OUTER HOUSE, COURT OF SESSION

[2018] CSOH 77

CA7/18

OPINION OF LORD DOHERTY

In the cause

HIGHLAND WOOD ENERGY LIMITED

Pursuers

against

THE HIGHLAND COUNCIL

Defenders

Pursuers: Jones QC (sol adv), Reekie (sol adv); BTO Solicitors LLP
Defenders: Crawford QC, Haddow; Harper Macleod Solicitors

17 July 2018

Introduction

[1] On about 18 June 2013 the pursuers contracted with the defenders to operate certain heat generation equipment owned by the defenders, and to sell to the defenders the heat generated by the equipment. During 2014 the contract was varied by the addition of further heat generation equipment at other locations. By a notice dated 22 September 2015 the defenders purported to terminate the contract.

[2] In this commercial action the pursuers maintain that the defenders were not entitled to terminate the contract. They say that the termination was wrongful and a material breach of the contract. They seek damages from the defenders for breach of contract. A very

substantial part of the damages sought represents a claim for loss of profits and other consequential losses. In turn, the defenders counterclaim for sums said to be due by the pursuers to the defenders in terms of the contract and for damages for breach by the pursuers of the contract. The action came before me for a debate. The parties entered into a Joint Minute (no 24 of process) agreeing certain documents. By interlocutor dated 15 March 2018 the defenders had been allowed to lodge an affidavit speaking to the origins of certain further documents which were not agreed. They duly lodged an affidavit (no 29 of process) from Ann Hoyland, the Utilities Portfolio Manager for the Scottish Procurement and Commercial Directorate ("SPCD") (a Scottish Government Directorate).

Background

The Framework Agreement

[3] In 2012 the Scottish Ministers ("the Ministers") embarked upon a public procurement exercise to establish a national framework agreement for the provision of biomass energy supply agreements to the Scottish public sector and Scottish third sector bodies. The period of the framework agreement was to be two years from 7 January 2013 with an option to extend for up to two years to 6 January 2017 in single or multiple year extensions. On 31 May 2012 the Ministers published a contract notice relating to the services on the Public Contracts Scotland Portal and in the Official Journal of the European Union (with reference number 2012/S 105-175431). On the same date they issued an invitation to tender ("ITT") for those interested in becoming parties to the framework agreement. The procedure adopted was the open procedure.

[4] On 2 August 2012 the pursuers submitted a tender response to the ITT. The response indicated that the tenderer was "Highland Wood Energy Ltd (HWEnergy)", with company

registration number SC260419. The response indicated that the pursuers would provide the services in accordance with the schedules to the framework agreement and the conditions of contract; that they would submit a tender in accordance with the framework agreement clauses, standard terms of supply, and other schedules; and that they would abide by the framework terms and conditions and the standard terms of supply without alteration.

[5] No framework agreement tender was submitted by HWEnergy Ltd. The company number of HWEnergy Ltd is SC393901. The pursuers and HWEnergy Ltd are related companies.

[6] In December 2012 and January 2013 the framework agreement in relation to the supply of biomass energy supply agreements for the benefit of the Ministers and other public bodies (Framework ref SP-12-003) was entered into between the Ministers and ten framework service providers. In particular, on 14 December 2012 and 14 January 2013 a framework agreement bore to be executed between the Ministers and HWEnergy Ltd. That company was designated as "the Service Provider". The Preamble stated:

> "....
> FOUR On *2 August 2012* the Service Provider submitted its Tender;
>
> FIVE On the basis of the Tender, the Authority has selected the Service Provider, amongst Other Framework Service Providers, to supply the Services under this Framework Agreement;
>
> SIX In accordance with the Public Contracts (Scotland) Regulations 2012, this Framework Agreement establishes Standard Terms of Supply under which Call-off Contracts may be entered into for the supply of Services;
>
> SEVEN This Framework Agreement also includes:
> - a Specification setting out the Services that the Service Provider has undertaken to provide, including Service Levels setting out particular levels of service that the Service Provider has undertaken to meet;
> - Award Procedures prescribing the mandatory procedures for entering into Call-off Contracts; and
> - Management Arrangements for the strategic management of the relationship between the Authority and the Service Provider."

[7] Clause 1 provided:

> **"1. Definitions and Interpretation**
>
> 1.1. In this Framework Agreement unless the context otherwise requires the following terms have the meanings given to them below:
>
> ...
>
> **'Award Procedures'** means the procedures for entering into Call-off Contracts set out at Schedule 2.
>
> **'Call-off Contract'** means any contract for the Supply of Services between a Framework Public Body and the Service Provider entered into in accordance with the Award Procedures and based on the Standard Terms of Supply.
>
> ...
>
> **'Framework Service Providers'** means the following Service Providers
>
> ...
>
> HWEnergy - Fort William
>
> ...
>
> **'Service Provider'** means HWEnergy Ltd
>
> ...
>
> **'Standard Terms of Supply'** means the standard terms and conditions for Call-off Contracts set out in Schedule 4.
>
> **'Tender'** means the tender submitted by the Service Provider to the Authority in response to the ITT dated *2 August 2012.*
>
> ..."

[8] Clauses 3, 8 and 12 provided:

> "**3. Nature of this Agreement**
>
> 3.1. This Agreement is a framework agreement within the meaning of regulation 2(1) of the Public Contracts (Scotland) Regulations 2012. Call-off Contracts are public contracts within the meaning of that regulation.
>
> 3.2. This Agreement is a multi-supplier framework agreement and the service providers that are party to it are the Framework Service Providers. No other service providers are party to the Framework Agreement.
>
> ...
>
> **8. Award Procedures**
>
> 8.1. The Award Procedures may be invoked by any Framework Public Body and Call-off Contracts may be entered into at any time during the period of the Framework Agreement.
>
> 8.2. But the Award Procedures may not be invoked and Call-off Contracts may not be entered into with the Service Provider if:
>
> 8.2.1. the period of the Framework Agreement has expired;

8.2.2. the Service Provider's interest in the Framework Agreement has been terminated; or

8.2.3. the Service Provider's appointment to provide Services to Framework Public Bodies has been suspended in accordance with clause 9.2 (Management Arrangements).

8.3. The Framework Public Bodies and the Service Provider must comply with the Award Procedures and must establish each Call-off Contract without material amendment to the Standard Terms of Supply.

8.4. The Service Provider must maintain the capacity to enter into and perform Call-off Contracts throughout the period of the Framework Agreement.

...

