OUTER HOUSE, COURT OF SESSION

[2022] CSOH 29

CA1/21

OPINION OF LORD CLARK

In the cause

(FIRST) COLONNADE PROPERTIES LIMITED, KEITH BRIGGS STEPHEN and OLIVER JAMES STEPHEN, AS THE TRUSTEES OF THE NEWBATTLE PENSION FUND; (SECOND) COLONNADE PROPERTIES LIMITED

Pursuers

against

BEECHMOUNT LIMITED (IN LIQUIDATION)

Defender

Pursuers: McColl QC, Brodies LLP
Defender: Ower, Morton Fraser LLP

30 March 2022

Introduction

[1] The parties were previously involved in two litigations. A settlement agreement was reached. Beechmount Limited then went into liquidation. In this case, the pursuers seek payment from the defender, said to be due in terms of the settlement agreement. The defender contests the pursuers' right to payment on three grounds: (i) the liquidator is not bound by the terms of the settlement agreement; (ii) the settlement agreement was frustrated as a result of the appointment of the liquidator; and (iii) the pursuers' claim could only succeed if other obligations under the settlement agreement had been discharged,

which had not occurred. To resolve these issues, the case called before me for a proof before answer, conducted remotely via Webex.

Background

Initial dispute

[2] For the purposes of clarity Beechmount Limited is referred to herein as "the Company" and the term "defender" is used when referring to the liquidator. The Company was incorporated on 5 March 1996. The two directors of the Company for most of the time of its operation were Iain Dewar and Keith Stephen. There are three shareholders in the Company, each with the same percentage of shares: the Newbattle Pension Fund (the first pursuer), Colonnade Properties Limited (the second pursuer) and Iain Dewar. The first pursuer is a trust set up by Keith Stephen. He is also a director of the second pursuer. The only significant asset of the Company was a property named Beechmount House, in Edinburgh.

[3] There was a breakdown in relations between Iain Dewar and Keith Stewart. In 2017, the Company and Iain Dewar were the subject of a petition brought by the pursuers seeking orders under section 996 of the Companies Act 2006 on the grounds that the pursuers had been subjected to unfair prejudice. In 2018, Iain Dewar brought a petition under the same statutory provisions against the pursuers, Keith Stephen and the Company. These litigations were resolved extra-judicially by way of an agreement dated 17 October 2018 between the pursuers, Keith Stephen, the Company and Iain Dewar (the settlement agreement). The sale of Beechmount House formed part of the settlement agreement.

[4] Each director, along with family members or connected persons had spent time living at Beechmount House or in another property within its grounds. In settling their

dispute, one issue which the parties felt they required to consider was whether, as a result of living there, benefits-in-kind were obtained to which HMRC would wish to have regard in dealing with the Company's tax liabilities. This included a subsidiary issue as to whether, if there were benefits-in-kind, these might be viewed as a salary and that could have an impact on National Insurance Contributions due by the Company.

Terms of the settlement agreement

[5] The settlement agreement stated, under the sub-heading "Background" that:

> "The parties have entered into this agreement in order to settle the current dispute(s) between them, to regulate the sale of Beechmount House by Beechmount Limited, the liquidation of Beechmount Limited and the distribution of the proceeds and a mechanism to encourage co-operation between the parties in relation to the settlement of certain potential tax issues with HMRC".

Clauses 3, 4 and 5 are in the following terms:

> "3. ARRANGEMENTS WITH HMRC
>
> Each party shall use reasonable endeavours to co-operate with the others in relation to agreeing with HMRC any tax outcomes relevant to any benefits in kind that the directors and/or their families or connected parties may have enjoyed from Beechmount Limited.
>
> Specifically, each party shall appoint a recognised tax adviser to represent them in discussions with HMRC and instruct such advisers to co-operate and use reasonable endeavours to reach agreeable positions on the level and nature of any benefits in kind.
>
> In the event that the tax advisers cannot reach agreement between themselves in so far as that may be necessary, either may ask the President of the Institute of Chartered Accountants Scotland to nominate a third party to act as arbitrator in relation to such disagreement and such person shall be paid half and half by Iain Dewar and Keith Stephen.
>
> The parties shall appoint an independent expert on behalf of Beechmount Limited, nominated by agreement or in the absence of agreement by the President of the Institute of Chartered Accountants Scotland who shall represent the interests of Beechmount Limited in those discussions with HMRC.

