "Completion" as defined in the licence for works between pursuer and GAL then had to occur. The licence for works made provision for GAL to dispute the issue of a practical completion certificate which would postpone completion as defined by the licence for works until the independent architect was satisfied that the necessary works had been completed. Once completion occurred, the pursuer required to give notice of that fact to the defender.

[22] Clause 4.1 of the missives sets out the suspensive condition, which is notice given by the pursuer to the defender that completion as defined in the licence for works has occurred "pursuant to the provisions of the Licence for Works". It therefore concerns the giving of notice as to whether, under a separate contract to which the defender is not a party, completion has occurred. There is no right under the missives for the defender to challenge or question whether completion under the other contracts had taken place. Clause 4.2 deals with notice from the pursuer "when they consider" that the totem has been properly completed and the digital displays function fully. The defender is then given a right to inspect the works and make representations about them, to which the pursuer must pay due regard. Thus, rather than rights to challenge whether completion has occurred under other contracts, the defender had this specific right. Thereafter, assuming that notice of completion had been given and no such representations had been made, or due regard had been had to them, the defender was entitled (under clause 4.3 *et seq*) following completion, "if ... not satisfied that ... the digital displays [on the Totem] are able to function fully", to

insist upon an inspection of the works by an independent person. The defender could seek a determination by that person of whether or not the displays were able to function fully, and what (if any) outstanding matters required to be attended to, with a right to resile if the issues were not resolved. Otherwise, if no such issues arose, or were dealt with timeously, there was purification of the suspensive condition in clause 4.1 of the missives.

[23] It is common for a tenant under a commercial lease to be required to accept the property as being in good and tenantable condition and repair and satisfactory in all respects and suitable for the purpose for which they are let. Under clause 5 of the sub-lease, the defender has that obligation here. Importantly, however, the same clause requires the defender to permit the pursuer to have access to the property “to maintain, repair, replace and renew the same during the currency of this Sub-Lease, irrespective of the cause of damage or destruction.” So, if there is a defect or damage, the pursuer must deal with it. The pursuer also has obligations to insure the property and to comply with statutory obligations in relation to it, and to clean it. The defender has no such obligations.

[24] When one views the language used by the parties objectively, in context and looking at its purpose, it is clear that completion is a matter dealt with under other contracts not involving the defender, with GAL able to challenge completion, and with the defender having specific rights under the missives to make its own representations. Beyond that, the defender cannot, under the contract, challenge completion. If, as here, GAL makes no challenge and the pursuer makes no representations, purification will occur but the ongoing duty to repair remains with the pursuer. There is no factor involving commercial common sense that sways that approach to interpretation. Indeed, it is difficult to see any commercial common sense in allowing a sub-tenant to challenge completion when the parties to the contracts (GAL being entirely independent) in which that is a core obligation have not done

so. The points made on behalf of the defender about commercial common sense concerned matters such as negative effects on the defender's reputation and on clients' desire to use an impaired advertising totem. These points are addressed by the rights and duties under the missives and sub-lease.

[25] A central feature of the submissions for the defender on construction of the contract was that key definitions (such as for "Works", "Completion" and "Licence for Works") were fixed by the pursuer and defender as the parties to the missives, with the draft licence for works incorporated into the missives and agreed between the parties. The suggestion that the terms of the licence for works were fixed, or even agreed, by the pursuer and the defender is not well-founded. The missives do make reference to head lease and the licence for works, and drafts of these documents are appended to the missives. But that is done because the missives refer to certain specific terms in those documents, such as about the duration of the head lease and sub-lease and completion under the licence for works. I see no basis for concluding that either party to the missives could enforce rights or duties derived from these contracts with other parties. As to the defender's submissions, under reference to *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* and *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* that the parties had agreed that the decision-making functions under the building contract and the licence for works would be carried out by someone who was not an employee of (or otherwise someone with a material interest in) the pursuer, the appointment and duties of the project manager are not matters that arise under the missives. The defender's argument that on the pursuer's construction the defender was placed at the mercy of a third party (in this case GAL) is unmerited. As noted earlier, GAL is an independent entity, with rights and duties under the licence for works. The fact that decisions by a party to another contract can affect the defender's interests

should have been clear to the defender prior to the contract being entered into and in any event, with its rights under clause 4.2, it was hardly at the mercy of GAL.

[26] In relation to the pursuer's challenge on specification of the alleged defects, the defender makes a number of averments about the allegedly incomplete, potentially dangerous and defective state of the totem. These include problems with cladding, bracing, bolts, steel angles, nuts, Tek-screws, screen fixings, advertising displays, palisade fencing and street lighting, landscaping, plate edges and "numerous other incomplete, missing or defective works". Reference is made to the concerns of the defender's expert engineer which are set out in his report. It is said that the designers have provided approved drawings which confirmed that the structure is not built in accordance with the approved structural designs. The defender's expert viewed the works to be no more (and possibly much less) than 60% complete. He identifies the parts of the works not included in the building contract and the parts that are included within the building contract but not completed. I am satisfied, in this commercial action, that fair notice of the alleged problems and defects is given in the pleadings, under reference to the expert report.