12. Notices

...

12.3. For the purposes of this clause, the address of each Party is:

...

12.3.2. For the Service Provider:
HWEnergy Ltd, Lochaber Rural Complex, Torlundy, Fort William, PH33 6SQ For the attention of: Stuart Reid

…"

[9] Schedule 1 provided:

"**1. General Specification & Requirements**

1.1 Each participating Framework Public Body (Client) and Scottish Third Sector Body (Client) will identify the Service Provider who will provide their Energy Supply Agreement by means of a mini-competition which all the appointed Framework Service Providers will be invited to participate in.

...

2. Call-off Contracts

2.1 Call-off Contracts will be established by Clients running a mini-competition with all of the Framework Service Providers. The terms of the Call-off Contract will be identified through the mini-competition and will be appropriate and proportionate to the specific Call-off Contract requirements.

...

21. Framework Terms and Conditions

21.1 The Service Provider is required to accept Scottish Procurement's Framework Terms and Conditions. The intention of the Framework Agreement is to maintain consistent Terms and Conditions across the successful Service Providers. Limited and reasonable changes ***may*** be considered and proposals must be provided as part of the tender

submission. The absence of any such proposals will be deemed to be full acceptance of the Framework Terms and Conditions. For the avoidance of doubt, any issues raised at a future date will be interpreted as a resubmission of the tender and therefore deemed non-compliant.

...

23. Service Levels

23.1 The service levels which will apply for all Call-off Contracts are detailed in Schedule 3 of the Framework Agreement. The intention of the Framework Agreement is to maintain consistent Terms and Conditions across the Framework Service Providers. Limited and reasonable changes ***may*** be considered and proposals must be provided as part of the mini-competition stage.

..."

[10] Schedule 1 Part 2 was headed "HWEnergy Ltd Tender Response" and bore to summarise elements of a tender response attributed to that company. In fact, the tender response referred to had been the tender response submitted by the pursuers. Schedule 2 set out the mini-competition award procedure. Schedule 3 Part 1 set out the mini-competition project brief. Schedule 3 Part 2 set out service levels. Schedule 4 contained standard terms of supply:

"**A.GENERAL PROVISIONS**

1 Definitions and Interpretation

1.1 In these Standard Terms of Supply unless the context otherwise requires all defined terms shall have the same meaning as terms defined in clause 1 of the Framework Agreement, however the following terms shall have the meanings given to them below:

...

'Call-off Contract' means these standard terms of supply which form a Biomass Energy Supply Agreement between the Client and the Service Provider.

...

'Default' means any material breach of the obligations of the relevant Party (including but not limited to fundamental breach or breach of a fundamental term) or any other material default, act, omission, negligence or negligent statement of the relevant Party in connection with or in relation to the subject-matter of the Call-off Contract and in respect of which such Party is liable to the other.

...

'Framework Agreement' means the framework agreement between the Authority and the Service Provider from which these Standard Terms of Supply are derived.

...

'Services' means the Biomass Energy Supply Agreement services as specified in Schedule 1 and 3 to the Framework Agreement.

'Service Levels' means the service levels identified as such in the Specification and service levels in Schedules 1 and 3 to the Framework Agreement.

...

'Standard Terms of Supply' means these terms and conditions as set out in Schedule 4 to the Framework Agreement.

...

1A Nature of the Call-off Contract

1.A.1 This Call-off Contract is a public services contract within the meaning of regulation 2(1) of the Public Contracts (Scotland) Regulations 2012.

...

3 Entire Agreement

3.1 The Call-off Contract constitutes the entire agreement between the Parties in respect of the matters dealt with herein. The Call-off Contract supersedes all prior negotiations between the Parties and all representations and undertakings made by one Party to the other, whether written or oral, except that this clause shall not exclude liability in respect of any Fraud or fraudulent misrepresentation.

3.2 In the event of, and only to the extent of, any conflict between the clauses of the Framework Agreement, the Schedules, these Standard Terms of Supply, and/or any document referred to in these Standard Terms of Supply, the conflict shall be resolved in accordance with the following order of precedence:

(a) the clauses of the Framework Agreement, with the exception of Clause 43 of the Terms of Supply, as amended at Call-off Contract, which shall take precedence in Call-off Contracts;

(b) these Standard Terms of Supply;

(c) any other of the Schedules; and

(e) any other document referred to in these Standard Terms of Supply.

...

B. CALL-OFF CONTACT (BIOMASS ENERGY SUPPLY AGREEMENT)

8. Services under the Call-off Contract (Biomass Energy Supply Agreement)

8.1 The Service Provider shall carry out the Services in accordance with the Client's requirements set out in Schedules 1 and 3 to the Framework Agreement.

...

C. **STRATEGIC CONTRACT MANAGEMENT**

13. Contract Performance

The Service Provider shall perform its obligations under the Call-off Contract:

(a) in accordance with the Statement of Requirements and the Service Levels;
(b) in accordance with the particular requirements of the Call-off Contract;
(c) with appropriately experienced, qualified and trained personnel with all due skill, care and diligence; ·
(d) in accordance with Good Industry Practice; and
(e) in compliance with all applicable Laws.

14 Service Levels

The Service Provider shall provide the Services to the Client in a manner which meets or exceeds the Service Levels. The Service Levels are set out in the Specification and service levels in Schedules 1 and 3 to the Framework Agreement.

...

G. CONTROL OF THE CONTRACT

...

39 Waiver

39.1 The failure of either Party to insist upon strict performance of any provision of the Call-off Contract, or the failure of either Party to exercise, or any delay in exercising, any right or remedy shall not constitute a waiver of that right or remedy and shall not cause a diminution of the obligations established by the Call-off Contract.

39.2 No waiver shall be effective unless it is expressly stated to be a waiver and communicated to the other Party in writing in accordance with clause 6 (Notices) .

39.3 A waiver of any right or remedy arising from a breach of the Call-off Contract shall not constitute a waiver of any right or remedy arising from any other or subsequent breach of the Call-off Contract.

40 Amendment

40.1 These Standard Terms of Supply may not be amended save for the necessary information to complete the Call-off Contract.

40.2 Subject to the provisions of this clause, the Client may request an amendment to the Call-off Contract provided that such amendment does not amount to a material change to the Call-off Contract.

...

H. LIABILITIES

43. Liability, Indemnity and Insurance

...

