OUTER HOUSE, COURT OF SESSION

[2024] CSOH 89

CA97-23

OPINION OF LORD SANDISON

In the cause

ROCEP-LUSOL HOLDINGS LIMITED

Pursuer

against

LINDAL DISPENSER GmbH

Defender

Pursuer: Lord Davidson of Glen Clova KC, Welsh; Morton Fraser MacRoberts LLP
Defender: Tariq KC; Burness Paull LLP

19 September 2024

Introduction

[1] In September 2015 the parties to this action entered into a contract whereby the pursuer exclusively licensed to the defender the benefit of certain patents. The patents in question were due to expire on or by 22 December 2020. The contract provided for royalty payments to be made by the defender to the pursuer in respect of products sold or commercialised by it which used the patented technology at specified rates from 1 January 2016 until 31 December 2020 and then at lower rates for the period between 1 January 2021 and 31 December 2023. The pursuer now seeks an accounting from the defender as to how many relevant products it sold or commercialised between 1 October 2022 and 31 December

2023, and payment of such sum in royalties as may be brought out by that accounting. The defender maintains that no accounting is due from it. It firstly maintains that, on a true construction of the contract, royalties were not payable for any period of time after the licensed patents had expired on 22 December 2020. Secondly, it claims that any obligation to make royalty payments on its part was the counterpart of an obligation on the part of the pursuer to provide it with exclusive rights to deal in the patented technology, an obligation which the latter was unable to perform after 22 December 2020. Finally, it argues that, even if it would otherwise be due to make royalty payments to the pursuer in respect of any period after the expiry of the patents, any obligation to do so would be unenforceable as contrary to the prohibitions contained in sections 2 and 18 of the Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union. The matter came before the court for a debate on the parties' respective preliminary pleas.

The contract

[2] The contract between the parties (in which the pursuer is referred to as the "Licensor" and the defender as the "Licensee") contains *inter alia* the following terms:

> "Preamble
>
> The Licensor is owner of the patents listed in Annex 1.
>
> …
>
> **§ 1 Definitions**
>
> For the purposes of this Agreement, the following definitions shall apply:
>
> 'Licensed Patents' shall mean all patents listed in Annex 1. 'Licensed Territory' shall mean all countries for which the Licensed Patents are in force at the date of signature of the present agreement.
>
> 'Products' are aerosol cans with actuator (including the dispenser valve system)- hereafter 'Can Products' - or sole actuators (including the dispenser valve system)-

hereafter 'Actuator Products' - falling under the scope of protection of one or more of the Licensed Patents.

'Commencement Date' shall mean 1 January 2016 notwithstanding the date or dates of execution hereof

…

§ 2 License scope

(1) In consideration of the royalties payable by the Licensee under § 3 with effect from the Commencement Date, the Licensor herewith grants the Licensee an exclusive license on the Licensed Patents to manufacture, assemble and thereafter market, sell and promote Products.

(2) The license is granted for the Licensed Territory.

…

(4) The Licensor shall not during this Agreement manufacture or sell or otherwise deal in any products incorporating any system or apparatus identical and/or similar to the system or apparatus detailed within any of the Licensed Patents.

§ 3 Royalties

For the license under this contract, the Licensee shall pay to the Licensor

(1) For the period from the Commencement Date to 31 December 2020

a) a royalty of € 0.06 (in words: six Euro cent) per Can Product and €0.03 (in words: three Euro Cent) per Actuator Product for the first five million Products sold within one Year, falling under one or more of the Licensed Patents.

b) a royalty of € 0.04 (in words: four Euro cent) per Can Product and€ 0.02 (in words: two Euro Cent) per Actuator Product for sales of Products exceeding five million Products within one Year falling under one or more of the Licensed Patents.

(2) For the period from 1st January 2021 to 31 December 2023 a royalty of € 0.02 (in words: two Euro cent) per Can Product and 0.01 (in words: one Euro Cent) per Actuator Product falling under one or more of the Licensed Patents.

§ 4 Records

(1) The Licensee shall keep separate and detailed books and records relating to the manufacture and sale of all Products manufactured under one or more of the Licensed Patents in such a way that the precise number of Products commercialized by the Licensee and its sub-licensee(s), the customer and the shipment dates are apparent.

…

§ 5 Reports and payment

(1) The Licensee shall submit a report within 30 days after the expiration of each calendar quarter (i.e. 31 March, 30 June, 30 September and 31 December in each Year) detailing the information referred to $ 4 (1) and the royalties due. Within the same period, the Licensee shall effect payment of the royalties due to the Licensor by transfer of cleared funds to the Licensor's nominated bank account. The payment shall be made in currency of the home country of the Licensee, all costs of the payment being borne by the Licensee.

…

§ 6 Warranties and product liability

The Licensor guarantees the existence of all Licensed Patents on the date of signature of the agreement and that Annex 1 shows the complete list of patents concerning the Products. Any liability for later invalidation or lapse of the Licensed Patents is excluded. Except to the foregoing extent, the Licensor does not make any representation, warranty or statement in relation to the Licensed Patents and/or the technology comprised therein and to the maximum extent permitted all such representations, warranties and guarantees implied by law are expressly excluded.

…

§8 Invalidation of Licensed Patents

In case of invalidation of one or more of the Licensed Patents prior to 31 December 2020, the parties shall negotiate with best efforts a reduction of the royalties taking into account the importance of the Licensed Patent(s) which has (have) been invalidated.

§ 9 Commencement, Replacement of existing agreements, Termination

(1) The present agreement enters into force on the Commencement Date.

(2) The present agreement succeeds all Prior Agreements with effect from the Commencement Date and the Prior Agreements will be deemed terminated as at that date. Lindal France SAS, Bernard Derek Frutin and Rocep Pressure Packs Limited agree with this succession and express their approval by signing this agreement. The foregoing is without prejudice to the Licensee's obligation to pay and the Licensor's right to receive and enforce payments of sums accrued and due to the Licensor under Prior Agreements.

(3) Subject to other provisions herein for earlier termination, the present agreement ends automatically on 31 December 2023.

(4) For the period of six months after the termination of the present agreement, the Licensee shall have the right to sell all Products manufactured at that date under the royalties and other conditions agreed herein or, as the case may be, to finish and fulfil all agreements which have been entered into prior to the termination.

(5) In the case of a material breach of agreement by one party, the other party shall have the right to terminate this agreement by written notice of termination where the party in breach has failed to remedy the breach within a reasonable time after having been advised in writing of such breach which shall not in any event be more than 28 days.

(6) With respect to the Licensor, a valid reason for termination under § 9 (4) would include a non-compliance with the reporting and payment periods for royalties as set out in § 5. For the Licensee, a significant reason for termination would be the invalidation of all Licensed Patents listed in Annex 1, prior to 31/12/2020.

(7) Termination of this Agreement for whatever reason shall not affect the accrued rights of either party arising in any way out of this Agreement (including, without limitation, any right to recover damages from the other party). All provisions of this Agreement which in order to give effect to them are meant to survive termination and shall remain in full force and effect thereafter.

(8) Should the Licensee (and/or any sub-licensee permitted pursuant to clause 2(3) hereof fail to sell at least three million products in any one Year, the Licensor shall be entitled to convert the exclusive license in a simple license and to grant one license to another party. However, this new license must exclude then current existing customers of the Licensee for the Products.

§ 10 Maintenance of the Licensed Patents

The Licensor shall maintain the registration of the Licensed Patents for the remaining duration of such Licensed Patents. If one or more of the Licensed Patents lapse due to non-payment of the renewal fees, the Licensee can choose to reduce the applicable royalty rate(s) detailed in § 3 by half or terminate this Agreement.

…

$ 12 Venue and applicable law

(1) This agreement shall be subject to the laws of England.

