OUTER HOUSE, COURT OF SESSION

[2025] CSOH 11

A113/21

OPINION OF LORD BRAID

In the cause

ARTHUR SIMMERS

Pursuer

against

GREEN CAT RENEWABLES LIMITED

First Defender

and

GREEN CAT CONTRACTING LIMITED

Second Defender

Pursuer: Thomson KC, Mitchell; Stronachs LLP
Defenders: Barne KC; CMS Cameron McKenna, Nabarro and Olswang LLP

31 January 2025

Introduction

[1] In May and June 2016 the pursuer contracted with the first defender and, separately, the second defender in relation to the design and construction of three wind turbines in Aberdeenshire. The turbines were to be erected on land leased to three Special Purpose Vehicles (SPVs) incorporated by the pursuer: Meadaple Energy Limited (MEL), Folla Energy Limited (FEL) and Cranna Energy Limited (CEL). The pursuer avers that until

July 2017, 50% of the shares in each of the SPVs were owned by him, and the remaining 50% by ABC Ltd, a company of which he now owns 15% of the shares; and that since July 2017, ABC has owned 100% of the shares. (The references to ABC appear to be a throwback to an earlier formulation of the pursuer's claim, since departed from; indeed, the pursuer accepts that all references in the summons to ABC fall to be deleted.)

[2] The pursuer's objective was, through the conduit of the SPVs, to develop a wind farm - Rothienorman Wind Farm - the turbines on which would be accredited by Ofgem for the purposes of the Feed-In Tariffs (FIT) Scheme, which, in broad terms, meant that the electricity generated by the turbines would entitle the SPVs to FIT payments in accordance with the rules of the scheme.

[3] The pursuer avers that he and the SPVs have suffered losses through the breach of contract, and separately the fault and negligence, of both defenders and he sues for recovery of those losses. He does so by concluding for payment to himself of the losses he claims to have suffered in his own right; and (following an amendment in light of the recent Inner House decision in *Forthwell Limited* v *Pontegadea UK Ltd* [2024] CSIH 38; 2024 SLT 1245) by concluding for payment to the three SPVs of the losses claimed to have been suffered by them. The SPVs have been convened as defenders but have not entered the action following service of the pleadings on them.

[4] The action called before me on the procedure roll for discussion of the defenders' plea-in-law directed at the relevancy and specification of the pursuer's pleadings. The defenders' principal submission is that insofar as the pursuer is suing in respect of the losses sustained by the SPVs - the so-called transfer of loss claim - the action is irrelevant and ought to be dismissed. In addition, the defenders challenge the manner in which the pursuer has chosen to quantify the losses sustained by the SPVs. The final substantive

argument advanced by the defenders is that the pursuer's averments about the reasonableness of an exclusion clause in the contract between the pursuer and the second defender are irrelevant and ought not to be admitted to probation. The pursuer argues in response that his averments are at least sufficiently relevant to entitle him to a proof before answer on all aspects of the case as it is currently pled.

The pleadings

[5] The pursuer avers that the first defender was the consulting engineer, and the second defender the contractors, in relation to the design and construction of the wind turbines. The contract between the pursuer and the first defender was constituted by that defender's Proposal dated 20 May 2016, which the pursuer accepted; while the contract between the pursuer and the second defender comprised the NEC3 Short Contract dated 21 and 27 June 2016, incorporating a letter of intent of 30 May 2016. Both contracts contained exclusion and limitation of liability clauses: the contract between the pursuer and the first defender excluded, in terms of clause 9.2, liability for "indirect or consequential loss which...shall include loss of revenue or profits, loss of business of goodwill", and also sought to place a limit on liability; clause 80 of the NEC3 Short Contract excluded liability for indirect and consequential loss.

[6] In very broad outline, the pursuer's complaints are (a) that the wind turbines were erected at the wrong locations, in that they were not at the co-ordinates for which planning consent had been granted (Meadaple is said to be located 49 metres north and 21 metres east of its consented location; Fola 5 metres north and 3 metres east of its consented location; and Cranna 7 metres north of its consented location); and (b) that the second defender did not construct the foundations of the turbines in accordance with the contract drawings, in

particular that it installed ductwork which did not meet the contractual requirements. The pursuer attributes both of these failings to the breach of contract *et separatim* fault and negligence of both defenders. He avers that the consequence of the failures to site the turbines in the correct locations is three-fold: the pursuer incurred legal fees and outlays in order to vary leases of the land on which the turbines were situated; in relation to Meadaple, the electricity generated is materially less than forecast by the first defender in a feasibility report, due to the wind conditions in its actual location being less favourable than would have been the case had it been constructed in the consented location; and the accreditation of all three turbines might be withdrawn by Ofgem because the planning permission obtained for the sites was not complied with, in which event FIT payments already received may require to be repaid and future FIT payments would not be received or may be reduced. The pursuer has not informed Ofgem of the potential difficulty over the planning permission. In relation to the ducting, the pursuer avers that the defects are such that (i) the turbines are incapable of being uprated from their accredited rating of 500kW to 900kW, as would otherwise have been the case; and (ii) the turbines are at risk of premature failure. He avers specifically that "[t]he prospect of the premature failure of the turbines is a material risk to the financial outlook of the development, whether considered as a whole or in respect of each turbine."