4. PAYMENT TO THE COMPANY IN RESPECT OF HISTORIC BENEFITS IN KIND

The parties have agreed that the following payments be made or are procured in payment to Beechmount Limited for certain benefits in kind which may have been enjoyed by Keith Stephen, lain Dewar and/or certain of their family members or connected parties.

(a) Keith Stephen will pay or procure the payment of £410,722 such payment to be made by set off against the loan to the company from [the second pursuer] and the balance in cash.

(b) lain Dewar will pay £385,452 such payment to be made by a combination of set off against the loans to the company from lain Dewar and McKay Limited and the balance in cash.

Such payments will be made (in respect of the cash payments) and deemed to have been made (in respect of the set off) by 30 November 2018 at the latest (with the deemed set offs deemed to have been made on the same date as the cash payment). If any additional benefits in kind are not taken to zero by the above mechanism resulting in tax consequences for either director such liability will be for the respective individual directors to meet any tax effect on them personally.

5. DISTRIBUTION OF FUNDS

The parties agree that further to the resolution of matters in paragraphs 3 and 4 and the completion of the sale of the property (with the payment of any relevant tax liabilities) that the net assets held by Beechmount Limited will be distributed in the following manner:

1. The first £800,000 is paid to [the first and second pursuers] in proportion to their respective shareholdings.

2. The remaining surplus is paid 50% to lain Dewar and 50% to [the first and second pursuers} in proportion to their respective shareholdings.

The parties agree following the sale of Beechmount House promptly to put Beechmount Limited into solvent members voluntary liquidation by appointing a liquidator as agreed, or in the absence of agreement, as nominated by the President of the Institute of Chartered Accountants Scotland. The liquidator is hereby directed to distribute the net assets of the company as agreed.

Prior to appointment of a liquidator, at the option of Keith Stephen, the distribution of the first £800,000 may be paid by way of dividend if so requested and all parties agree to pass a shareholders resolution to the extent necessary to amend the articles to facilitate that payment. A liquidator shall be appointed no later than 7 days after the payment of said dividend".

Events after the settlement agreement

[6] Following the settlement agreement, there was a substantial amount of correspondence between the solicitors acting on behalf of the pursuers (Brodies LLP) and those acting for Iain Dewar (Rooney Nimmo). The correspondence related largely to seeking to implement the agreement, including clause 3. One of the issues, covered by many emails, concerned whether Johnston Carmichael CA ("JCCA") should represent the Company in discussions with HMRC. JCCA tendered certain advice, including that the payments suggested in clause 4 of the settlement agreement should not take place. The pursuers proposed to add a supplementary settlement agreement, to assist implementation by seeking to make the appointment of JCCA irrevocable and dealing with the effect of clause 4 not being necessary. If the supplementary settlement agreement was not agreed to by Iain Dewar, the pursuers indicated that they would raise proceedings for the compulsory winding-up of the Company.

[7] Beechmount House was sold on 5 April 2019 for £3,250,000. In July 2019, a winding-up notice was issued on behalf of the pursuers. Iain Dewar engaged a new firm of solicitors and discussions continued. The pursuers' winding-up notice was not progressed. In November 2019, Iain Dewar presented a petition seeking orders for the Company to be wound-up. The pursuers did not oppose the winding-up petition. By an interlocutor dated 17 December 2019, the court ordered the Company to be wound-up and appointed Maureen Leslie as the interim liquidator. She was subsequently appointed liquidator on 31 January 2020. Following her retiral, she was replaced as liquidator on 22 November 2021 by Donald McKinnon.

Key factual issues

[8] The pursuers' case is based on enforcement of clause 5 of the settlement agreement. In light of the fact that clause 5 states that net funds will be distributed "further to the resolution of matters in paragraphs 3 and 4" and that the defender contended that resolving these matters had not occurred, a significant amount of the evidence concerned whether such resolution had indeed happened. This involved evidence about many email exchanges by or on behalf of the parties.

