



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 53

CA58/20

OPINION OF LORD TYRE

In the cause

HCC INTERNATIONAL INSURANCE COMPANY PLC

Pursuer

against

THE SCOTTISH MINISTERS

Defenders

**Pursuer: McBrearty QC, T Young; Harper MacLeod LLP  
Defenders: Delibegović-Broome QC, Ower; MacRoberts LLP**

21 May 2021

**Introduction**

[1] In October 2015, Ferguson Marine Engineering Ltd (“FMEL”) entered into contracts with Caledonian Maritime Assets Ltd (“CMAL”) for the construction of two passenger vessels. In terms of the contracts, CMAL made substantial advances of funds to FMEL towards the costs of construction. As is common practice in shipbuilding, FMEL required to arrange refund guarantees in order to provide security to CMAL that, if FMEL defaulted on its obligations, CMAL would be able to recover those advances. The pursuer (“HCC”) is an insurance company which provides such guarantees. In 2016 HCC granted two guarantees, one for each vessel (“the Refund Guarantees”), in favour of CMAL. At the same time, FMEL

granted a deed indemnifying HCC in respect of any sums paid to CMAL under the Refund Guarantees.

[2] In February 2019, in circumstances narrated more fully below, an agreement (“the Intercreditor Agreement”) was entered into by HCC, the Scottish Ministers and other parties, regulating the respective rights of FMEL’s various creditors. That agreement provided *inter alia* that amounts received by any of the parties would be applied to liabilities in an agreed order of ranking, with debts due to HCC having first priority.

[3] In August 2019 FMEL entered administration, and its business and assets were transferred to a new entity owned by the Scottish Ministers. Following negotiations, a settlement was reached between HCC and CMAL, providing for certain payments to be made by HCC to CMAL, and for HCC’s liabilities under the Refund Guarantees to be discharged. In this action HCC, founding upon the terms of the Intercreditor Agreement, seeks reimbursement by the defenders of the sums that it paid to CMAL, together with incidental costs and expenses. The defenders deny liability to make any payment.

[4] The action came before me for proof before answer. Oral evidence was given on behalf of HCC by Mr Adrian Luto and Ms Lucy Collins, partners in Mills & Reeve LLP, solicitors, London, and on behalf of the Scottish Ministers by Mr Jason Higgs, a restructuring practitioner and partner in PWC. In addition, affidavits by Ms Lisa Maguire, a partner in MacRoberts, solicitors, who acted for the Scottish Ministers in the negotiation of the Intercreditor Agreement, and by Mr Dermot Rhatigan, the Scottish Government’s Deputy Director for Manufacturing and Industries, were agreed to form their evidence. I accept all of the witnesses as credible and reliable. Expert evidence on English law was given on behalf of the defenders by Ms Raquel Agnello QC, an English barrister and Deputy

Insolvency and Companies' Court Judge in London. In so far as admissible, I accept her evidence.

### **The Refund Guarantees, Deeds of Indemnity and Intercreditor Agreements**

[5] FMEL is a member of a group of companies which also includes Ferguson Marine Engineering (Holdings) Limited ("Holdings") and MacKellar Sub-Sea Limited ("MacKellar"). All of these companies are now in administration. At all material times the ultimate controlling shareholder of the group was Clyde Blowers Capital Fund III LP ("CBC").

[6] Each of the Refund Guarantees, dated 2 November 2016, provided, so far as material, as follows:

"In consideration of you agreeing to accept this Guarantee as security for the refund by [FMEL] to you of Instalments under the Contract, at the request of [FMEL], [HCC] hereby irrevocably and subject only to the conditions set out in this Guarantee guarantees to you that if [FMEL] becomes liable under the Contract to repay all or any part of any Instalment, ...[HCC] shall, upon receipt from you of a written Demand for the same..., pay to you or to your order on or before the expiry of thirty (30) days from receipt of such Demand the amount so demanded together with Contractual Interest (if any) in respect thereof..."

[7] Also on 2 November 2016, FMEL and HCC executed a Deed of Indemnity, the operative provision of which (clause 2) stated as follows:

"The Indemnitors shall indemnify and keep indemnified the Surety from and against all claims, liabilities, costs, expenses and/or losses (including loss of interest) incurred by the Surety under or by virtue of any Bond. Costs and expenses shall include those reasonably incurred by the Surety where a claim or threatened claim is resisted or disposed of or to make a payment to a third party to avoid a claim being made by the Beneficiary in such sum or sums as may be required to satisfy or limit all loss and expense arising in relation to the Bond or as a result of the Surety having issued it, without any payment being made in respect of any such claim..."

Although "Indemnitors" is in the plural, the only entity bound by the deed at this time was FMEL. The "Beneficiary" was CMAL. "Bond" was defined as each of the Refund

Guarantees or any replacement thereof. In terms of clause 21, the governing law of the deed was English law.

[8] On the same date, FMEL granted various securities in favour of HCC, including a standard security over its premises at Port Glasgow. These bore to be in security of “the Secured Liabilities” or “Secured Obligations”, each defined as present and future obligations and liabilities under the Deed of Indemnity and certain other documents.

[9] In February 2018, FMEL entered into an Intercreditor Agreement to which the Scottish Ministers were a party. As a result of this, FMEL also executed an amended and restated Deed of Indemnity and amended and restated securities in favour of HCC.

[10] In the summer of 2018, FMEL required further funding. The Scottish Ministers entered into a facility agreement for the provision of £30 million to FMEL on conditions, among others, that the Scottish Ministers were granted second ranking security over the assets of FMEL and its group entities, and that CBC invested equity into FMEL upon certain dates. HCC were the first ranking creditor in respect of all debt and security, but only held securities from FMEL. The Intercreditor Agreement of February 2018 later required to be amended, and a further Intercreditor Agreement was executed in June 2018.

