



OUTER HOUSE, COURT OF SESSION

[2018] CSOH 33

CA43/17

OPINION OF LORD CLARK

In the cause

TARMAC TRADING LIMITED

Pursuer

against

NETWORK RAIL INFRASTRUCTURE LIMITED

Defender

**Pursuer: Ower; Shepherd & Wedderburn LLP  
Defender: J Broome; Dentons UKMEA LLP**

6 April 2018

**Introduction**

[1] In this action, the pursuer (“Tarmac”) seeks damages for an alleged breach of contract by the defender (“Network Rail”). The alleged breach is of implied terms in an Undertaking given by the defender to the pursuer. The defender’s position is that the terms founded upon do not fall to be implied into the Undertaking. The case called before me for a proof before answer, restricted to the issue of whether the implied terms founded upon by the pursuer form part of the Undertaking.

[2] In brief terms, the key facts can be summarised as follows. The pursuer owns areas of land at Blackridge, in central Scotland, including parts of Blairhall Quarry and land

adjacent to the quarry. The pursuer also has a lease of the whinstone in the quarry and has planning consent for the winning and working of minerals from 20 acres of land at the quarry. The planning consent is due to expire in 2042, but the pursuer expects it to be extended. For some years the quarry has not been in use. A road or track runs from the quarry, broadly in a northerly direction and slightly to the west. Bogend Farm, which is owned by others, is located to the west of the quarry, on adjacent land. A separate road or track runs from the farm, again broadly in a northerly direction, and slightly to the east. Prior to the carrying out of the works discussed below, the two tracks met and joined up into a single track ("the joined track"), and the joined track then ran, still to the north, to meet the A89 trunk road. The M8 motorway lies to the south of the quarry and the farm. There is no road or track which runs from the quarry to the M8.

[3] Until the 1980s, there was a railway line, running broadly in an east to west direction, just north of the point where the Bogend Farm access track and the quarry access track joined up. The joined track ran underneath a bridge. The bridge and the railway line were removed at some point in the 1980s. Following their removal, the joined track ran across the now flat area of land where the railway line had formerly been positioned. Therefore, if a vehicle had been travelling from the A89, in a southerly direction, down the joined track, it would cross the land where the bridge and railway line had been situated, and it could then either take the fork to the south-east (to the left) towards the quarry, or take the fork to the south-west (to the right) towards the farm.

[4] In or around 2006, Network Rail proposed to reinstate the railway line, as part of the Airdrie-Bathgate Rail Link. A private Bill, the Airdrie-Bathgate Railway and Linked Improvements Bill, was introduced on 30 May 2006 before the Scottish Parliament. Accompanying the Bill was a Design Development Proposal, which contained an

Environmental Statement. The Bill specified certain proposed works, including Work No. 27 which related to the construction of a new road and bridge over the proposed railway line close to the point where the joined track crossed the land where the former railway line had been situated. The pursuer objected to the Bill, in a Notice of Objection dated 27 July 2006. In broad terms, the Notice of Objection did not object to the general principles of the Bill, but the key point made was that the pursuer was keen to reach an agreement with the defender that would protect the operational viability of the quarry. The defender, as promoter of the Bill, issued a response to the Notice of Objection.

[5] On 9 October 2006, staff and solicitors for the pursuer met with staff and representatives of the defender, to discuss the concerns raised by the pursuer in the Notice of Objection. By letter dated 1 December 2006, from the defender to the solicitor acting for the pursuer, the defender set out various proposals designed to meet the points raised in the Notice of Objection. There were then telephone discussions, followed by a letter dated 15 January 2007 from the defender's solicitor to the pursuer's solicitor. The pursuer's solicitor responded by email on 17 January 2007, indicating a broad acceptance of the terms of the letter dated 15 January 2007. The defender's solicitor prepared a draft Undertaking, which was intended to set out the proposals in the letter dated 15 January 2007 in a formal and binding document. The draft was sent to the pursuer's solicitor on 21 January 2007. Revisals were then exchanged and a final version was agreed on 28 January 2007. An oral hearing was due to take place on 29 January 2007 at the Scottish Parliament. On 28 January 2007, in light of the agreement on the terms of the Undertaking, the pursuer withdrew its objection to the Bill. The Undertaking was signed on 13 February 2007. While it might be said that the Undertaking is unilateral, it was in fact given in exchange for the dropping of the pursuer's objection to the Bill. It was therefore part of a bilateral agreement.

[6] Thereafter, works were carried out which resulted in the new section of railway line being installed and a new road and bridge being constructed over the railway line. The road and bridge run between, and hence connect, the joined track to the north of the railway line and the Bogend Farm access track to the south. The road and bridge do not connect with the Blairhill Quarry access track. In evidence, it was stated that if one followed the quarry access track from the quarry in a northerly direction towards the A89, one would now come to face an embankment, approximately 10 metres in height, which formed part of the bridge structure. In other words, the construction of the railway line and the road and bridge resulted in the quarry access track no longer joining with the Bogend Farm access track to then run as the joined track heading north to the A89. Thus if a lorry heading south from the A89 on the joined track comes over the bridge, it will be on the Bogend Farm access track. The defender has not constructed a connecting road or track which could then take the vehicle on to the quarry access track.

### **Questions for the court**

[7] The parties produced a joint note of questions to be determined by the court:

“1. Was it necessary to imply the following term into the Undertaking dated 13 February 2007 in order to give the Undertaking business efficacy:

‘That the defender would design and construct the bridge and access road [as condescended upon] so as to provide continued access to and egress from Blairhill Quarry by the pursuer, for the purposes of its quarrying operations’?

2. Was it necessary to imply the following term into the Undertaking in order to give the Undertaking business efficacy:

‘That the bridge and access road to be constructed by the defender would provide a replacement for the access route which previously allowed access to, and egress from, Blairhill Quarry?’”

## **The evidence**

### *Evidence for the pursuer*

[8] Evidence was led from one of the pursuer's employees, Stephen Cowan, an Estates Manager with responsibility for property and planning matters. He explained the extent of Tarmac's ownership of, and leasehold interests in, parts of the quarry and surrounding land. The quarry had been dormant since 1986, other than for a short period of working which took place in 1996. Substantial rock reserves were contained in the quarry, and Tarmac's intention was that it would be fully operated again in the medium to long term. In the meantime, access was needed for emergencies and inspections. Some light use of the quarry was also planned in the near future.

[9] Until around 2009, the quarry was accessed from the A89 travelling south, down to and then along the quarry access track. Around that time Network Rail constructed the new access road and bridge, cutting off the connection to the quarry access track. After the works had been done by Network Rail, Tarmac had no means of vehicular access to the quarry. To facilitate the use of the quarry for the limited purposes referred to above, Tarmac had to construct a new track connecting the Bogend Farm access track to the quarry access track. The new track is suitable for light use only. It is anticipated that on the new track there will be only one to two vehicles per week, each carrying a load of around two to three tonnes. To carry out any significant operations at the quarry, it will be necessary to construct a track which is capable of carrying significantly higher volumes of traffic and greater weight of vehicles. When fully operational there could be around 500 vehicles per week going in and out of the quarry carrying an average of 20 tonnes each.