43.5 Subject always to clause 43.1, in no event shall either Party be liable to the other for any:

(a) loss of profits, business, revenue or goodwill; ahd/or
(b) indirect or consequential loss or damage; providing that the Service Provider shall be liable to the Client for additional operational, administrative costs and/or expenses or wasted expenditure resulting from the direct Default of the Service Provider.

...

44 Warranties and Representations

The Service Provider warrants and represents that:

...

(j) the Call-off Contract is established on these Standard Terms of Supply without amendment thereto save for the necessary information to complete the Call-off Contract.

...

46 Termination on Default

46.1 Without prejudice to the Client's other rights of termination under the Call-off Contract or the Law the Client acting reasonably may terminate the Call-off Contract by Notice to the Service Provider with immediate effect if the Service Provider commits a Default and if:

(a) the Service Provider has not remedied the Default to the satisfaction of the Client within 25 Working Days, or such other period as may be specified by the Client, after issue of a Notice specifying the Default and requesting it to be remedied; or

(b) the Default is not in the opinion of the Client, capable of remedy; or

(c) the Default is a material breach of the Call-off Contract.

..."

[11] It is plain that the framework agreement contemplated that a call-off contract could only be awarded to one or other of the framework service providers. It also seems that, for whatever reason, the framework agreement proceeded on the basis that HWEnergy Ltd (rather than, as in fact had been the case, the pursuers) had been the company which had submitted a tender response to the ITT.

The Call-off Contract

[12] By letter dated 26 April 2013 the defenders invited the framework service providers to participate in a mini-competition to provide a call-off contract. The letter indicated that the invitation was "[a]s per the SPCD Framework". Reference was also made to "Framework Ref SP-12-003".

[13] It seems that the pursuers rather than HWEnergy Ltd responded to the invitation of 26 April 2013. They submitted a tender submission dated 17 May 2013. The defenders

evaluated that tender and three other tenders which were submitted. On 7 June 2013 the defenders wrote to the pursuers indicating that their tender had been found to be suitable for award; that the defenders would observe a standstill period of 10 days commencing on the 8 June 2013; and that as soon as possible after the expiry of the standstill period it was intended to award the call-off contract to the pursuers. By letter dated 18 June 2013 the defenders wrote to the pursuers indicating that the standstill period had expired and offered to purchase their requirements from the pursuers on the basis of their tender. The letter continued:

> "...The following documentation will comprise the contract for the requirements:
>
> 1. Each of the documents contained in the tender documentation package issued to Highland Wood Energy Ltd under cover of the Council's letter dated 26th June 2013;
> 2. The tender from Highland Wood Energy dated 17th May 2013 at a total rate of [x] per kWh (based on [y] for Heat and [z] for Maintenance)
> 3. This letter of award; and
> 4. Your confirmatory letter, as requested below.
>
> Please confirm by return that Highland Wood Energy Ltd are in full agreement with the foregoing, and that an agreement for the provision of these requirements is acceptable to Highland Wood Energy Ltd on the basis of the above-referenced documentation.
>
> Please note that I have attached the Form of Agreement, and I would appreciate your counter-signing of this one-page document, retaining a copy for your records and returning a copy, by-e-mail, to me.
> ..."

[14] The documents which accompanied the letter were:

1. A document headed "Biomass Fuel and Servicing – Highland Council Requirements";
2. A document headed "Section 2 Scope of Works";
3. A document headed "Schedule 3 Part 1 – Mini Competition Project Brief for call-off Contract for Highland Council";

4. A document headed "Schedule 3 part 2 Service Levels".

Document 1

[15] Document 1 stated:

> "...
> The Highland Council has a requirement to obtain fuel and plant maintenance as part of the National Procurement contract provision. The Council has a number of sites that will need woodchip or wood pellet as listed below in the Biomass Sites spreadsheet.
>
> In addition to the standard arrangements laid out in the contract, there are other specific requirements that the Highland Council have for the supply service and these are as follows;
> ..."

The document went on to list eight specific requirements. Five of those requirements made reference to clauses in Document 4.

Documents 2 and 3

[16] Document 2 set out the scope of the works. It referred *inter alia* to Document 3. Document 3 followed the form and content of Schedule 3 Part 1 of the framework agreement but had been completed by the pursuers to include the requested information.

Document 4

[17] Document 4 replicated Schedule 3 Part 2 of the framework agreement with adjustments appropriate to the contract made in certain clauses (3.1.4, 4.1.1, 10.1) and with the omission of certain other clauses (3.2, 3.3, 14).

Form of Agreement

[18] The Form of Agreement was duly signed by the defenders on 18 June 2013 and by the pursuers on 21 June 2013. It provided:

> "...
> **FORM OF AGREEMENT - BIOMASS ENERGY SUPPLY AGREEMENT FOR THE HIGHLAND COUNCIL**
>
> THIS AGREEMENT is made between The Highland Council ("the Authority")
>
> And
>
> Highland Wood Energy Ltd ("the Contractor') having his main or registered office at Lochaber Rural Complex, Torlundy, Fort William, PH33 6SQ
>
> together referred to as ("the Parties")
>
> IT IS AGREED THAT:
>
> 1. This Form of Agreement together with the Sections 1 to 4 inclusive are the documents which collectively form "the Call-Off Contract" (as defined in Section 1).
> 2. The Call-Off Contract effected by the signing of this Form of Agreement constitutes the entire agreement between the Parties relating to the subject matter of the Call-Off Contract and supersedes all prior negotiations, representations or understandings whether written or oral.
>
> ..."

The Public Contracts (Scotland) Regulations 2012

[19] At the times when the framework agreement and the call-off contract were entered into the Public Contracts (Scotland) Regulations 2012 ("the Regulations") were in force. The Regulations were revoked by the Public Contracts (Scotland) Regulations 2015 with effect from April 18, 2016, subject to transitional provisions and savings.

[20] The framework agreement was a "framework agreement", the call-off contract was a "public services contract", the pursuers were an "economic operator", and the defenders

and the Ministers were each a "contracting authority", all in terms of reg 2(1)(b) of the Regulations.

[21] Part 3 of the Regulations made provision for the procedures leading to the award of a public contract. These included prior information notices (reg 11), and four contract award procedures *viz.* the open procedure (reg 15), the restricted procedure (reg 16), the negotiated procedure (regs 13, 14 and 17), and the competitive dialogue procedure (reg 18). Part 4 made provision for the selection of economic operators. Part 5 made provision for the award of a public contract. Part 9 made provision for applications to the court to enforce a contracting authority's obligations under the Regulations (reg 47); to grant interim orders suspending *inter alia* the award of a contract or the conclusion of a framework agreement or the implementation of any decision or action taken by the contracting authority (reg 48(1)(a)); or, if satisfied that a decision or action taken by a contracting authority was in breach of reg 47(1) or (2), to order the setting aside of a decision or action, or to amend any document or to award damages to an economic operator (reg 48(1)(b)). Reg 49 made provision for the making of an ineffectiveness order.