Annex 1-Rocep Lusol Holdings Limited

Patent Schedule as at 25th August, 2015 (B. D. Frutin registered as Inventor)

Description	Patent Number	Country/ Region	EPO Member State	Expiry Date
Double Piston Can	738657	Australia		7th October 2018
(Millennium Pack Piston)	64483	Bulgaria		
	2306550	Canada		
	98811387.2	China		
	302746	Czech Republic		
	04336	Estonia		

	1021357B	Europe	Austria Belgium Denmark Finland France Germany Greece Ireland Italy Luxembourg Netherlands Portugal Spain Sweden Switzerland United Kingdom	
	226540	Hungary		
	4160256	Japan		
	191458	Poland		
	6321951	United States		
Valve Actuator	778056	Australia		22nd December 2020
(Linroc Cam and Lever Pack)	2394726	Canada		
	12422958B	Europe	Austria Belgium Denmark Finland France Germany Ireland Italy Netherlands Portugal Spain Sweden Switzerland United Kingdom	
	4620315	Japan		
	6820777	United States”		

Submissions for the defender

[3] On behalf of the defender, counsel submitted that the action should be dismissed as irrelevant if the court found in favour of the defender on either of the contract law defences. The competition law defences (with the possible exception of the defence that the object of any clause in the contract entitling the pursuer to royalties after the expiry of the licensed patents was anti-competitive) could not be resolved without the hearing of evidence. If the

outcome of the case turned on those defences, a proof before answer should be fixed to determine their merits.

[4] The rules for the interpretation of contracts were well-established and had recently been re-stated in *Lagan Construction Group Limited (in Administration)* v *Scot Roads Partnership Project Limited* [2023] CSIH 28, 2024 SC 12 at [10]. The court required to ascertain the intention of the parties, which was most obviously to be gleaned from the language which they had chosen to use. This was to be done by determining what a reasonable person, having all the background knowledge of the parties, would understand from the language selected by them. The court should not normally search for drafting infelicities in order to justify a departure from the natural meaning of that language. Where a contract was a complex and sophisticated one prepared and negotiated by skilled professionals, it might best be interpreted by textual analysis.

[5] Applying those principles to the contract in question, the defender had no obligation to account for and pay royalties to the pursuer after the licensed patents had expired. In clause 2(1) of the contract, dealing with the scope of the license, the pursuer granted to the defenders an exclusive license on the licensed patents to manufacture and market "Products", expressly in consideration of the royalties payable by the defender under clause 3. The licensed patents were those listed in Annex 1. That Annex only stated the expiry dates of two patents there listed. The term "Products" was defined as can products or actuator products "falling under the scope of protection of one or more" of those patents. Royalties were payable from 1 January 2021 to 31 December 2023 for each can product and actuator product falling under one or more of those patents. In terms of clause 4(1), the defender was only obliged to keep separate and detailed books and records relating to the

manufacture and sale of all "Products" manufactured under one or more of the licensed patents.

[6] After a patent had expired, there was no patent. An expired patent could not offer any rights or protections. There was no grant of exclusivity to the defender after expiry of the licensed patents, as anyone could exploit the technology that had previously been protected by them. After all the licensed patents had expired, there was no "Product" as no can products or actuator products fell under the scope of protection of any of the licensed patents. There were no "Products" manufactured under one or more of the licensed patents after they had all expired. In these circumstances, no royalties were payable from that point.

[7] The pursuer pointed to the change in royalty rates as at 1 January 2021 and ascribed that to the expiry of all the licensed patents. It further averred that, as it had not granted a license to any other party to exploit the patents, its obligation to grant exclusivity had been complied with. However, after the expiry of the patents, no rights in or protection from the expired patents could be granted to anyone. There was no exclusivity after all the licensed patents had expired, and it was without significance that the pursuer did not grant a license to any other party to exploit them – it would be surprising if any other party wished to license expired patents. It was acknowledged, however, that clause 2(4) prevented the pursuer from competing with the defender in products using the inventions of the licensed patents for the whole duration of the contract, whether before or after the patents had all expired.

[8] There was no proper basis for the pursuer's assertion that the defender had taken a commercial decision to pay royalties after the expiration of the patents. In fact, it had been operating under a misapprehension that at least one relevant patent remained valid after the end of 2020, and that that was the reason for the change of royalty rates under the contract

from 1 January 2021 onwards. The defender accepted that its misapprehension was not relevant to the proper interpretation of the contract, but it indicated that the pursuer's explanation as to the reasons for the change in royalty rates was not uncontroversial. The pursuer's proposed interpretation of the contract disregarded the definitions clause of the contract as well as commercial logic, and the defender's interpretation, that the obligations to keep records and to pay royalties did not arise after the expiry of all the licensed patents, should be preferred.

[9] In any event, the defender was entitled to withhold performance of its obligations under the contract on the basis of the pursuer's material breach of the contract. The pursuer was in breach of its obligation under clause 2(1) of the contract after 22 December 2020 as it could no longer provide the defender with an exclusive license to the licensed patents to manufacture, assemble, market, sell and promote relevant products. Section 130 of the Patents Act 1977 defined, for its purposes, an exclusive license as meaning a license from the proprietor of or applicant for a patent conferring on the licensee, or on him and persons authorised by him, any right in respect of the invention to which the patent or application related, to the exclusion of all other persons (including the proprietor or applicant). There was no exclusivity after the expiry of the last licensed patent as anyone could then manufacture, assemble, market, sell and promote the technology that had previously been protected by the licensed patents. Therefore, the pursuer had been in breach of its obligations under clause 2(1) since 22 December 2020 as from that point it could not effectively grant the rights required. The obligation to pay royalties under clause 3(2) was reciprocal to the pursuer's own obligations.

[10] In any event, the clauses in the contract relied upon were anti-competitive. The competition rules were designed to protect "not only the immediate interests of individual

competitors or consumers but also to protect the structure of the market and thus competition as such": *T-Mobile Netherlands BV etc* v *Raad van Bestuur van de Nederlandse Mededingingsautoriteit* (C-8/08) [2009] ECR I-4529, [2009] 5 CMLR 11 at [38]. If the contract entitled the pursuer to royalty payments after the expiry of all the licensed patents, it was anti-competitive and unenforceable. The contract granted the defender exclusive rights in relation to the licensed patents in each of the territories in which they were in force at the date of its signature. These territories included, amongst others, the UK and the EU member states.

[11] Section 2 of the Competition Act 1998 prohibited agreements between companies which might affect trade within the UK and had as their object or effect the prevention, restriction or distortion of competition within the UK. Article 101 of the Treaty on the Functioning of the European Union ("TFEU") prohibited agreements between companies which might affect trade between EU Member States and had as their object or effect the prevention, restriction or distortion of competition within the EU – the so-called "Chapter I Prohibition". The pursuer's interpretation of the contract would render it unenforceable after the expiry of all the licensed patents because it would breach, *inter alia*, the Chapter I Prohibition. That interpretation of the contract might affect trade within the UK and between EU Member States. The contract would also then have as its object or effect the prevention, restriction or distortion of competition within the UK and between EU Member States.

[12] The aim of section 2 and Article 101 was not to regulate commercial relations between undertakings in a general sense. Rather, the aim was to prohibit some types of agreements between undertakings which might affect trade in the UK or between EU Member States, and which had as their object or effect the prevention, restriction or

distortion of competition within the respective markets. Section 2(2) of the 1998 Act identified particular types of agreements to which the prohibition in sub-section (1) applied. That included, at sub-paragraph (d), agreements which applied dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. The continuing payment of royalties to exploit the technology that had previously been protected by the licensed patents put the defender at a competitive disadvantage when others were able to exploit the same technology without charge. The contract applied dissimilar conditions to equivalent transactions with other potential trading parties.

[13] In *Ottung* v *Klee & Weilbach A/S* (Case C-320/87) [1989] ECR 1177, [1990] 4 CMLR 915, the Sixth Chamber of the Court of Justice of the European Communities, considering Article 85(1) EEC, had held at [12] – [15] that a patent licensing agreement which did not grant the licensee the right to terminate the agreement by giving reasonable notice, or sought to restrict the licensee's freedom of action after termination, and thereby obliged him to continue to pay royalties after expiry of the patent in question, might restrict competition within the meaning of the Article, depending on the economic and legal context, but that where a licensee might freely terminate the agreement by giving reasonable notice, an obligation to pay a royalty throughout the validity of the agreement could not come within the prohibition contained in the Article.