[10] Various documents indicated that it had been made clear to Network Rail that Tarmac required future access to the quarry. On 10 August 2005, Mr Cowan wrote to

Network Rail's solicitors stating that future access to the quarry track would be required. The plan produced by Network Rail ("Sheet No. 22", dated 21 March 2006) which accompanied the Bill, showed the plots of land that Network Rail intended to compulsorily acquire in the area covered by the plan. It indicated that they intended to make some provision for access, but it did not provide any details of what was proposed. There was no indication from the plan that there would no longer be an access route to the quarry once the railway was constructed. The description of Work No. 27 in the Bill and in the resulting 2007 Act did not explain in detail what was proposed. That description did not indicate that there would no longer be an access route to the quarry once the railway line was constructed. The Environmental Statement that was produced for the purpose of the Bill stated, in Table 12.13: "The existing access to Bogend Farm and Blairhill Quarry will be severed." In the column headed "Mitigation", it stated: "A new vehicle bridge is proposed at this location". In the column headed "Significance", it stated that there would be no impact for vehicles. Table 12.17 in the same document detailed the mitigation measures proposed for communities near the railway line. For Blackridge, the table stated: "A new road bridge will be built at AGC18 to provide access to Bogend Farm and Blairhill Quarry". Network Rail were fully aware of the existence of the quarry access track. Those parts of the Environmental Statement accorded entirely with what was understood to be Network Rail's proposal.

[11] It was known to both parties that the proposed new railway line would have an impact on the access track to the quarry. Network Rail were proposing to design and construct an access road and bridge over the railway line so as to provide continued access to Bogend Farm and to the quarry. Tarmac understood that the access road and bridge were intended to provide a replacement for the access route which would be severed by the new

railway line. Nothing in the material relating to the Bill indicated that Network Rail intended otherwise, or that there would not be an access route to the quarry once the new road and bridge were constructed. Given that it was the witness's understanding that Network Rail intended to provide continued access to the quarry, his main concern with what was proposed was that the access road and bridge might not be suitable for the volume of traffic and the size and weight of vehicles which would need to go in and out of the quarry for the purpose of future operations (that is, the specification of the road and bridge).

[12] The main objective for Tarmac in objecting to the Bill was not to prevent it from being enacted, but to ensure that Tarmac would continue to have an access route to the quarry that was sufficient for future operations. This had repeatedly been made clear to Network Rail. Access issues were dealt with in the Notice of Objection. Tarmac's position in relation to the proposed new access road and bridge was set out under the heading "Access issues: Specification of new access road and bridge to be created". Those passages reflected the witness's understanding, based on the material he had seen relating to the Bill, that Network Rail intended to design and construct the access road and bridge so as to provide continued access to the quarry. It was clear from those passages that Tarmac expected that result, and that Tarmac's major concern was to ensure that the bridge and access road had a sufficient specification for Tarmac's future operations.

[13] The Notice of Objection also stated that 24 hour access to the quarry was required for health and safety reasons. It was made clear that Tarmac required continued access to the quarry at all times, even though it was not operational.

[14] The letter from Network Rail dated 1 December 2006 provided general assurances, but it was not specific enough. However, it did state:

“The Promoter has however indicated in the preceding paragraphs that it intends to provide a means of access to the quarry from the A89 over the proposed railway. We would therefore invite you to withdraw this element of your objection.”

This accorded entirely with the witness’s understanding of what Network Rail intended: to design and construct the access road and bridge so as to provide continued access to the quarry.

[15] Witness statements were submitted to the Parliament in relation to the objection to the Bill and these set out Tarmac’s position in relation to particular issues. The first issue raised (protection of land-holding for use as a quarry) was overarching. Those statements again made clear that Tarmac required to ensure that the access road and bridge would have a sufficient specification for future operations, and also that Tarmac required to have access to the quarry at all times even though it was not operational.

[16] The letter from John Kennedy & Co to Tarmac’s solicitors dated 15 January 2007, referred to “Issue 1: Protection of land-holding for use as a quarry”, and stated:

“Your clients seek a binding Agreement which would allow Blairhill Quarry to remain ready to be opened for extraction. It appeared from our conversation that this issue would be met by dealing with the specific issues below in a way satisfactory to your clients.”

That paragraph accorded with the witness’s understanding that Network Rail intended to design and construct the access road and bridge so as to provide continued access to the quarry, and that they understood that Tarmac’s major concern was to ensure that the road and bridge were of a sufficient specification for future operations. Nothing in the letter indicated that Network Rail did not have the intention to provide access to the quarry, or that there would not be an access route to the quarry once the access road and bridge were constructed.

[17] The witness was satisfied that the final version of the Undertaking provided the specific commitments that Tarmac sought in order to ensure that it would have a continued means of access to the quarry and that the road and bridge had a sufficient specification for future operations. The Undertaking did not explicitly state that Network Rail would design and construct the access road and bridge so as to provide continued access to the quarry, or that the access road and bridge would provide a replacement for the access route which previously allowed access to the quarry. As far as the witness was concerned, there was no need for the Undertaking to explicitly set that out. It was obvious that those were requirements of the Undertaking. The Undertaking needed to set out the specific commitments Tarmac required, and it did that. Those specific commitments were of no value if there was no requirement to provide continued access, because if there was no continued access then Tarmac would be in a worse position once the access road and bridge were constructed than before their construction. If it was not Network Rail's intention to provide continued access to the quarry that would have been made clear, but at no time was there any indication that they did not have that intention. Clause 3 of the Undertaking, which was headed "Health and Safety", narrated that Tarmac sought a commitment that it would have 24 hour access to the quarry, and Network Rail provided the following Undertaking:

"Network Rail undertakes that it will not at any time prevent Tarmac from gaining 24 hour access to or egress from Blairhill Quarry and shall ensure that its contractors are likewise bound by this obligation."

This was another part of the Undertaking that was consistent with the requirement to provide continued access to the quarry.

[18] As a result of Network Rail's failure to provide a continued means of access to the quarry, it will be necessary for Tarmac to engage a contractor to carry out the necessary

works to construct a track connecting the quarry access track to the Bogend Farm access track. The works will not be straightforward as the ground between the quarry access track and the Bogend Farm access track is very boggy. It will be necessary to ensure that the track will be suitable for the heavy vehicles which will require to use it when the quarry is fully operational. Tarmac has estimated that the cost of the necessary works will be approximately £312,485.

[19] In cross-examination, Mr Cowan confirmed that the track used to access the quarry included part of the Bogend Farm access track and ran on property owned or controlled by Tarmac, north and south of the railway line. The quarry access track had formerly connected with the Bogend Farm access track south of the bed of the former railway line. The area where the joined track crossed the old railway line was not within Tarmac's ownership or control. It was accepted that Sheet No. 22 showed the new road bridge alignment. What had been built was essentially what was shown on Sheet No. 22. It showed the road and bridge traversing the railway line and it specifically referred to Bogend Farm. Mr Cowan did not agree that there was no proposal from Network Rail to connect the pursuer's quarry access track to the Bogend Farm access track as accessed from the bridge. He accepted that it was known that there would need to be an embankment supporting the road as it came off the bridge at the south. He did not know prior to the bridge being constructed that the quarry access track would come up directly against a large embankment.