[11] An amended and restated Deed of Indemnity was also to be granted at this time in favour of HCC. According to Ms Collins’ evidence, HCC made the accession of MacKellar to this Deed of Indemnity as an indemnitor a condition of HCC agreeing to enter into the June 2018 Intercreditor Agreement and to the granting of security over the assets of FMEL and MacKellar in favour of the Scottish Ministers. Minutes of a meeting of the Board of MacKellar record the Board’s agreement to MacKellar acceding to the June 2018 Deed of Indemnity. The minutes record the Board resolving *inter alia* that accession was likely to promote the success of MacKellar for the benefit of its members as a whole having regard to

the commercial benefits to MacKellar that were expected to result from it. A Deed of Accession, Amendment and Restatement was accordingly entered into on 25 June 2018 between FMEL, MacKellar and HCC, amending and re-stating the 2016 Deed of Indemnity as previously amended and re-stated in February 2018. MacKellar thereby agreed to be bound by the terms of the Deed of Indemnity as if it had been an original party to it.

### **The 2019 Intercreditor Agreement**

[12] The equity capital from CBC was not forthcoming. Instead CBC offered a secured loan. This required yet a further amendment and restatement of the Intercreditor Agreement to introduce CBC as a secured creditor. As this is the version founded upon by HCC in these proceedings, it is necessary to set out some of its terms. It was executed on 1 February 2019 by HCC, the Scottish Ministers, CBC, Holdings, FMEL and MacKellar. By clause 2.1.1, the parties agreed that

“...the HCCI Debt ranks and shall rank in priority to the SG Priority Debt, the CBC Debt, the SG Debt, and the Intra-Group Debt in all respects...”

The "HCCI Debt" was defined in clause 1.1 as

“all Liabilities which are or may become payable or owing by Holdings and/or FMEL and/or any other member of the Ferguson Group to HCCI pursuant to and/or as a result of the issue of any and all Bonds”.

"Bond" was in turn defined as

“any surety bond, undertaking, guarantee, indemnity or other obligatory instrument (including unconditional obligations in the nature of letters of credit in whatever form) and shall include any reinsurance accepted by HCCI and any indemnity or guarantee given to HCCI in respect of any Bond executed, procured, provided or reinsured on behalf of any Principal... For the avoidance of doubt, 'Bond' includes any Bond already issued by HCCI which is outstanding as at the date hereof including without limitation the Refund Guarantees”.

[13] Clause 10 provided *inter alia*:

“10.1 The priority of HCCI and the Subordinated Creditors, as between HCCI and the Subordinated Creditors, shall stand (regardless of the order of execution, registration or notice or otherwise), so that all amounts from time to time received or recovered by HCCI or a Subordinated Creditor from any Obligor, after providing for all reasonable outgoings, costs, charges, expenses and liabilities of enforcement, exercising rights on winding up and payments ranking in priority as a matter of law, shall be applied in the following order of priority:

10.1.1 first, in or towards discharge of the HCCI Debt...”

[14] Clause 11, entitled “Company Insolvency”, provided *inter alia* as follows:

**“11.1 The Subordinated Creditors**

If an administration or winding-up order is made in relation to any Obligor, the Subordinated Creditors may (but shall not be obliged to) take all steps (whether as shareholder and/or as a creditor of any Obligor) it reasonably can to:

11.1.1 recover all amounts which may be due to it from the relevant Obligor (or any third party) in respect of any of the SG Priority Debt or the Subordinated Debt;

11.1.2 exercise its rights (however arising) against any property in respect of any such amounts; and

11.1.3 prove in that administration or winding-up.

...

**11.3 Payment to HCCI and the Subordinated Creditors**

11.3.1 Before the Bond Discharge Date, CBC, the Scottish Ministers or Holdings (as the case may be) shall pay all monies received by them under Clause 11.1 or 11.2 to HCCI, after deducting all reasonable costs and expenses (including legal fees and expenses).”

[15] Clause 13 provided that

“This Deed shall cease to have effect after the occurrence of the Bond Discharge Date and the Discharge Date.”

The “Bond Discharge Date” was defined as

“(i) where no enforcement action has been taken by HCCI prior to the expiry date of the Bonds, the date on which the Bonds expire or (ii) where any enforcement action has been taken by HCCI prior to the date on which the Bonds expire, the date

upon which all present and future Liabilities and obligations at any time of Holdings and/or FMEL and any other indemnitor (as the case may be) to HCCI and/or any procured surety (as the case may be) under the last Bond outstanding and/or any related deed of indemnity, both actual and contingent and whether incurred solely or jointly or as principal or surety or in any other capacity have been fully and finally discharged to the satisfaction of HCCI, whether or not as the result of an enforcement”.

It is a matter of agreement that alternative (ii) above is applicable because HCC took enforcement action by having administrators appointed. The reference to “Discharge Date” is not material.

[16] In terms of clause 22.1, the deed and any dispute or claim arising out of or in connection with it is governed by Scots law. Clause 22.2, entitled “Jurisdiction”, stated:

“Each party irrevocably agrees that, subject as provided below, the courts of Scotland shall have exclusive jurisdiction over any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this Deed or its subject matter or formation. Nothing in this Clause shall limit the right of HCCI to take proceedings against any party hereto in any other court of competent jurisdiction, nor shall the taking of proceedings in any one or more jurisdictions preclude the taking of proceedings in any other jurisdictions, whether concurrently or not, to the extent permitted by the law of such other jurisdiction.”

### **The 2019 restatement of the Deed of Indemnity**

[17] A further Deed of Amendment and Restatement of the 2016 Deed of Indemnity was also executed on 1 February 2019. The parties to it were FMEL, MacKellar and HCC. The recitals stated:

“A This Deed is supplemental to and amends and restates the deed of indemnity dated 2 November 2016 as amended and restated on 14 February 2018 and as further amended and restated on 25 June 2018 and made between the Lead Indemnitor and HCCI (the ‘Deed of Indemnity’).