[9] In relation to clause 3, the central factual raised was whether or not the parties had complied with the obligation to "appoint an independent expert on behalf of Beechmount Limited, nominated by agreement …". This was a core feature of the evidence and submissions. Emails about making an appointment of the accountancy firm JCCA had been sent. JCCA had done some work and in due course sent an invoice to the liquidator. In essence, the pursuers' position was that the evidence showed that this obligation had been complied with. The defender's position was to the opposite effect.

Witnesses

[10] On behalf of the pursuers, evidence was led firstly from Oliver Stephen, a trustee of the first pursuer and director and company secretary of the second pursuer. He is the son of Keith Stephen. He spoke to the circumstances before the settlement agreement, the efforts made to implement it and the circumstances leading up to the liquidation of the Company. On his evidence, the pursuers had made repeated attempts to take matters forward in respect of the point in clause 3 about making reasonable endeavours to co-operate in agreeing a position with HMRC in relation to benefits-in-kind. The witness refused to accept that JCCA had not been appointed to represent the interests of the Company. On the

contrary, his understanding was that JCCA had been instructed on behalf of the Company. JCCA had done work (including preparing a document described as a strategy note) and sought to charge the Company for it, by sending the invoice to the liquidator. While he had sought to have a supplementary agreement reached, the settlement agreement itself was in any event entirely enforceable. It was agreed by the parties, as Iain Dewar said in his witness statement, that clause 4 would not be implemented.

[11] Evidence was led next from Iain Rutherford, a partner in Brodies LLP, the firm of solicitors which acted for the pursuers. He gave evidence about communications with the solicitors who acted on behalf of Iain Dewar, and was taken through a large amount of email correspondence. His understanding was that JCCA had received instructions on behalf of the Company. As far as he was aware, no engagement letter had been issued. In relation to the supplementary agreement proposed by the pursuers, there was an email sent by him to Mr Dewar's solicitor on 5 June 2019, which stated that if there was no response on the supplementary settlement agreement by the end of the week, it would be assumed that agreement is not possible and that the only available route for resolution is winding up. The pursuers also called Ross Mitchell, an associate and solicitor-advocate in the same firm of solicitors. He explained the background and some of the correspondence with the solicitors who acted on behalf of Iain Dewar. He understood that agreement was reached between the directors regarding instruction of JCCA.

[12] John Nimmo gave evidence. He is a partner in the firm of solicitors, Rooney Nimmo, which acted for Iain Dewar. He spoke about the correspondence on behalf of Iain Dewar sent by colleagues who worked at Rooney Nimmo and noted that Iain Dewar did not consider that his instructions had been properly implemented. Solicitors in his firm always sought to act in accordance with a client's instructions. There may, however, have been

some misunderstanding. Acting for Iain Dewar was dealt with largely by another solicitor in the firm rather than by the witness. JCCA had a long-standing relationship with the Stephen family, which concerned Iain Dewar in relation to them being appointed on behalf of the Company.

[13] Parties agreed that the contents of the witness statement of Brian Rudkin, a director and Head of Employer Services at JCCA, could be taken as his evidence for the purposes of the action, without calling him as a witness. In summary, Mr Rudkin's position was that there had been no instruction on behalf of the Company to appoint JCCA to act on its behalf in liaising with HMRC and there had been no formal letter of engagement. The witness statements of two other witnesses were also agreed as evidence, but that evidence did not ultimately bear upon the issues in dispute.

[14] The defender led evidence from Iain Dewar. He spoke to the circumstances leading to the settlement agreement, the obligations set out in the agreement and whether those had been performed or were no longer relevant, and the circumstances leading up to and surrounding the liquidation of the Company. His evidence included that clause 4 of the settlement agreement was resolved by agreement that the payments provided for under that clause would not be made. As to clause 3, notwithstanding the content of correspondence sent on his behalf by solicitors, he was adamant that he did not agree that JCCA should be appointed on behalf of the Company and he could not have given instructions to that effect. It appeared to him that his solicitors "had their wires crossed". His perception was that he had agreed to exploratory talks between his accounting advisor (Bruce Connolly) and JCCA. He accepted that on his behalf Bruce Connolly had agreed that JCCA should approach HMRC and that there was email correspondence from Rooney Nimmo, on his behalf, that JCCA will be appointed to act for the Company. But at no time did he actually instruct

anyone to employ JCCA. They had acted for the Stephen family and he did not wish to instruct them to act for the Company.