[14] In *Genentech Inc* v *Hoechst GmbH* (C-567/14) [2016] 5 CMLR 9, [2016] Bus LR 1016, the Cour d'Appel de Paris made a reference to the Court of Justice of the European Union for a preliminary ruling concerning the interpretation of Article 101(1) TFEU. The Court noted at [35] that:

> "…the question raised by the referring court must be understood as asking, in essence, whether article 101(1)FEU must be interpreted as precluding, under a licence agreement such as that at issue in the main proceedings, the imposition on the licensee of an obligation to pay a royalty for the use of a patented technology for the entire period during which that agreement was in effect, in the event of the revocation or non-infringement of patents protecting that technology."

[15] The Court acknowledged at [39] that, in the context of an exclusive license agreement, the obligation to pay a royalty, even after the expiry of the period of the validity of the licensed patent, might reflect a commercial assessment of the value to be attributed to the possibilities of exploitation granted by the license agreement. It concluded at [40]:

> "It thus follows from *Ottung's* case, that article 101(1)FEU does not prohibit the imposition of a contractual requirement providing for payment of a royalty for the exclusive use of a technology that is no longer covered by a patent, on condition that the licensee is free to terminate the contract. That assessment is based on the finding that that royalty is the price to be paid for commercial exploitation of the licensed technology with the guarantee that the licensor will not exercise its industrial-property rights. As long as the licence agreement is still valid and can be freely terminated by the licensee, the royalty payment is due, even if the industrial-property rights derived from patents which are granted exclusively cannot be used against the licensee due to the fact that the period of their validity has expired. In the light of such circumstances, in particular the fact that the licence may be freely terminated by the licensee, the contention may be rejected that the payment of a royalty undermines competition by restricting the freedom of action of the licensee or by causing market foreclosure effects."

[16] The Court's judgments in *Ottung* and *Genentech* that an exclusive license agreement that required the payment of royalties after the expiry of the licensed patent was not prohibited by Article 101 TFEU were subject to the condition that the agreement allowed the licensee freely to terminate the agreement after the expiry of the licensed patent by giving reasonable notice. There was no such provision in the contract in the present case.

[17] There were sound reasons in support of these judgments. The exclusive right of a patentee to manipulate the invention protected by a patent for the duration of the patent was an exception to the prohibition in section 2 and Article 101. The royalty was the price to be

paid by the licensee for commercial exploitation of the patented technology with the guarantee that the licensor would not bring legal proceedings for infringement against it. If the licensee was required to pay royalties after the expiry of the licensed patents, this could affect trade and restrict competition in the relevant territories. It put the licensee at a competitive disadvantage when others were able to exploit the same technology without charge. The license agreement applied dissimilar conditions to equivalent transactions with other trading parties. That restricted the licensee's freedom of action. The fact that the agreement might be freely terminated by the licensee after the expiry of the licensed patent mitigated against the anti-competitive effects. The reasoning of the Court of Justice in *Ottung* and *Genentech* applied *a fortiori* within the UK market, which was smaller than the EU internal market.

[18] The defender's position was that the contract had as its object the prevention, restriction or distortion of competition within the UK and between EU Member States. Where the object of an agreement was anti-competitive, the court was able to determine the applicability of section 2 and Article 101 by reference to the terms of the contract itself. Where the anti-competitive object of an agreement was established, it was not necessary to examine its effects on competition. Certain types of agreements between undertakings revealed by their very nature a sufficient degree of harm to the proper functioning of competition to be regarded as being restrictions by object, so that there was no need to examine the actual effects of that behaviour on the market. In *Gazdásagi Versenyhivatal* v *Budapest Bank Nyrt* (C-228/18) [2020] 5 CMLR 11 at [33] – [40], the Fifth Chamber of the Court of Justice of the European Union had observed:

> "[33] It should be noted at the outset that, in order to be caught by the prohibition laid down in art.101(1) TFEU, an agreement must have as its "object or effect" the prevention, restriction or distortion of competition within the internal market.

According to the settled case law of the Court since the judgment of 30 June 1966, *Societe Technique Miniere* v *Maschinenbau Ulm GmbH* (56/65) EU:C:1966:38; [1966] CMLR 357, the alternative nature of that requirement, as shown by the conjunction "or", leads, first of all, to the need to consider the precise object of the agreement (judgments of 26 November 2015, *SIA"Maxima Latvija"* v *Konkurences padome* (C-345/14) EU:C:2015:784; [2016] 4 CMLR 1 at [16], and of 20 January 2016, *Toshiba Corp* v *European Commission* (C-373/14 P) EU:C:2016:26; [2016] 4 CMLR 15 at [24]).

[34] Thus, where the anti-competitive object of an agreement is established, it is not necessary to examine its effects on competition (*Maxima Latvija* at [17], and *Toshiba Corp* at [25]).

[35] Indeed, it is apparent from the Court's case law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition to be regarded as being restrictions by object, so that there is no need to examine their effects. That case law arises from the fact that certain forms of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of competition (judgments of 11 September 2014, *MasterCard Inc* v *European Commission* (C-382/12 P) EU:C:2014:42; EU:C:2014:2201; [2014] 5 CMLR 23 at [184] and [185], and *Toshiba Corp* at [26]).

[36] Thus, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying art.101(1) TFEU, to prove that it has actual effects on the market. Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers (judgment of 11 September 2014, *Groupement des cartes bancaires (CB)* v *European Commission* (C-67/13 P) EU:C:2014:1958; EU:C:2014:2204; [2014] 5 CMLR 22 at [51], and *Maxima Latvija* at [19]).

[37] In the light of the case law of the Court recalled in [35] and [36] of the present judgment, the essential legal criterion for ascertaining whether an agreement involves a restriction of competition "by object" is therefore the finding that such an agreement reveals in itself a sufficient degree of harm to competition for it to be considered that it is not necessary to assess its effects (*Maxima Latvija* at [20] and the case law cited).

[38] Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent (*CB* at [52] and the case law cited)."

[19] In the present case, the anti-competitive effect of the contract requiring the defender to pay royalties after the expiry of the licensed patents without the ability freely to terminate the agreement was by its very nature anti-competitive in light of the decisions in *Ottung* and *Genentech*.

[20] If the object of the contract was not the prevention, restriction or distortion of competition within the UK and between EU Member States, that was nonetheless its effect. The defender manufactured and sold a product called LinRoc in terms of the contract. The relevant market for that product was for dispensing apparatus consisting of a dual chamber system by which highly viscous material could be delivered. Other products manufactured and sold by third parties were part of the same product market and were regarded by consumers as interchangeable with, or as a substitute for, the LinRoc product. These products were (i) Nussbaum Can in Can; (ii) Variopack; (iii) Crown; (iv) ZIMA; and (v) Clayton. The products within this market were or could be supplied around the world without additional technical, legal, regulatory or practical barriers. The defender supplied the LinRoc product in markets including the UK, EU, Australia, China, Russia, Turkey and the United States of America. In these circumstances, the geographical extent of the relevant market was worldwide. On the basis of annual sales of the other products and the defender's anticipated sales in 2024, it reasonably estimated that the products within the relevant market had the following market shares: (i) LinRoc – 65%; (ii) Nussbaum Can in Can – 23%; (ii) Variopack – 9%; (iii) Crown – 2%; (iv) ZIMA – 0%; and (v) Clayton – 0%. The effect of the purported obligation in the contract materially restricted competition within the relevant market. The LinRoc product was superior to the other products because of its distinguishing elements. The strengths of the LinRoc product over other products in the market were reflected in its greater market share. However, the defender was artificially

constrained from reducing the sale price of the LinRoc product for consumers because there remained a purported obligation on it to pay royalties to the pursuer. The payment of these royalties was factored into the sale price of LinRoc. This restricted the ability of the defender to grow its market share by reducing the sale price of LinRoc. In contrast, the manufacturers of other products could increase their market shares because they were not under the same constraints as the defender. The effect of the purported obligation was therefore to distort competition within the relevant market. This in turn affected trade within the UK and between EU Member States.

[21] In these circumstances, the purported obligation in the contract was a breach of the Chapter I Prohibition. The purported obligation to pay royalties after the expiry of the licensed patents was void and unenforceable under competition law in terms of section 2(4) of the 1998 Act.

[22] This particular defence would require the court to assess competition within the actual context in which it would occur if the contract had not existed in order to assess its impact on the parameters of competition, such as the price, quantity and quality of the goods: *Gazdásagi Versenyhivatal* at [55].