Issue 2: Implied terms

[27] The requirement for project managers to act in a manner that is independent, impartial, fair and honest and the avoidance of conflicts of interest are discussed in *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* and *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd*. However, that is in the context of building contracts. The implication of a term requiring reasonableness and good faith in such contracts is supported by the decisions in *Re Brown v GIO Insurance Ltd* [1998] CLC 650, Chadwick LJ at 59 C-F and the reasoning in *Gordon District Council v Wimpey Homes Holdings Ltd* 1989 SLT 141 and *John*

H Wyllie v Ryan Industrial Fuels Ltd 1989 SLT 302. The present case involves missives with a sub-tenant. While the missives give no right to challenge the completion certificate, they allow (clause 4.2) inspection and representations to be made by the defender. The duty on the pursuer is to give “due regard” to all representations “reasonably and properly made”. In addition, when entering into the missives both parties were aware that a separate party (GAL), independent of the pursuer or any company associated with the pursuer, had the right to challenge whether there was truly practical completion under the licence for works. The cases cited do not in my view have any bearing on implied terms in the missives.

[28] The question of whether a term falls to be implied is to be considered after reaching a view on the proper construction of the contract. Having regard to what I view as the proper construction, and the points noted above about the defender’s right of inspection and GAL’s rights to challenge the certificate, I do not consider that an implied term in any of the forms proposed by the defender is warranted on the basis of the authorities referred to and having particular regard to *Marks and Spencer PLC v BNP Paribas Securities Services Trust Co (Jersey) Limited*. It cannot be said that the officious bystander element of the test is met for any of the implied terms or that either of them is so obvious that it goes without saying. Business efficacy, given the terms of the missives and their context, does not support any such implied term. Notional reasonable people, in the position of the parties at the time they contracted, would in my view not have agreed to any such term. Accordingly, the missives did not include an implied term of any of the kinds suggested by the defender.

Issue 3: Fraud

[29] The defender avers:

“Separatim, the purported practical completion certificate was issued fraudulently and dishonestly by Mr Chandler and is, and was, relied on dishonestly by the Pursuer. The certificate was, as both Mr Chandler and, through him, the Pursuer knew and intended, issued as part of a connivance to attempt to prevent the Defender from resiling from the Missives.”

As is well-established, fraud is “a machination or contrivance to deceive”: Erskine, *Institute of the Law of Scotland*, III.i.16. The features of fraud are explained in *Marine & Offshore (Scotland) Limited v Hill* (para [16]): “There requires to be a false pretence and, in the civil context, resultant loss (a practical result)”. That case, and *Politakis v John Wood Group PLC*, each of which involved actions of damages for fraud, were referred to by senior counsel for both parties. The essence of a claim for damages for fraud is a false pretence or fraudulent misrepresentation inducing a course of action that causes loss. However, this is not a case where the defender seeks damages based upon having suffered loss as a result of relying upon a fraudulent misrepresentation.

[30] Rather, the defender seeks reduction, that is, the remedy to annul a deed or other writing which is in prejudice of the defender’s right: Stair *Institutions*, IV.xx.2; Erskine, *Institute* IV.i.18; Maclaren, *Court of Session Practice* (p 675). The case does not involve reduction of a contract which the defender was induced to enter into as a result of a fraudulent misrepresentation. The defender seeks reduction *ope exceptionis* of an allegedly false document which if not reduced would result in the purification of the suspensive condition in the missives and the defender becoming bound by the sub-lease. In effect, the allegation is that there was an attempted fraud or a dishonest assertion intended to achieve, and which if not reduced will achieve, a practical result. While I was not addressed in any detail on the law applying to such an attempt or assertion, a false document dishonestly prepared to achieve purification of a suspensive condition must be open to reduction. I cannot therefore conclude that the defender’s case for reduction *ope exceptionis* on the basis

of alleged falsity, characterised as fraud or connivance, is bound to fail. My reasoning in reaching that view is based, as it requires to be, on taking the defender's averments *pro veritate*, and to succeed at the proof the defender will of course require to establish the serious allegations it avers, as quoted above.

Conclusions

[31] For the reasons given, I conclude that the defender's contentions on construction of the terms of the missives and on implied terms must fail, but the issue of reduction of the completion certificate *ope exceptionis*, on the grounds alleged, is a matter for proof.

Disposal

[32] I shall fix a by-order hearing for the purposes of identifying the averments that fall to be excluded from probation and dealing with further procedure, reserving in the meantime all questions of expenses.