[7] The pursuer goes on to aver that standing (i) the inherent and ongoing risk of revocation of the FIT accreditation, (ii) the risk of premature failure of the turbines and (iii) the inability to maximise the energy generation of the turbines by uprating, the value of the windfarm as a whole, and of each of the turbines individually, is diminished in comparison to the value they ought to have had in September 2016 and at all times thereafter. The total loss, approached in that way, is estimated at £7.18 million. He further

avers that the loss sustained by each of the SPVs is estimated at £2.393 million (ie, he offers to prove that the total loss is borne equally by each of the SPVs). Article 61C incorporates the report of the pursuer's expert, Mr Thornton-Kemsley, *brevitatis causa* and specifically references certain paragraphs of it. The report contains reasoning as to why the turbines are each worth around £2.393 million less than ought to have been the case. The first conclusion seeks payment of the total sum of £7.18 million to MEL, FEL and CEL.

[8] The pursuer does not predicate his claim entirely on diminution of value. He also avers that the cost of rectifying the ducting would be £500,000 per turbine, or £1.5 million in total. The lost revenue due to the inability to uprate the turbines is averred to amount to up to £1,272,179. Additional costs amounting to £39,474.73 are said to have been incurred as a result of the incorrect ducting. These sums are the sums second, third and fourth concluded for, and payment of those sums to MEL, FEL and CEL is sought in the alternative to the sum first concluded for. The sums fifth and sixth concluded for, being the relatively modest amounts of £39,474.73 and £5,400, are in respect of losses averred to have been incurred by the pursuer personally.

[9] As regards the pursuer's entitlement to sue for recovery of losses suffered by MEL, FEL and CEL, he avers (at article 56 of condescendence) that they have each suffered loss and damage in circumstances where they, having no legal relationship with the first defender, and, the contract between the pursuer and the first defender creating no *jus quaesitum tertio* in their favour, have no right of action against the first defender. The SPVs were not named or referred to in the contracts between the pursuer and the first defender (being the Proposal and the NEC Short Contract). The pursuer admits that the parties were aware that pre-accreditation had been obtained in the names of the SPVs. He goes on to aver:

> "Neither of those documents demonstrate an intention as between the parties to benefit the SPVs. As the beneficial owner of the SPVs, the pursuer has a substantial interest to enforce the terms of the Proposal and NEC Short Contract. The pursuer is therefore entitled to (and hereby does) sue for the loss and damage suffered by each of them, on the basis that the pursuer is obliged to, and will, account to each of them for any damages recovered by him on their behalf."

The issues

[10] I will consider each of the issues discussed at the procedure roll in turn, beginning with the thorny topic of transferred loss, before turning to quantification, the exclusion clause and finally certain other criticisms made by the defender of the pursuer's pleadings.

Transferred loss

Does such a principle exist in Scots law? Forthwell considered

[11] The question is whether, at least in some situations where A has entered into a contract with B, the law entitles A to sue B for losses suffered by C as a result of B's breach of contract, where C is not a party to the contract and has no direct right of action, whether under contract or delict. Until *Forthwell*, above, there was (distinguished) judicial and academic support for the view that Scots law did recognise the principle of transferred loss, as it has come to be known: see, for example, *McLaren Murdoch & Hamilton Ltd* v *The Abercromby Motor Group Ltd* 2003 SCLR 323, Lord Drummond Young at [33] to [43], *Marquess of Aberdeen and Temair* v *Turcan Connell* 2009 SCLR 336, Lady Smith at [45] and [46] (both Lord Drummond Young and Lady Smith drawing upon the speech of Lord Clyde in *Alfred McAlpine Construction Ltd* v *Panatown Ltd* [2001] AC 518 at 530), *Axon Well Intervention Products Holdings AS* v *Craig* [2015] CSOH 4, Lord Doherty at [29]; McBryde, *The Law of Contract in Scotland* (3rd edition), 22-26 to 22-31. The rationale underlying the principle was said to be that the law should not permit losses to fall into a legal black hole, which would

otherwise be the case if, in the example given above, C had no direct right of action against B and A was unable to sue for recovery of C's loss. Such an outcome would result in B, the party in breach, enjoying a windfall benefit.

Forthwell v *Pontegadea*

[12] *Forthwell* was the first case in which transferred loss was considered by the Inner House. In that case, the pursuer sued for recovery of losses said to have been incurred by its subsidiary as a result of the defender's breach of contract in circumstances where the subsidiary was the (unauthorised) licensee of bar and restaurant premises leased by the pursuer from the defender. The majority (Lord President Carloway and Lord Pentland) attached some weight to the terms of the licence and to the fact that the pursuer and subsidiary could have arranged their affairs such that the subsidiary's losses were not irrecoverable (Lord President at [35], Lord Pentland at [103] and [104]). The Lord President said, at para [36], that the short answer to the pursuer's argument that it was suing on behalf of the subsidiary, and would be under an obligation to account to it for any damages recovered, was that that there was no such obligation; the pursuer could have concluded for payment to the subsidiary, and in any event the subsidiary had not been called for any interest it might have; and then, at [37], that the claim must fail in accordance with the general rule of contract law, because the pursuer had not sustained the losses sued for. He acknowledged that there might be exceptions to that general rule, but said that the pursuer's approach in that case placed no meaningful limits on the extent of those exceptions, concluding that, if there were exceptions to the general rule in cases based on contract, the pursuer's claim did not meet the criteria for either exception. That was sufficient to dispose of the reclaiming motion (appeal) in that case but in deference to the submissions made, he