[23] Section 18 of the 1998 Act prohibited any conduct on the part of one or more undertakings which amounted to the abuse of a dominant position in a market if it might affect trade within the UK. Article 102 TFEU prohibited any conduct on the part of one or more undertakings which amounted to the abuse of a dominant position in a market if it might affect trade between EU Member States. This was referred to as the "Chapter II Prohibition".

[24] An intellectual property right did not automatically confer a dominant position on the proprietor despite its exclusionary effect: *Parke, Davis & Co.* v *Probel, Reese, Beintema-*

Interpharm and Centrafarm (C- 24/67) 1968 ECR 55, [1968] CMLR 47. Market dominance referred to a position of economic strength which enabled the proprietor "to prevent effective competition being maintained on the relevant market by giving it the power to behave independently of its competitors, customers and ultimately of its consumers": *United Brands Company and United Brands Continentaal BV* v *Commission of the European Communities* (C-27/76) 1978 ECR 207, [1978] 1 CMLR 429 at [65]. Competition law secured access to markets, not to property. The concept of a functioning market implied that there could be "effective competition between the products and services which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products or services forming part of the same market in so far as a specific use of such products or services is concerned": *F Hoffmann-La Roche & Co AG 13* v *Commission of the European Communities* (C-85/76) 1979 ECR 461, [1979] CMLR 211 at [28]. In order to assess the position that an intellectual property owner occupied in the market as a result of its right to exclude others from using its intellectual property, it was necessary to determine whether the protected subject-matter of that right was interchangeable with or substitutable for other products or services by reason of its characteristics, its price or its intended use. At the point the contract was entered into, the pursuer had the sole rights to exploit the inventions which were the subject of the licensed patents. That was the exclusionary effect of its patent rights. The relevant market for the purposes of assessing whether the pursuer had a dominant position consisted of its technology and other technologies that were regarded by licensees as interchangeable with or substitutes for it. The defender's position was that there were no other technologies that licensees could switch to in response to the pursuer imposing a small but permanent increase in the royalty payments it demanded (the so-called "SSNIP test" in competition law). If a licensee such as the defender wished to use alternative technologies, it

would require significant capital investment to purchase and develop manufacturing equipment for use with that alternative technology. The defender would require to develop a completely new propellant-based high delivery system. It would also require to develop, construct and install a new line converting the developed system for production. It reasonably estimated that the capital investment required to do so would amount to around €13 million. This process of developing the manufacturing equipment would take over two years to complete. The defender would not receive a return on that investment for at least four to five years. If the pursuer increased royalties payable, the defender (or any other licensee) would have no practical alternative but to agree to pay those royalties as there was no interchangeable or substitutable alternative technology available to licensees. In these circumstances, the relevant market for determining whether the pursuer was in a dominant position was the upstream market for the intellectual property rights in its technology. Reference was made to paragraph 3.6 of the 2004 "Market Definition" publication of the Office of Fair Trading. The substantial barriers to pursuing alternative technologies meant that prospective licensees would not regard those technologies as interchangeable with or substitutes for the pursuer's. The pursuer held a dominant position in the relevant market at the time of entering into the contract. Indeed, it had a 100% share in the relevant market as it was the proprietor of the licensed patents and could control access into that market.

[25] Even where the owner of an intellectual property right enjoyed a dominant position, he did not automatically commit an abuse by exploiting his right to the possible detriment of others. The Chapter II Prohibition did not prohibit dominance nor did it prohibit the creation, preservation or strengthening of such dominance *per se*. Rather, it prohibited the abuse of such dominance. In *United Brands*, the Court of Justice of the European Communities had observed:

> "[249] It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.
>
> [250] In this case charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse."

[26] In the present case, charging royalties after the expiry of the patents to which they related amounted to charging a price which bore no reasonable relation to the economic value of what was being supplied. Section 18(2) of the 1998 Act set out examples of "abuse" which included, *inter alia*, directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions. As there were no alternative technologies available to licensees, the pursuer could behave independently of its competitors and customers. The pursuer had abused its dominant position in the relevant market. The abuse consisted in the imposition of royalties for licensed patents which continued after their expiry. On expiry of the licensed patents, absent the purported obligation to pay the royalties, there was no normal commercial reason for the defender to pay royalties to the pursuer in respect of the manufacture and sale of products which utilised the pursuer's technology. The defender derived no commercial benefit from the contract following expiry of the licensed patents. By stipulating that payment of the royalties should continue beyond that expiry, the pursuer had abused its dominant position by failing to act in a fair, reasonable and non-discriminatory manner. By seeking payment of royalties after expiry of the licensed patents, it had imposed unfair trading conditions on the defender. In effect, it was compelling payment for nothing. It was an abuse for a dominant undertaking to levy a charge, or an additional charge, where that did not provide anything of additional value to the customer. In *British Leyland Plc* v *Commission of the European Communities* (C226/84) [1986] ECR 3263,

[1987] 1 CMLR 185 at [30], the Fifth Chamber of the Court of Justice of the European Communities found that there was no justification for any material difference in the fees charged for providing a certificate of conformity for right-hand drive cars compared with left-hand drive cars. It held that "the Commission was entitled to conclude that the fee was fixed at a level which was clearly disproportionate to the economic value of the service provided and that that practice constituted an abuse by BL of the monopoly it held by virtue of the British rules". In *Der Grüne Punkt-Duales System Deutschland GmbH* v *Commission of the European Communities* (C-385/07 P) [2009] ECR I-6155, [2009] 5 CMLR 19, the Grand Chamber of the Court affirmed the First Chamber's decision that a recycling company had abused its dominant position by including in its trademark agreement an obligation requiring payment of a fee for all packaging bearing its logo, even where customers of the company did not use its system for some or all of that packaging. It held at [143] that "the conduct of DSD … which consists in requiring payment of a fee for all packaging bearing the DGP logo and put into circulation in Germany, even where customers of the company show that they do not use the DGP system for some or all of that packaging, must be considered to constitute an abuse of a dominant position". That was said at [142] to be because it was settled case-law that "an undertaking abuses its dominant position where it charges for its services fees which are disproportionate to the economic value of the service provided".

[27] In the present case, the defender was receiving no economic value from the contract after the expiry of the licensed patents, yet it remained under a purported obligation to continue to pay royalties for the manufacture and sale of products utilising the pursuer's technology, which it could do freely now that the licensed patents had expired. The imposition of and reliance on an unfair contractual term by a dominant undertaking could constitute an abuse of that dominance. In *Preventx Limited* v *Royal Mail Group Limited* [2020]

EWHC 2276 (Ch), the High Court granted an injunction against Royal Mail restraining it until trial from refusing to provide its freepost service to a remote diagnostic testing company, and from refusing to process and deliver samples returned via the freepost service, where the company had alleged that Royal Mail's insistence it be moved from a freepost service to a substantially costlier tracked returns service was contrary to the provisions in the 1998 Act. Roth J at [100] noted that "the statutory reference to 'unfair trading conditions' is broad enough, in my view, to apply to the unfair reliance on a contractual term in certain circumstances". His Lordship at [95] was also willing to accept at the stage of interim relief that the imposition of unfair terms might constitute an abuse absent a distortion of competition:

> "the authorities on excessive pricing, and the *United Brands* test, show that it is not necessary to show a distortion of competition to establish that form of exploitative abuse. If that is the position for the 'unfair prices' limb of Art 102(a), it is not evident that a different approach should apply to the 'unfair trading conditions' limb of this provision".

[28] The requirement in section 18(1) that any abusive conduct was prohibited if "it may affect trade within the United Kingdom" was a purely jurisdictional test to establish that the conduct concerned had some effect in the United Kingdom, rather than a substantive competition test. In *Aberdeen Journals Ltd* v *Director General of Fair Trading* [2003] CAT 11, the CAT held at [459] that "we are not satisfied that we should read into the statutory wording of section 18(1) of the 1998 Act a requirement that the effect on trade should be appreciable". Conduct which amounted to an abuse under section 18(1) would infringe the Chapter II prohibition unless it could be shown either that the only effect of that conduct was on trade outside of the United Kingdom or that the conduct did not affect "trade" within the meaning of section 18(1): *Aberdeen Journals* at [462]. The pursuer's conduct met this test. If a licensee was required to pay royalties after the expiry of the licensed patents, this could restrict

competition in the relevant territories. It put the licensee at a competitive disadvantage when others were able to exploit the same technology without charge. That in turn affected trade within the UK and between EU Member States. In these circumstances, the purported obligation in the contract was a breach of the Chapter II Prohibition. The purported obligation to pay royalties after the expiry of the licensed patents was unenforceable under competition law.