[20] He was taken to Work No. 27 and the reference in it to the realignment of the Bogend Farm access track which would include the bridge. He did not accept that it was evident from that document that there would be a bridge over the railway line. He accepted that it was "available to the pursuer to know" that the bridge was going to be built and that Tarmac had lawyers instructed to look after its interests. He also accepted that the

Environmental Statement stated that the existing access to Bogend Farm and the quarry would be severed. He agreed that there was no specific mention by Tarmac of the need for Network Rail to connect to the quarry access track. He accepted that there were various references in the documents to Sheet No. 22. While there was no specific mention of connection to the quarry access track, his position was that this was “taken as read”. The minutes of the meeting on 9 October 2006 made no mention of connection to the quarry access track. He had understood that Network Rail would pay for what would be a new access track connecting to the quarry access track. He accepted that Network Rail does not own any of the land on which the connection would be built and that Tarmac would be required to grant access rights. He agreed that there was no provision in the Undertaking as to where any such connecting track would be situated. He further accepted that it would have to be built to a particular standard. In re-examination he said that he had understood that the bridge would serve both the quarry access track and the Bogend Farm access track. Thus, the bridge would lead to the quarry and would provide access to the quarry.

*Evidence for the defender*

[21] The first witness for the defender was Alison Gorlov, a partner in a London firm of solicitors. The firm also practises as parliamentary agents in England and Scotland, in the latter case under the name John Kennedy & Co. In the period between December 2005 and the date when royal assent for the Airdrie-Bathgate Railway and Linked Improvements Act 2007 was granted (May 2007), she acted for Network Rail in its promotion of the Bill. She also dealt with objections to the Bill. Her direct involvement with Tarmac began on 11 January 2007 when she was instructed to advise on a formal settlement in respect of Tarmac’s objection to the Bill. She referred to the meeting with Tarmac’s representatives on

9 October 2006 and the letter dated 1 December 2006 from Network Rail to Tarmac. There was a telephone conference call held on 12 January 2007 for the purposes of discussing the proposed Undertaking. In that call, a senior legal adviser for Network Rail told Tarmac's solicitor, in the context of a discussion about a possible alternative access via the M8, that Network Rail could only construct what was in the Bill. There was nothing in the Bill dealing with an access track, or link to the existing access track, on Tarmac's own land. That was never part of the works.

[22] Following discussions with Tarmac's solicitor, she prepared the letter dated 15 January 2007. The letter was written in the context of the works to be authorised by the Bill and nothing more. The relevant scheduled work was Work No. 27. She referred to the email of 17 January 2007, in which Tarmac's solicitor had stated that in relation to the access/egress issues the technical experts had confirmed that they were happy with the content of the letter dated 15 January 2007. The witness then went on to draft the Undertaking.

[23] The Undertaking was intended to be the letter dated 15 January 2007 set out as a formal Undertaking. It was concerned only with what was within the scope of the Bill, that is, Work No. 27 as detailed in the Bill. A draft of the proposed Undertaking was sent to Tarmac's solicitor on 21 January 2007 and further drafts were exchanged until the final version was agreed on 28 January 2007. The Undertaking was then signed on 13 February 2007.

[24] During her involvement in drafting the Undertaking and corresponding with Tarmac's solicitor there was never any mention of the specific position of the bridge or of any connection with the quarry access track. The main concerns expressed by Tarmac's solicitor were about the particular specifications of the bridge. Sheet No. 22 was a plan of

the bridge and it clearly showed the positioning of the bridge. Network Rail did not own any land across which any connection to the quarry access track could be built. There was never any discussion of any further land being made available for that purpose.

[25] The powers granted by the 2007 Act and the deemed planning permission that went with them only applied to what the 2007 Act had actually authorised, which did not include any connection with the quarry access track on Tarmac's land.

[26] In cross-examination, she accepted the various points that had been raised by Tarmac in correspondence, in its witness statements provided in relation to opposition to the Bill, at the meeting on 9 October 2006, and in the Notice of Objection and other documents.

However, the reference to Network Rail providing the means of access to the quarry simply meant a means of access over the proposed railway line. Network Rail was discussing works to be done under the Bill regarding the access road and the quarry. The Act authorised Network Rail to carry out certain works of which Work No. 27 was one. That work was a bridge over the railway line and approach roads to and from the bridge. In essence, Network Rail was saying that it was able to build the works and thus give access to the quarry but not that it would provide a new access road to the quarry. Sheet No. 22 set out clearly what was to be done. Land leading down to the quarry was outwith the limits of deviation of the works. The new road and bridge did provide a means of access to the quarry land. In the context of the Bill, the language used did not mean there would be an access road all the way to the quarry. She explained that any separate arrangement for the construction of an access road would have required planning permission and an agreement between the parties as to the use of Tarmac's land. The works which were carried out provided such access as was permissible under the 2007 Act. Tarmac could take its vehicles over the bridge and go along the farm access track. That is what was authorised by the Act.

[27] The Bill and the Undertaking did not include any access track to the quarry after the road had exited to the south from the bridge. That road enabled access to the quarry. It may have been the case that Tarmac had an understanding of Work No. 27 resulting in the replacement of the existing access to and egress from the quarry. But that was incorrect. The Bill provided the context. The Undertaking must be viewed in that context. Work No. 27 and Sheet No. 22 made the position clear.

[28] The next witness for the defender was Carol Deveney, who is the defender's Head of Sponsorship. In 2006, she was the Commercial Schemes Sponsor for the Airdrie-Bathgate rail link project. Part of her function was to seek to resolve objections to the Bill. She described Tarmac's objection as concerning whether the bridge to be built to join the Bogend Farm access track would be able to carry the pursuer's quarry vehicles. After the possibility of an alternative route to the M8 was ruled out, Tarmac focused on the specification of the bridge. Tarmac never objected to the specific position of the bridge, which was laid out in the relevant plans which accompanied the Bill. It was never suggested that Tarmac might require additional work to connect the quarry access track to the bridge approach road. From the outset, the plans had shown where the bridge would land, and this was adjacent to Tarmac's property. This was never questioned by Tarmac. Sheet No. 22 showed the limits of deviation that Network Rail could work within for Work No. 27. The works did not include a connection to the quarry access track. This would have been clear to Tarmac and its advisors.

[29] In cross-examination she accepted that the main reason for Tarmac's objection was the adverse effect on its business operations. Protection of Tarmac's landholding for use as a quarry was the primary issue it had raised. In addition to protection of operational viability, there was also reference to the need for 24 hour access for health and safety reasons. The

witness was aware that these were concerns of Tarmac. She agreed that Tarmac wished to have replacement of the current access to and egress from the quarry. Tarmac wished access to the main public roads, including the A89, from the quarry. It was not merely the specification of the bridge which was the issue. Tarmac was looking for a replacement for what had gone before. Network Rail had been put on notice that Tarmac needed access to the quarry at all times. She had attended the meeting on 9 October 2006 and agreed that the issue of the access road caused the most concern to Tarmac. The objection was about maintaining access to facilitate operational use of the quarry. It was her understanding that Tarmac's primary concern was continuing access and egress.

[30] She was taken to the letter dated 1 December 2006 and accepted that Network Rail had indicated that it intended to provide a means of access to the quarry from the A89 over the proposed railway. However she did not agree with the proposition that this was not what had, in fact, happened. She accepted that Tarmac no longer had access directly to the quarry. She further accepted that Tarmac's position had also been made clear in the witness statements lodged in relation to the objection to the Bill. She was taken to the document which was the promoter's response to Tarmac's objection which stated that the objector was concerned that the specification of the new access road and bridge to be constructed over the railway to and from Blairhill Quarry should be sufficient to cater for heavy vehicles that would operate out of the quarry. The same document stated that the promoter's proposals would not restrict extraction under the existing conditions. The Undertaking itself referred to the specification of the new access road and bridge to be created "at Blairhill Quarry"; it did not refer to a new access road and bridge at Bogend Farm.