went on to analyse the pursuer's case in light of the authorities. As senior counsel for the pursuer in the present case submitted (and as senior counsel for the defenders acknowledged), what the Lord President went on to say was therefore strictly *obiter*. However, at best for the pursuer in the present case, and at the risk of understatement, the Lord President was unenthusiastic about the argument that transferred loss formed any part of Scots law, stating that it appeared to have "emerged from the ether" in an unprincipled way. Whatever the current thinking south of the border may be (in cases such as *Swynson Ltd* v *Lowick Rose LLP* [2018] AC 313 and *BV Nederlandse Industrie Van Eiprodukten* v *Rembrandt Enterprises Inc* [2020] QB 551), there was little reason for Scots law to follow it down a rabbit burrow (para [44]). The Lord President concluded by stating, at para [47], that in an appropriate case there may require to be a deeper analysis of where the transfer of loss concept comes from, but that for the purposes of that case it was sufficient to say that the pursuer's case fell within neither of the two possible exceptions to the general rule, viz, the situation where property had been transferred from A to C; or where there was a common intention by A and B to benefit C.

[13] Lord Pentland, while agreeing with the Lord President, was less reluctant to venture into the metaphorical rabbit burrow: in his view, English law was the same as Scots law (paras [96] to [98]). Thus, on Lord Pentland's approach, the transferred loss principle does form part of Scots law, but only (following Lord Sumption in *Swynson*) where it is necessary to apply it in order to give effect to the object of the transaction and to avoid the loss disappearing into a legal black hole. That could arise in one of two situations; first, where the contract envisaged that title to property in respect of which the loss arose would be transferred to the third party (in the example above, C) (para [96]); and, second, where a

party enters into a contract which is intended to be for the benefit of a third party, and as a result of the breach, the third party does not receive the benefit (para [97]).

[14] Lord Malcolm issued a dissenting opinion. In his view, the licence agreement was irrelevant to the issue at hand (para [90]), nor did he see any problem in principle in the court framing an appropriate order whereby there was an enforceable obligation upon the pursuer to pass on monies recovered to its subsidiary (para [89]). He considered that the transferred loss principle was not confined to cases where there was a common intention to benefit a third party (paras [84] and [85]) and that the rule arose "as a matter of general legal policy to ensure that if a loss results from a breach of contract it can be recovered from the party responsible for the breach" (para [92]).

[15] There is, therefore, support in the opinions of two of the judges in *Forthwell*, that Scots law does recognise a transferred loss principle, albeit they differed as to the circumstance in which it might apply; while the third, the Lord President, was of the view that the matter might need to be reconsidered in an appropriate case but he, too, was prepared to acknowledge the possibility that there might be such a principle.

Submissions

Defenders

[16] Senior counsel for the defenders submitted that there was no principle of transferred loss in Scots law. It was clear from what Lord Clyde said in *Panatown*, above, at 535, that his view that there was such a principle in English law was driven by the non-recognition there of anything akin to the *jus quaesitum tertio.* There was no hint from what Lord Jauncey said in that case that the principle, which had by that time become established in England, had emerged from Scots common law. *Swynson*, above, contained the most up to date statement

of English law, namely, that there must be a contractual intention to benefit a third party, or, per Lord Sumption, at [14], a class of persons to which a third party belonged: that was of particular interest since it resonated with the circumstances in which the *jus quaesitum tertio* was available in Scots common law. It followed that the justification which had existed in England for adoption of the transferred loss principle had never existed in Scots law, because it had developed its own solution to the legal black hole. It was nothing to the point that the circumstances in which loss might be recovered under the *jus quaesitum tertio* and under the principle of transferred loss were not coterminous. The point was that Scots law had developed its own solution and had no need to follow English law. Lord Drummond Young had erred in *McLaren Murdoch & Hamilton* when he said, at para [39], that the *jus quaesitum tertio* was not available where the third party who was to benefit was not named in the contract. The *jus* was available where the *tertius* was the member of a class which was named or referred to in the contract: Gloag and Henderson, *The Law of Scotland* (13th Edition), paragraph 8.04. There had, accordingly, been no need for Lord Drummond Young to supplement the *jus quaesitum tertio* by adoption (albeit, *obiter*) of the principle of transferred loss, which never had, and did not now, form part of Scots law. That this was correct was supported by the opinion of the majority in *Forthwell.* It followed that the action was irrelevant insofar as the pursuer sought to recover the losses suffered by the SPVs. The defenders averred that the SPVs were entitled to sue the defenders in their own right by virtue of the *jus quaesitum tertio* (the contracts having been entered into before the coming into force of the Contract (Third Party Rights) (Scotland) Act 2017, which even on Lord Drummond Young's approach would exclude the operation of any principle of transferred loss, although senior counsel accepted that whether the SPVs held such a right was a matter for proof.

[17] If contrary to the foregoing the principle of transferred loss did exist in Scots law, it was not available to the pursuer. It was neither a transfer of heritage from one company to another, nor an intercompany transfer. If Lord Pentland in *Forthwell* was correct in saying that Lord Drummond Young had not expressed the view that Scots law differed from English law in regard to the principles in which transferred loss is recoverable (para [98]) then it followed that third party intention was required in Scotland, as in England, and the pursuer expressly disavowed in his pleadings any contractual intention to benefit the SPVs. Further, on the pursuer's own pleadings, the defenders owed duties of care to the SPVs, which would also exclude the operation of transferred loss. Further still, the origin of the pursuer's obligation to account had not been identified, an omission which was not cured by the fact that the pursuer now sought payment direct to the SPVs.