[29] It was the pursuer which challenged the relevancy of the competition law defences. The defender maintained that the competition law defences (possibly with the exception of the defence that the object of any clause in the contract entitling the pursuer to royalties after the expiry of all the licensed patents was anti-competitive) could not be resolved at debate.

Submissions for the pursuer

[30] On behalf of the pursuer, counsel submitted that the defender had stated no relevant defence to the action and, accordingly, its conclusion for an accounting should be granted *de plano*: cf. *Herberstein* v *TDR Capital General Partner II LP* [2021] CSOH 64, 2021 SC 348, 2021 SLT 1473 at [27]. The only question for the court at this stage of proceedings was whether there was an obligation to account.

[31] The defender's contractual obligation to account was clear on the face of the contract between the parties. Clause 5(1) of the contract required the defender to provide to the pursuer within 30 days of the end of each calendar quarter a report detailing the information set out in clause 4(1). That clause required the defender to keep separate and detailed books and records relating to the manufacture and sale of all products manufactured under one or more of the licensed patents in such a way that the precise number of products commercialised by the defender and any sub-licensees, the customer and the shipment dates

were apparent. The reason for keeping and providing the records was so that the parties could accurately calculate the royalties payable by the defender to the pursuer under clause 3 of the contract, noting that different rates of royalty were payable between (i) the commencement of the contract and 31 December 2020, and (ii) 1 January 2021 and 31 December 2023. The contract came to an end on 31 December 2023. The effect of the contract was, therefore, that the defender had an obligation to account to the pursuer.

[32] The first purported defence sought to suggest that the true construction of the contract was that the contractual obligation to pay royalties ended when the patents expired. That view of the import of the contract was incorrect and was not supported by the plain meaning of the words used by the parties. It proceeded on a highly literal approach which ignored the reality of the parties' relationship and produced an artificial outcome. The contract was governed by English law. The rules of contractual interpretation, however, were effectively identical and no party sought to suggest otherwise. The role of the court in determining such a dispute was to determine the true meaning of the contract. The canons of contractual interpretation were well-settled. The interpretation of a written contract required the court to concern itself with identifying the intentions of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The meaning should be assessed in light of (i) the natural and ordinary meaning of the language, (ii) any other relevant provisions of the agreement, (iii) the overall purpose of the clause and the agreement, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense: *Arnold* v *Britton* [2015] UKSC 36, [2015] AC 1619 per Lord Neuberger PSC at [15]. The defender's argument that the defined term "Licensed Patent" could not include a patent

which had expired suffered from the fundamental flaw that it ran contrary to the plain meaning of the contract when read as a whole, and ignored entirely what was clearly within the knowledge of the defender at the time the contract was concluded. Reading the contract as a whole, it was clear that the contract term was 1 January 2016 to 31 December 2023 and that royalties were payable at a higher rate until 31 December 2020 and at a lower rate from 1 January 2021 to 31 December 2023. The reason for that was plain when one had regard to Annex 1 of the contract, which set out expressly that all the patents would expire at two different points during the term of the contract; and the parties had expressly made provision for any earlier expiration of the patents at clause 8. The overall tenor of the contract was to record an agreement whereby, in exchange for the exclusive use of the patented technology whilst still under patent, the defender agreed to continue to pay royalties for a short and defined period of time after they were due to expire. That was a perfectly standard commercial arrangement. Having had use of the patented technology on an exclusive basis (and thereby having prevented the pursuer from being able to exploit its intellectual property by licensing it to multiple parties), the defender now sought to resile from the agreement to continue to pay royalties for that short, defined period of time should it choose to continue to exploit the technology during the period in question. The defender also had the continued advantage that, for the whole term of the contract (including after expiry of the patents), the pursuer agreed, by clause 2(4), not itself to deal in any product embodying that technology. Contrary to its repeated assertions to the contrary, the defender was not paying something for nothing during that run-off period, during which it was unlikely in practical terms that competitors would be able to exploit the technology in question.

[33] The defender's argument in relation to the definition of "Licensed Patents", on which the remainder of the interpretation argument is premised, was simply incorrect. The definition was: " 'Licensed Patents' shall mean all patents listed in Annex 1". The patents were then listed in Annex 1 with their patent numbers, relevant regions and expiry dates. The definition said nothing about "so long as the patents remain unexpired" or "only insofar as the patents are enforceable". The defender sought to read into the contract words that were not there and which were not warranted in the circumstances. The restrictive wording suggested by the defender was not necessary in order to understand the contract. The patents listed in Annex 1 remained the patents there listed even after their expiry dates. If that was right, the whole of the defender's interpretation argument fell. The entire argument was premised on "patent" meaning "unexpired patent". If one accepted that "patents listed in Annex 1" meant just that, then the definition of "Products" and the obligation to account in relation to those products betrayed no ambiguity at all. The fact that the definition of "Products" referred to items "falling under the scope of protection" of one or more of the patents in issue did not assist the defender. The items they produced fell within the <u>scope</u> of protection of the patents even if they did not, after patent expiry, actually have that protection.

[34] But, beyond that, the defender's argument was simply irreconcilable with clauses 3 and 8 of the contract. Clause 3(2) would have no place in the contract at all if it was the agreed intention of the parties that "patent" meant "unexpired patent". It would be denuded of all meaning in a manner that could not have been intended. The court should avoid any construction that produced an unworkable outcome. Clause 8 provided an additional protection to the defender in the unexpected circumstance that the patents became invalidated before 31 December 2020, indicating that the parties were aware – as was

in any event clear from Annex 1 – that they were known to be due to expire by around that date. The defender was unable to argue that the parties were not aware that the patents would expire during the contractual period. That would create an irreconcilable tension between the provisions (as the defender read them) and the express contract end date. Clause 10 of the contract also made provision for the lapse of any or all of the patents during the contract term due to non-payment of renewal fees, further demonstrating that all eventualities had been considered and dealt with.

[35] Having regard to the factors set out in *Arnold* v *Britton*, it was plain that the defender's argument was incorrect, and was nothing more than a belated attempt to avoid the premium it had agreed to pay to secure the exclusive use of the patents at the time of entering into the contract.

[36] Any misunderstanding on the part of the defender as to the expiration dates of the patents was irrelevant to the determination of these proceedings. There was no suggestion that any such misunderstanding was brought about by the pursuer. The law was clear that an uninduced unilateral error would not (other than in the most extreme situations) provide a valid ground for seeking to have the contract brought to an end: *Royal Bank of Scotland plc* v *Purvis* 1990 SLT 262 at 265-266; *Ellis* v *Lochgelly Iron and Coal Co* 1909 SC 1278 at 1282.

[37] A further attempt was made to suggest that the defender was entitled to withhold performance of its obligations because there had been a material breach of contract by the pursuer. The defender sought to rely on clause 2(1) of the contract in order to formulate an argument that, after the expiry of the patents, the contract could not be exclusive. This argument was misconceived. Assuming that the definition of "exclusive licence" provided by section 130 of the Patents Act 1977 was applicable to the current question, it was satisfied. It simply required the conferral of a relevant right in respect of the invention to which the

patent related, not a right in the patent itself. Such a right had been conferred during the whole term of the contract, by a combination of clauses 2(1) and 2(4). The pursuer had not granted a license to any party other than the defender in relation to the patents in Annex 1. No other person received any right in respect of the invention to which the patents related. The defender had an exclusive license. In *Oxford Nanopore Technologies Ltd* v *Pacific Biosciences of California, Inc* [2017] EWHC 3190 (Pat), [2018] Bus LR 353, it was determined that a license granted to a person in circumstances where a third party had an option to call for a license at any time was and remained exclusive while that third party had not yet exercised the option. The appropriate question was whether anyone else had lawfully exploited the technology, and the answer in this case was clearly "no". The defender did not plead that anyone else had made use of the technology licensed to it by the pursuer. The argument that the pursuer failed to provide the defender with exclusivity was irrelevant.