[22] Regulations 19, 30 and 47 provided:

> "**19.— Framework agreements**
>
> (1) A contracting authority which intends to conclude a framework agreement must comply with this regulation.
>
> (2) Where the contracting authority intends to conclude a framework agreement, it must—
>
> (a) follow one of the procedures set out in regulation 15, 16, 17 or 18 up to (but not including) the beginning of the procedure for the award of any specific contract set out in this regulation; and
>
> (b) select an economic operator to be party to a framework agreement by applying award criteria set in accordance with regulation 30.
>
> (3) Where the contracting authority awards a specific contract based on a framework agreement, it must—
>
> (a) comply with the procedures set out in this regulation; and

(b) apply those procedures only to the economic operators which are party to the framework agreement.

(4) When awarding a specific contract on the basis of a framework agreement neither the contracting authority nor the economic operator must include in that contract terms that are substantially amended from the terms laid down in that framework agreement.

...

(7) Where the contracting authority concludes a framework agreement with more than one economic operator, a specific contract may be awarded—

...

(b) where not all the terms of the proposed contract are laid down in the framework agreement, by re-opening competition between the economic operators which are parties to that framework agreement and which are capable of performing the proposed contract in accordance with paragraphs (8) and (9).

(8) Where the contracting authority is following the procedure set out in paragraph (7)(b), it must re-open the competition on the basis of the same or, if necessary, more precisely formulated terms, and where appropriate other terms referred to in the contract documents based on the framework agreement.

(9) Where the contracting authority is following the procedure set out in paragraph (7)(b), for each specific contract to be awarded it must—

(a) consult in writing the economic operators capable of performing the contract and invite them within a specified time limit to submit a tender in writing for each specific contract to be awarded;

(b) set a time limit for the receipt by it of the tenders which takes into account factors such as the complexity of the subject matter of the contract and the time needed to send in tenders;

(c) keep each tender confidential until the expiry of the time limit for the receipt by it of tenders;

(d) award each contract to the economic operator which has submitted the best tender on the basis of the award criteria specified in the contract documents based on the framework agreement; and

...

(11) In this regulation, a *"specific contract"* means a contract based on the terms of a framework agreement.

(12) The contracting authority must not use a framework agreement improperly or in such a way as to prevent, restrict or distort competition.

...

30 — Criteria for the award of a public contract

(1) Subject to regulation 18(28) and to paragraphs (6) and (9) of this regulation, a contracting authority must award a public contract on the basis of the offer which—

(a) is the most economically advantageous from the point of view of the contracting authority; or

(b) offers the lowest price.

(2) In order to determine that an offer is the most economically advantageous, a contracting authority must use criteria linked to the subject matter of the contract which may include quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period or period of completion.

...

47 — Enforcement of obligations

(1) The obligation on—

(a) a contracting authority to comply with the provisions of these Regulations, other than regulations 14(2), 30(9) , 32(11), 40 and 41(1), and with any enforceable EU obligation in respect of a contract, framework agreement, dynamic purchasing system or design contest (other than one excluded from the application of these Regulations by regulation 6 , 8 or 33); and

(b) a concessionaire to comply with the provisions of regulation 37(3), is a duty owed to an economic operator.

...

(5) A breach of the duty owed in accordance with paragraph (1) or (2) is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage and those proceedings must be brought in the Sheriff Court or the Court of Session.

...

(7) For the purpose of paragraph (6)(b), proceedings must be brought—

(a) in the case of proceedings seeking an ineffectiveness order (as defined in regulation 49)—

(i) where paragraph (8) applies, within 30 days from the relevant date referred to in that paragraph; or

(ii) in any other case, within 6 months from the date of the contract being entered into or the date of conclusion of the framework agreement; and

(b) in any other case, within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen unless the Court considers that there is a good reason for extending the period within which proceedings may be brought, in which case the Court may extend that period up to a maximum of 3 months from that date.

Buyers' Guide

[23] In conjunction with the conclusion of the framework agreement the Scottish Government prepared a Buyers' Guide for public bodies considering or intending to establish a biomass energy supply agreement using the framework agreement. The Guide listed framework service providers. In both the Guide and the agreement "HWEnergy" (i.e. not Highland Wood Energy Limited or HWEnergy Ltd) was listed as a provider.

Default notice

[24] The pursuers provided services to the defenders under the call-off contract between 2013 and 2015. On 22 September 2015 the defenders gave the pursuers written notice that they had committed Defaults which in the defenders' opinion were material breaches of contract and which entitled them to terminate the contract with immediate effect in terms of clause 46.1 (of the standard terms of supply). The notice purported to terminate the contract.

The debate

Introduction

[25] The principal issue at the debate was whether the standard terms of supply comprising Schedule 4 of the framework agreement had been incorporated in the call-off contract. If clause 46.1 of the standard terms of supply had not been incorporated the defenders would not have been entitled to terminate in terms of that clause. On the other hand, if clause 43.5 of the standard terms was a term of the call-off contract the defenders would not be liable for loss of profits, business, revenue or goodwill or indirect or consequential loss or damage caused by the suggested breaches of the call-off contract upon

which the pursuers found, with the result that most of the pursuers' claim would be excluded. Moreover, it was common ground that if clause 39 of the standard terms was incorporated certain of the pursuers' averments (that the defenders had waived certain rights or remedies) would be irrelevant.

[26] A number of further relevancy points not dependent upon the issue of incorporation were also debated. They are discussed below.

The Framework Agreement

Who was the contractor who entered into the framework agreement with the Ministers?

[27] Miss Crawford submitted that the framework agreement was part of the context which was relevant to the proper construction of the call-off contract. She contended that it was plain that there had been a clerical error or slip when the agreement had been executed with the result that the contracting party had been stated to be HWEnergy Ltd rather than the pursuers. It was clear that could not be right. It had been the pursuers, not HWEnergy Ltd, who had submitted the tender to be a contracting party. The information in that tender had related to the pursuers, not to HWEnergy Ltd. Construing the framework agreement objectively it was ambiguous as to the identity of the party contracting with the Ministers because no company number had been specified. Reliance was placed on the following authorities: *Arnold* v *Britton* [2015] AC 1619, per Lord Neuberger of Abbotsbury PSC at paras 15 and 18; *Midlothian Council* v *Bracewell Stirling Architects* [2018] CSIH 21, per the Opinion of the Court delivered by Lord President Carloway at para 19; *Lightways (Contractors) Ltd* v *Inverclyde Council* 2016 SLT 177, per Lord Tyre at para 10.