[31] When it was put to her that what was in fact provided was not a new road and bridge which leads to the quarry but one which leads to the farm, she explained that the

road and bridge lead on to Tarmac's land. It was, however, correct that they lead to the Bogend Farm access track and not to Blairhill Quarry.

[32] The final witness for the defender was Keith Sheridan. He is the divisional director of Jacobs and he had begun work on the Airdrie-Bathgate rail link project in 2004. On behalf of Network Rail, Jacobs was to produce specimen designs and prepare maps, plans and descriptions of the works to be carried out. He recalled as the earliest contact with Tarmac the meeting held on 9 October 2006, which was to discuss Tarmac's requirements in order for the objection to the Bill to be withdrawn. From his recollection, there were three main issues which required to be resolved. Firstly, there was Tarmac's concern as to the specification of the bridge, that is, such things as its load-bearing capacity and approach gradients. Secondly, Tarmac had concerns about noise on the bridge caused by heavy vehicles going over it. Thirdly, Tarmac asked if access could be created south to the M8 either instead of, or as well as, from the A89. These matters were all dealt with, the last point about access to the M8 being dropped. Tarmac never asked about the specific positioning of the bridge. It only ever asked about load-bearing capacity and approach gradients in relation to the bridge itself.

[33] In cross-examination, he was taken to the Notice of Objection. He accepted that it was fair to say that Network Rail was on notice that Tarmac's first concern was to protect its landholding, so as to allow it to work the reserves in the quarry in the medium to long term. Tarmac was concerned to protect its business operations but willing to enter into an agreement which would protect the operational viability of the quarry. That was Tarmac's key concern. The notice of objection also mentioned health and safety and 24 hour access for that purpose. The previous bridge had bridged over the quarry access track. He accepted that the purpose of the new road and bridge was to replace the current access to and from

the quarry. He agreed that Tarmac was concerned with the long-term effect on its business and with maintaining access while the works were being carried out. This included 24 hour access for health and safety purposes. He also accepted that Tarmac wished to ensure that vehicles could access the quarry. It wanted to maintain such access and egress as was available to it at the time. However, what he meant by access and egress was access and egress over the railway bridge. He understood that Tarmac wished access to and from the quarry. He accepted that Tarmac did not wish future extraction work to be restricted. He did not know whether the road coming over the bridge would connect with the quarry access track. He learned after the works were done that the road and bridge did not connect with the quarry access track. In re-examination he accepted that Work No. 27 was the work required to deal with the access issue. He had no concern with anything to do with access beyond the end of Work No. 27, to the south. Tarmac had never raised any issue about continued access beyond that point, to the south.

### *The witnesses*

[34] It was not suggested on behalf of either of the parties that any of the evidence given by the witnesses was not credible or not reliable. Mr Cowan gave a genuine and clear account of the pursuer's concerns and the understanding it had from the various documents and from the correspondence and exchanges with the defender and its representatives. Ms Gorlov struck me as a very careful and impressive witness who had an extremely clear understanding of the factual and legal issues with which she was dealing. Ms Deveney also gave her evidence in an open and straightforward manner, as did Mr Sheridan. There was no direct conflict of evidence on any particular facts, the differences in the parties' positions

stemming largely from their differing understandings, impressions and interpretations. I therefore accept the factual evidence of the witnesses.

### **Agreed statement of legal principles**

[35] The parties helpfully prepared an agreed statement of the relevant legal principles, derived from the decision of the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another* [2015] UKSC 72; [2016] AC 742. The relevant principles derived from that case are discussed below.

### **Submissions for pursuer**

[36] The submissions made on behalf of the pursuer can briefly be summarised as follows. The implied terms were both necessary in order to give the contract business efficacy, and so obvious that their existence went without saying. The evidence disclosed that the Undertaking was entered into in order to secure the withdrawal of the pursuer's Notice of Objection to the Bill. At all times, in all correspondence and in all discussions, the pursuer made clear that its objective was twofold: (a) to maintain the operational viability of the quarry; and (b) to ensure that the new road and bridge to be created provided a replacement for the previous access/egress route to and from the quarry. Conversely, at no time, in any piece of correspondence or discussion in respect of which evidence was led, did the defender say to the pursuer that what was sought, namely a replacement of the current access route giving continued access to Blairhill Quarry, was beyond the scope of Work No. 27, nor that any such access route would require to be provided by the pursuer, at the pursuer's cost. On the contrary, the defender led the pursuer to believe, by its words and actions, that its objections were being met.

[37] The Undertaking was not effective without the implication of the terms which the pursuer sought to imply. Its purpose was to meet the pursuer's objections. The Undertaking itself provided expressly, in bold, in the heading to Clause 2, for the "Specification of new access road and bridge to be created at Blairhill Quarry, Blackridge, West Lothian" (emphasis added).

[38] On any view, without the implication of the terms which the pursuer sought to imply, the Undertaking lacked commercial or practical coherence. The pursuer was persuaded to withdraw its Notice of Objections on the basis of the assurances given to it by the defender, evidenced by the various exchanges of correspondence and discussions, culminating in the provision of the Undertaking. Put another way, the provision of the Undertaking to provide a bridge, built to a high specification, and access road which leads to a farm, but not to the pursuer's business asset, made no commercial or practical sense. There was no commercial or business common sense in the result being that the pursuer's access to the quarry was cut off.

[39] Notional reasonable people in the position of the parties at the time at which the Undertaking was provided would have understood the Undertaking to have contained the terms which the pursuer sought to imply. That was the commercially sensible approach. Conversely, the approach favoured by the defender was unreasonable, and not commercially sensible. The defender's defence to the action was predicated, or at least very heavily reliant, upon the provision by the defender to the pursuer of Sheet No. 22. That document was a plan which, on the defender's evidence, detailed the scope of the works to be carried out in terms of the Bill (Work No. 27), and from which the defender asserts the pursuer ought to have known that the provision of what the pursuer sought, namely the provision of a road which allowed access to and egress from the quarry, by way of

replacement of the current arrangements, was outwith the scope of the works. The defender had failed to address the following issues: (i) nowhere on Sheet No. 22 was it stated that Work No. 27 would result in the pursuer's access to the quarry being cut off, with no replacement being provided, yet the quarry access track was shown on it, evidencing that the defender was, or ought to have been, well aware of it; (ii) Sheet No. 22 was provided to the pursuer in or prior to 2006, at an early stage of proceedings, when the pursuer understood that what it intended to show were the areas (or plots) of land to be affected by the proposed compulsory purchase to be effected by the defender; (iii) the pursuer's Notice of Objection, and all correspondence, discussions and exchanges discussed in evidence which followed thereon, expressly stated and acknowledged that the pursuer's objection was based upon its desire to maintain the operational viability of the quarry, and the need to secure replacement access/egress to and from the quarry, for that purpose; and (perhaps most importantly) (iv) at no time following its receipt of the Notice of Objection, or in any document or discussion, did the defender say to the pursuer that the access road which they sought was outwith the scope of the works provided for in the Bill and that, in the event that such access was sought, the relevant works required to be instructed, and funded, by the pursuer.

[40] On the contrary, the assurances and, ultimately, the Undertaking given by the defender referred expressly to the provision of an access road "to Blairhill Quarry".