B The parties have agreed to amend and restate the Deed of Indemnity on the terms of this Deed.”

The “Lead Indemnitor” is FMEL. In terms of clause 2, FMEL and MacKellar expressly confirmed that the Deed of Indemnity as amended and restated would remain in full force

and effect, that the Security Documents to which they were a party would continue to secure the liabilities which were expressed to be secured by them and would remain in full force and effect, and that the indemnity under clause 2 of the Deed of Indemnity would continue to have effect. The governing law was English law.

[18] The amended and restated Deed of Indemnity was set out in a schedule. The operative provision, clause 2, was in the same terms as in the original deed, set out at paragraph 7 above. This time, however, the definition of “Indemnitors” included MacKellar. “Bond” was again defined as each of the Refund Guarantees or any replacement thereof. As before, the governing law was English law.

### **The Settlement Agreement and Deeds of Discharge**

[19] The additional funding provided in 2018 and 2019 did not resolve FMEL’s financial problems. Progress on construction of the two vessels remained slow, and it was unclear where further cash could be found. There was political pressure to find a way of enabling construction to be completed at the yard. The Scottish Ministers sought advice from PWC as to the options for achieving this. In July 2019, Mr Higgs took over as the lead financial adviser. Mr Higgs noted that HCC held a package of first-ranking securities in relation to the Refund Guarantees. He considered that it would be more difficult for the Scottish Government to find a funding solution if those securities remained in place, and recommended that negotiations should be opened with HCC to investigate means of removing the Refund Guarantees from the picture. His understanding at this time was that MacKellar was a dormant subsidiary within the group.

[20] During July 2019 discussions took place between Mr Higgs on behalf of the Scottish Ministers and, initially, officials of HCC and, subsequently, their solicitors, Mills & Reeve.



In a letter to Mr Higgs dated 24 July 2019, Ms Collins drew attention to “the potential adverse consequences and inconvenience for CMAL (and the Scottish Ministers)” if HCC exercised its rights under the various securities that it held. She stated:

“ (T)he only proposal the Surety Panel is willing to consider (which has been put forward on a without prejudice basis and with all HCC's rights reserved) is that in consideration of the full and unconditional release by CMAL of the two Refund Guarantees HCC will release its security. For the avoidance of doubt, this would include the £4.5m currently held in escrow, which would be immediately available to FMEL for use in the business.”

(The reference to £4.5m currently held in escrow was to a cash collateral sum held by HCC.)

[21] On 30 July 2019 a meeting took place in London with a view to identifying a solution to the Refund Guarantee issue. Mr Higgs attended on behalf of the Scottish Ministers. He described the discussions as “commercial”. His aim was to find a way of removing the Refund Guarantees “as if they had never been issued”. He referred to this as the “unwinding” of the Refund Guarantees. The meeting ended without an agreement having been reached, but those attending felt that progress had been made. Mr Higgs considered that an appropriate time had come to hand the matter over to lawyers to negotiate the detail of an agreement. He did not recall it being suggested that any part of HCC’s security package would remain in place after the Refund Guarantees had been removed.

[22] On the following day (31 July), Ms Collins sent an email to Mr Jamie McIntosh of Addleshaw Goddard, acting on behalf of CMAL, containing the following proposal:

“The Sureties have recommended for internal approval that the whole Refund Guarantee structure is ‘unwound’ to place the parties in as far as practical the same position as if the two Refund Guarantees had never been issued. This would involve the following steps (all of which are we believe in the control of CMAL and HCC):

- HCC returns the premium received by them, both on issue and on each subsequent extension of each Refund Guarantee. This is a sum of £2.94 million.

- HCC releases its security. For the avoidance of doubt, this would include the £4.5m currently held in escrow together with accrued interest, which would be immediately available to FMEL for use in the business.
- All of the assets of FMEL of course remain subject to the security rights of Scottish Ministers but those rights are then no longer secondary to those of HCC.
- In consideration of the above, HCC is fully and unconditionally released by CMAL under the two Refund Guarantees, the originals of which are returned to HCC for cancellation.”

[23] On 1 August 2019, Mr Luto on behalf of HCC sent a “without prejudice” settlement offer to Mr McIntosh. The letter began:

“Further to our call yesterday, we are instructed by our client, HCC International Insurance Company plc (‘HCC’) to put a without prejudice offer to Caledonian Maritime Assets Limited (‘CMAL’) on the following terms:

HCC will agree to ‘unwind’ the Refund Guarantee structure agreed by HCC and CMAL to place the parties (and FMEL) in as far as practical the same position as if the Refund Guarantees had never been issued.”

The letter then set out the terms of HCC’s offer, which in essence repeated the proposal contained in Ms Collins’ email of the previous day. During the next 2 weeks, Mr Luto and Mr McIntosh discussed the mechanics of a settlement procedure. In broad outline, once the terms of the settlement had been agreed, HCC would make a demand for a payment of cash collateral and then appoint administrators. The administrators would execute a pre-pack sale of FMEL’s business to an entity acceptable to CMAL. On completion of the sale, HCC would make its payments and release its securities, and CMAL would release the Refund Guarantees.

[24] On 16 August 2019, CMAL and HCC entered into a Settlement Agreement (which was subsequently amended and restated on 15 November 2019). The Settlement Agreement contained the following introduction (the Builder is FMEL, the Surety is HCC and the Buyer is CMAL):

“...(B) The Builder and the Surety entered into inter alia the Deed of Indemnity and the Cash Collateral Deposit Deed;

(C) The Surety has made demand on the Builder for cash collateral under the Deed of Indemnity and is proposing to appoint the Administrators to the Builder;

(D) The Surety issued the Refund Guarantees in favour of the Buyer;

(E) The Buyer is entitled (but not obliged) to terminate the Contracts and to make a Demand under (and as defined in) each Refund Guarantee; and

(F) The Parties have agreed fully and finally to settle the actual and/or contingent liability of the Surety under the Refund Guarantees in accordance with this Deed.”