[15] Bruce Connelly gave evidence. He acted as an advisor to Iain Dewar, including on tax and strategic matters, and in relation to the long-running dispute between Mr Dewar and Keith Stephen. His evidence included the circumstances of the settlement agreement, and his discussions with the liquidator, on behalf of Mr Dewar, throughout the liquidation. He was referred to the emails about JCCA acting for the Company. He explained that he had not been averse to JCCA taking on the role in relation to the benefits-in-kind issue and a point about National Insurance Contributions, but that was all. It would not include any discussion with HMRC about personal loans to Iain Dewar. However, when shown the emails from Rooney Nimmo on behalf of Iain Dewar he had not been aware that these were being sent and they "cut across" the position as he understood it.

[16] Maureen Leslie, the former liquidator of the Company, gave evidence about the circumstances leading to her appointment, the liquidation of the Company, the terms of the settlement agreement and the information which she had about the obligations set out in it. She had been told that both Keith Stephen and Iain Dewar had been in receipt of benefits-in-kind as a result of occupation of the property. She had been made aware that Iain Dewar was adamant that JCCA had not been formally instructed. JCCA made a claim in the liquidation for payment for work done in preparing the strategy note but that claim was subsequently withdrawn. She had reached the view, following discussion and advice with tax advisers, that there was no need arising from the benefits-in-kind for the liquidator to hold back from distribution of any funds, any tax issue being primarily a matter for the individuals who obtained those benefits. However, the terms of the settlement agreement

required to have been satisfied before any payment under clause 5 could be made. Senior counsel had advised that the settlement agreement was not binding upon the liquidator.

Submissions

Submissions for the pursuers

[17] The purpose of the settlement agreement was to see to it that the principal (if not sole) asset of the Company, Beechmount House, would be sold and the funds generated thereby distributed between the pursuers and Iain Dewar. Clause 5 created an obligation that was binding upon the Company, as a party to the agreement. The words "further to the resolution of matters in paragraphs 3 and 4" did not make the obligation to distribute the funds dependent upon those clauses having been implemented or otherwise resolved. It was effectively saying that those points had been dealt with, using the past tense as opposed to it being prospective. In any event, even if clause 5 was construed in the manner argued by the defender, both of those clauses were dealt with, prior to the Company going into liquidation.

[18] There was no dispute between the pursuers and Iain Dewar that clause 4 was resolved by agreement that the payments provided for under that clause would not be made. This was supported by the evidence of Iain Dewar, Bruce Connelly and Oliver Stephen. The need to make payments in terms of clause 4 had been waived.

[19] In relation to clause 3, that was also resolved or dealt with. The overarching obligation on the parties under clause 3 was to use reasonable endeavours to co-operate in agreeing a position with HMRC in relation to benefits in kind, The pursuers plainly met that obligation by making repeated attempts to take matters forward in this regard (as narrated in the evidence of Oliver Stephen). That was sufficient to meet the obligation on

the pursuers in terms of clause 3, such that it would be resolved (so far as required by clause 5). Further, the position had been reached, endorsed by Ms Leslie as liquidator, that there is no need for the Company to make any payments to HMRC in respect of historic benefits-in-kind. Any liability in that regard would attach to the individuals who enjoyed those benefits. Clause 3 proceeded on the underlying hypothesis that there were such historic liabilities but that position did not, in fact, pertain. Thus, clause 3 has been resolved in that manner.

[20] In any event, tax advisers were properly appointed by each party. Mr Dewar accepted in cross-examination, on more than one occasion, that there was an agreement that JCCA be appointed for the Company. The evidence about the meeting of 3 December 2018 between Mr Connelly and JCCA and the subsequent preparation by JCCA of the strategy note supported that position, to which Mr Connelly (acting for Mr Dewar) said he was "not averse".