[38] The defender's competition law argument was misconceived. It made reference, firstly, to Article 101 TFEU and section 2 of the Competition Act 1998. Those provisions outlawed anti-competitive agreements at both an EU and UK level respectively. They made unlawful all agreements that might affect trade or had as their object or effect the prevention, restriction or distortion of competition. The prohibition applied in particular to certain types of agreement, including (by dint of section 2(2)(d) of the 1998 Act) "agreements, decisions or practices which apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage". In the present case, there were no agreements, decisions or practices with trading parties other than the defender. Further, the EU Commission Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (2014/C 89/03) noted at [187]:

> "… parties can normally agree to extend royalty obligations beyond the period of validity of the licensed intellectual property rights without falling foul of Article 101(1) of the Treaty. Once these rights expire, third parties can legally exploit the technology in question and compete with the parties to the agreement. Such actual and potential competition will normally be sufficient to ensure that the obligation in question does not have appreciable anticompetitive effects."

[39] It was for the defender to plead and prove the circumstances in which it maintained that the contract, post-expiry of the patents, became anti-competitive. That was not automatically the case. In *Ottung* at [12], [13] and [15] the Court had determined that, in the context of an indeterminate license, so long as the licensee was not bound into the contract indefinitely, a contractual obligation under which the licensee was required to pay royalties after the expiry of the patent did not in itself constitute a restriction of competition. In *Genentech* at [33], [35] and [39] – [41] it was again determined that a contractual obligation to continue to pay royalties for the exclusive use of a product which was no longer covered by a patent was not, of itself, a breach of competition law, provided that the licensee was not bound into an indeterminate contract. There was no indeterminate contract in this case. The contract had a specified end date, coupled with a reduction in royalty rates and a non-compete obligation on the pursuer after expiry of all the patents, which the parties had agreed as reflective of the defender's willingness to pay royalties for an extended period in order to secure the exclusive use of the patented technology and gain the favourable position in the market which the popularity of the products using that technology conferred on it. The contract was always going to come to an end, in the manner agreed between the parties. That was the functional equivalent of termination by the giving of reasonable notice, which was all that the Court of Justice had so far been required to consider in this context. Furthermore, the contract did not require the defender to use the technology during the run-off period in the contract, nor was there any specific minimum royalty payment stipulated in

the contract. The defender was under no obligation to carry on the activity which would render it liable to pay royalties to the pursuer. The suggestion that its obligation to pay royalties after expiry of the patents had compelled it to maintain prices at a higher level than would otherwise have been the case was not supported by relevant and specific averment, and was more theoretical than real. The defender, knowing what it had agreed to do in the contract, had chosen to continue to use the technology during the run-off period and, therefore, was obliged to (i) account, and (ii) make payment, to the pursuer.

[40] Difficulties attended both the defender's "object" argument and its "effect" argument. The essential legal criterion for ascertaining whether agreements between undertakings involved the object of restricting competition was that the agreement or coordination was in itself of a kind materially to harm competition: *Groupement des Cartes Bancaires (CB)* v *European Commission* [2014] 5 CMLR 22 at [57]. It was only once a sufficient degree of harm to competition existed that one could bring oneself into the scope of an "object" argument: [49]. One was concerned to discover a level of infringement causing such a degree of harm to competition that there was no need to examine the effect: *BGL (Holdings) Limited* v *Competition and Markets Authority* [2022] CAT 36 at [203] – [205]. An agreement did not have an anti-competitive object if it might – in theoretical or abstract terms – have a variety of outcomes, not all of which were anti-competitive. This was a matter that competition law required to be interpreted strictly: *Generics (UK) Ltd* v *Competition and Markets Authority* [2020] 4 CMLR 14, [2020] Bus LR 1323 at [67]. The defender pled nothing close to such a degree of harm to competition and nor could it, in light of what had been said in the decisions of the Court of Justice already noted. The "object" argument was irrelevant.

[41] The "effect" argument was similarly misconceived in its approach to competition law. The legal principles to be applied were those set out in *Achilles Information Ltd* v

Network Rail Infrastructure Ltd [2019] 5 CMLR 23, [2019] CAT 20 at [121]. What one was concerned with was anti-competitive effects on the market, not on the defender. The defender's averments demonstrated two matters which were fatal to its competition law argument: (i) other products were available in the relevant market, manufactured and sold by third parties, constituting dispensing apparatus for highly viscous products, and (ii) the defender's real complaint was that it conceived that it could not (for a restricted period of time which had now ended) increase its market share beyond the 65% share it averred it already had. The first of those matters demonstrated that, even on the defender's own case, it was not bound in any way to use the pursuer's technology. Other options existed. Had the defender wished to avoid paying the contractual royalties for the contractual period, it had the clear option of not using the pursuer's technology. It did not choose to do that, and was therefore contractually bound by the commercial terms it had agreed. The second of those matters was equally irrelevant. That others might be able to enter the market or increase their own market share was the definition of pro-competitive. The defender had no protected right to a particular position in the market. What was relevant was the effect on the market. On the defender's own pleadings, the market continued to function (i.e. there was no market failure). So, even if the effect of the (limited) contractual run-off period was of the nature described by the defender, that was not anti-competitive. Any "effect" had to have an appreciable (and real, not merely theoretical) negative effect on competition within the relevant market – either the EU or the UK. As already set out, the EU's own guidance described the scenario relied upon by the defender as "sufficient to ensure that the obligation in question does not have appreciable anti-competitive effects". That guidance was given on the express premise that the validity of the patent had expired. The defender's argument about the "effect" of the obligations in question was irrelevant.

[42] In any event, given the very limited period in question, the defender had no prospect of being able to demonstrate that, even if the provisions were *prima facie* anti-competitive, that was sufficiently material as to render the relevant obligations unenforceable. The obligations were objectively justified under Article 101(3) TFEU and section 9(1) of the 1998 Act, given the balancing exercise that the court would be required to carry out if the matter were remitted to probation: *Sainsbury's Supermarkets ltd* v *Visa Europe Services LLC* [2020] UKSC 24, [2020] 5 CMLR 16, [2020] Bus LR 1196 at [116]. Taken at its highest, the defender's argument amounted to nothing more than an attempt to rewrite the terms of the commercial agreement into which it entered. That was not a relevant defence and was not something that should be countenanced by the court. The defender now also sought to pray in aid the Article 102 TFEU and section 18 prohibitions, both of which outlawed the abuse of a dominant position. Read short, the defender's argument was that it did, in fact, agree to the payment of royalties beyond the expiry of the patents, but only because the pursuer had a dominant position. It argued only that it would not have entered into the agreement on the same terms if the pursuer did not have the commercial leverage that it had at the time as a result of the patents. That was not an argument that, even if proven, would amount to an abuse of a dominant position for competition law purposes. It was irrelevant. The facts pled by the defender – that one party had commercial leverage in the circumstances of a particular negotiation with a specific counterparty – were perfectly normal (and lawful) aspects of many commercial negotiations and did not amount to the abuse of a dominant position. Further, it was settled as a matter of law that normal transactions of commercial operators could not constitute abuse for Article 102 or the Chapter II prohibition: *AstraZeneca AB* v *European Commission* [2013] 4 CMLR 7 at [74]. The defender was required to show that there was an effect on the parameters that affected the ultimate consumer's

choice among the products which made up the relevant market: *National Grid plc* v *Siemens Plc* [2009] CAT 14 at [89] – [92]. The defender did not make any such averments. Even if the pursuer was in a dominant position in the market, it was perfectly lawful for it to compete. Certain vertical exclusivity agreements could fall foul of Article 102 – such as if the pursuer had made it a condition of its contract with the defender that the defender could not contract with one of the pursuer's competitors – but that was nothing like the situation before the court in this case. The defender was not even obliged by way of the contract to manufacture the pursuer's product; it was entirely open to it to use any product it chose. However, having chosen to make and sell the pursuer's product, it was required to pay the agreed royalties for doing so.

[43] Each of the purported defences pled by the defender was irrelevant as a matter of law. The court should sustain the pursuer's first plea-in-law, refuse to remit the defender's pleadings to probation, and grant decree *de plano* in relation to the accounting sought in the first conclusion.