“Deed of Indemnity” is defined as “the deed of indemnity between *inter alia* the Surety and the Builder dated 2 November 2016 as amended and restated”.

[25] The Terms of Settlement in clause 4 were as follows:

“4.1 On the Completion Date the Surety shall pay the Consideration to the Buyer's Solicitors' Client Account.

4.2 On the Completion Date the Surety shall pay the Cash Collateral Deposit to the Administrators' Bank Account.

4.3 On the Completion Date the Surety shall legally deliver the validly executed Surety Releases to the Builder's Solicitors. It is acknowledged that the Surety shall have provided the original executed but legally undelivered Surety Releases to the Builder's Solicitors prior to the Completion Date with such executed but legally undelivered documents to be held to the order of the Surety's Solicitors.

4.4 On the Completion Date the Buyer shall deliver (i) the validly executed Buyer Releases and (ii) the original Refund Guarantees and extensions thereof to the Surety's Solicitors.”

Clause 14 provided that the Settlement Agreement and any disputes arising out of it were governed by English law, and that the English courts would have exclusive jurisdiction to settle any such disputes.

[26] Administrators were appointed by HCC to FMEL on 14 August 2019. Holdings and MacKellar entered administration on 22 October 2019. On 1 November 2019, Macrocom (1067) Limited (“Macrocom”), the Scottish Ministers, FMEL, and the Administrators of FMEL entered

into a Sale and Purchase Agreement (“the SPA”) in respect of the business and assets of FMEL. Macrocom, which was the buyer under the SPA, was incorporated by the Scottish Ministers for the purpose of entering into the SPA. It is entirely owned and controlled by the Scottish Ministers. The consideration to be paid by Macrocom to FMEL and its administrators was £7,543,857. This consideration was paid in kind by reduction of, and set off against, the Scottish Ministers’ secured debt. It is a matter of agreement that, in these circumstances, the Scottish Ministers have indirectly received or recovered assets worth £7,543,857 from FMEL.

[27] In accordance with the Settlement Agreement, HCC paid the sum of £4,850,000 to CMAL. On 2 December 2019, Deeds of Release were executed which released HCC from the two Refund Guarantees and which released (only) FMEL from the Deed of Indemnity.

### **HCC’s claim**

[28] In these proceedings HCC claims to be entitled, in terms of the Intercreditor Agreement, to payment by the Scottish Ministers of the sum that it paid to CMAL, which, together with costs and expenses, is said to amount to £5,047,775.79. The Scottish Ministers deny liability to make any payment. The crux of the dispute is whether the Intercreditor Agreement is still in force or whether, as the Scottish Ministers contend, it has ceased to have effect because the Bond Discharge Date has occurred as a consequence of the discharge of FMEL’s liabilities to HCC. HCC contends that although the liabilities of FMEL have been discharged, there has been no discharge of the liabilities of MacKellar in terms of the Deed of Indemnity, as amended and restated, and that accordingly the Bond Discharge Date has not yet occurred.

[29] Shortly prior to the start of the proof in this action, proceedings were commenced by the Scottish Ministers in the High Court in London for rectification of the Settlement

Agreement. I was informed that no issue is raised in those proceedings regarding the proper interpretation of the Settlement Agreement; the application is solely for rectification.

### **Expert evidence**

[30] Ms Agnello was initially asked for her opinion on the following three matters:

1. Do you consider that the Deed of Indemnity as amended and restated on 1 February 2019 is a valid “deed” under English law?
2. The Bonds were issued on 2 November 2016 and MacKellar became an indemnitor on 1 February 2019. In those circumstances, to the extent you are able to comment under English law, do you consider MacKellar to have entered into the Deed of Indemnity “pursuant to and/or as a result of the issue of any and all Bonds” (part of a definition used in the Intercreditor Agreement)?
3. If MacKellar did not become an indemnitor pursuant to or as a result of the issue of the Bonds, on what basis do you consider it to have done so?

Ms Agnello answered the first question in the affirmative. As to the second, her opinion was that because MacKellar had not previously been a party to the Deed of Indemnity, its accession in 2019, without consideration being provided to it, was as a volunteer.

Accordingly, the equitable remedy of specific performance would not be available against it.

Ms Agnello went on to offer her opinion on possible interpretations of the phrase “pursuant to and/or as a result of the issue of any and all Bonds” in the Intercreditor Agreement.

[31] In one respect, Ms Agnello’s written opinion proceeded upon an erroneous factual assumption. As I have narrated, MacKellar acceded to the Deed of Indemnity in 2018, not in 2019. Ms Agnello’s unawareness of this was excusable because, for reasons that are entirely unclear to me, HCC’s agents had refused to provide copies of the pre-2019 versions

of the Deed of Indemnity until a few days before the proof. By the time she gave her oral evidence, Ms Agnello had had an opportunity to consider the previous versions of the Deed of Indemnity and was able to confirm that this did not affect the substance of her opinion. It was in fact MacKellar's accession to the 2018 re-statement of the deed that had been as a volunteer, but the legal analysis remained the same.

[32] It was put to Ms Agnello in cross-examination that the evidence of Ms Collins, supported by the MacKellar board minutes, indicated that, contrary to Ms Agnello's understanding, there had been consideration for MacKellar's accession to the Deed of Indemnity. Ms Agnello accepted that the court might in certain circumstances have regard to such evidence, but explained that it would be unusual to look behind the terms of the document. In the present case the recitals to the Deed of Indemnity were the same in all versions and made no reference to MacKellar. The court would wish to know why the parties had signed a deed containing an allegedly inaccurate recital. She did however agree that if regard were to be had to the minutes, they indicated that consideration had been received by MacKellar, although it did not relate to the Refund Guarantees.