[28] For the pursuers, Mr Jones submitted that there was no error or slip in the framework agreement. It was perfectly clear from its terms that it had been HWEnergy Ltd and not the pursuers who had been party to it.

[29] I readily accept that the history of events is rather puzzling. HWEnergy Ltd did not submit a tender in response to the ITT. The tender which the Ministers scored and evaluated was that submitted by the pursuers. Since no tender from HWEnergy Ltd was submitted or evaluated in accordance with the Regulations, the making of the award to that company was a breach of reg 19 (regs 19(1), 19(2)(a), and 19(2)(b)). The Ministers' obligation to comply with that regulation was a duty owed to an economic operator (reg 47(1)): and a breach of the duty was actionable by any economic operator which, in consequence, suffered or risked suffering loss or damage (reg 47(5)). Such economic operators could have brought proceedings seeking an ineffectiveness order or damages within the periods referred to in regs 47(7) and 47(8).

[30] Notwithstanding these curious circumstances, I am not persuaded that there is any uncertainty as to the party who contracted with the Ministers. The framework agreement was executed by HWEnergy Ltd on page 20, and that company was also clearly and unambiguously identified as the contracting party on pages 1, 5, 10, 21, 31, 32, 34, 56, 84, 86, and 87. In my opinion there is no proper basis for treating those references to HWEnergy Ltd as mere clerical errors. On the face of things, and as a matter of contractual interpretation, there is no room for dubiety that the contracting party was HWEnergy Ltd. A reasonable third party in the position of the contracting parties at the time the agreement was entered into would have realised that the contract would be vulnerable to challenge and that the Ministers would be susceptible to claims for damages by any economic operator which suffered, or risked suffering, loss or damage as a consequence of the Ministers' breach

of the Regulations. However, he would have been in no doubt that the contracting party was HWEnergy Ltd.

Personal bar

[31] In answer 2 of the defences the defenders aver:

> "The Pursuers held themselves out to be a party to the Framework Agreement in all their dealings with the Defenders up to and including the raising of these proceedings. The Contract was concluded after the Pursuers, holding themselves to be a party to the Framework Agreement, tendered as part of the said mini-competition under the Framework Agreement. The tender was provided under cover of a letter on notepaper headed "hwenergy". Only parties to the Framework agreement were entitled to tender for the Contract. The Pursuers continued and continue to hold themselves out publicly to be a party to the Framework Agreement. Extracts from the Pursuers' website (accessed on 16 June 2017) are produced herewith. The Pursuers relied upon provisions incorporated in the contract by the Framework agreement during the life of the contract. They received payment in accordance with the provisions of the Framework Agreement. The Pursuer relied upon provisions incorporated within the Contract by the Framework Agreement when bringing this action. During and after the life of the Contract, the Defenders both acted and refrained from acting in reliance on the provisions of the contract incorporated by the Framework Agreement. The Defenders did so in the knowledge and acquiescence of the Pursuers. The Pursuers are bound by the Framework Agreement as if they were the party to it."

The defenders' twelfth plea-in-law in the principal action is:

> "12. The Pursuers having held themselves out as being bound by the Framework Agreement condescended upon, and the Defenders having acted and refrained from acting on that representation, the Pursuers are bound by the terms of the Framework agreement."

[32] In paras 67 to 74 of the defenders' Note of Argument they had submitted that, in the event that the standard terms were not incorporated in the call-off contract, the pursuers were nevertheless personally barred from maintaining that they were not bound by the standard terms. They had consistently held themselves out as being bound by the framework agreement and the standard terms, *inter alia* by tendering for and concluding a call-off contract that was explicitly offered under reference to the framework agreement

(Joint Bundle ("JB") 248 and JB251) and which could only be concluded with framework service providers; by holding themselves out publicly to be a party to the framework agreement (JB195 and JB201); by acquiescing to the defenders' reliance on the standard terms when the defenders terminated the contract (JB367) (albeit that they denied the breaches alleged by the defenders); and by taking the stance which they had in the present action between January 2016 and May 2017 *viz* that the standard terms bound the defenders (JB374). To the pursuers' knowledge the defenders had acted and refrained from acting in reliance on the pursuers' said actings, and they had materially altered their position to their prejudice, by awarding the call-off contract to the pursuers; by relying on the standard terms when they terminated that contract; by refraining from terminating the contract on other grounds; and by relying on the standard terms when defending the present action. Reference was made to *William Grant & Sons Limited* v *Glen Catrine Bonded Warehouse Limited* 2001 SC 901 per Lord Rodger at para 29 and per Lord Clarke at para 4.

[33] While Miss Crawford formally adopted this part of the defenders' Note, she made no oral submissions in support of it. She described it as not being the defenders' best point. Mr Jones submitted that the defenders' averments are irrelevant. In the circumstance it suffices to say that I agree with him. I am not persuaded that the defenders have pled a relevant case that the pursuers require to be treated as if they were a party to, and were bound by, the framework agreement.

The Call-off Contract

Validity

[34] In answer 2 the defenders aver:

> "The Pursuers held themselves out to be a party to the Framework Agreement in all their dealings with the Defenders... The Contract was concluded after the Pursuers, holding themselves to be a party to the Framework Agreement, tendered as part of the said mini-competition under the Framework Agreement. The tender was provided under cover of a letter on notepaper headed "hwenergy". Only parties to the Framework agreement were entitled to tender for the Contract... *Esto* the Pursuers are not bound by the Framework Agreement (which is denied) the defenders were induced to enter the Contract by the misrepresentations of the Pursuers that they were a party to the Framework agreement and the Contract is void."

The defenders' thirteenth plea-in-law in the principal action is:

> "13. *Separatim, esto* the Pursuers are not bound by the Framework Agreement, the Defenders having been induced to enter the Contract by the misrepresentations of the Pursuers that they were a party to the Framework Agreement, the Contract is void and the action should be dismissed."