[21] The terms of the e-mail correspondence between Rooney Nimmo and Brodies between November 2018 and January 2019 showed that Rooney Nimmo clearly and correctly set out Mr Dewar's agreement to the appointment of JCCA. Mr Dewar did not suggest that this correspondence was sent against his instructions. The position was reiterated in correspondence between Rooney Nimmo and Brodies LLP as at April 2019. JCCA were instructed by Iain Dewar (as director of the Company) by way of the Rooney Nimmo e-mail of 16 April 2019. Similar instruction had also been given on behalf of Keith Stephen as the other director of the Company. JCCA rendered a fee for work done further to its appointment on behalf of the Company. It would not have done so fraudulently and, indeed, the plain evidence of Ms Leslie was that she was minded to accept the fee as being properly due for payment by the defender. While the defender may seek to

found upon the statement of Mr Rudkin, it was important to note that he does not say that work was not done for the Company by JCCA and does not say that JCCA were not instructed to act for the Company by the directors. All he observes is that no engagement letter was executed after April 2019. But the instruction had been given prior to that and, notably, work for which JCCA sought to charge a fee had been carried out. There was no need for a letter of engagement.

[22] The result was that, prior to the Company entering liquidation, there was a purified obligation on the Company to distribute the initial £800,000 tranche of funds to the pursuers under clause 5 of the settlement agreement. There are ample funds within the present solvent liquidation for this payment to be made. Even if there has been rejection of the settlement agreement by the liquidator, this would simply mean that the Company was in breach of its obligations under the settlement agreement and damages would fall to be paid.

[23] On the defender's point about frustration, that had not occurred. There was no supervening event that rendered performance of the contract impossible. There had already been a crystallised payment obligation when liquidation took place. The payment obligation was not dependent upon voluntary liquidation taking place.

Submissions for the defender

[24] The liquidator was not bound by the terms of the settlement agreement. It did not bear to impose any obligations on a court-appointed liquidator, nor could it competently have done so. It sought to impose obligations on a liquidator appointed as part of a solvent members' voluntary liquidation, following the carrying out of certain obligations in terms of the settlement agreement. Moreover, no members' voluntary liquidation took place.

[25] The obligation to distribute the Company's assets in accordance with the provisions of clause 5 in the agreement was not imposed upon the Company, but rather on the voluntary liquidator whose appointment was contemplated by the agreement. Many of the obligations provided for in terms of the settlement agreement had not been met by the date on which the liquidator was appointed.

[26] The terms of the settlement agreement were also so unclear that it could not be implemented. That was why the pursuers considered that a further supplementary settlement agreement was necessary (see the evidence of Oliver Stephen). A draft supplementary settlement agreement was prepared by the pursuers' solicitors but no supplementary agreement was agreed between the parties.

[27] Even if the settlement agreement could be said to have imposed obligations on a court-appointed liquidator it was, in any event, frustrated at common law, in part because of the fact that the various steps which it required to be taken prior to the distribution of its assets were not taken; but primarily because of the appointment of a court-appointed liquidator as part of a compulsory winding-up by the court. Reference was made to McBryde, *The Law of Contract on Scotland* (3rd ed, at 1-04); *Davis Contractors* v *Fareham Urban DC* [1956] AC 696 at 729; and *Paal Wilson & Co A/S* v *Partenreederei Hannah Blumenthal* [1983] 1 AC 854.

[28] Frustration having occurred, the settlement agreement was not productive of any further obligation on any party. It has been deprived of its effect. Any rights which the pursuers had under the contract ended on the date on which the liquidator was appointed, if not before. There was no breach of contract; and, consequently, no right to payment under that contract, or damages in respect of its alleged breach.

[29] In relation to the interpretation of clause 5, reference was made to familiar authorities on contractual construction: *Ashtead Plant Hire Co Ltd* v *Granton Central Developments Limited* 2020 SC 244; *Wood* v *Capita Insurance Services Ltd* [2017] AC 1173 and *Bank of Scotland* v *Dunedin Property Investment Co Ltd* 1998 SC 657. The intention of the parties at the time at which the settlement agreement was entered into was, plainly, that the obligations set out in clauses 3 and 4 required to be obtempered before distribution of funds in accordance with clause 5.