### **Argument for HCC**

[33] On behalf of HCC it was submitted that the Deed of Indemnity to which MacKellar acceded in June 2018 established HCC's entitlement to seek indemnity from MacKellar. This was not a security: it was the deed constituting MacKellar's debt. Without it, MacKellar would have had no obligation to HCC and so there would have been nothing to secure by the Security Documents so far as MacKellar was concerned. The definition of "HCCI Security Documents" in the Intercreditor Agreement correctly did not include the Deed of Indemnity because it was a personal obligation and not a security.

[34] The definition of “Bond” in the Intercreditor Agreement expressly included the Refund Guarantees. It also included the Deed of Indemnity, which was an “indemnity or guarantee given to HCC in respect of any Bond...” The occurrence of the Bond Discharge Date required full and final discharge by HCC of “all present and future liabilities and obligations at any time of Holdings and/or FMEL and any other indemnitor... to HCC”. Again, therefore MacKellar was expressly included, and the situation that had now occurred had been foreseen. Although FMEL, the lead indemnitor, had been discharged from liability by the Deed of Release, MacKellar had not, and therefore the Bond Discharge Date had not arrived. In terms of clause 11.3 of the Intercreditor Agreement, the Scottish Ministers were obliged to pay over to HCC the sum indirectly recovered from FMEL, in so far as necessary to reimburse HCC for the payments that it had made.

[35] Much of Ms Agnello’s evidence was inadmissible, being concerned with the proper interpretation of the Intercreditor Agreement, which was a matter for the court. In so far as she had given evidence on English law, she had proceeded upon the erroneous factual premise that there had been no consideration for the accession of MacKellar to the Deed of Indemnity. In any event her opinion did not address the analysis under which the Deed of Indemnity was itself a “Bond”.

[36] The Scottish Ministers’ argument founded upon personal bar was misconceived. The complaint appeared to be that the Settlement Agreement had not achieved the goal of “unwinding” the Refund Guarantees. That, however, had at best been a pre-contract understanding. The personal bar argument relied upon representations that had been made prior to the coming into existence of the relevant right, which was not created until the conclusion of the Settlement Agreement and the consequent execution of the Deeds of Release. As a matter of the taxonomy of contract law, that was incorrect. Remedies were

available in relation to pre-contract representations in respect of, eg, contract induced by essential error or, alternatively, by an application for rectification. Personal bar was concerned rather with *post*-contractual events. In any event the Scottish Ministers had failed to establish circumstances in which reliance on representations in relation to “unwinding” would have been reasonable. High level commercial discussions in which that expression was used had been followed immediately by professional negotiation of the terms of the Settlement Agreement. It would not have been reasonable for the Scottish Ministers to disregard the latter and rely on the former, which had been a goal stated in general terms and wholly unspecific. Further, the representation had been made not to the Scottish Ministers but to CMAL and its agents which, despite the Scottish Ministers’ ownership of CMAL, was not the same thing. Finally, it was difficult to identify any prejudice to the Scottish Ministers: CMAL had got what it wanted, namely removal of the Refund Guarantees, allowing work on the vessels to continue. The personal bar argument was merely an attempt to find a Scottish hook for matters that would more properly be canvassed in the English rectification proceedings.

### **Argument for the Scottish Ministers**

[37] On behalf of the Scottish Ministers, it was submitted that there had been a full and final settlement reached in relation to the Ferguson group of companies involving the “unwinding” of the Refund Guarantees, with HCC having been taken out of the picture completely as a creditor of those companies. Firstly, HCC no longer held any “HCCI Debt” as defined in the Intercreditor Agreement. The Bonds (ie the Refund Guarantees) and the original Deed of Indemnity were entered into at the same time, namely 2 November 2016. MacKellar was not a party to the Deed of Indemnity at that point, having acceded only on



25 June 2018. Accordingly, MacKellar did not and could not have entered into the Deed of Indemnity “pursuant to and/or as a result of the issue of any and all Bonds”. This analysis was supported by Ms Agnello’s evidence.

[38] Properly construed, the Intercreditor Agreement gave priority ranking to HCC in relation to its contingent liabilities under the Refund Guarantees. HCC had taken various securities, including the cash collateral deposit deed, which were listed in the Intercreditor Agreement. There was no mention of the Deed of Indemnity. The reason why HCC were involved with the Ferguson Group was the Bonds: everything else, including the Deed of Indemnity, was there to reduce or manage HCC’s risk in relation to the Bonds. That being the case, the Deed of Indemnity was truly a “security” for HCC’s exposure in relation to their contingent liability under the Bonds. Its existence should have been fully disclosed to the other parties. Because it had not been included in the list of HCCI Security Documents, the proper construction of the term “HCCI Debt” did not include any amounts that might now be due under it.

[39] Secondly, the Bond Discharge Date had occurred. Recital F to the Settlement Agreement stated that “the Parties have agreed fully and finally to settle the actual and/or contingent liability of the Surety under the Refund Guarantees in accordance with this Deed”. The definition of [HCC] Security Documents referred to the Deed of Indemnity dated 2 November 2016 as amended and restated. The definition of [HCC] Releases referred to the release of the Builder (FMEL), which was the only party that was relevant as the obligor and had meaningful assets. For this reason the Settlement Agreement only included a specific discharge of FMEL. The securities HCC took from the members of the Ferguson group were all in relation to managing its exposure under the Refund Guarantees: when its exposure under the Refund Guarantees was settled on a full and final basis, so was its ability

to enforce any further rights against any member of the group. If the Court was of the view that it could not at this stage determine the Bond Discharge Date construction point in favour of the Scottish Ministers, the issue should be left to be resolved after the rectification proceedings in England had been concluded.