[35] Mr Jones attacked the relevancy of these averments. He submitted that they did not give fair notice of the suggested misrepresentation. Fair notice of a suggested misrepresentation was essential. Reference was made to *Yeatman & another* v *Proctor* (1877) 5 R 179, per Lord Gifford at p. 182; *Hamilton* v *Allied Domecq PLC* 2006 SC 221, per Lord Justice Clerk Gill at para 2; McBryde, *The Law of Contract in Scotland* (3rd ed), para 15-68. It was not clear what the defenders maintained had been said or done (or when and by whom it had been said or done) to cause the defenders to believe that the pursuers were a party to the framework agreement and to induce them to enter into the contract. The defenders did not even make clear whether the suggested misrepresentation had been fraudulent, negligent or innocent. Although the defenders averred that the contract was void they did not aver that the misrepresentation induced error in any of the substantials of the contract which was so material as to preclude any real consent.

[36] Miss Crawford submitted that if the pursuers were not a party to the framework agreement the call-off contract was void because the defenders had entered into it in essential error as to the identity of the party with whom they were contracting. They had

erroneously understood that the pursuers were a framework service provider. That error had been induced by the pursuers' misrepresentation and it had induced the defenders to enter into the contract with them. Only parties to the framework agreement had been eligible to participate in the mini-competition. She explained (although it was not a matter of averment) that at the time of the mini-competition and the call-off contract being concluded the defenders did not have sight of the framework agreement which had been executed by the Ministers and HWEnergy Ltd. All they had had was the Buyer's Guide and a template version of the framework agreement. Accordingly, at that time they had no reason to think that the pursuers were not the party to the framework agreement. By tendering in the mini-competition and using the same trading name (ie HWEnergy) as the pursuers had used in their tender to be parties to the framework agreement the pursuers had held themselves out as being the entity which had tendered for and been appointed to that framework agreement. There had been no *consensus in idem* (Bell, *Principles*, (10th ed.), s. 11; *Menzies* v *Menzies* (1893) 20 R (HL) 108 at p. 142; *Morrison* v *Robertson* 1908 SC 332; *MacLeod* v *Kerr* 1965 SC 253 at p 256). If the contract was not void as a result of the pursuers' misrepresentation, it was nonetheless voidable on that ground because the misrepresentation had induced the defenders to enter into the contract (*Stewart* v *Kennedy* (1890) 17 R (HL) 25, per Lord Watson at p. 30; *Mair* v *Rio Grande Rubber Estates Ltd* 1913 SC (HL) 74, per Lord Shaw of Dunfermline at p. 82).

[37] I am unimpressed by the pursuers' complaint of lack of specification of the misrepresentation upon which the defenders rely. In my opinion the essence of the defenders' complaint is clear enough *viz.* that the pursuers held themselves out to the defenders as being framework service providers who were entitled to participate in the mini-competition for a call-off contract.

[38] However, the pursuers' other criticisms of the relevancy of this part of the defenders' case appear to me to be well-founded. In my opinion the averments that the call-off contract was void are irrelevant. There was no error on the defenders' part as to the identity of the party with whom they were contracting. The error, if there was one, was not that they thought that they were entering into a contract with a different party. It was merely an error as to an attribute of the party with whom they intended to contract. There was no error in any of the substantials of the contract which precluded real consent.

[39] The misrepresentation averred could have rendered the contract voidable at the option of the defenders, but that is very different from maintaining that there was never any contract. As it happens the defenders did not seek to rescind the contract on the ground of misrepresentation. They have not averred that the contract is voidable, nor do they seek reduction of it. Had they done so other issues would have been likely to have arisen (eg whether the contract had been homologated by them; and whether *restitution in integrum* remained possible).

Incorporation of standard terms

[40] Miss Crawford emphasised that her primary position was that the contract was valid and enforceable, but that its terms included the standard terms of supply. Having regard to the surrounding facts and circumstances which would have been known to any party in the position of the contracting parties, on a proper construction of the contract Schedule 4 of the framework agreement had been incorporated. Those circumstances included the fact that the framework agreement envisaged that any call-off contracts granted under it would be subject to the Schedule 4 standard terms of supply. All tenderers who had sought to be parties to the framework agreement (including the pursuers) had understood that. All those

participating in the mini-competition knew or ought to have known that. The grant of a call-off contract on terms which did not include the standard terms of supply would have been an award on terms very substantially different from the terms envisaged by the framework agreement. Such non-inclusion would have resulted in an award which was in breach of the Regulations. Reasonable third parties in the position of the contracting parties would have concluded that that cannot have been the contractual intention. Without the standard terms, the contract would lack a raft of provisions which the framework agreement had envisaged as being necessary and appropriate. Moreover, several key terms (such as Call-off Contract, Client, and Service Provider) would be undefined. The contract would be incoherent. In the whole circumstances it was clear that the words " 'the Call-Off Contract' (as defined in Section 1)" where they appeared in the Form of Agreement (JB253) were intended to be a defined term. A reasonable third party in the position of the contracting parties would have understood those words to be a reference to the definition of 'Call-off Contract' in clause 1 of the framework agreement. In terms of that definition a Call-off Contract was based on the standard terms of supply set out in Schedule 4. Reference was made to *Wood* v *Capita Insurance Services Ltd* [2017] AC 1173, per Lord Hodge JSC at paras 9-14.

[41] Mr Jones submitted that on a proper construction of the contract there had not been incorporation of the standard terms of supply upon which the defenders relied. The only terms incorporated were those contained within the documentation listed in the offer letter of 18 June 2013 ((JB251). Those documents had not included either Schedule 1 Part 1 or Schedule 4 of the framework agreement. The only references to those Schedules within the listed documentation was in Document 4 (Schedule 3 Part 2 Service Levels) where there was reference to Schedule 1, Part 1 and Schedule 4 for limited and specific purposes (clauses 1.1.21 (JB274), 5.2.2(f) (JB277), 7.5.4 and 7.5.5 (JB281), and 7.2.2 (JB282)). None of those

references assisted the defenders' contention that the clauses in Schedule 4 upon which they relied were terms of the contract. Reference was made to *Skips A/S Nordheim & Others* v *Syrian Petroleum Co Ltd* [1984] QB 599, per Sir John Donalson MR at page 616A-D; McBryde, *supra*, paras 7-09, 7-11, 7-12.

[42] Mr Jones further submitted that the Regulations did not provide that all the conditions set out in the framework agreement should be "stepped down" into a call-off contract. Reg 19(7)(b) and reg 19(8) envisaged that in circumstances where not all the terms of proposed call-off contracts were laid down in the framework agreement, competition could be re-opened between the economic operators who were parties to the framework agreement on the basis of the same or, if necessary, more precisely formulated terms and, where appropriate, other terms referred to in the contract documents based on the framework agreement.