The pursuer's objection was to be met by the defender placing the pursuer in the same position as it had been in prior to the carrying out of the works. It followed that the terms sought to be implied were reasonable and equitable, standing the clear objectives which the pursuer set out, repeatedly, in clear and simple terms, to the defender; and in view of the assurances which the defender gave to the pursuer. Importantly, they were both reasonable

and equitable standing the defender's failure, at any stage of proceedings, to state to the pursuer that the provision of an access road which provided access to and egress from the quarry, ensuring its operational viability, was outwith the scope of the works. Reference was made to *Chitty on Contracts*, 32<sup>nd</sup> ed., paragraphs 14-002 - 14-007.

[41] Reliance was placed on the evidence of Mr Cowan and on his explanation of the content of the various items of correspondence, documents and other exchanges between the parties. The pursuer did not envisage that a connecting track would be required between the Bogend Farm access track and the quarry access track. The pursuer's expectation was simply that having come over the bridge heading south, vehicles would continue to have access to the quarry. The form of access to the quarry would be a replacement for what had gone before.

[42] In relation to the defender's witnesses, Alison Gorlov was unduly focused on the works said to be authorised by the Bill and, in particular, Work No. 27. In her evidence, she failed properly to recognise the fundamental issues raised by the pursuer's objection, and the steps that were necessary in order to meet it. It was redolent of the absurdity of the defender's position that, in order to meet an objection raised by the pursuer that access and egress to the quarry was being severed, and required to be maintained to secure its operational viability, the construction of a bridge which did not provide access would have been sufficient to meet that objection. Carol Deveney accepted that the pursuer's concern was far wider than simply the specification of the bridge. On her evidence, in terms of the correspondence, meetings, discussions and documents, the pursuer's objectives, namely the maintenance of the operational viability of the quarry and the obtaining of a replacement access/egress to and from the quarry, were made absolutely clear to, and fully understood by, the defender. Keith Sheridan accepted that the pursuer's concerns were far wider than

the issues identified in his witness statement. The pursuer's objectives, and the defender's knowledge and acceptance of those, was absolutely clear from the documents. The access to be provided was to and from Blairhill Quarry.

[43] Evidence had therefore been adduced which bore upon the purpose of the Undertaking, viewed objectively, and upon parties' knowledge of the circumstances in which the words contained within it were used. That is the context in which the pursuer's objection was withdrawn, in exchange for the grant of the Undertaking. Understood objectively, that could only mean that the pursuer's concerns had been satisfied by the defender.

[44] Not only did the defender fail positively to advise the pursuer of the fact that the provision of the access road to replace that which had gone before was said to be outwith the scope of the works; but numerous statements were made, on various occasions and by various means, which clearly indicated that the defender, in fact, intended to provide a new bridge and access road to the quarry. No indication was given that what was to be provided was something other than what was suggested by the ordinary use of those words.

[45] The approach contended for by the pursuer was a commercially sensible one, in contrast with the defender's approach, which did not produce a sensible result. A further difficulty for the defender was that its contention focused entirely on documentation provided to the pursuer at an early stage, prior to the lodging of its Notice of Objection, which the Undertaking was produced to meet. It was open to the court to conclude that there had simply been a mistake by the defender in relation to where the bridge connected.

[46] Accordingly, the answer to each of the questions before the court should be in the affirmative.

### Submissions for the Defender

[47] In summary, the submissions for the defender were as follows. The questions before the court should be answered in the negative. The underlying principles to be applied to implication of contract terms are those identified in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another*, principally in paragraphs 18 to 21. All of the agreed legal principles were of relevance to the determination of the two questions before the court. However, the first three agreed legal principles were of particular application in this case. They were that: (i) a term will be implied into a detailed commercial contract only if that is necessary in order to give the contract business efficacy or so obvious that it goes without saying (*Marks and Spencer* at paragraphs 18 and 21); (ii) a term will not be implied if the contract is effective without it (*Marks and Spencer* at paragraphs 18 and 21); and (iii) a term can only be implied if, without the term, the contract would lack commercial or practical coherence (*Marks and Spencer* at paragraph 21). The unifying theme was that the implication of the precise implied terms pleaded must be necessary to make the Undertaking effective, otherwise they will not be implied.

[48] The starting point for addressing whether any term was to be implied was what the parties had expressly agreed in the Undertaking (*Marks and Spencer* at paragraph 28). The Undertaking was given generally in the context of the Bill. It made repeated references to Work No. 27 and it referred to Parliamentary plans; Sheet No. 22 was the relevant Parliamentary plan. The Undertaking also expressly narrated the terms of eight specific commitments which the pursuer had sought. In each case, by way of response, there was narrated the specific Undertaking given by the defender. Any argument that there was in some way a significance in the words “to be created at Blairhill Quarry” in the heading to Clause 2 was entirely misconceived. There was nothing in the evidence of any witness to

suggest that Work No. 27 was considered by any party to be located in Blairhill Quarry itself. There was no scope for seeking to extend what was covered by Clause 2 to encompass or touch upon something other than Work No. 27.

[49] Clause 3 was expressly headed “Health and Safety”. If the pursuer had ever considered that the part of the Undertaking in respect of access for health and safety purposes had been breached it could have, and no doubt would have, sued in respect of such breach, given the importance of health and safety obligations.

[50] Clause 4 expressly related solely to Work No. 27 in both its heading and its terms. Clause 5 simply expressly recorded “For the avoidance of doubt” the pursuer’s right to object to any amendment to the Bill.

[51] From the foregoing analysis, it was plain that the Undertaking was entirely effective on its own express terms. It lacked nothing in any coherence of any kind. The issue of any connecting road or track did not in any way arise in respect of the terms of the Undertaking. The Undertaking was entirely commercially and practically coherent in its express terms. The fact that the location and extent of Work No. 27 meant in practice that a connecting road or track remained to be constructed did not in any way deprive the Undertaking of its effectiveness. The pursuer owned the land on which any such road or track could be built. In terms of commercial coherence the cost of any such construction would fall to the pursuer, which was an entirely coherent position (even if the pursuer now wishes it were otherwise). In contrast, forcing the defender to construct any connecting road or track, and to bear the cost thereof, would take the defender entirely outside the terms of the framework in the Bill, which provided only for Work No. 27. That would be both practically and commercially incoherent. Moreover, the fact of there being two alternative contractual

solutions, one of the pursuer bearing the cost of a connecting track or road and the other of the defender doing so, pointed to the proposed implied terms not being implied.

[52] The Undertaking being entirely effective on its own express terms alone was sufficient for the defender to succeed in these proceedings. There were however other factors beyond the Undertaking's own terms which supported that same conclusion that it was not possible to imply the implied terms. The Undertaking was negotiated by experienced professionals on each side, including solicitors for the pursuer and a parliamentary agent for the defender. Mr Cowan also gave evidence that he had engaged specialist roads consultants to assist the pursuer in its task of objecting to the Bill. In this case the matter in issue was the implication of terms intended to compel the defender to build a connecting road or track between the Bogend Farm access track and the pursuer's quarry access track (all to an unstated specification, at an unspecified cost and in an unspecified location on the pursuer's land over which the defender has no rights). It could not be inferred with confidence that the parties must have intended to make provision to that effect when they plainly omitted to do so in what was a carefully drafted contract by well-qualified and experienced professionals.