[40] The plea of personal bar was relevant and should be sustained. The antecedent right founded upon by HCC was not created by the Settlement Agreement: it was their pre-existing right as first-ranking creditor. The key concept underlying the Settlement Agreement was the “unwinding” of the Refund Guarantee structure. “Unwinding” carried with it the idea of *status quo ante*, when there were no Refund Guarantees, no securities, and no indemnities. That was what Ms Collins had stated in her email to Mr McIntosh on 31 July 2019: it contained a clear statement of fact that her clients “have recommended” that the structure be unwound. That constituted the formulation of the representation, previously made at the meeting and in correspondence, that the Scottish Ministers had reasonably relied on to their prejudice by recommending to CMAL, their wholly-owned subsidiary, to enter into the Settlement Agreement, and by approving and ratifying that decision. HCC had been well aware of the Scottish Ministers’ interest and involvement in the settlement process.

[41] Finally, it was submitted that these proceedings should be sisted until the English rectification action had been determined. The Scottish Ministers had taken a plea of *forum non conveniens*. The word *conveniens* meant “appropriate”. The Settlement Agreement was key to the issues in this case, providing the background to any questions of construction of the Intercreditor Agreement and to the plea of personal bar. The Intercreditor Agreement was the only relevant document governed by Scots law, and the fact that proceedings in Scotland had been raised first did not mean that they had to proceed to be determined first.

It would be in the interests of justice for the court to await the outcome of the English proceedings before reaching a decision in this action.

## **Decision**

### *Forum non conveniens*

[42] I address firstly the defender's plea of *forum non conveniens*. In my opinion it is not well founded. The essence of the plea is that although the court seized of the case has jurisdiction to hear it, there is another competent court before which, in the interests of all the parties and for the ends of justice, the cause would be more appropriately tried: see *Société du Gaz de Paris v Armateurs Français* 1926 SC (HL) 13, Lord Chancellor (Cave) at 16 - 17; Lord Dunedin at 18. The issue raised in these proceedings is one of interpretation of an agreement governed by Scots law. In my opinion it is appropriate for that issue to be determined by a Scottish court. Senior counsel for HCC submitted, under reference to *Foster v Foster's Trustees* 1923 SC 212, that it was vain to plead *forum non conveniens* where the subject matter of the cause was subject to the exclusive jurisdiction of the Scottish courts. Given the somewhat unusual terms of clause 22.2 (above), I am not persuaded that the plea is altogether excluded, but I do not regard it as being in the interests of all the parties and in accordance with the ends of justice for this court to decline jurisdiction because a related but distinct dispute is being litigated in an English court with regard to a deed governed by English law.

[43] It is conceded by HCC that, in the event that I were to find in its favour, it would not be appropriate to grant decree for payment until the English rectification proceedings have been concluded. The only practical question seems to be whether, in the exercise of my discretion, I should sist these proceedings without pronouncing my decision, or whether I

should provide my decision and then sist the action. In my opinion the latter course is preferable. I do not accept that there are any issues arising in these proceedings that ought not to be addressed until the question of rectification has been determined. The principal issue is the proper construction of the Intercreditor Agreement. In so far as reference has to be made to deeds governed by English law, the court is entitled to proceed on the basis that the “foreign” law is the same as Scots law, except to the extent that there has been expert evidence to the contrary. The defender’s plea of personal bar can also be addressed on the basis of the evidence led at the proof. The parties to the English proceedings are not identical and the rectification that is sought is of a different document. Far from trespassing on the jurisdiction of the English court, it seems to me that it will be of assistance to that court to have available to it the decision of this court on those matters that are governed by Scots law.

*“The HCCI debt”*

[44] Turning to the substantive issues, the first of the Scottish Ministers’ submissions was that HCC could not found upon its rights under the Intercreditor Agreement because there was no longer any “HCCI debt” as defined. The point is whether any liabilities assumed by MacKellar in 2018 or 2019 were “pursuant to and/or as a result of” the Refund Guarantees that had been issued in 2016 when MacKellar was not a party to the Deed of Indemnity.

[45] It is appropriate to consider here the significance of the expert evidence of Ms Agnello. To some extent her opinion was concerned with the proper construction of the phrase “pursuant to and/or as a result of the issue of any and all Bonds”. That question of construction is, as she readily acknowledged, for the court to determine. Her evidence was that because MacKellar had received no consideration and was therefore a “volunteer”

under English law against whom specific performance could not be ordered, its liability could not fall within the phrase. However, I find no reason to reject the evidence of Ms Collins, under reference to contemporaneous board minutes, that MacKellar's accession to the Deed of Indemnity was not given without receiving consideration. Ms Collins explained that without MacKellar's accession as an indemnitor in 2018, HCC would not have agreed to the granting of additional security to the Scottish Ministers by FMEL and MacKellar in respect of the additional funding being provided. The board minute narrates that the board were satisfied that MacKellar's interests would be promoted by acceding to the Deed of Indemnity. That, it seems to me, is understandable in a situation in which the continued funding of the group as a whole would be in jeopardy if the additional securities could not be granted. In these circumstances I am satisfied that the evidence demonstrates that MacKellar did receive consideration for its accession as an indemnitor.

[46] Ms Agnello's next point was that the recital to the Deed of Indemnity remained unchanged in both 2018 and 2019, referring to FMEL and making no mention of MacKellar. It has to be borne in mind that by 2019, the 2016 Deed of Indemnity was contained in a schedule to a Deed of Amendment and Restatement to which MacKellar was a party, and which provided expressly, at clause 4, that "the Deed of Indemnity and this Deed shall be treated as one document". Ms Agnello accepted that it would be possible to argue that a recital in a deed was inaccurate, but the court would require a convincing reason why a professionally drafted deed contained an incorrect recital. I have no reason to doubt that that is so, but the argument seems to me to fail to take account of the fact that after 2019 the 2016 deed had to be read as one with the 2019 Deed of Amendment and Restatement. When these are read together, there can be no doubt that MacKellar was an indemnitor along with FMEL and Holdings, and there is no inaccuracy requiring explanation. The

matter becomes one of the style that the parties have chosen to use in order to give effect to the need to make a further amendment to their rights and obligations in relation to the indemnity.