Pursuer

[18] Senior counsel for the pursuer, while recognising that *Forthwell* did not provide an encouraging starting point for his argument, submitted that the actual basis of the decision was narrow, and that it could be distinguished from the present case. A major point of distinction was that the pursuer was not seeking to recover damages from the defender on his own behalf. That was the *in limine* answer to the issue in *Forthwell*, identified by the Lord President at para [36]. In the present case any funds recovered from the defenders would not be inmixed with the pursuer's own funds. The objection raised by the defenders that no obligation to account had been identified simply did not arise.

[19] As regards the suggestion that the principle of transferred loss had been conjured out of nowhere by Lord Clyde, that suggestion was founded on the fallacious notion that a principle could not form part of our law if there was no prior authority to support it. There

was nothing wrong with the law developing to address novel situations and changes in practice which confronted it; or, as Lord Reed put it in *Westbury Estates Ltd* v *The Royal Bank of Scotland PLC* 2006 SLT 1143, at [18]:

> "Scots law is not as the law of the Medes and Persians, which altereth not: it has to reflect changes in social practices, in respect of the drafting of commercial leases as in other respects."

The principles of Scots law were not in a state of stasis and transferred loss had had some basis in the opinions of Scottish judges for at least 40 years. There was a sound basis for saying that the law had simply developed in this respect. The underlying principle was the idea that in a mature legal system there were certain losses that the law would not allow to go uncompensated; that was the view recognised in the speech of Lord Clyde in *Panatown* and in the subsequent expressions of opinion in the Outer House. In the Inner House, Lord Malcolm, in *Forthwell*, had provided principled reasons as to why the policy of the law should not be to allow claims of that sort to go uncompensated. To say, as the majority in *Forthwell* had, that the pursuer could have structured matters differently was to approach matters from the wrong end, and also failed to recognise that although one could not say that the law was clear when the contracts were entered into, the broad thrust of the authorities, had the pursuer sought advice, was to the effect that any loss suffered by the SPVs would be recoverable by him. The relevant question was not, must the pursuer suffer the consequences of the arrangements put in place, but should the loss be allowed to go uncompensated?

[20] Allowing that the principle did apply in Scots law, it was not coterminous with the *jus quaesitum tertio.* In particular, there was a difference between what was required at common law to establish the latter, namely an intention that the third party would not only benefit but would be entitled to sue under the contract; and the different concept of an

intention to benefit as recognised in English law. In the present case, when the contracts were entered into, everyone knew that there would be involvement by the SPVs, which was the type of territory canvassed in the English cases (and in *Forthwell*). The averment in the pleadings in article 56 that the contractual documents did not demonstrate an intention as between the parties to benefit the SPVs must be read in context, in that it formed part of a passage directed at establishing that no *jus quaesitum tertio* had been created.

Decision on transferred loss

[21] I agree with senior counsel for the pursuer that a sound, and principled, starting point is to ask (as did Lords Clyde and Drummond Young) whether, as a matter of policy, the law should allow the losses which have been incurred to go uncompensated, rather than whether the underlying transaction could have been structured in some different way. The question is whether in the circumstances that do exist, the law recognises a claim to recover a loss sustained by a third party, rather than whether there might have been an enforceable claim by the third party had the circumstances been different. Further, and in a similar vein, I do not agree with senior counsel for the defenders that simply because Scots law developed a principle, the *jus quaesitum tertio*, which prevented some losses from falling into a legal black hole, it necessarily follows that other losses must go uncompensated even where the consequence is that the contract-breaker enjoys a windfall benefit.

[22] Further, for the reasons discussed above at paras [12] to [15], and as submitted by senior counsel for the pursuer, the *ratio* of *Forthwell* is narrow, and that case does provide some support for the view that the current state of the law is that in some circumstances a loss sustained by a third party can be recovered by a pursuer, at least where there was a contractual intention to benefit that party, or where property has been transferred. Beyond

that, however, I acknowledge that it is difficult to discern from *Forthwell* any encouragement for a right to recover such a loss in any other circumstance. It must also be borne in mind that, on any view, the state of the authorities is such that a pursuer cannot sue in respect of a third party's loss if the third party itself has a direct right of action by virtue of the *jus quaesitum tertio* or otherwise. It is also undeniable, as the majority in *Forthwell* recognised, that if transferred loss does exist in Scots law, it is difficult to decern what its boundaries would be on any principled basis; and in that regard the pursuer's pleadings in the present case suffer from the same weakness as those in *Forthwell*. Further, on no view is the averment that "[a]s the beneficial owner of the SPVs, the pursuer has a substantial interest to enforce the terms of the Proposal and NEC Short Contract" (above, para [9]) relevant to support a transferred loss claim, on any view of *Forthwell* or the other authorities.

[23] It is true that the pursuer has avoided the particular pitfalls which directly led to the demise of the claim in *Forthwell*, in that he has now concluded for payment not to himself but directly to the SPVs. Since any award of damages would never pass through his hands, there can be no question of his ever having an obligation to account (although averments about such an obligation remain in the pleadings, I think in error), and so it is unnecessary for him to aver, or for the court to analyse, how such an obligation might have arisen had the award been made to him. There is no risk of money due to another becoming inmixed with his own, one of the difficulties seen by the Lord President in *Forthwell*.