Decision

Contractual construction

[44] The parties were in agreement about the basic principles of contractual construction to be applied, and neither sought to make anything of the fact that the contract was subject to the laws of England rather than those of Scotland. The contract came into effect on 1 January 2016 and was scheduled to terminate automatically on 31 December 2023. The defender agreed to pay royalties calculated by reference to the quantity of "Products" commercialised during that entire period, with a drastic reduction in the rate at which those royalties were payable with effect from 31 December 2020. The patents in respect of which

the contract granted an exclusive licence were guaranteed by the pursuer to exist as at the date of execution of the contract in September 2015. Annex 1 to the contract, on its most natural reading, described the patents being licensed as falling into two groups, the first group relating to a Double Piston Can (Millennium Pack Piston), in respect of which an expiry date of 7 October 2018 was stated, and the second relating to a Valve Actuator (LinRoc Cam and Lever Pack), in respect of which an expiry date of 22 December 2020 was stated. It is plain from elsewhere in the contract that the parties regarded the end of December 2020 as a date of some significance in their relationship; quite apart from the royalty rate reduction which was then automatically to occur, clause 8 provided that invalidation of one or more of the licensed patents before that point (but not thereafter) would result in the opportunity for the defender to renegotiate the royalty rates, and clause 9(6) provided that the invalidation of all the licensed patents before then (but not afterwards) would entitle the defender to terminate the contract. Objectively viewed (as they must be), these clauses are strongly supportive of the construction of the Annex to the contract already advanced, and clearly suggest that the significant event which the parties understood would occur in late December 2020 was the natural expiry of the last of the relevant patents. Coupled with the clear statement in clause 3(2) that royalty payments were to continue after 31 December 2020, albeit at a reduced rate, the defender's attempt to persuade the court that the true construction of the contract is otherwise given expiry of the last relevant patent on 22 December 2020 is attended by formidable difficulty.

[45] Further, and contrary to the defender's submission that it gained no benefit from the contractual relationship after 22 December 2020, it will be recalled that by clause 2(4) the pursuer bound itself not to deal in products incorporating the patented technology for the full duration of the contract. The defender thus gained for the three years from the start of

2021 to the end of 2023 the benefit of not having in the market a competitor which was familiar with the relevant technology. The continued payment of royalties after the expiry of the licensed patents cannot be said to be entirely bereft of potential commercial explanation.

[46] Two minor points may also be noted at this point. Firstly, clause 10 of the contract further entitled the defender to reduce by 50% the stipulated royalty rates, or to terminate the contract, if one or more of the licensed patents lapsed due to non-payment of renewal fees. No particular date by which such lapse had to occur to have that consequence was stated in this clause, but since no patent could lapse in the manner contemplated after its natural expiry, this clause does not detract from the construction that the parties were aware of the expiry of the last of the patents in December 2020. Secondly, there is a slight discrepancy between the actual expiry date of the LinRoc patents (22 December 2020) and the date selected by clauses 3(2), 8 and 9(6) as the point when royalty rates would change, and after which invalidation would have no effect (31 December 2020), but that may readily be accounted for by the fact that the latter date constituted the expiry of a calendar quarter, on which basis the defender's reporting and royalty payment obligations turned, and was sufficiently close to the actual patent expiry date to represent a reasonable and convenient surrogate therefor.

[47] The defender's construction argument in essence turns on a single point, which is that the definition of "Products" states that they are to comprise cans or actuators "falling under the scope of protection of one or more of the Licensed Patents". The record-keeping, reporting and royalty payment obligations of the defender relate only to "Products", so anything not falling under the scope of protection of one or more of the patents does not attract those obligations. Since nothing can be protected by an expired patent, so the argument goes, anything produced after the expiry of the patents does not qualify as a

"Product". However, the phrase "scope of protection" of a patent is attended by a degree of ambiguity. It could mean either "protected by a patent" (the defender's preferred construction) or "within the scope of the claims" of a patent (the pursuer's preferred construction). The meaning which ought to be preferred is that which integrates itself more effectively with the remainder of the contractual provisions, so as to give effect to the principle that a contract ought to be construed as a whole. The application of that principle clearly indicates that the pursuer's preferred construction of clause 2(1) is to be favoured.

[48] The defender's argument that, on a proper construction of the contract, its obligation to pay royalties ceased on the expiry of the last licensed patent, accordingly fails.

Reciprocity/mutuality

[49] The defender's alternative argument based on contract law is based on the fact that clause 2(1) of the contract is clear that the royalties are payable in consideration of the grant of an exclusive license on the licensed patents to manufacture, assemble, market, sell and promote Products. Clause 3 also refers to the royalties being payable "for the license". The defender claims that since no license was required to do any of those activities after the date of expiry of the last patent, the pursuer failed to provide it with what it had promised after that date, with the consequence that its counterpart obligation to pay the royalties otherwise due then fell away. No specific period during which the contemplated license is to be valid in whole or in part is set out in the contract. Although both parties referred in argument to the definition of "exclusive licence" set out in section 130 of the Patents Act 1977 (a definition provided solely for the purposes of references to that concept in the Act itself), it does not appear to me that that definition is particularly useful for the purpose of determining what the parties to the contract meant by their deployment of the phrase in the context of their

contract. There is no dispute that, for the period from 1 January 2016 to 7 October 2018 the pursuer provided the defender with exclusive rights to the Double Piston Can (Millennium Pack Piston) group of patents, and that they did the same for the period 1 January 2016 to 22 December 2020 in respect of the Valve Actuator (LinRoc Cam and Lever Pack) group. The question is whether a reasonable reader of the contract would have considered that it had obliged itself to do more, and in particular whether it had obliged itself to provide the defender with valid rights in those patents after the points when (as the terms of the contract itself made clear) that was impossible in point of law for it to do.

[50] Viewed in that light, the question resolves itself into a question of the proper construction of clauses 2(1) and 3 of the contract; moreover, it is a question which falls to be answered by the application of the same principle of construction in context which has just been mentioned. A reasonable person reading the contract objectively would appreciate that the patents were to expire on the dates respectively stated in Annex 1, that no valid rights in them could be conferred or otherwise dealt in after those dates, and that the contract had made provision for that circumstance by a reduction in the royalties payable after the latter of those dates. Such a reader would not conclude that the express obligation to pay royalties was dependent on the continuing conferral of rights on the defender after the points from which the pursuer could not validly confer such rights. It follows that the pursuer was not in breach of contract by failing to confer such rights on the defender after those points, and that the defender continued then to be obliged to pay the stipulated royalties at the specified rates.

Competition law

The Chapter I Prohibition

[51] Section 2 of the Competition Act 1998 and Article 101 TFEU prohibit agreements between companies which might affect trade in their respective fields of application and which have as their object or effect the prevention, restriction or distortion of competition. The defender argues in particular, and without prejudice to the generality of the prohibition, that the contract in the present case is an example of the specific kind of objectionable agreement listed in section 2(2)(d) of the 1998 Act, namely one which applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. The immediate difficulty with that argument is that there is no claim that the pursuer entered into equivalent transactions with anyone other than the defender, rendering it impossible for the contract to be adjudged to have applied any such dissimilar conditions as are envisaged by the subsection. It is conceivable that the effect of the contract having been entered into was to put the defender at a competitive disadvantage in the conduct of its own business (because it felt constrained by the requirement to continue to pay royalties after the expiry of the patents to reflect the burden of that payment in the prices it charged for the products it put onto the market in a way in which its competitors in that market did not), but that is not the specific mischief at which section 2(2)(d) of the 1998 Act strikes, and it is therefore necessary to approach the matter on a broader and principled basis.

[52] The decisions of the European Court in *Ottung* and *Genentech* make it clear that an arrangement which involves the payment of royalties after the expiry of the intellectual property to which the royalties relate is not automatically something struck at by Article 101 TFEU. The Court has specifically acknowledged – in *Genentech* at [39] – that such an

arrangement may simply reflect a commercial assessment of the value to be attributed to the overall possibilities of exploitation granted by the license. Further support for the view that such an arrangement is not necessarily anti-competitive is provided by the text of paragraph [187] of the Commission Guidance on the application of Article 101 to technology transfer agreements already cited. However, it is difficult to see how much further the general proposition that post-expiry royalty payments will not necessarily fall foul of the Article 101 prohibition can be taken. Since the decisions in *Ottung* and *Genentech* were not dealing with a fixed-term contract, it remains an open question whether such a contract is or is not within the scope of those decisions, or, if a more general criterion of reasonableness is being posited as a means by which the prohibition may be determined as inapplicable to a particular contract, how one might assess the application of that criterion in the present context. The particular way in which the Court of Justice rationalizes and expresses its decisions does not lend itself to the reaching of any clear conclusions on those matters.