[47] It is, to say the least, regrettable that the terms of the previous versions of the Deed of Indemnity, and the MacKellar board minutes, were only disclosed by HCC a few days before the proof, in response to Ms Agnello's opinion. At the outset of the proof, senior counsel for the Scottish Ministers sought a discharge of the diet in order to investigate whether the accession of MacKellar to the Deed of Indemnity was a challengeable transaction. I refused the discharge on the ground that that was not a matter arising from the last-minute disclosures; the only relevant new information was that MacKellar had acceded in 2018 and not in 2019. As regards the board minutes, I consider that this court should, in the absence of any contrary evidence, proceed on the basis that these accurately record decisions taken at the board meeting.

[48] I turn now to the proper construction of the phrase "pursuant to and/or as a result of the issue of any and all Bonds" in the definition of "HCCI debt" in the Intercreditor Agreement. The expression "HCCI debt" refers to liabilities owed to HCC by any member of the Ferguson group. The word "Bonds" has a very wide definition. Depending upon context, it is capable of meaning either guarantees granted by HCC (including, expressly, the Refund Guarantees) or indemnities given to HCC (such as the Deed of Indemnity). The Deed of Indemnity, in its original form and as subsequently amended and restated, provided for the indemnification of HCC in respect of *inter alia* all its liabilities under the Refund Guarantees. That obligation of indemnification was assumed by MacKellar when it acceded to the Deed of Indemnity in 2018. In these circumstances, in my opinion, the liabilities incurred by MacKellar to HCC by acceding to the Deed of Indemnity ought, on a

proper construction, to be regarded as having been incurred pursuant to - or alternatively as a result of - the issue of the Refund Guarantees, notwithstanding that MacKellar was not originally an indemnitor. Again the words "pursuant to" and "as a result of" are broad expressions, and I find no reason to restrict them to obligations undertaken immediately upon the execution of the 2016 Deed of Indemnity. It follows that the liabilities of MacKellar to HCC under the Deed of Indemnity, as amended and restated in 2019, fall within the definition of "HCCI Debt".

[49] An alternative submission was presented on behalf of HCC that MacKellar's liabilities to HCC fall within the definition of "HCCI Debt" because they were incurred pursuant to the issue of the Deed of Indemnity, which as I have noted also falls within the definition of "Bonds". I agree that also on this somewhat more direct basis MacKellar's liabilities fall within the definition. Again I find no reason to restrict it to liabilities incurred in 2016; the express mention of other group members, including MacKellar, is a clear indication that parties did not intend it to be so restricted.

[50] I reject the submission made on behalf of the Scottish Ministers that because the Deed of Indemnity was not listed as one of the "HCCI Security Documents" in the Intercreditor Agreement, it was granted in breach of clause 4 of the Intercreditor Agreement, and so did not fall within the definition of HCCI Debt. I accept HCC's submission that although the Deed of Indemnity fell within the definition of "Bonds" in the agreement, it is not in substance a security. It is, rather, the deed that creates the principal obligation undertaken by each of the Ferguson entities in favour of HCC, which obligation was secured by a variety of securities including the standard security over the property at Port Glasgow. In the case of MacKellar, there would, in the absence of the Deed of Indemnity, have been no liability to secure. It appears from Ms Maguire's evidence that the Scottish Ministers

remained unaware of the existence of the Deed of Indemnity until shortly before FMEL entered administration, and continued to remain unaware of its full terms (including MacKellar's accession as an indemnitor) for some time thereafter. I do not regard this as relevant to the proper characterisation of the deed, and any issue arising out of its non-disclosure appears to me to be relevant, if at all, to the English rectification proceedings and not to the questions arising in this action.

*Has the Bond Discharge Date occurred?*

[51] I have set out the definition of the Bond Discharge Date at paragraph 15 above. Read short, in the circumstances that have occurred, it is the date upon which all present and future liabilities at any time of Holdings, FMEL or MacKellar to HCC under the last Bond outstanding and/or any related deed of indemnity have been fully and finally discharged. In my opinion that date has not yet occurred. At the time when HCC's obligations under the Refund Guarantees were discharged, FMEL's liabilities under the Deed of Indemnity as amended and restated were also discharged. But MacKellar's were not. The wording of the definition of "Bond Discharge Date" is emphatic in postponing the date until every "Bond" has been "fully and finally" discharged. The effect of the Deed of Release granted by HCC was to discharge the Deed of Indemnity in part only, leaving alive the obligations of indemnitors other than FMEL itself. It follows that the obligations of the various parties to the Intercreditor Agreement remain outstanding. In particular, it follows that HCC's entitlement under clause 10 to have all amounts received by any of the creditors applied first in discharge of HCC's debt remains extant, as does the Scottish Ministers' obligation under clause 11 to pay any monies recovered from any member of the Ferguson group to HCC, to the extent necessary to discharge the HCCI Debt.



[52] In support of their submission that the Bond Discharge Date had occurred, the Scottish Ministers founded upon certain provisions of the Settlement Agreement and upon the recital to the Deed of Release of the Refund Guarantees, which emphasised that all of the obligations of HCC were being fully and finally released, from which it should be inferred that HCC's rights against the Ferguson group were also being fully released, especially as FMEL was the only entity that had "meaningful assets". There was very little evidence regarding the assets of MacKellar, but in my opinion this is not relevant to the proper interpretation of the Intercreditor Agreement. The short answer is that all of the conditions for the occurrence of the Bond Discharge Date have not been met by the clear terms of the Deed of Release of the Deed of Indemnity, which discharged only FMEL's liabilities.