[24] However, the biggest problem for the pursuer is that he avers, in terms, in article 56 of condescendence, that neither the Proposal (issued by the first defender to the pursuer) nor the NEC Short Contract demonstrates an intention as between the parties to benefit the SPVs. Senior counsel for the pursuer made a valiant attempt to draw a distinction between an intention to benefit a third party, and an intention that a third party should be able to sue

under the contract, only the latter giving rise to a *jus quaesitum tertio.* That may well be so, but the averment in question unequivocally addresses the former, notwithstanding counsel's submission that it was directed towards refuting the defender's averments that the SPVs enjoyed a *jus quaesitum tertio.* Accordingly, to the extent that *Forthwell* might offer a glimmer of hope to third parties in some situations that a transferred loss might be recoverable, the pursuer does not make relevant averments to bring himself within the limited circumstances where that might be the case. On the contrary, his pleaded case expressly disavows the very circumstance which might have been relevant. Senior counsel argued that the circumstances disclosed common knowledge that "everyone knew" that the SPVs would be involved, would operate the wind turbines and would benefit, but that ultimately amounts to no more than a submission as to the parties' subjective intentions, whereas intention must of course be determined objectively from the terms of the contract itself.

[25] For that reason, the pursuer's averments in support of his transferred loss claim are irrelevant. The action, insofar as it seeks to recover the losses sustained by the SPVs (both in the first instance, and in the alternative, in other words, the first to fourth conclusions inclusive) will therefore fall to be dismissed. In many ways, this is an unfortunate outcome, not least as the defenders aver that the SPVs would have had a right to sue by virtue of the creation of a *jus quaesitum tertio*, which the pursuer denies. That could only have been determined after proof, and had the pursuer been successful in resisting this aspect of the defence, it is possible that the court might have held, on the defenders' pleadings, that there was an intention to benefit the SPVs, but not such as to create a *jus quaesitum tertio.* Nonetheless, the relevance of the pursuer's case must be tested by reference to his pleadings, not the defenders'.

[26] For completeness, I mention one further point, namely, that the pursuer's averments do not adequately explain why the pursuer would have a delictual transferred loss claim against the defenders, and to that extent the pleadings are something of a muddle and devoid of specification. At best for the pursuer, even had I been persuaded that he had relevantly averred a right to pursue his transferred loss claim under the contracts, I would not have allowed the averments about breach of duty *quoad* that claim to be admitted to probation. However, I do not require to explore that further, where the first four conclusions fall to be dismissed in any event.

Quantification of loss

[27] Given the view I have reached as to the transferred loss claim, the pursuer's approach to quantification of the losses sustained by the SPVs does not strictly fall for decision. However, lest the matter should go further, and out of deference to parties' submissions, I will set out what my decision would have been had I allowed that claim to proceed to a proof before answer.

Submissions

Defenders

[28] Senior counsel for the defenders submitted that insofar as the pursuer sought damages on the basis of diminution of value, his action was irrelevant: where a business continued after a breach of contract, the claim *must* be for loss of profits (*McGregor on Damages* (22nd Edition), at 5-018 under reference to *MMP GmbH* v *Antal International Network Ltd* [2011] EWHC 1120). The diminution in value approach was suitable only for a breach of warranty claim in a share purchase agreement. The pursuer's approach ignored the profit-

generating potential of the turbines from September 2016 onwards, hence he sought an element of double-recovery, highlighting the irrelevancy of the approach. That irrelevancy was further apparent from the fact that two of the factors said to give rise to the diminution in value involved the risk that something might occur. The creation of a purely contingent risk did not sound in damages. In any event the risk of revocation was perpetuated by the pursuer's failure to advise Ofgem of the issue that had arisen. The pursuer's approach further sought to obviate the contractual effect of the exclusion clauses in the respective contracts. A contracting party could not avoid the terms of a contract by seeking an irrelevant measure of damages. Further and in any event, the pursuer's averments on quantum in support of the first conclusion were lacking in specification. No attempt was made to explain the basis of the valuation or to quantify, in percentage terms or otherwise, the risk of revocation and premature failure. Senior counsel for the defenders took me to various passages in the expert report lodged by the pursuer, in an attempt to persuade me of the fallacy of the pursuer's approach. Finally, insofar as the pursuer's claim hinged on showing what the price of electricity would have been over a period of years, it was incumbent on him to specify precisely what that price was: he could not simply specify a range of prices, and sue for the sum at the top of the range without explaining why, as he had done in relation to the third conclusion.

Pursuer

[29] Senior counsel for the pursuer submitted that, as a matter of Scots law, the assessment of loss, in order to achieve compensation, was essentially in the nature of a jury question (*Duke of Portland* v *Wood's Trs* 1926 SC 640, 651-652, per the Lord President (Clyde)).

As Lord Dunedin put it in *Watson Laidlaw & Co Ltd* v *Pott Cassels and Williamson* 1914 SC (HL) 18, 29-30:

> "In the case of damages, in general, there is one principle which does underlie the assessment. It is what may be called that of restoration. The idea is to restore the person who has sustained injury and loss to the condition in which he would have been had he not so sustained it…**The restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound imagination and the practice of a broad axe** (emphasis added)**.**"

When viewed in that proper context, the pursuer's averments of loss were entirely suitable for inquiry. Without prejudice to that generality, the court was entitled to assess damages by reference to losses that arise from a diminution in value of assets that were now affected by contingent future risks, which they otherwise would not have been had the breach not occurred. As was stated in *Golden Strait Corpn* v *Nippon Yusen Kubishika Kaisha* [2007] 2 A.C 353 at [36] (*The Golden Victory*) in relation to uncertain contingent losses:

> "The lodestar is that the damages should represent the value of the contractual benefits of which the claimant had been deprived by the breach of contract, no less but also no more".