[31] It appeared from the evidence of Iain Dewar that the parties agreed that the payments provided for in clause 4 would not be made. It was, however, clear from the evidence that the parties' position on clause 4 changed as matters progressed. More importantly, the matters provided for in clause 3 had not been resolved. Ms Leslie's evidence was that she was advised by Bruce Connelly that this was one of the points in issue between Mr Dewar and Mr Stephen and had never been resolved. In relation to the pursuers' assertion that they had met their obligations under clause 3 to use reasonable endeavours, that did not suffice to discharge the obligations. Actual appointment was required. No expert was appointed for the Company. In that regard, the evidence of Brian Rudkin was that he was involved in "preliminary discussions" with Oliver Stephen on behalf of his father, Keith Stephen, and Bruce Connelly, on behalf of Iain Dewar. He had "exploratory meetings" with both parties. Oliver Stephen requested that Mr Rudkin prepare a "tax advice note", which he duly did. Mr Rudkin says expressly in his witness statement that JCCA had not been appointed to act for the Company at that time. He made clear that an engagement letter was necessary but none was ever issued. Formal appointment from the Company, that is by both directors, was required. The absence of an

appointment was supported by the pursuers' own correspondence, including by solicitors on its behalf. JCCA submitted, but later withdrew, its claim in the liquidation.

[32] As the matters in clause 3 had not been resolved, there was no obligation on the Company, and hence the defender, to make the distribution provided for in terms of clause 5.

Decision and reasons

[33] It is convenient to deal firstly with clause 4 of the settlement agreement. Mr Stephen's evidence was that JCCA had advised that clause 4 was incompatible with JCCA's proposed strategy and the payments under clause 4 should not be made. In his supplementary witness statement, Iain Dewar said that it is correct that JCCA and Bruce Connelly understood that the payments envisaged by clause 4 would not be accepted by HMRC and so he and Mr Stephen agreed not to make these payments. Clause 4 was therefore dispensed with.

[34] Turning to clause 3, it is clear that it did not merely require reasonable endeavours by the parties. That expression is used in the opening paragraph but the clause goes on to say that the parties shall appoint an independent expert on behalf of Beechmount Limited, nominated by agreement, which failing the president of ICAS would make the appointment. As to whether an appointment was actually made, there is no doubt that the pursuers wished to instruct, and indeed instructed, JCCA to act for the Company. The correspondence from Rooney Nimmo, on behalf of Iain Dewar, about instructing JCCA is also of some importance. On 16 April 2019, in an email to Brian Rudkin of JCCA, Mr Dewar's solicitor stated:

> "Thank you for sending over your details. My client, Mr Dewar (director of Beechmount Limited) has confirmed his intention to instruct JCCA to act on behalf of Beechmount Limited in regard to any NIC liabilities which may be due by the company. I understand this is the confirmation you need to start the ball rolling and I look forward to receiving your letter of engagement and the information request soonest."

Later that day, an email from the same solicitor to Brodies LLP included the following:

> "Please can you have Oliver and Keith confirm to Brian Rudkin that he is engaged on behalf of the company as soon as possible. We have confirmed the same on behalf of Iain Dewar. Please then request Brian Rudkin to issue his engagement letter soonest and promptly comply with any AML requested as we are doing this afternoon".

Iain Dewar, at two separate email addresses, was copied into this second email.

[35] In light of the number of emails sent and the words used, I am unable to accept Mr Dewar's evidence that the solicitors must have "had their wires crossed". Mr Nimmo made clear that solicitors in his firm acted only on instructions. The suggestion that they would make these statements about Iain Dewar's position when he had never given any such instructions and indeed was vehemently against JCCA working for the Company makes no real sense. Read against the background of the other correspondence issued on his behalf, these emails can only have been based on his instructions. Indeed the oral evidence of his advisor Mr Connolly about not being averse to JCCA acting for the Company fits with that approach. Plainly Iain Dewar had no desire for JCCA to act for him as an individual, and Mr Connolly knew that and would not have sought that to occur, but acting for the Company is a different point and the emails make the position on that point clear.

[36] However, the fundamental problem when reading the terms of the emails in the context of all of the evidence is that formal instruction by the Company did not take place and there was no letter of engagement from JCCA. Brian Rudkin of JCCA had a discussion with Oliver Stephen in early April 2019 in which he advised that both directors required to

confirm there was a joint instruction from the Company. After Brian Rudkin had received the email on 16 April 2019 from Rooney Nimmo, he had a telephone conversation with John Nimmo to explain that JCCA required Beechmount Limited to instruct the firm to act on this matter, not just an instruction by the directors separately. He then sent an email to Oliver Stephen on 17 April 2019, which included the following:

> "Further to our discussion earlier this week, I wanted to let you know that I have received instructions from Mr Dewar's legal advisors to appoint JC as advisors to the company in resolving the benefit in kind issues.
>
> However, I have reiterated that we are acting for Beechmount the company and not the individual directors and, given the fractious relationship between the two directors, it is important that we receive formal appointment as advisors from the company itself."