### *Personal bar*

[53] In *Ben Cleuch Estates Limited v Scottish Enterprise* 2008 SC 252, at paragraphs 85 and 87, the Court made the following observations on the requirements for the operation of personal bar:

"85 The circumstances in which a plea of personal bar will be sustained were formulated by Lord Birkenhead LC in *Gatty v Maclaine* [1921 SC (HL) 1] (p 7), in the following familiar terms:

'Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time.'

It seems to us that the most important word in that dictum is 'justified'. There must be a representation made by A, whether by words or by conduct, as to the existence of a certain state of fact. B must believe the representation, and must act in reliance upon it to his prejudice. But that is not sufficient. The belief in that state of fact must be justified by the representation...

...

87 ... (T)o found a plea of personal bar, the representation must be such that a reasonable man would regard it as intended to be believed and relied upon. In other words, the representation must be interpreted objectively. If it conveys to the reasonable man that it was seriously intended, and that the person to whom it was made was being invited to believe it and act upon it, it matters not that the party making the representation may not in fact have intended that it be relied upon, either generally or for a particular purpose. If, judged objectively in that way, the representation is to be treated as one which its maker intended should be relied upon, the person to whom the representation was made is then, to revert to Lord Birkenhead's language, 'justified' in believing it, and if he is justified in believing it, he is entitled, in a question with the representor to rely on it. Entitlement to rely on the representation is a consequence of justified belief in the represented state of facts. As expressed in the authorities, where the representation has produced a justified belief in a state of facts, the representor is personally barred from maintaining that the facts were other than as represented..."

[54] The representations relied upon by the Scottish Ministers in the present case are the various statements made by or on behalf of HCC during the negotiations in July and August 2019 that the whole Refund Guarantee structure was to be "unwound", with the effect of placing the parties, so far as practicable, in the same position as if the two Refund Guarantees had never been issued. It is contended that the Scottish Ministers, through their agent Mr Higgs who attended the meeting on 30 July 2019, had justifiably understood this to mean that all of HCC's priority rights in terms of the Intercreditor Agreement would be removed at the same time as its obligations under the Refund Guarantees, and that they had relied upon these representations to their prejudice.

[55] In my opinion it is difficult to see how statements of a high level nature, made during the early stages of negotiation of an agreement, can found a plea of personal bar when the "commercial negotiations" during which a representation was made have been followed by negotiation by professional advisers of a formal settlement agreement. I am inclined to agree with the submission on behalf of HCC that where a party claims to have contracted on the basis of a misunderstanding of the consequences of the contract, the appropriate remedy is likely to lie in the realm of reduction of the agreement on the ground

of essential error, including error induced by misrepresentation, or alternatively by applying to a court for rectification of a document intended to give effect to the parties' common intention. It is unnecessary, in the circumstances of the present case, for me to express a view on whether the operation of personal bar is wholly excluded from pre-contractual negotiations. For present purposes it is sufficient for me to find that the Scottish Ministers have failed to establish that their reliance on the formulations used by HCC and its advisers at the meeting on 30 July 2019 and in subsequent correspondence was justifiable when they were aware that those negotiations had been followed by a process of negotiation of a formal agreement by whose terms HCC and CMAL, their subsidiary, would be bound. Putting the matter another way, under reference to the *dictum* from *Gatty v Maclaine* cited in *Ben Cleuch Estates* (above), I hold that the Scottish Ministers have failed to prove that HCC, by its words or conduct, justified them in believing that a certain state of facts existed that is different from the state of facts that HCC now claims to exist, entitling it to demand relief in terms of the Intercreditor Agreement.

[56] The evidence indicates that although the Scottish Ministers were not a party to the Settlement Agreement, they were, through their solicitors, MacRoberts, fully aware of what was being negotiated. Although, as I have noted, Ms Maguire stated that the Scottish Ministers only became aware of the Deed of Indemnity shortly before FMEL entered administration, its existence was no secret during the negotiation of the Settlement Agreement. It is expressly referred to in that agreement, which provides *inter alia* for the granting of a "Deed of Release by the Surety of the obligations of the Builder under the Deed of Indemnity", with the latter deed being defined as "the deed of indemnity between *inter alia* the Surety and the Builder dated 2 November 2016 as amended and restated". In these circumstances it does not appear to me that any reliance that the Scottish Ministers

continued to place upon general statements of objectives made at the outset of the negotiations could be regarded as objectively justifiable.

[57] Senior counsel for HCC sought to emphasise the “personal” aspect of personal bar. In the present case all of the written statements made on behalf of HCC said to constitute representations were made not to the Scottish Ministers but to solicitors acting on behalf of CMAL. Reference was made to observations by Lord President Rodger in *William Grant & Sons Limited v Glen Catrine Limited* 2001 SC 901 at paragraph 29. These observations, however, appear to me to be concerned with the plea being personal in the sense of being available against a particular representor, as opposed to being available to a particular representee. In the present case the Scottish Ministers do not contend that HCC’s written representations were relied upon by CMAL to its prejudice, but rather that they themselves relied upon verbal representations made to their agent, Mr Higgs, as well as upon written representations made to CMAL, their wholly owned subsidiary. I would not have excluded the application of the plea for this particular reason. Nor would I have excluded its application on the basis of lack of prejudice. It is not contended that CMAL suffered prejudice; rather, the prejudice is said to lie in the continuing existence of the obligation of relief imposed on the Scottish Ministers by the Intercreditor Agreement. I am satisfied that that would have amounted to prejudice had the other requirements for the operation of personal bar been present.

### **Disposal**

[58] For the above reasons, I hold that HCC has proved that it is entitled, in terms of the documentation as it stands, to payment of the sums sued for. As I have noted, however, it would not be appropriate to grant decree for payment until the conclusion of the English

rectification proceedings, and this action will now require to be sisted. I shall put the case out By Order for discussion of the terms of the interlocutor to be pronounced at this stage.