The Golden Victory also provided that where quantification of damages is, at the date of breach, subject to some uncertainties or contingencies, the court should take account of known facts when it is called upon to assess and quantify the damages: para [36]. *The Golden Victory* was followed by the Supreme Court in *Bunge SA* v *Nidera BV* 2015 Bus LR 987, and was consistent with the approach adopted by the Scottish courts: *Douglas Shelf Seven Ltd* v *Co-operative Wholesale Society Ltd* 2007 GWD 9-167. The pursuer was entitled to seek damages as at the date of breach, being the date on which construction of the turbines in the wrong locations, and containing the various defects, completed. The fact that the precise date when the turbines will prematurely fail was not yet known entitled the court to start its assessment of damages as at the date of breach. In the event that the risks upon which the

pursuer founded in this action in fact emerged, then either party was entitled to aver that, and the court could approach damages from the perspective of what was known to have happened: *Bwlfa and Methyr Dare Steam Colleries (1891) Ltd* v *Pontypridd Waterworks Co* [1903] AC 426. However, where that evidence was not yet available: "the court must do the best it can" *Biggin* v *Permanite* [1951] 1 K.B. 422 at [438]. The points raised by the defender were all matters for cross-examination, and ought not to be explored by the court at this stage. As regards the point made about electricity prices, there was nothing wrong with a party suing for the maximum figure which he could possibly be awarded. Whether the loss lay at the bottom, middle or top of the range could only be decided after the leading of evidence.

Decision on quantification

[30] Three points principally arise. First, whether, as a matter of principle, a claim for damages for breach of contract may be formulated by reference to the diminution in value of assets owned by a business, in circumstances where the business has continued to trade following the breach and has sustained loss of profits; second, whether the pursuer's claim is lacking in specification for want of any averment quantifying, in percentage terms, the risks which are said to give rise to the loss; and, third, whether the pursuer is entitled to rely upon the contingent risk of accreditation being revoked when it is within his own gift to resolve the contingency by informing Ofgem that the turbines have been erected in the wrong place.

[31] As regards the first of these, the defenders' submissions are predicated on an English text book which itself cites one authority in support of the "rule" that where a business is continuing, the only measure of damages is loss of profits. Whatever the position may be in

English law, Scots law eschews the adoption of rigid rules when it comes to assessing damages: see *Duke of Portland* v *Wood's Trustees*, above, per Lord President Clyde at 651-2:

> "The measures employed to estimate the money value of anything (including the damage flowing from a breach of contract) are not to be confounded with the value which it is sought to estimate; and the true value may only be found after employing more measure than one – in themselves all legitimate, but none of them necessarily conclusive by itself and checking one result with another. As Lord Stair puts it...'It is rather in the arbitrament of the Judge to ponder all circumstances.'"

While the issue in that case was in some respects the opposite of that here - the pursuer sought damages following the expiry of a minerals lease where mines were left in a flooded condition, and the issue was whether he could recover damages for the cost of putting the subjects in the condition they would have been in had the defenders fulfilled their contractual obligations, or whether damages were limited to the value of lost royalties - the *dictum* is of wider application: there is no single method of calculating damages, and different methods may be employed as a cross-check. As an example of a case where Lord Clyde's *dictum* was applied, see *Prudential Assurance Co Ltd* v *James Grant & Co (West) Ltd* 1982 SLT 423, in which Lord McDonald, at p424, after observing that he would be reluctant to rely too heavily on English authority in a matter of this nature (measure of damages), said that pursuer landlords were entitled to pursue a dilapidations claim by reference to the cost of repairs; and that if the defenders considered that was too high, it was open to them to aver and prove that.

[32] Senior counsel also founded upon what Lord Dunedin said in *Watson Laidlaw & Co* v *Pott Cassels and Williamson*, above. The application of a broad axe at the quantification stage, of course, begs the question as to which method of quantification the axe is to be applied to. However, while the pursuer's approach to quantification of loss is perhaps unusual, it would be going too far to hold, at this stage, that it is necessarily wrong where, as here, the

circumstances giving rise to the loss are said to include as yet unfulfilled risks that either the turbines will fail or the FIT accreditation will be revoked. It would be unduly prescriptive, and wrong in principle, to say that the pursuer's claim *must* be pursued by reference to loss of profits, although doubtless the extent of any loss of profits could be relevant as a cross-check on the damages arrived at by a different method. I am conscious too that, as senior counsel for the pursuer submitted, many if not all of the points made by senior counsel in submissions - such as whether the approach results in double recovery of losses - are more appropriately matters for cross-examination. If the defenders contend that the pursuer's approach brings out too high a figure, it is open to them to make averments to that effect. If the claim is truly a claim for consequential loss, the exclusion clauses would not be circumvented simply due to the manner the pursuer has chosen, in his pleadings, to quantify it.