[53] Although not necessary for the defender to succeed, the evidence also showed that the implied terms would make the Undertaking commercially and practically less coherent. There would be no specification of any connecting road or track. The pursuer's implied terms were tantamount to trying to imply an engineering contract into the Undertaking. Moreover, the evidence demonstrated the width of the scope for disagreement on this issue. Mr Cowan in his evidence accepted that the pursuer itself had been able to construct, and had already constructed, a connecting road or track, which has as a purpose the removal of rock from the pursuer's quarry. Yet Mr Cowan referred to the fact that if the pursuer

wished to carry out any significant operations at the quarry, it would be necessary to construct a track which is capable of carrying significantly higher volumes of traffic and greater weight of vehicles. Just what such a specification of track would have been was entirely unknown. The absence of any specification would result in the Undertaking, if it contained the implied terms, being incoherent both commercially and practically.

[54] Similarly the cost of construction of any connecting road or track would be unknown. Without the implied terms it was clear that the obligation to construct the connecting road or track, and therefore the obligation to bear the resultant cost, lay on the pursuer. It was a much more coherent position, both commercially and practically, that the party for whose benefit the road or track would be and on whose land it would be constructed should bear the unknown cost of constructing it. That party was in a much better position to balance the issues of cost and benefit. It would also avoid the obvious scope for disagreement over betterment as against the quality and standard of the previous quarry access track. Similar considerations applied as to where exactly any connecting road or track was to be built. The pursuer was in a much better position to judge where it perceived the benefits and dis-benefits of alternative locations and routes for any connecting road or track to lie. Particular ground conditions at particular spots, in what was boggy ground, would plainly be a salient factor. Mr Cowan stated that the works would not be straightforward as the ground between the quarry access track and Bogend Farm access track was very boggy. There would be no provision in the Undertaking as to access to, and possession of, whatever would become the required parts of the pursuer's land for the purpose of construction itself and for any necessary working compounds. Ms Gorlov gave uncontradicted evidence in her cross-examination that planning permission was likely also to be required. There was plainly no provision in the implied terms to deal with that. These

factors were relevant not only to the issue of commercial and practical coherence but also to the other aspects of the test for implication of terms.

[55] The evidence that the pursuer had indicated in the course of objecting to the Bill that the pursuer was interested in maintaining access to its quarry for operational purposes, and that the defender understood this, had no bearing on the questions before the court as to whether the pursuer's particular implied terms were to be implied. As the Undertaking was effective without the implied terms and the implied terms made the Undertaking less coherent, reasonable people in the position of the parties would not have agreed to the implied terms. In any event, should any weight be given to such matters they would be outweighed by the fact that the evidence established that the pursuer never at any point prior to the Undertaking raised the issue of any form of connecting road or track being required by it. Standing the detail which the pursuer, and ultimately the Undertaking, went into on the specification of Work No. 27, it stretched the bounds of credibility that reasonable people in the position of the parties would have agreed to the bare implied terms being contained within the Undertaking in the circumstance where the pursuer had never even troubled to seek any undertaking in relation to any connecting road or track.

## **Decision and reasons**

### *Introductory observations*

[56] The pursuer repeatedly made clear its desire for continued access to allow the quarry to remain viable and operational, as well as that it required 24 hour access for health and safety reasons. It is, however, equally plain that a requirement for direct access to the quarry access track, either straight from the new road and bridge or by means of a connection with the Bogend Farm access track, was not expressed in specific terms to the

defender. When one looks at the exchanges between the parties, this point appears almost to be the elephant in the room.

[57] Of course, the reason for the present action and the basis upon which it proceeds is that the Undertaking itself does not make provision to deal with the access requirements desired to be implied by the pursuer. It might therefore be said that the pursuer is the author of its own misfortune in failing to have the Undertaking encompass what it says was its key specific concern. But I prefer the view that Mr Cowan and the representatives of the pursuer genuinely felt, and had some grounds for so feeling, that the pursuer's key concern had repeatedly been made clear. However, the evidence amply demonstrates that the parties had different understandings of what was meant by the concept of the continuation of the means of access to the quarry.

[58] The defender was seeking to construct a railway line. The railway line would run east to west, and at right angles across the existing joint track. To deal with the effect of the railway line being put in place, there were, at least in theory, two possibilities. One was that the railway line would run up and over a bridge, rather than along the ground. The alternative was to build a road and bridge over the railway line. There appears never to have been any suggestion of the former course. Work No. 27 specifically stated that it "includes a bridge over the railway" so the chosen method, the latter option, was never in any doubt. The former option would have left the joint track unsevered, continuing to run, as it had done when there had previously been a railway line, under the bridge. The latter option necessarily involved a road and bridge that would rise up from ground level on either side of the railway line. What was, on the evidence, foremost in the mind of the defender, was in essence how it would deal with the main effect of installing a railway line on the ground, and severing the track, which was to put in place a road and bridge over it.

From the defender's perspective, the pursuer's position was open to the interpretation that if the new road and bridge gave access to the pursuer's land, that would resolve the pursuer's objection. That view on the part of the defender can be seen as having been bolstered by what appears to be the pursuer's apparent focus on particular issues with the specification of the road and bridge, for the purposes of carrying heavy-duty vehicular traffic to and from the quarry. Importantly, in my view, the pursuer's engagement with the issues about specification makes clear that the pursuer understood that traffic would come across the bridge, rather than under it, as had been the earlier position.

[59] The defender's understanding was further bolstered by the fact that documents were issued setting forth the nature and extent of the works to be carried out (in particular Work No. 27 and Sheet No. 22), which on a reasonable understanding of their terms dealt with the construction and placement of the road and bridge and did not include the connection which the pursuer desired. In addition, no point was raised by the pursuer in any of the numerous exchanges as to the positioning of any connection between the road, as it exited south from the bridge, and the quarry access track. On the basis of the exchanges between the parties, the defender could readily be forgiven for concluding that any such connection, requiring to be on the pursuer's land, was not a matter in which it required to become involved; rather, dealing with the fact that the existing track was to be severed by a railway line by putting a road and bridge over the railway line, meant that the defender could consider that it had resolved the difficulty.

[60] I make these points by way of introduction and in order to seek to understand how it came to be that the problem in this case arose. However, the question of the subjective intentions of the parties and whether or not they had, by the language they used, agreed on what work was to be done is, of course, not the issue with which the court is faced; this is

not an action in which rectification is sought. Rectification is a means of giving effect to the parties' actual intentions, commonly as manifested in a prior agreement. Instead, the central matter upon which I require to focus is the application of the legal test for the implication of terms into a contract. That exercise is designed to give effect to the presumed intentions of the parties. It is about what notional reasonable people in the position of the parties at the time of contracting would have agreed. In that regard, the parties jointly identified the key legal principles to be applied.

### *The key legal principles*

[61] In *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another*, Lord Neuberger of Abbotsbury PSC (with whom Lord Sumption and Lord Hodge JJSC agreed), drew the well-established distinction between, on the one hand, terms implied by law and, on the other hand, terms "implied into a particular contract, in the light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made" (paragraph 15). That case concerned, as does the present case, the latter type of implied term. Lord Neuberger then (at paragraphs 16-21) cited earlier seminal authorities on implied terms and then the succinct summary by Lord Simon in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283, of the five conditions to be met for the implication of a term into a contract. Lord Neuberger added in various observations made by Bingham MR (as he then was) in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 481, and then went on to add six further comments of his own. Taken together, and read in the context of the earlier authorities cited by Lord Neuberger, these passages set out the key principles now to be applied in respect of implication of terms. The five separate conditions mentioned in the *BP*

case were described by Lord Neuberger as “cumulative”. He also commented that it is questionable whether the first condition added anything and noted that the second and third conditions could be alternatives, in the sense that only one of them needs to be satisfied. In the present case, the defender places no particular reliance on any alleged failure to meet the fourth or fifth condition. Accordingly, the central points for present purposes are the potentially alternative conditions two and three, which I discuss further below. In addition to these two elements of the test, there are also principles which apply to the approach to be taken, including that the starting point is construing the express words of the contract (*Marks and Spencer* at paragraph 28).