Mr Rudkin's evidence was that no further correspondence took place with either Oliver Stephen or Iain Dewar (through his advisers) on the specific engagement terms. No instruction of a formal appointment was sent on behalf of the Company. There was no other evidence in contradiction of that position. The result was that JCCA did not progress matters and did not issue a formal engagement letter and terms of business.

[37] It is correct that JCCA did some work. Mr Rudkin and his colleagues had met with Oliver Stephen in October 2018 and thereafter in December 2018 with Bruce Connolly on behalf of Iain Dewar. These discussions resulted in the drafting by Mr Rudkin of the strategy note (giving tax advice) which was as requested by Oliver Stephen and was shared with him and Iain Dewar (via Bruce Connolly). It is also correct that JCCA later sought to bill the Company, through the liquidator, for this work, although that invoice was subsequently withdrawn.

[38] However, as noted above Mr Rudkin had expressly explained to the parties, very shortly after the key discussions with the pursuers and the emails from Rooney Nimmo, that

JCCA had to receive a formal appointment as advisors from the Company itself. That was simply never taken forward. On that evidence, having particular regard to the neutral position of Mr Rudkin and the absence of any reason why he would mis-state the position, it is not possible to conclude that JCCA were appointed by the Company to act on its behalf. Appointment of an independent expert must involve that expert agreeing to be appointed. JCCA would, it seems, have agreed to be appointed, but, as it made clear to the parties, that could occur only if appointment was made by the Company. Absent such an appointment, JCCA did not proceed any further. Clause 3 was not implemented and hence there was, at the time of the compulsory liquidation, no crystallised obligation on the part of the Company to make the distributions stated in clause 5.

[39] If such a crystallised obligation had been reached prior to the liquidation, I would not have regarded the liquidation as amounting to frustration of the settlement agreement. I do not view the reference to voluntary liquidation in the agreement as meaning that if that did not occur then distribution could not take place. It is clear from clause 5 that if clauses 3 and 4 have been resolved, and tax paid, the obligation to distribute would arise. The provision stating that distribution was to be done by voluntary liquidation set up the method or means of distribution rather than being a condition or precursor for the existence of the obligation itself. The right to payment was not inter-dependent on voluntary liquidation occurring. In consequence, while the court-appointed liquidator was not a party to the settlement agreement and not bound thereby, there would have been an obligation upon the Company which the liquidator would have required to consider.

[40] However, as clause 3 had not been implemented or resolved by the time of the compulsory liquidation, the effect of the process was that the liquidator took control of the Company's affairs and the directors ceased to have authority to bind the Company,

including in appointing an independent expert. In the result, there was frustration of the agreement because this supervening event rendered performance of the outstanding elements of the contract impossible.

[41] Ms Leslie, on balance, decided not to make a declaration to HMRC about the benefits-in-kind, because in her view any such declaration would be extremely vague in its terms as she had no personal knowledge in relation to the benefits. She was advised that the Company's liability in this regard would certainly be substantially less than the liability which might accrue to the individual directors, assuming that such liability could be proved. She considered that this was not something she should take forward with HMRC. Her view was that final distribution could be made without any payments by the Company to HMRC, because that liability would fall largely on the individuals. While the liquidator received advice to the effect that the benefits-in-kind issue is not a matter for the Company but is for the individuals to deal with, that was a point for her to decide upon. It does not and cannot, post-frustration, amount to a means of resolving clause 3, which required appointment by the parties of an independent expert for discussion between the Company and HMRC. Clause 3 was not dispelled by compliance of the parties with its terms, because that did not occur.

Conclusion

[42] For the reasons given, the matters in clause 3 of the settlement agreement were not resolved and, as a result, the obligation to distribute under clause 5 was not crystallised. Compulsory liquidation removed the ability of the parties to perform clause 3 and thereby caused frustration of the contract.

Disposal

[43] I shall sustain the second, third and fourth pleas-in-law for the defender, repel the pursuers' pleas-in-law, and grant decree of *absolvitor*, reserving in the meantime all questions of expenses.