[43] I recognise, of course, that it was open to the defenders to award a contract to someone other than a framework service provider. However, if they had chosen to go down that road they would have been obliged to start an award process *ab initio*, and to have complied with all of the attendant obligations under the Regulations that would have been applicable to such a procedure. The pursuers do not suggest that at the time the award was made to them the defenders did not intend it to be a call-off contract to an entity they understood to be a framework services provider. All the relevant documentation suggests that the defenders did intend it to be such a call-off contract. These are all matters which anyone in the position of the pursuers and the defenders at the time of contracting would have known.

[44] In my opinion it would have been plain to any reasonable third party at the time of contracting that the defenders were purporting to award a call-off contract under the

framework agreement to a framework service provider. It was very clear (see eg the letters of 26 April 2013 (JB247) and 7 June 2013 (JB248)) that the defenders' object was the running of a mini-competition among framework service providers for a call-off contract. The defenders' offer of 18 June 2013 to purchase the tendered services (JB251) also made prominent reference to the framework agreement and the mini-competition which had taken place under it. The Form of Agreement referred to the award being the "'Call-Off Contract' (as defined in Section 1)". In my view, in the whole circumstances reasonable third parties in the position of the contracting parties would have concluded that the call-off contract included the standard terms of supply. They would have been aware that that was what the framework agreement contemplated and that that had been the basis upon which the defenders and those participating in the mini-competition for the call-off contract had proceeded. They would have known that "Call-off Contract" was a term defined in clause 1 of the framework agreement. Given the background a reasonable third party in the position of the parties would have understood that the words "'the Call-Off Contract' (as defined in Section 1)" meant 'Call-off Contract' as defined in clause 1 of the framework agreement. They would not have regarded the use of a capital "O" in "Call-Off Contract", or the use of the word "Section" rather than the word "clause", as being of any real significance. In my opinion both were mere slips: it is plain that the contractual intention was to refer to the term defined in clause 1. The defenders' construction appears to me to be coherent. It gives intelligible content to the defined term 'Call-off Contract' and to the words in parenthesis which follow it. The same cannot be said for the pursuers' suggested construction. It follows that, in my opinion, the standard terms of supply were incorporated in the call-off contract.

Interpretation of the call-off contract – remote monitoring and 2 hour call-out

[45] The parties were also in dispute in relation to the interpretation of provisions relating to remote monitoring and 2 hour call-out.

Remote monitoring

[46] In terms of clause 6.1 of Document 4 (Schedule 3 Part 2 Service Levels) the pursuers were required to monitor the boiler performance and adhere to the protocol agreed for notifying the defenders if there was a drop in heat. Requirement 2.9.2 provided:

> "**2.9.2 Performance Monitoring** The Service Provider will be required to monitor the boiler system performance and have a clear protocol for advising the Client immediately if there is a reduction in performance resulting in a loss of heat."

That requirement was set out in the pursuers' tender response and was followed by the following question and answer:

> "2.9.2 Q Please provide details of how you i) would monitor the performance of the system ii) the protocol you would follow to notify the Client of any drop in performance which has an impact on heat production and iii) the protocol you would want the Client to follow to notify you of any drop or loss of heat.
>
> 2.9.2 A
>
> i) there are a number of ways we intend to monitor the performance of the system. These include:
>
> 1) Remote monitoring
>
> For the operation of our heat supply contracts it is key that we have immediate automated notification (via email or text message) of any faults with the biomass boiler, plus access to remote monitoring of the biomass hat meter. This ensures that we can react immediately to any fault situations or visible drops in performance.
>
> Our understanding is that most of the biomass systems are connected to the Highland Council BMS system, and that (pending discussions with the Council IT supplier) that we may be afforded access to this system. If this is the case, and this can be configured to provide us with remote monitoring and fault signals and meter

readings remotely, this can then be monitored during office hours by our support desk, and outwith office hours by our on call Support engineer.

If access cannot be provided to the BMS system we would propose the installation of our own 'Logic Energy' remote monitoring facility. If installed at each site, this can provide fault signals, meter and temperature readings, and historic data and graphs via a web portal and mobile application. The system can then be monitored and used to provide immediate notification of any fault of (*sic*) drop in performance of the biomass system.
..."

Requirement 2.11.4 was:

"**2.11.4 Energy Efficiency and Sustainability** The Service Provider should provide proposals to the Client to support and promote initiatives and schemes aimed at improving energy efficiency and reducing overall energy consumption. The proposals should have a cost attached where applicable or identified at zero cost where they would be provided as part of the contract. the proposals should be further developed with the Service Provider post contract award."

That requirement was set out in the pursuers' tender response and was followed by the following question and answer:

"2.11.4 Q Please provide proposals to support and promote initiatives and schemes aimed at improving energy efficiency and reducing overall energy consumption. The proposals should have a cost attached where applicable or identified as zero cost where they would be provided as part of the contract. These proposals will be further developed with the service provider post contract award.

2.11.4 A

Please see table below with proposals to support energy efficiency measures as outlined by our Design/Energy Management team.

We can asset in implementing these measures via our design and service team.
Highland Council Biomass Heat Contract Energy Efficiency Measures

Action	Cost
…	Perhaps available through via existing BMS system?
Monitor existing heat meters (where fitted with suitable interfaces) to highlight deviations from expected values for energy consumption, when compared to industry benchmarks and/or site specific historical data.	Alternatively, cost to fit 'Log Energy' remote monitoring system will be approximately £2,000 per site

..."

Clause 4 of the tender response document provided:

> **"4. Cost Schedule & Terms of Payment**
>
> 4.1 Cost Schedule
>
> | **Item** | **Cost** |
> |---|---|
> | £x per kWh; Heat | **[a]** |
> | £x per kWh; Maintenance of Biomass Boiler | **[b]** |
> | **TOTAL PRICE kWh rate for Highland Council properties** | **[a + b]** |
>
> ..."

[47] Mr Jones submitted that para 2.9.2 A of the tender response should be read together with para 2.11.4 A. If that was done, and if regard was also had to clarification which the defenders had given during pre-contractual correspondence, it was clear that the correct interpretation was that the pursuers had agreed to provide remote monitoring within the contract kWh rate provided the BMS system could be used for that purpose, but that if it could not they would provide it using their 'Log Energy' system for an additional cost of £2,000 per site. The clarification given had been:

> "the Service Provider will be able to be (sic) remotely access the boiler via the BMS system, although this is currently in discussion with our IT provider."