### *Application of the key legal principles*

#### *Construction of the Undertaking*

[62] I now deal in turn with the particular aspects of these key principles which I consider to be of importance in the present case. I begin by construing the express words in the Undertaking. In Clause 1.1, under the heading “Interpretation”, it states that “references to the new access road and bridge are to Work No. 27”. In Clause 1.2, it states that “unless the context otherwise requires, words and expressions to which a meaning is assigned by the Bill have the same respective meanings”. In the Bill, Work No. 27 was expressly described as a “realignment of the Bogend Farm Access Road” between specified points and, as I have noted, that it “includes a bridge over the railway”. Work No. 27 did not include a connection to the track which led to the quarry, whether that was a connection directly after the exit of the road south from the bridge or between the Bogend Farm access track and the quarry access track.

[63] The Undertaking states in the heading of Clause 2: "Specification of new access road and bridge to be created at Blairhill Quarry, Blackridge, West Lothian". I accept that there is potential for confusion in the reference to "at Blairhill Quarry" but the definition of the new access road and bridge as being Work No. 27 brings one back to the meaning of that term as stated in the Bill. Work No. 27 was plainly not going to be located in or beside the quarry itself.

[64] In Clause 2, the Undertaking sets out seven commitments sought by the pursuer, each under the heading "Commitment sought". Apart from the seventh of these, the commitment is followed by a paragraph headed "Undertaking", which sets out the aspect of the Undertaking which relates to that particular commitment. As is apparent from the heading of Clause 2, noted above, these matters deal with issues of specification of the new access road and bridge, that is, such things as vehicle loading, width and design of the bridge and approaches, gradients, and road and bridge surfacing. The last of the seven commitments, dealing with inspection, maintenance and repair, is met with a "Response" that the road will become a public road. In other words, no undertaking is given on that matter. I accept the defender's submission that this fact makes plain that the parties did not have an objective common intention at the time of the Undertaking of giving to the pursuer anything and everything that the pursuer sought. I also accept the defender's submission that each of the Undertakings given in Clause 2 was itself given, either expressly or by obvious implication, specifically in relation to Work No. 27. Clause 2 contains nothing which encompasses or touches upon anything other than Work No. 27.

[65] Clause 3 is headed "Health and Safety". The commitment sought was that the pursuer would have 24 hour access to Blairhill Quarry. The undertaking given in response was that the defender will not at any time prevent the pursuer from gaining 24 hour access

to or egress from the quarry and shall ensure that its contractors are likewise bound by this obligation. As the defender submitted, there has been no suggestion that Clause 3 has ever been breached, but if the pursuer considers that it has been breached then the appropriate remedy is not that sought in the present case.

[66] Clause 4 is headed “Status of Work No. 27”. It contained an undertaking that, if and in the event that the Bill was amended so that Work No. 27 was not a public right of way, the defender would grant the pursuer and its successors in title as the owners of Blairhill Quarry

“a servitude right of access for pedestrians and vehicles, including heavy vehicles, along Work No. 27 between its junctions at either end with the access track from the A89 to Blairhill Quarry and Bogend Farm, to and from Blairhill Quarry for the purposes of its quarrying business”.

Once again, this part of the Undertaking is tied to Work No. 27.

[67] Clause 5 merely preserves the right of the pursuer to object to any amendment of the Bill that the pursuer considered to adversely affect its interests in any land.

*The second condition*

[68] The second of Lord Simon’s five conditions is that the term must be necessary in order to give the contract business efficacy, so that no term will be implied if the contract is effective without it (*Marks and Spencer* at paragraphs 18 and 21). The meaning of the expression “business efficacy” is explained by Bowen LJ in *The Moorcock* (1889) 14 PD 64, 68:

“In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties...”

Another way of putting this aspect of the test was described by Lord Clarke of Stone-cum-Ebony in *Marks and Spencer* (paragraph 77) as

“whether it is necessary to make the contract work: see the detailed discussion by Lord Wilberforce in *Liverpool City Council v Irwin* [1977] AC 239, 253-254.”

In that case, Lord Wilberforce stated (at 253) that

“In other cases, where there is an apparently complete bargain, the courts are willing to add a term on the ground that without it the contract will not work - this is the case, if not of *The Moorcock* (1889) 14 PD 64 itself on its facts, at least of the doctrine of *The Moorcock* as usually applied.”

[69] In *Marks and Spencer*, Lord Neuberger, referring to the test of “business efficacy”, considered that a more helpful way of putting the point was that suggested by Lord Sumption in the course of argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

[70] The proper approach is not simply to take the express terms of the contract and ask the question whether these are effective in the sense that they can work. Implication of terms does not succeed only where without them the contract would be completely inoperable. As was made clear by Bowen LJ in *The Moorcock*, what is being considered is an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. This involves, as Bowen LJ went on to state, considering what each party knew the transaction to be. Thus to ask whether, without the implied terms, the contract would work, is not simply to raise that point in the abstract; it is to ask whether it would work, in the sense of being commercially and practically coherent, in light of the presumed intention of the parties. It is therefore relevant, in an issue as to implication of terms, to have regard to the surrounding circumstances as known to both parties at the time of the contract (*Marks and Spencer* paragraph 27). I would add that the court is dealing here with the presumed intention of the parties, having regard to their shared knowledge of the surrounding circumstances and viewing them as notional reasonable people. This is therefore an

objective exercise and not one which relies upon the subjective intentions or interests of either party. The shared knowledge in this case includes the contents of the various documents which were exchanged. While there was some evidence about what could perhaps be described as pre-contractual negotiations, it did not add materially to the evidence about the contents of these documents (including such things as the Notice of Objection and the Parliamentary witness statements) which plainly were not themselves pre-contractual negotiations.

[71] On behalf of the pursuer, it was submitted that the defender's witnesses had accepted that they knew that the pursuer's consent would be given only if, after the works had been completed, the connection to the quarry access track remained in place. I do not consider this proposition to be well founded. It does not reflect the evidence of Ms Deveney that she understood the access road should simply lead on to the pursuer's land. Nor does it reflect the evidence of Ms Gorlov, the gist of whose evidence was that the whole focus was on the works provided for in the Bill, that is, Work No. 27. Mr Sheridan's concern was that Work No. 27 would provide replacement access over the railway line. As I have noted above, that appears to have been, for the defender, the primary issue.