[53] Returning, then, to the text of the Chapter I prohibition, it may confidently be determined that the contract here in issue does not have as its object the prevention, etc., of competition within the particular meaning of the Chapter 1 prohibition. It is not an example of the sort of co-operation between undertakings which has by its nature been recognised as harmful to the proper functioning of competition: see *Gazdásagi* at [35] – [36]. Had it been otherwise, the decisions in *Ottung* and *Genentech* would not have been possible.

[54] It is accordingly necessary to consider the effect of the agreement. For a relevant case to be made in our procedure that it is caught by the "effect" prohibition, it is necessary for sufficient averment to be made of the presence of factors which might after proof be held to have demonstrated that competition has <u>in fact</u> been prevented, restricted or distorted <u>to an</u>

appreciable extent by the contract in question: cf. *Gazdásagi* at [38], *Groupement des Cartes Bancaires* at [52].

[55] As has already been noted, the defender's position is that the terms of the contract pertaining to royalty payments post-expiry of the relevant patents put it at a competitive disadvantage in the conduct of its own business because the burden of those payments constrained the prices it was able to charge for the products it put onto the market. However, its averred case in that regard is without any of the detail necessary to enable the court to conclude that a viable outcome of the desired proof on those averments is a conclusion that the terms of the contract have in fact distorted competition in the relevant market to an appreciable extent. The core difficulty is that no detail whatsoever is given of the economic context in which the defender or its competitors were operating at the material time (i.e. 23 December 2020 to 31 December 2023) in the relevant market. For example, no indication is given of the degree to which the post-expiry royalties contributed to the pricing decisions made by the defender during that period (indeed no actual claim is made that it so contributed at all). Nothing is said about the relationship which the amount of the royalties in question bore to the overall prices of the defender's products. There are no averments as to the extent to which competition in the market turned on price as opposed to the other attributes of the products available in the market (although it is claimed that the LinRoc product was qualitatively better, and recognised as such, in comparison to other substitutable products on the market – and thus might be thought capable of commanding a price premium). The unavoidable conclusion is that, if the defender proved everything that it offers to prove, that would provide no proper basis at all on which the court could conclude that the post-expiry royalty terms had distorted competition in the relevant market to an appreciable extent. Rather, it is clear that the suggestion that there was such distortion

is advanced on a purely theoretical basis. That does not meet the legal test for the invocation of the "effect" prohibition as set out in *Gazdásagi* and *Groupement des Cartes Bancaires*. The stated defence based on the Chapter I prohibition is irrelevant.

The Chapter II Prohibition

[56] Section 18 of the 1998 Act and Article 102 TFEU prohibit any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market if it might affect trade in their respective spheres of operation.

[57] The defender avers that the relevant market for these purposes was the upstream market for the intellectual property rights in the technology used to make the products it has been making since equivalent licensing arrangements with the pursuer were first entered into by it in 2003. It claims that, if the pursuer had increased the royalties it sought to demand for a license to those rights, neither the defender nor anyone else in the market for such a license would have had any realistic alternative but to pay that increase, since no interchangeable or substitutable alternative technology was available. With the market defined so narrowly, it follows – so the argument goes – that the pursuer, as the only seller in that market, must necessarily have been dominant in it. I venture to doubt that, after enquiry, the relevant market would be found to be quite so restrictive as that for which the defender contends, particularly since there are other products in the market for the dispensing of viscous material which, on the defender's own averments, are regarded by ultimate consumers as interchangeable with those which it manufactured and sold under licence from the pursuer. In such circumstances it may be doubted that, after proof, the pursuer would be found capable of effectively acting independently of its customers and of ultimate consumers of products interchangeable with those embodying its patented

technology in the way envisaged in *United Brands*. However, for present purposes I proceed on the basis that the relevant market is as the defender would have it defined.

[58] The defender's position is that the pursuer abused that dominant position by demanding post-expiry royalty payments. It maintains that there was no normal commercial reason for it to pay those royalties and that the pursuer's demand for them was an example of it imposing unfair trading conditions and failing to act in a fair, reasonable and non-discriminatory manner. Specifically, it is claimed that the post-expiry royalties bore no reasonable relation to the economic value of what was being supplied to the defender in terms of the contract.

[59] In *AstraZeneca*, the First Chamber of the Court of Justice of the European Union observed at [74]:

> "As a preliminary point, it must be noted that it is settled case law that the concept of 'abuse' is an objective concept referring to the conduct of a dominant undertaking which is such as to influence the structure of a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition …"

[60] I note from that judgment that the concept of abuse of a dominant position is an objective one, and may be present if there has been recourse to methods different from those governing normal commercial competition, with the effect of hindering the maintenance or growth of competition in the relevant market by influencing its structure. While that market may for present purposes be defined as the market for a license to the pursuer's intellectual property, that does not mean that the defender was the only potential buyer in that market. The defender's argument proceeds on the erroneous assumption that it should be treated as if it were. Its complaint about supposed market abuse is primarily expressed by reference to

the weakness of its own position in negotiating with the pursuer for a continuation of the license which it had previously enjoyed and which was due to expire. That weakness arose because its established production processes were geared to the manufacture of the products using the pursuer's technology rather than anything else, and it would have had to incur considerable expense in changing those processes had it chosen to walk away from a further license agreement with the pursuer and move to the manufacture of other products. However, relative strength and weakness of negotiating positions is a normal incident of commerce, and for the stronger party to take some advantage of its position cannot sensibly be described as recourse to a method different from those governing normal commercial competition, or as influencing the structure of the market. Had the defender not been willing to agree to whatever terms the pursuer was prepared to offer, the pursuer would have had to go to other potential licensees of its intellectual property and attempt to negotiate a contract with one of those, or else see its technology unexploited and producing no income for it. The other potential licensees would have had their own degrees of interest in acquiring a license and their own constraints in doing so. That is not a description of a structurally dysfunctional market. The defender further suggests that this is a case like *British Leyland* or *Grüne Punkt*, in that it received nothing of economic value from the parties' contract after the expiry of the licensed patents. I consider that this is another way of putting the same point as that just discussed, rather than a separate head of complaint about a supposed market abuse, and it is capable of being met by the same response. It has, further, already been noted that the Court of Justice (in *Ottung* and *Genentech*) and the Commission (by the technology transfer guidance cited above) have both stated the view that post-expiry royalty payments are not *per se* anti-competitive. Although those observations were made in the context of Article 101, the statement of principle which they contain reads seamlessly

across to the Article 102 and section 18 sphere, and the specific acknowledgement in *Genentech* at [39] that post-expiry royalties may simply reflect a commercial assessment of the value to be attributed to the overall possibilities of exploitation granted by the license, resonates particularly in that sphere. Another way of putting that point is to say that there is no necessary basis for the supposition that payments made at a particular time in the lifetime of the contract reflect benefits being contemporaneously received. Finally, the underlying premise of this way of putting the defender's argument, that it got nothing in return for the post-expiry royalties, is not made good by an examination of the terms of the contract as a whole. Most notably, the defender got the benefit of the non-compete obligation incumbent on the pursuer in terms of clause 2(4) throughout the whole term of the contract, both pre- and post-expiry of the patents. If the defender were to prove all its averments directed at establishing an abuse of the pursuer's putative dominance in the market – a matter for objective determination by the court – it would not succeed in establishing that the conduct of which it complains amounts to such an abuse. The stated defence based on the Chapter II prohibition is also irrelevant.

Conclusion

[61] I shall sustain the pursuer's first and second pleas-in-law, repel the defender's pleas, and grant decree *de plano* ordaining the defender to produce a full account of its sales or commercialisation of can and actuator products during the period 1 October 2022 until 31 December 2023, all as first concluded for.