[33] Senior counsel for the defenders also submitted that a claim for reflective loss was not open to the pursuer and that averments that seek to support the value of the claimed loss by reference to the loss in value of the shares of the SPVs were irrelevant. The pursuer does indeed have an averment that the value of the shares in the SPV is diminished, but that is said to be by way of a cross-check on the diminution in value of the turbines and the wind farm as a whole, which are of course operated by the SPVs. In that regard, senior counsel for the pursuer, while not disputing that a claim for reflective loss could not be pursued by the pursuer (*Marex Financial Ltd* v *Sevilleja* [2021] AC 39), referred to *UYB* v *British Railways Board* 2000 WL 1629557 at para [34], where the Court of Appeal said that "cross checks", in the form of alternative methods of calculation, could be used to demonstrate that the damages awarded fairly compensated the claimant. While I do not read that as going so far as to say that a completely irrelevant method of quantification is of any value as a

cross-check, and I consider that the averment about diminution in share value is of dubious relevance, ultimately it may, as the pursuer submitted, simply come down to a question of what weight would be attached to that factor after evidence had been led. For that reason, I would not have been minded to exclude the averment in question from probation, had the transferred loss claims been proceeding to proof.

[34] The second issue which arises in relation to quantification is whether the risks - of accreditation being removed and of the turbines failing - must be quantified by the pursuer, and whether further specification ought to have been given of other aspects of the claim. I disagree with the submission advanced for the defenders that the pursuer must be able to aver and prove on a balance of probabilities that the risk will eventuate, where it is the existence of the risk, large or small, which is said to have an adverse effect on the value of the turbines. If the risks had eventuated by the time of the proof (or not), the court would be able to take that into account in its assessment of damages: *Bwlfa and Methyr Dare Steam Colleries (1891) Ltd* v *Pontypridd Waterworks Co*; *The Golden Victory*; *Bunge SA* v *Nidera BV*, all above. Further, I agree with the pursuer that, as matter of specification and relevancy, a pursuer is entitled to sue for the sum which lies at the top end of the range within which the loss is said to lie, as the pursuer has done in relation to the third conclusion.

[35] The third point is whether the pursuer is precluded from relying on the risk of accreditation being revoked when it lies in his own hands to inform Ofgem of the fact that the turbines are not in the consented locations, whereupon he would know, one way or the other, whether the accreditation would be revoked. There would no longer be a risk but a known fact. I accept the submission for the pursuer that this point goes to whether the pursuer has mitigated his losses, which could be decided only after proof.

[36] Finally, and for completeness, senior counsel submitted that the averments about loss were lacking in specification as to how the total figure was arrived at and why it fell to be split equally among the SPVs. However, the pursuer's pleadings, incorporating as they do, an expert report which provides further detail, do give fair notice to the defenders as to how the claim has been calculated, and why the loss is said to fall equally on the SPVs. The points made in submission by senior counsel as to why that was unlikely are, again, points more appropriately to be made in cross-examination.

[37] For all of these reasons, had I considered that the pursuer had made relevant averments in support of the first four conclusions, I would have admitted all of his averments about loss to probation.

[38] Finally, senior counsel for the defenders somewhat half-heartedly attacked the competency of the claim, insofar as payment was sought of the entire amount to all of the SPVs jointly, rather than of a separate amount to each one, although he conceded this might be a specification rather than a competency point. Senior counsel for the pursuer submitted that the conclusion was competent. Since the pursuer avers that the loss was split equally among the three SPVs, and does give adequate specification of why that is the case, it would have been a simple matter for him to cure any incompetency by amendment, if necessary, and I would have been reluctant to have dismissed the first four conclusions on that somewhat technical point alone. However, it is unnecessary to express a concluded view.

The exclusion clause in the NEC3 Short Contract

Introduction

[39] Before dealing with the exclusion of liability clause in the NEC3 Short Contract, I should acknowledge that the contract between the first defender and the pursuer also

contains an exclusion clause. The defenders rely on both clauses in their defences. The pursuer avers, in relation to both clauses, that they do not satisfy the reasonableness test in section 17 of the Unfair Contract Terms Act 1977, which, reading short, applies where one party to a contract (the customer) deals on the basis of the written standard terms of business of the other party to the contract who deals in the course of a business. Insofar as the contract with the first defender is concerned, parties agree that the reasonableness or otherwise of the clause can be decided only after proof.

[40] In relation to the contract with the second defender, the pursuer submitted in his written note of argument that, since it refers to indirect or consequential loss, it is not engaged at all, since the losses sued for flowed naturally and directly from the second defender's breach, and were not indirect or consequential losses. However, since the pursuer does not invite me to exclude any of the defender's averments from probation, I need not explore that point, nor the authorities cited in relation to it, at this stage. In any event, that is a point best decided after proof.

[41] The point which does arise for determination at this stage is whether the NEC Short Contract can be regarded as "the written standard terms of business" of the second defender.

[42] To set the context, the defenders aver in answer 60(v) that clause 80.1 forms part of the NEC Short Contract; that such contracts are commonplace in the renewables industry; that parties to it can negotiate its terms; and that the pursuer is not a "customer" of the second defender for the purposes of section 17(1), since the NEC Short Contract is not the "written standard terms of business of the second defender". In response, the pursuer avers that the clause is contained in the second defender's standard terms of business, and that the terms of the clause were not open for negotiation as far as the pursuer was aware. Both

parties then have averments about the reasonableness of the clause, which of course is a question of fact which arises only if the clause is indeed to be found in a standard terms contract.