[72] It was also submitted for the pursuer that its understanding was not that a track connecting the quarry access track to the Bogend Farm access track needed to be constructed. Rather, it was just that the road and bridge would connect with the track and allow access to the quarry. There are difficulties with this contention. Firstly, it is merely the subjective view of the pursuer and there is no basis for considering that a notional reasonable person in the position of the parties would have understood matters on that basis (particularly having regard to the contents of Work No. 27 and Sheet No. 22). Secondly, and related to the first point, the pursuer cannot reasonably rest on so broad an assumption,

without having considered with appropriate care the contents of the documents just referred to, and the practicalities of connecting with the quarry access track. In very simple terms, if a road and bridge were to run north to south, across the railway line running east to west, the structure would require to rise up over the railway line and come back down. That raises the obvious and immediate issue of whether the road leaving the bridge and running south could connect with the joined track, and, if not, then whether it would connect with either the Bogend Farm access track or the quarry access track. The pursuer appears not to have applied its mind to the question of the extent of the road and bridge and whether the road would extend southwards beyond what had been the point at which the tracks joined, and with what consequences. Work No. 27 was described in the Bill as including a road,

“being a realignment of the Bogend Farm Access Road between Main Street (A89) and Bogend Farm...passing southwards over the railway...and terminating at a point in Bogend Farm...”.

Sheet No. 22 shows the beginning and end of the road as described in Work No. 27. Even a fairly cursory examination of Sheet No. 22, when compared with, for example, the plan prepared in 1999 by the pursuer for planning permission purposes, shows that after the road exits south from the bridge it connects with the Bogend Farm access track and that it does so quite some distance to the south beyond where that track had formerly joined with the quarry access track. Notional reasonable people in the position of the parties, knowing that Work No. 27 and Sheet No. 22 stated what was to be done, could not sensibly have assumed that the implied terms required to be part of the contract in order to give it commercial or practical coherence, for that would mean that, as the road exiting south from the bridge connected with the Bogend Farm access track, another connecting track would require to be constructed. Questions would then arise as to where, how (given that the land was owned by the pursuer), to what specification, at what cost to which party, and subject to what

constraints such as planning permission, any further connecting road or track would be constructed. There was simply no evidence to the effect that the road coming from the bridge, at the south, could have been made to connect to the joined track. I was left with no basis for concluding that such a connection with the joined track could have been a presumed intention of both parties in the circumstances.

[73] I am satisfied that the Undertaking is effective, on an objective assessment of its terms and having regard to the shared knowledge and presumed intention of the parties, as notional reasonable people. It works without the implied terms. It does not lack commercial or practical coherence. In terms of commercial coherence, the Undertaking makes clear commercial sense. An objector, the pursuer, had raised various issues about the impact of the works to be done under the Bill. The Undertaking dealt with the matters caused by Work No. 27, the key works specified in the Bill, being carried out. It addressed the issues raised by the pursuer, as objector, by listing each commitment sought and giving the defender's undertaking or response. If these were acceptable to the pursuer, as the pursuer had confirmed, a commercial deal could then be done which rendered otiose the Parliamentary objection procedure. On the face of the Undertaking, the pursuer got what it wanted in terms of the specification of the new access road and bridge and a commitment which met its requirement for 24 hour access to the quarry. The new road and bridge would accommodate quarry vehicles carrying heavy loads. The scope and effects of the Undertaking were clear.

[74] Another aspect of commercial coherence is that the Undertaking includes express terms of a similar nature to the proposed implied terms, in the sense that it identifies where, under reference to Work No. 27, the road over the bridge would exit: on the Bogend Farm access track. Moreover, the Undertaking did not involve itself with matters concerning the

land owned by the pursuer on which any connecting road or track could be built. It did not engage with questions of where, how, at what specification, at what cost to which party, and subject to what constraints such as planning permission, any further connecting road or track would be constructed. It made clear commercial sense not to engage with these hitherto unventilated issues. In terms of practical coherence, similar points can be made. The Undertaking was given in the context of works to be done under a Bill, to which an objection had been taken, and it sought to identify the grounds of objection and the undertakings and responses given by the defender. It was a practical solution to resolving the objection. Limiting the Undertaking to the matters noted above was entirely appropriate and practical.

[75] While the Undertaking is not particularly lengthy, there can be little doubt that it is carefully drafted. It is true that it was drafted principally by the defender's solicitor, but drafts were exchanged and the pursuer's legal team considered and consented to the terms which ultimately formed the Undertaking. It cannot be inferred with confidence that the parties must have intended to make provision in the terms contended for by the pursuer when they plainly omitted to do so in what was a carefully drafted contract between what appear to be experienced professionals and when the parties had clearly directed their minds to the specific points listed and dealt with in the Undertaking.

[76] My conclusion therefore is that the Undertaking is effective on its own express terms. The second condition is not satisfied. This conclusion applies in respect of each of the proposed implied terms.

*The third condition*

[77] However, there are also other aspects of the “strict constraints on the exercise of this extraordinary power” to imply terms (to quote from Bingham MR, as cited in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another*, paragraph 29) which are not satisfied.

[78] As a potential alternative to the element of the test just discussed, the third condition for a term to be implied is that the term must be so obvious that it goes without saying that it forms part of the contract (*Marks and Spencer* at paragraphs 18 and 21). This is again a matter to be determined objectively. The condition derives from the famous articulation by MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, at 227, of the officious bystander suggesting some express provision to form part of the parties’ contract and their reaction to that suggestion being that of course it did. It is not the presumed reaction of the actual parties to the hypothetical officious bystander’s suggestion that is relevant; it is the response of notional reasonable persons in their position. Standing the clear language, structure and meaning of the Undertaking, and the parties’ shared knowledge of the surrounding circumstances, it is simply not possible to see how this condition could be met in respect of either of the implied terms proposed by the pursuer.

[79] When one views the implied terms and seeks to fit them into the carefully drafted Undertaking they do not sit well. The primary reason is that the implied terms entirely fail to deal with essential issues such as, in light of the description of the works in Work No. 27 and Sheet No. 22, where any connection between the quarry access track and the road after it had exited from the bridge was to be situated. The implied terms do not specify that the road was to connect with the joined track. They therefore leave open the possibility (which, on the evidence, seems to have been the only real possibility) of the road connecting with the

Bogend Farm access track so that a connection between it and the quarry access track would become necessary. How that connection was to be constructed and to what specification, what arrangements were to be made between the pursuer and defender allowing the defender to carry out this work on the pursuer's land, and how and when any necessary issues of planning permission would be addressed are not covered by the implied terms. In brief, it cannot be accepted that notional reasonable people in the position of the parties would agree that the carefully drafted, detailed and comprehensive Undertaking should have implied into it two terms which would leave many important questions entirely unanswered. That would be an odd result. Applying the officious bystander test as stated by MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd*, I am quite unable to conclude that notional reasonable people in the parties' positions at the time of contracting, faced with the officious bystander suggesting as express provisions the implied terms now proposed by the pursuer "would testily suppress him with a common 'Oh of course!'" I reach this view in respect of each of the implied terms.

### **Conclusion**

[80] I have a degree of sympathy with the position in which the pursuer finds itself. It plainly thought that the severing of the access track would be remedied and that the existing access route to the quarry would be replaced. But the pursuer appears not to have directed its mind to the specifics of what was being proposed in the Bill or in the Undertaking. Instead, the pursuer accepted a form of words which made commercial and practical sense, but which did not meet its own expectations. What was, on the evidence for the pursuer, "taken as read" by it, was not taken as read by the defender, nor would it have been by a notional reasonable person in the position of the parties.

[81] For these reasons, my answer to each of the two questions posed by the parties is in the negative: the proposed implied terms do not form part of the Undertaking. The result is that I shall repel the pursuer's pleas-in-law, sustain the defender's third and fourth pleas-in-law and pronounce decree of *absolutor* in favour of the defender.