[48] Miss Crawford submitted that on a proper construction of the contract the pursuers had undertaken to provide remote monitoring within the agreed KWh price rate. The ordinary reading of para 2.9.2 A of the tender response was that they had agreed that they would provide that using the BMS system if access to it could be provided, failing which that they would provide it by installing their 'Logic Energy' remote monitoring system. Requirement 2.11.4 and the related paras 2.11.4 Q and 2.11.4 A dealt with a separate and different matter from Requirement 2.9.2 and its related paras 2.9.2 Q and 2.9.2 A. Para 2.11.4 A did not qualify para 2.9.2 A. It was not legitimate to look at pre-contractual

correspondence for the purpose for which the pursuers sought to rely upon it. Any such approach was excluded by the entire agreement clauses in the contract (clause 3.1 of the Standard Terms and para 2 of the Form of Agreement).

[49] In my opinion Miss Crawford's construction of this aspect of the contract is correct. On an ordinary reading of para 2.9.2 A the pursuers agreed to provide remote monitoring using the BMS system if access to it could be provided, failing which they agreed that they would provide it by installing their 'Logic Energy' remote monitoring system. The remote monitoring was intended to be reactive - to detect faults and visible drops in performance. Requirement 2.11.4 and the related paras 2.11.4 Q and 2.11.4 A dealt with a separate and different matter, namely the provision of proposals to support and promote initiatives and schemes aimed at improving energy efficiency and reducing overall energy consumption. Those proposals were matters put forward for the defenders consideration and approval. If the defenders wished to take them forward some would have involved no additional payment to the pursuers, but others would have involved extra payment. This remote monitoring proposal had different purposes from the remote monitoring which the pursuers had contracted to provide at para 2.9.2 A. On an ordinary reading of both provisions para 2.9.2 A is not qualified by the proposal at para 2.11.4 A. I am not persuaded otherwise by reference to the pre-contractual clarification upon which the pursuers rely. The parties concluded a formal and detailed written contract which included two entire agreement clauses. The pre-contractual correspondence did not form part of the contract. In some circumstances reference to pre-contractual material may nevertheless be permissible in order to ascertain facts known to the parties at the time of contracting. However, here, at the time the clarification was given it was made clear that the possible provision of the desired facility still had to be confirmed by the defenders' IT provider. That remained the position

at the time of contracting. The terms of para 2.9.2 A reflected the continuing uncertainty as to whether the desired access would be provided.

Response times

[50] Document 1 of the call-off contract (JB256) contained the defenders' specific requirements. It provided:

> "...In addition to the standard arrangements laid out in the contract, there are other specific requirements that the Highland Council have for the supply service and these are as follows;
> 1. Call Out – the contractor is to provide a 2hr response time to heating failures and plant faults (*ref Clause 5.3.2)*
> ..."

The reference to clause 5.3.2 was, it seems to me, a cross-reference to clause 5.3.2 in Document 4 (Schedule 3 part 2 Service Levels) which provided that quarterly statements should report on performance against key performance indicators which may include achievement of response times. Paragraph 2.9.4 of the pursuers' tender response stated:

> "**2.9.4 Response & Resolution Times** The Service Provider's performance will be measured and assessed against the targets identified in the call-off contract special terms and conditions; unless an alternative is identified which is agreed by both the Client and Service Provider.
> **2.9.4 Q** The response & resolution times are identified in the Call-off Contract Terms and Conditions – please provide details of how you will meet these stated targets ...
> **2.9.4 A** The Contract terms and conditions outline a 2 hr response time requirement to site.
> 1) Site Engineers
> We will meet the stated target using our extensive Service network within the Highland Region...
> ...
> 2) Response Notification
> In order to be able to achieve the stated target it will also be essential to have access to immediate remote fault notification.
> As outlined above, this could be provided via the existing boiler room BMS systems, or alternatively, we could deploy our own 'Logic Energy' remote monitoring system (utilising GPRS signals) to provide this instant alert function..."

[51] Miss Crawford submitted that on a proper construction of the call-off contract the pursuers were required to respond to heating failures and plant faults within 2 hours. Mr Jones submitted that there was no such requirement. He maintained that the 2 hours response time was a merely a target of an aspirational nature. If he was wrong about that, the obligation was contingent upon the defenders having facilitated remote monitoring through BMS or having instructed the pursuers to provide the 'Logic Energy' system at an additional cost.

[52] Once again I agree with Miss Crawford. On an ordinary reading of the provisions the pursuers were obliged to respond within 2 hours. The matter was dealt with clearly and prominently within the defenders' specific requirements. It was described by the pursuers as a requirement in para 2.9.4 A of the tender response. I am not persuaded that the use of the words "target" and "targets" in para 2.9.4 should to be interpreted as merely setting an aim rather than a requirement. Reading the contract as a whole, in my view it is clear that the pursuers bound themselves to respond within 2 hours. That obligation was not contingent upon the defenders facilitating BMS or paying for 'Logic Energy'. As already discussed, the pursuers were obliged to provide remote monitoring using one or other of those systems as part of the package which it was agreed would be provided in return for the tendered contract rate.

Other criticisms in the pursuers' note of argument

[53] In his note of argument Mr Jones made several further brief relevancy and fair notice criticisms of the defenders pleadings. At the debate he adhered to them but he did not advance any oral argument in support of them. Miss Crawford did not respond to these points in her note of argument or in her oral submissions. In light of the limited assistance I

have been given I am very reluctant to say much about these matters at this stage. So far as the fair notice points are concerned (paras 4 and 6 on pp. 14-15 of the pursuers' Note), if there are real difficulties the pursuers can and should seek an order for further specification. So far as the criticism of the defenders' averments anent the suggested failure to prepare and submit annual maintenance schedules is concerned, the defenders aver that that failure was a default which was a material breach of contract, and that it was one of the defaults which entitled them to terminate the contract with immediate effect in terms of clause 46.1. I incline to the view that those averments are suitable for inquiry. Similarly, I am not satisfied on the submissions which I have heard that it would be right to exclude from probation any of the other averments which Mr Jones discusses in paras 5, 7, 8 and 9 on pp. 14-15 of his Note.

Disposal

[54] I shall put the case out by order to discuss the appropriate interlocutor to give effect to my decision.