Submissions

Defender

[43] I should refuse to admit to probation the pursuer's averments about reasonableness. The NEC Short Contract, being a standard construction contract, could not be the defender's standard terms of business. In *Langstane Housing Association Ltd* v *Riverside Construction (Aberdeen) Ltd (and others)* 2009 CSOH 52, Lord Glennie held, at para [48] that the ACE Conditions, drafted by the Association of Consulting Engineers and used widely within the profession, were not standard terms of the defender's business.

Pursuer

[44] There was nothing to prevent a contracting party from adopting terms drafted by a professional body as its own standard terms of business. Such a construction would have the effect of defeating the very purpose of section 17(2) of the 1977 Act, by permitting companies to simply state that another body drafted the terms and they happen to be used by equivalent companies. The court ought not to adopt a construction of a legislative provision which is intended to confer a benefit or protection in a manner which effectively defeats that intention. The question was whether the terms were invariably applied by the defender to contracts of this kind (*McCrone* v *Boots Farm Sales Ltd* 1981 SC 68, Lord Dunpark at 74). Lord Glennie's decision in *Langstane Housing Association* must be read in the light of his comment that it was "in the context of the relationship of the parties as a whole" (also

para [48]). In *Border Harvesters Ltd* v *Edwards Engineering (Perth) Ltd* 1985 SLT 128, the issue before the court was whether a contract which appeared to have both generic standard terms, but also very specific details particular to that contract, could amount to a standard form contract for the purposes of section 17; Lord Kincraig held that proof was necessary before he could sustain the argument that the contract was a standard form contract. The present case was analogous inasmuch as the NEC Contract contained a mixture of standard terms and also detail relating to the specific construction project in question.

Decision on the exclusion clause

[45] If, in *Langstane Housing Association*, above, Lord Glennie meant that standard form building contracts could never amount to a party's standard form contract for the purposes of section 17(1), then I respectfully disagree. But the reference to the party's business relationship as a whole (and to the fact that it was unclear, in that case, which party had introduced the standard form contract) strongly suggests that that is not what he meant. The critical issue in any given case is whether a particular set of terms and conditions was used by a party as its standard terms and conditions. It matters not whether those terms were drafted by that party, a professional body or indeed whether they have been plagiarised from a competitor; nor does it matter whether other parties in the same line of business use those self-same terms and conditions. *Border Harvesters*, above, is not quite in point, since the issue in this case does not arise because there is a mixture of specific and general terms, but rather from the provenance of the general terms. Nonetheless, just as the question in that case turned on the facts, to be determined after the leading of evidence, so too does the question of whether a party uses a standard form contract, drafted by another, as its own standard terms. Accordingly, the pursuer's averments about the applicability of

section 17 are not irrelevant simply because clause 80 appears in the NEC3 Short Contract. That said, the pursuer's averments that the NEC3 Short Contract *was* used by the second defender as its standard terms of business are, to put it mildly, somewhat thin, appearing to rest on the averment that the terms were not open for negotiation. However, I was not invited to exclude the averments from probation for want of specification, and I have come to the view that this branch of the case is suitable for proof before answer. (Whether there is a need for amendment or not in advance of any proof, as Lord Kincraig thought there might be in *Langstane Housing Association*, is a matter for the pursuer.)

Other issues

[46] Senior counsel for the defenders also presented the court with a *pot pourri* of pleading points, criticising the degree of specification given in parts of the pursuer's pleadings in support of various conclusions, which were impossible to marry up with the pleas-in-law. By and large, these criticisms have been met, either by the pursuer's minute of amendment or by his concession that any references to ABC or the SPVs having suffered any loss in relation to the sums concluded for in the fifth and sixth conclusions (which, it will be recalled, are losses said to have been incurred by the pursuer personally) are irrelevant and ought to be deleted. As regards the defender's alleged failure to strip the wooden shutters from the turbines, one of the specific issues raised where it was said there were inconsistencies in the pursuer's approach, it is tolerably clear from the pursuer's pleadings that he seeks payment of that sum solely to himself. Accordingly, insofar as the action is to proceed to proof before answer, I am not prepared to refuse to admit any of the averments complained of to probation.

Disposal

[47] In light of my decision that the pursuer's transferred loss claim is irrelevant, the first four conclusions will fall to be dismissed. Certain averments in the pursuer's pleadings will also fall to be deleted, as irrelevant. However, at the procedure roll hearing senior counsel for the defenders was unable to identify these for me. Additionally, it is unclear to me from the pleadings, whether, standing the dismissal of the first four conclusions, the defenders will continue to rely upon the exclusion clauses. While I am mindful of the guidance given by the Inner House in *McCluskey* v *Scott Wilson Scotland Ltd* [2024] CSIH 26 that by orders following a debate or a proof ought to be relatively rare events, I am satisfied that this is one of those rare occasions when such an approach is the most efficient way of taking matters forward. Given the different decisions which were possible on the merits, I can see why counsel chose not to present the court with a smorgasbord of averments which might or might not fall to be deleted, depending on the outcome, from which the court could have selected various options. That not being available (and counsel not having taken the opportunity afforded them of presenting the court with an agreed written note of the averments which might fall to be deleted), rather than embarking upon my own voyage of discovery through the (voluminous) pleadings in the hope of identifying every averment which might fall to be deleted, I will fix a by order to be addressed on the precise terms of the interlocutor which ought to be pronounced following the issuing of this opinion.